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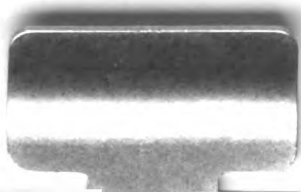
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# The Pacific reporter

California.  
Supreme Court,  
Colorado. ...













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# JUDGES

OF THE

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VAN R. PATERSON.	J. J. DE HAVEN. <sup>3</sup>

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W. F. FITZGERALD. <sup>5</sup>	

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## OREGON—Supreme Court.

REUBEN S. STRAHAN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM P. LORD.	R. S. BEAN.
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<sup>1</sup> Elected to succeed Hon. James D. Thornton, whose term expired January 5, 1891.

<sup>2</sup> Elected to succeed Hon. John D. Works, whose term expired January 5, 1891.

<sup>3</sup> Elected to succeed Hon. Charles N. Fox.

<sup>4</sup> Appointed to succeed Hon. Robert Y. Hayne, who resigned.

<sup>5</sup> Appointed to succeed Hon. James A. Gibson, who resigned.

**ARIZONA—Supreme Court.**

HENRY C. GOODING, CHIEF JUSTICE.

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EDMOND W. WELLS. <sup>1</sup>	

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ASSOCIATE JUSTICES.

JOSEPH W. HUSTON. <sup>2</sup>	JOHN T. MORGAN. <sup>2</sup>
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ASSOCIATE JUSTICES.

WILLIAM H. DE WITT.	EDGAR N. HARWOOD.
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**NEVADA—Supreme Court.**

CHARLES H. BELKNAP, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

MICHAEL A. MURPHY.	R. R. BIGELOW.
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**NEW MEXICO—Supreme Court.**

JAMES O'BRIEN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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JOHN R. MCFIE.	EDWARD P. SEEDS.

**UTAH—Supreme Court.**

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ASSOCIATE JUSTICES.

THOMAS J. ANDERSON.	JOHN W. BLACKBURN
JAMES A. MINER.	

**WASHINGTON—Supreme Court.**

T. J. ANDERS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

J. P. HOYT.	ELMON SCOTT.
T. L. STILES.	R. O. DUNBAR.

**WYOMING—Supreme Court.**

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HERMAN V. S. GROESBECK, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

ASBURY B. CONAWAY.	HOMER MERRELL.
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**OKLAHOMA—Supreme Court.**

EDWARD B. GREEN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

A. J. SEAY.	JOHN G. CLARK.
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<sup>1</sup> Qualified March 5, 1891.<sup>2</sup> Qualified November 8, 1890.<sup>3</sup> Resigned.

# SUPREME COURT RULES—UTAH.

Rule 1. The clerk of this court shall keep his office at the place where sessions of this court are held. Three days before the first day of each term he shall prepare a calendar for each member of the court, and one for the bar wherein the causes brought into this court shall be entered in the following order, viz : (1) Causes arising under laws of the United States; (2) criminal causes arising under laws of the territory; (3) all other causes in the order of the filing of the transcript. In the title of all cases in this court, the plaintiff in the court below shall be first named, being called "appellant" or "respondent," as the case may be.

Rule 2. In all cases where an appeal shall be perfected, a transcript of the record shall be filed in this court within thirty days after such appeal shall have been perfected, unless further time is given by this court, or a justice thereof. This transcript shall be certified to be correct by the attorneys of the respective parties or by the clerk of the court from which the appeal is taken. The pleadings, proceedings, and papers shall be chronologically arranged in the transcript, and the pages of said transcript shall be numbered, and the transcript shall be perfected with an alphabetical index, specifying the page on which each separate paper, pleading, proceeding, and the testimony of each witness is found; provided, that the appellant or his attorney may by *precipe* indicate to the clerk what of the files of the cause shall be inserted in the transcript, and in such case, if the record shall be insufficient, it shall be perfected at his cost; and, if unnecessarily voluminous, the cost of the unnecessary parts shall be taxed against him.

Rule 3. If the transcript be not filed within the time prescribed or allowed, the appeal may be dismissed, on motion, during the first week of the term, without notice, and at any time afterwards, upon notice. A cause so dismissed without notice may be restored during the same term on notice of five days to the adverse party, and for good cause shown; but, unless so restored, the dismissal shall be final.

Rule 4. On such motion there shall be presented to the court the certificate of the clerk of the court below, under the seal of such court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, and the fact, date, and mode of service thereof; the fact and date of the filing of the undertaking on appeal, and that the same is in due form, and also that appellant has received a certified transcript of the record, or that he has failed to request one, or has failed to pay the legal fees therefor, if the same were demanded; but, in case the transcript has been certified to be correct by the at-

torneys of the respective parties, the fact and date thereof may be shown by any one of them by affidavit.

Rule 5. For the purpose of correcting any error or defect in the transcript either party may suggest the same in writing to this court, specifying such error or defect, and obtain an order that the proper clerk certify the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel in open court before argument. If the attorney of the adverse party be not present, or if the fact of the alleged error or defect be controverted by him, the suggestion must be accompanied by an affidavit, showing the existence of the error or defect alleged.

Rule 6. The appellant shall, within fifteen days after the filing of the transcript, prepare and file with the clerk eight copies of a printed abstract of the record in each case, in which shall be set forth the title of the cause, with the date of the filing of all papers in the court below, and a brief statement of the contents of each pleading, and shall set forth fully the substance of the pleadings and of the evidence, if any, and the points relied upon for the reversal of the judgment or decree; and appellant shall refer to the page numbers in the transcript on the margin of the abstract in such manner that orders, pleadings, and evidence referred to in the abstract may be easily found in the record.

Rule 7. The respondent's counsel may, if he be not satisfied with the abstract or abridgment of the record by the appellant's counsel, within fifteen days after the same is filed, file with the clerk eight copies of such further abstract as he may deem necessary to a full understanding of the merits of the cause.

Rule 8. In case the appellant shall neglect to file an abstract in compliance with the rules of this court, the opposite party may file the abstract and prepare the cause for a hearing *ex parte*, and have the costs taxed therefor, or the court may dismiss the appeal; and, if the abstract filed shall not present the parts of the record to which reference is made in the assignment of errors, the appeal may be dismissed.

Rule 9. For good cause shown, the court or any justice thereof may extend the time for the filing of transcripts and abstracts.

Rule 10. The attorney for the appellant shall serve on the attorney for the respondent a copy of his points and authorities, in the form of a printed brief, at least ten days before the hearing; and within five days therefrom, the counsel for the respondent shall serve upon appellant's counsel a like copy of his points and authorities; and, before the hearing, the attorneys for each of the respective parties shall file with the clerk of this court eight copies of his brief; and the appellant, in his brief, shall plainly and distinctly set

forth the particular errors upon which he relies for a reversal of the judgment of the court below.

Rule 11. All abstracts of the record and briefs hereafter filed in this court shall be printed on unruled white paper of the size and style now used in the supreme court of the United States, and in small pica type, with one inch for margin; but, by leave of court or one of the justices thereof, a brief (and in criminal cases an abstract) of another character may be filed.

Rule 12. All technical objections affecting the right of the appellant to be heard on the merits of a cause must be taken at the first term or adjourned term after the abstract is filed, and must be specified in writing, filed at least one day before the cause is called for argument, or will not be regarded. Such objections must be presented to the court before any argument upon the merits.

Rule 13. Cases appealed into this court will not be heard at any particular term unless the abstract of the record shall be filed before the commencement of such term, or unless the appellant shall in writing present a satisfactory excuse for not having filed the abstract before the commencement of the term; but this rule shall not apply to cases docketed for the purpose of dismissal under the rules of this court.

Rule 14. All motions shall be in writing, subscribed by counsel, and filed with the clerk; and, in cases where a notice of motion is required, the time prescribed therefor may be shortened by any justice of the court, as well as by the court.

Rule 15. All stipulations and agreements of parties or their attorneys in respect to a cause shall be reduced to writing, signed by them, and filed with the clerk, or stated in open court, and entered by the clerk; otherwise the same will be disregarded. Counsel obtaining any order or judgment may be required by the clerk to furnish to him the form of the same.

Rule 16. Any cause may be submitted on brief by stipulation, and either party may submit a cause on his behalf on brief filed, and without oral argument.

Rule 17. Counsel for each party shall be allowed one hour, to be divided among associates, as they may desire, but the court, in special cases, will allow further time. Each defendant who appeared separately in the court below, and an intervenor, may be heard through his own counsel.

Rule 18. All opinions of the court, after having been finally corrected, shall be filed and recorded by the clerk, and his fees therefor shall be taxed as a part of the costs.

Rule 19. No papers shall be taken from the files of this court, except by leave of court, or one of the justices thereof; but appellants may withdraw the transcript of the record for the purpose of making an abstract, upon giving a receipt therefor to the clerk, and upon such withdrawal may retain the same for eight days, but no more, unless upon the written order of one of the justices of the supreme court. If the respondent shall desire to make an ab-

stract of the record, he may withdraw the transcript upon giving the like receipt, and retain the same for a like time; but neither party shall withdraw the transcript more than once. All records and papers of said court shall be open to inspection by the public, and any person may procure or make copies thereof.

Rule 20. Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged the court has erred; such petition to be filed within twenty days next after the filing of the opinion in the case. Counsel shall accompany such petition with a brief of the authorities relied upon in support thereof, and the certificate required by law. The filing of a petition for a rehearing shall suspend proceedings under the decision until the petition for a rehearing is disposed of. Upon the determination of a petition for a rehearing, or where, on notice to the party against whom the judgment is entered in any case, the party does not signify an intention to move for rehearing, the clerk shall issue *remittitur* to the court below, or, if an original proceeding, a copy of the final judgment, upon payment of the balance of costs, if any, due to the clerk in the cause.

Rule 21. The clerks of district courts shall be entitled to receive the fees allowed by law for all transcripts of records, and also any balance of costs due in the cause, before delivering the same; except in criminal cases where the defendants are unable to pay for transcripts of the record, and the trial judge shall have ordered the same to be furnished without cost, and except in criminal cases where plaintiff is appellant.

Rule 22. Whenever an action shall be brought into this court, the party so bringing the cause shall pay to the clerk the usual and reasonable deposit required by him to pay the costs as they accrue: provided, that, if upon the final determination of any cause there shall remain in the hands of the clerk any balance of deposit in excess of costs, it may be returned to the party entitled thereto.

Rule 23. There shall be appointed at the beginning of each term of this court a standing committee of three members of the bar of this court, whose duty it shall be to examine and report in writing upon the qualifications of every applicant for admission to the bar of this court, who is required to be examined.

Rule 24. Any party entitled, by reason of a personal interest, to ask for or to oppose any order, judgment, or decree in the probate court, may appeal from the order, judgment, or decree made by the court, adverse to him or his interest, to the district court of a judicial district embracing the county where such probate court is held, in all cases involving the probating or revoking the probate of a will, the administration of a decedent's estate, and in all cases of guardianship. All appeals from provisional or interlocutory orders shall be taken within thirty days from the entry of the same; and all appeals from the final decree or judgment declaring the validity or invalidity of a

will, or the final order on the administration of an estate by an executor, administrator, or guardian, shall be taken within one year after the entry thereof; and on appeal from such final order the appellate court shall have jurisdiction to review the entire proceeding from the beginning, and to affirm, modify, or reverse any and all orders or decrees therein which shall affect the substantial rights of the parties, and shall thereupon make such order or decree as to the court shall seem just, and may remand the case to the probate court in case of reversal or modification of its orders or decrees, or retain and exercise jurisdiction to complete the proceeding. [As adopted July 23, 1881.]

Rule 25. Such appeal may be taken within sixty days after the order, decree, or judgment is made and entered, and shall be by filing with the clerk of such probate court a notice stating the appeal from the order, decree, or judgment, or some specific part or parts thereof, and by exe-

cuting an undertaking or giving surety in the same manner and to the same extent as in case of appeal to the supreme court from a district court: provided, that, in case of appeal by an executor or administrator who has given official bonds, no additional undertaking need be given. [As adopted July 23, 1881.]

Rule 26. The trial of such appeal from the probate court shall be *de novo* in the district court; but, when the appellant in his notice specifies only some specific part or parts of an order, decree, or judgment appealed from, the trial in the district court shall be confined to the part or parts specified, and the balance of such order, decree, or judgment shall stand unaffected by such appeal. Appeals shall be allowed from the orders, decrees, and judgments of the district. In such appeal cases, to the supreme court, in the same manner and upon the same terms as provided by law in other cases. [As adopted July 23, 1881.]

. Adopted to go into effect June 10, 1890.



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VOLUME XXV.

(86 Cal. 483)

**BARKLY V. COPELAND.** (No. 13,520.)  
(Supreme Court of California. Nov. 27, 1890.)

OBJECTIONS WAIVED—WITNESS—IMPEACHMENT—  
DECLARATIONS—CONSPIRACY.

1. Where an answer of defendant's witness on cross-examination is stricken out because it was given too quickly to permit defendant's counsel to object to the question, but the objection is not then urged, and plaintiff's counsel passes on at once to another question, he thereby waives the first question, and his exception to the striking out of the answer is without merit.

2. It is proper on cross-examination of defendant's witness to allow a question whether she had not on a former occasion tried to induce another person to grant a request, involving a collateral matter, by promising that she would not testify for defendant, where the only object of the question is to show that she had been willing on a former occasion to suppress the testimony just given, and so to impeach her.

3. In an action for slander, defendant justified by attempting to show that plaintiff was connected with the cattle stealing charged by defendant. On cross-examination of the thief, he testified that while he was under arrest one T. told him that the whole matter of the stealing had been settled, but nothing was said to connect plaintiff with such settlement. *Held*, that this statement was merely a collateral matter, and the witness could not be impeached by contradicting it.

4. In an action for slander in charging plaintiff with complicity in the theft of cattle, where defendant justifies on the ground of the truth of the charge, entries in plaintiff's books showing that he purchased the cattle from the thief are not admissible to show his good faith, being his own declarations, and no part of the *res gestæ*.

5. Nor is evidence admissible to show that he paid a certain amount of money to the owner of the cattle after they were stolen, and then sued the thief to recover such amount.

6. Where the thief had testified that he had agreed with plaintiff to steal cattle for him, his statements to third persons of declarations made to him by plaintiff before the cattle were stolen, are admissible, as being evidence of the declarations of a conspirator.<sup>1</sup>

7. Under Code Civil Proc. Cal. § 2051, a witness' credit cannot be impeached by evidence of specific wrongful acts.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Clay W. Taylor and Jackson Hatch, for appellant. Chipman & Garter, John F. Ellison, and L. V. Hitchcock, for respondent.

FOOTE, C. This action was brought to recover damages for slanderous words spoken by defendant, in (as it is alleged) falsely charging the plaintiff, Barkly, with being interested with Russell Speegle in the larceny of certain cattle, the property of one Thomas Polk, and with receiving the same knowing them to have been stolen by Speegle. The defense set up was justification on the ground that the language spoken was true, and certain facts in mitigation were also pleaded. The jury found for the defendant, and from the judgment thereupon rendered, and an order refusing a new trial, this appeal is taken.

The first ground of error relied upon by the appellant is that the court erred in striking out, upon the defendant's motion, the answer of the witness Laura Mandeville in response to the question put by the plaintiff's counsel, with reference to whether or not she had made a certain statement to one Sam Nelson, at a time when Nelson mentioned to her that the defendant was watching her front door, etc., and in refusing to allow to be answered the plaintiff's question to the same witness relating to a conversation with Nelson. The question asked was: "Now, at the time before Nelson and Mandeville had a row, didn't Sam Nelson come into your house one night during the time of the former trial of this case,—your house that you rented at and in the town of Red Bluff,—and then and there say to you that he had seen Copeland standing out watching the front door of your house, or words in substance, and to that effect, and ask you what Copeland was doing there? Didn't you then respond to him, and tell him that Copeland was hanging around you shadowing you, and trying to get you to swear to something for him in this case, and that you were not going to do it?" The answer stricken out was: "He said nothing of the kind to me, and I said nothing to him." The objection was made on the ground that "it is not the proper way to impeach a witness. There is nothing in that question contradictory to what the witness stated upon the stand." The question was answered before the objection was made; and, upon the statement that the defendant's counsel had endeavor-

<sup>1</sup> Reversed on rehearing, post, 408.

ored to state the objection before answer, and was unable to anticipate it, the court, upon motion, struck it out, and the plaintiff excepted. There is nothing in the exception. The court had a right, and it was its duty, to give the opposite side a chance to object to the question, which had been answered too quickly, and to strike out the answer for such purpose. After the answer was stricken out, no objection to the question was made. The question therefore stood unchallenged, and while it was in this condition plaintiff's counsel passed to another question, and thereby waived the former.

This question was then asked: "After the row took place between Mandeville and Nelson, which you have just referred to, didn't you go to Nelson, in the town of Red Bluff, during the former trial of this case, and say to him, if he would not prosecute Mandeville for shooting him, that you would not testify for Copeland in this case, or words in substance, and to that effect?" Objection was made, and sustained, that the question was as to matter irrelevant and immaterial, and that it was not proper cross-examination. To this, exception was duly made. All this was upon the cross-examination of the witness, who took the stand for the defendant. If the matter attempted to be brought out was intended to show the defendant in the light of one attempting to corrupt the witness, and cause her to swear falsely, and that it would bind him, counsel for the plaintiff freely concede that the ruling of the court is correct; but the contention is that plaintiff's purpose was to impeach the witness as showing her unworthy of belief from her statements, as being willing to suppress testimony for a consideration, which went to her general integrity. Upon the other hand, the defendant contends that, while it is competent to impeach a witness by showing that at other times he or she had made statements inconsistent with his or her testimony as given upon the trial, yet that there is a limitation of the rule, and that the matter involved in the supposed contradiction must not of itself be merely collateral in its character, as is claimed that the matter here in dispute was, but must be relevant to the issue being tried. The evident design of the plaintiff's counsel was to show by Nelson if the witness denied that she had made the statement mentioned in the question, notwithstanding the denial that she had agreed with him to suppress testimony in this case, the latter having no connection with Copeland, nor any reason to hold out any inducement to this witness to suppress her testimony. The effect of this would be to prove by Nelson, contrary to the denials of the witness, that she had been guilty of bargaining with Nelson to suppress evidence in this case, which she afterwards gave upon the stand. This cross-question should have been allowed. It is true under the rule laid down in *Sharon v. Sharon*, 79 Cal. 673, 22 Pac. Rep. 26, 131, and hereinafter applied in the present case, that a witness cannot be impeached by evidence of particular wrongful acts not bearing upon the matter in issue. But

the cross-question here called, not for testimony tending to show the commission of or willingness to commit an isolated wrongful act, but one which was connected with her own testimony in the case given on behalf of the defendant. Therefore the answers should have been allowed, as it seems to us that it is important that the jury should know whether a witness, after she has given her testimony in favor of one party, had at some previous time offered or agreed for a consideration to suppress the very testimony she has given; for, if she did, it would certainly throw discredit upon her testimony as given, in the same manner as would the fact that she had made different statements upon a former occasion.

On cross-examination of the witness Speegle, a convict in the penitentiary, whose deposition was there being taken on behalf of the defendant, the plaintiff asked this question: "While you were in jail at Tehama did you send word to Barkly to come and see you at all? Answer: I am pretty certain that I did. I got out of jail the same night I was put in there. I was arrested after my escape in Nevada. While I was out I had no communication with plaintiff. I neither wrote to him nor sent any word to him. When I was brought back I was in jail ten or twelve days before I was convicted. During that time, I neither saw the plaintiff nor sent for him. I had counsel at my examination. Do not know who paid him. Made no defense at all in the justice's court. After I was arrested I told Leland Clark to tell plaintiff to go to Wiley Clark and get some money, so that the matter could be settled. Afterwards, Charley Tait told me the whole thing was settled, about the cow business,—stealing. The whole affair was settled with Polk, and I would have been loose the next morning if I had not got out of jail that night. Tait told me that while I was in the cell. He said all that was necessary was for me to go before the justice of the peace the next morning, and I would have been dismissed. In that conversation plaintiff's name was mentioned, but I do not remember whether he said that plaintiff had settled it up. After my conviction, I sent no word to the plaintiff about the matter, nor did I then, nor have I since, called on him for assistance, nor have I written to him." Afterwards Charles Tait was called by the plaintiff as a witness, and, after testifying that he was at the jail, and saw Speegle after his arrest, and had a conversation with him, he was asked if he had at that time a conversation with Speegle in which Tait told him "that the whole affair relative to the cattle stealing had been settled." This was objected to by defendant's counsel as irrelevant, immaterial, and incompetent, and that it was an attempt to impeach Speegle's testimony on a collateral point that was brought out by plaintiff on his cross-examination. The objection being sustained, exception was taken. After this, two other questions were asked Tait, evidently intended to contradict Speegle as to matters testified to by him on his cross-examination brought out by the plaintiff, and relating

to this conversation at the jail, to which Speegle alluded in his testimony. To them the same objection was made, ruling given, and exception taken. This matter of the Tait conversation was clearly collateral matter brought out on cross-examination, and it was not permissible for the cross-examiner to impeach the witness by contradicting his statement thus brought out. *People v. Dye*, 75 Cal. 112, 16 Pac. Rep. 537.

Again it is urged, as error, that the trial court would not permit the plaintiff to prove certain entries in his books showing that he had put down therein the stolen cattle as being purchased by him, etc., with a view to show his good faith in receiving them from Speegle. It is said by appellant that these entries were part of the *res gestæ*, and as such admissible. "A litigant is not permitted to strengthen his case by his own declarations, whether written or verbal. They may be used against him, but not for him." *Hausman v. Hausling*, 78 Cal. 286, 20 Pac. Rep. 570; *Code Civil Proc.* § 1870. Referring to a certain sum of \$28, which the appellant, when on the stand as a witness, had stated that he had paid to one Polk, the owner of the cattle that Speegle had stolen, the witness was asked by his counsel if he afterwards brought suit against Speegle for that amount. This was objected to by defendant's counsel, on the ground that it was irrelevant, immaterial, and incompetent, and that a party's own acts and declarations are inadmissible as evidence in his favor. The objection was sustained, and the plaintiff excepted. The ruling, we think, was clearly right. This transaction was no part of the *res gestæ*. The suit was brought some days after the cattle were stolen, and Speegle had been arrested for stealing them.

There were various questions on cross-examination asked the witness Laura Mandeville, as to acts which went to show her a woman "destitute of moral qualities." They were objected to, and objection sustained. This was properly done. She could not be impeached by evidence of specific wrongful acts. *Section 2051, Code Civil Proc.*; *Sharon v. Sharon*, 79 Cal. 633-673, 22 Pac. Rep. 26, 131.

Finally it is contended by the appellant, that the trial court erroneously admitted, over his objection, statements of Speegle to Laura Mandeville concerning his visit to Tehama, and his conversations with the plaintiff. These matters were related by Laura Mandeville when on the stand as a witness; the questions, to which answers were returned, being: "When he came back, [meaning Speegle,] did he tell you what he had done? What did he say Barkly said he would do with the cattle, if he would drive them over to him, if anything?" The objection was upon the ground that the matter sought to be brought out was irrelevant, immaterial, and incompetent, and was not responsive to any issue in the case, and was hearsay. Upon the other hand, the defendant by his counsel contended that the statements were those of a conspirator with the plaintiff in the theft of the cattle by Speegle, made before the theft, and while the con-

spiracy was in full force and effect. There was evidence by Speegle tending to show that he had made a bargain in the latter part of July, or the first of August, 1884, with the plaintiff, Barkly, to drive cattle to him, and that as early as June of that year the plaintiff had said to Speegle that he, Speegle, had been to a good deal of trouble; had the name of it, and might as well have it again; and that, if Speegle wanted to, to drive them up, and Barkly would do "the square thing" by him; and that, in accordance with this understanding, Speegle had delivered the cattle to the plaintiff. This tended to show a joint agreement between Barkly and Speegle as to the criminal enterprise; and the statements related by the woman Mandeville, as made to her by Speegle, were made before the cattle were stolen, and related to the enterprise with reference thereto in which he and Barkly were embarked, and, within a day or two after the last statement was made to her, Speegle drove the cattle to Tehama, and delivered them to Barkly. In the case of *People v. Collins*, 64 Cal. 295, it was said: "The conspiracy, according to the testimony, contemplated the robbing of stages and their passengers whenever and wherever opportunity offered. The law holds each party to it responsible for the acts of each co-conspirator, done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination. There was therefore no error in admitting in evidence against Collins the acts and declaration of Thorne, in relation to the gun with which the murder was committed." So here, the conspiracy having been testified to by Speegle, his acts and declarations relative to the taking and delivering the cattle to Barkly, in pursuance of the common design, was evidence against Barkly as to his complicity in the affair, afterwards consummated. On account of the error pointed out, we advise that the judgment and order be reversed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(36 Cal. 493)

BARKLY v. COPELAND. (No. 13,521.)

(*Supreme Court of California*. Nov. 27, 1890.)

COSTS—FEES FOR TRANSCRIPT.

1. Under *Code Civil Proc. Cal.* § 274, as amended by *Amend. Codes 1880*, p. 54, which provides that "in causes where a transcript has been ordered by the court the fees for transcription must be paid by the respective parties to the action in equal proportions," the fees paid by defendant are a necessary part of the costs incurred in his defense, and if he succeeds in the action he is entitled to recover them from plaintiff.

2. But where such transcript is ordered by defendant alone, he cannot recover the fees therefor, or any part of them, but must pay the whole himself, as provided by the same section.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

*Clay W. Taylor and Jackson Hatch, for appellant. Chipman & Garter, John F. Elison, and L. V. Hitchcock, for respondent.*

FOOTE, C. This is an appeal from an order refusing to retax a bill of costs presented by the defendant, who had succeeded in the action. There had been two trials of the case, and on each trial the evidence had been transcribed by the short-hand reporter. In the first instance this was done upon the order of the court; at the second trial it was done upon the order of the defendant, without any from the court. It is not entirely clear how much of the amount due to the short-hand reporter for the first transcript was paid by defendant and plaintiff, but it appears as if each one had paid half the fees. As this transcription was made upon the order of the court, but without any direction as to how the fees due therefor should be proportioned between the parties and paid, each side should have paid half, as they did. "In cases where a transcript has been ordered by the court the fees for transcription must be paid by the respective parties to the action, in equal proportions, or by such of them, and in such proportions, as the court, in its discretion, may order." Section 274, Code Civil Proc.; Amend. Codes 1880, p. 54. By the order of the court, this half of the fees thus paid by the defendant in the first instance became a necessary part of the costs and disbursements incurred by him in defense of the action. He was therefore entitled to recover it from his adversary against whom he obtained judgment.

As to the second item, which was \$559.40, paid by the defendant for the second transcription, he could not recover that, or any part of it, from the plaintiff, as neither the latter nor the court had ordered it, but the defendant alone. In another part of section 274 of the Code of Civil Procedure, as amended in 1880, it is said: "The party ordering the reporter to transcribe any portion of the testimony or proceedings must pay the fees of the reporter therefor." The court should have retaxed the defendant's bill of costs, and struck therefrom the item of \$559.40, above mentioned. For these reasons, we advise that the order appealed from be reversed, and the court below directed to retax the bill of costs as herein indicated.

We concur. BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the court below is directed to retax the bill of costs as therein indicated.

(86 Cal. 423)

HULING v. ABBOTT *et al.* (No. 12,909.)  
(Supreme Court of California. Nov. 21, 1890.)

NOTICE OF MORTGAGE—BONA FIDE PURCHASER.

An assignee of a certificate of purchase of land took it with knowledge of an unrecorded mortgage by the assignor, and assigned it to one who had no knowledge of the mortgage. The latter assignee, having obtained a patent to the land, conveyed it to the first assignee, who conveyed it to a person having notice of the mort-

gage. *Held*, that the mortgage could be enforced against the last grantee, as his grantor, though taking from an innocent purchaser, became, by reason of his former position, a purchaser with notice of the mortgagee's rights and equities.

Department 2. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

*E. W. Willson and Henry L. Ford, for appellant. G. W. Hunter, (J. N. Gillett and J. F. Coonan, of counsel,) for respondent.*

THORNTON, J. Action to foreclose a mortgage on a parcel of land situate in Humboldt county. Defendant Abbott was the mortgagor. Abbott made default, judgment of foreclosure was made and entered against defendants, and from this judgment defendant Bull alone prosecutes an appeal. The following facts are found: On July 7, 1885, Abbott was the owner of the tract of land which he, on the 28th of July, 1886, conveyed to plaintiff by mortgage to secure the payment of a debt due by Abbott to the plaintiff. Abbott's title to this land was derived under a certificate of purchase from the state of California, bearing date the day first above mentioned. On the 28th of July, 1886, Abbott assigned his certificate of purchase, and all his title in the land mentioned therein, to one M. H. Crissmon, who purchased with actual notice of the existence of plaintiff's mortgage. On April 15, 1887, Crissmon assigned the certificate of purchase and all his title in and to said lands to C. C. Fitzgerald. Fitzgerald purchased with actual notice of the existence of plaintiff's mortgage, and agreed, as part consideration for the assignment, to pay at maturity the debt secured by the mortgage, and for this purpose retained in his hands from the purchase price the full amount of the principal and interest due on the debt. On July 1, 1887, Fitzgerald assigned the certificate of purchase, and all his title to said lands, to one R. W. Rideout, who at the time of his purchase had no knowledge of the existence of plaintiff's mortgage. Thereafter, Rideout, while the owner of the land, received from the state of California, as assignee of the certificate of purchase, a patent for said lands. The plaintiff placed the mortgage on record in the proper office in the county of Humboldt, on the 19th day of September, 1887. On the 20th of October, 1887, and while the mortgage of plaintiff was of record, Rideout conveyed the lands described in the certificate of purchase above mentioned to the above-named C. C. Fitzgerald. On the 2d day of January, 1888, Fitzgerald conveyed to the defendant Bull (appellant here) the lands above referred to. At the date of the conveyance last named, Bull had full notice of the record of plaintiff's mortgage, and of the execution and existence of such mortgage. On the facts above stated, the court rendered judgment in favor of plaintiff. We think the judgment should stand. When Fitzgerald, who was the grantor of Rideout, and who had actual notice of plaintiff's mortgage when he purchased, and at the time he conveyed to Rideout, received a conveyance from the latter, he

occupied the same position he formerly did, viz., that of a purchaser with notice of plaintiff's rights and equities. He was not protected by the fact that Rideout, his grantor, was an innocent purchaser. *Talbert v. Singleton*, 42 Cal. 391; 2 Devl. Deeds, § 748; 2 Pom. Eq. Jur. § 754. When Fitzgerald secured the conveyance from Rideout, he occupied the same position he did when he purchased from Crissmon,—that of a purchaser with notice of and bound by all the equities of Huling. The court finds that Bull took his conveyance from Fitzgerald with full notice of plaintiff's equities. We cannot see in what way the conclusion can be avoided that plaintiff had a right to enforce his rights against Bull. It may be further observed that it does not appear that Bull paid any money on his purchase. He must, then, be held to occupy the same position that Fitzgerald did, and alike subject to the enforcement of plaintiff's rights. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(86 Cal. 479)

COOKE v. AGUIRRE, Sheriff. (No. 13,867.)

(Supreme Court of California. Nov. 26, 1890.)

#### JUDGMENT IN REPLEVIN.

1. In replevin, plaintiff alleged his ownership and right of possession, the value of the property, and defendant's wrongful taking and retention of possession. The answer put in issue all said allegations except value. *Held*, that a judgment for the return of the property could not be sustained, there being no finding that plaintiff was entitled to possession, but only that plaintiff was the owner and in possession, and that defendant, as sheriff, wrongfully took possession under a writ of attachment against another person.

2. A judgment for the possession of personal property, which merely describes it as "two stallion horses," without reference to other pleadings or papers for such description, is bad for uncertainty.

3. In an action to recover possession of personal property, a judgment for possession only, and not for possession or the value thereof, as provided by Code Civil Proc. Cal. § 667, is erroneous.

Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

H. H. Appel, Gage & Robarts, and Willis & Appel, for appellant. William Young, (H. C. Carr, of counsel,) for respondent.

WORKS, J. This is an appeal on the judgment roll from a judgment for the recovery of personal property. The plaintiff alleged that he was the owner, and entitled to the immediate possession of the property, giving its value, and that the defendant had wrongfully, and without the plaintiff's consent, taken and retained possession thereof, and detained the same from him; that he had demanded possession of the property, which was refused; and that he had been damaged in the sum of \$100. The defendant answered denying the ownership of the plaintiff, or his right to possession, or that he had wrongfully taken, or wrongfully detained, the property, or that the plaintiff had been damaged; and alleging, also, that

the property was owned by one Cyrus F. Cooke. He also justified, as sheriff, by alleging that said Cooke was the owner of the property, and that he had taken possession of the same by virtue of a writ of attachment regularly issued against Cooke, and placed in his hands, for service, as such sheriff. The answer did not put in issue the value of the property, as alleged in the complaint. The court found that the plaintiff was the owner, and in possession, of the property, and that the defendant, in his official capacity as sheriff, by virtue of a writ of attachment issued against said Cyrus F. Cooke, wrongfully took possession of the property, and still held the same. There was no finding that the plaintiff was entitled to the possession of the property, or its value, or the amount of plaintiff's damages. The property was sufficiently described in the complaint. The court rendered the following judgment: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that James A. Cooke, the plaintiff, do have and receive of A. G. Aguirre, (sheriff,) the defendant, judgment for the return of the property, to-wit: Two stallion horses, together with said sheriff's costs and disbursements, incurred in this action, amounting to the sum of sixty-two and 5-100 dollars, (\$62.05.)" The appellant contends that the findings do not support the judgment; that the court did not find on all the material issues; and that the judgment is invalid, because it does not sufficiently describe the property, and is not in the alternative, as required by law.

The questions whether the plaintiff was entitled to the possession of the property, and whether he was damaged by the taking, were put in issue by the pleadings. Both of these were material issues. One of them, at least, must have been found in favor of the plaintiff to entitle him to recover. There was no finding as to his right to the possession. For this reason, the judgment is not supported by the findings. The question of damages should have been found upon, but the appellant cannot reasonably ask for a reversal of the case, because a judgment for damages was not rendered against him. The judgment was erroneous because not in the alternative, as required by section 667 of the Code of Civil Procedure, (Berson v. Nunan, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. Rep. 605.) And for the further reason that it contained no sufficient description of the property. It contains no sufficient description of the property, nor does it refer to any other pleading or paper for such description. Such a judgment is bad for uncertainty. *Welch v. Smith*, 45 Cal. 230; *Kelley v. McKibben*, 53 Cal. 13. Judgment reversed.

We concur: PATERSON, J.; FOX, J.

(86 Cal. 445)

MADDEN v. OCCIDENTAL & ORIENTAL S. S. Co. (No. 12,799.)

(Supreme Court of California. Nov. 26, 1890.)

#### INJURY TO EMPLOYE—EVIDENCE.

While plaintiff's decedent was employed in loading defendant's ship; the sling to the ap-



paratus provided by defendant for loading the ship broke, precipitating freight onto deceased, causing his death. *Held*, that defendant's negligence could not be inferred from the mere breaking of the sling, in the absence of proof that it was being properly used by defendant's employees, and in the ordinary manner.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

*Taylor & Craig*, for appellant. *W. H. L. Barnes*, for respondent.

WORKS, J. This is an action by the appellant against the respondent for damages for the death of her husband, claimed to have resulted from the negligence of the appellant. The deceased was the employee of the respondent, engaged in loading one of its ships. The amended complaint alleges: "That, on the 18th day of October, A. D. 1886, the said Patrick Madden was an employee of the said defendant, employed by it, and for it, on the lower deck next above the lower hold of the ship *Belgic*, (one of said ships,) at the mail dock or wharf in the said city and county of San Francisco, as a laborer, assisting to load said ship by stowing cargo; that on the said 18th day of October, A. D. 1886, and while said Patrick Madden was engaged at said work, on said lower deck of the ship, as such laborer, four bales of cotton goods, each bale firmly packed so as to form a solid body, weighing from about 180 to 250 pounds avoirdupois, were, by means of a sling manufactured of rope, hoisted and worked by block and tackle, and operated by steam-power, transferred from said dock or wharf to the main-deck of said ship at the hatchway known and designated as 'Hatchway No. 5,' the said sling, block, and tackle being parts of the machinery and appliances provided by the defendant for the use of its laborers, employed by it in the business and work of loading said ship *Belgic*; that said four bales should have been, by means of said machinery and appliances, carefully lowered to and stowed on said lower deck of said ship, but because of the insecurity and unsuitableness of said sling, and because of the negligence of the defendant in failing to provide and maintain a safe and suitable sling, which insecurity, unsuitableness, and negligence were unknown to or by said Patrick Madden, said sling parted, and two bales of cotton were violently precipitated from the main-deck of said ship down said hatchway No. 5 to the place on said lower deck where said Patrick Madden was engaged in his work, a distance of from eighteen to twenty feet below said main-deck, and one or both of said two bales, containing cotton cloth, as aforesaid, violently struck the said Patrick Madden, without his fault or negligence, producing a fracture of the cervical *vertebra* which pressed on the spinal cord, and also producing an injury of the chest, and a fracture of some of his ribs, and said Patrick Madden was thereby otherwise greatly bruised and injured; and also, by means of the premises, the said Patrick Madden became and was sick, sore, lame, and disabled, and so remained and languished for the space of

four days, and until the 22d day of October, A. D. 1886, when, by reason and as the result of said injuries, and by reason of the premises and of the negligence of the defendant, the said Patrick Madden died." These allegations of negligence were denied by the answer. The cause was partially tried, and upon the evidence of the plaintiff a nonsuit was granted. A motion for a new trial was made, and denied, and the plaintiff appeals.

It is contended that the court below erred in sustaining a demurrer to the original complaint. But the plaintiff did not stand upon her original complaint, but filed an amended one, whereby she waived any error of the court in ruling upon such demurrer, if any error was committed. The nonsuit was properly granted, for the reason that there was no evidence of negligence on the part of the defendant. It was shown that the rope-sling, by which freight was being carried into the ship, and lowered through a hatchway to the lower deck, broke, whereby two bales of freight were precipitated down such hatchway, and the deceased thereby fatally injured, as alleged in the complaint. But there was no evidence showing, or tending to show, that the sling thus used was unsuitable or insecure, as alleged in said complaint, unless the mere proof that the sling broke was *prima facie* evidence of the fact. It is contended by counsel for the appellant that it was only necessary for her to prove that the sling broke, and that, from such proof alone, it must be inferred, in the absence of any evidence on the part of the defendant tending to show that the accident occurred from other causes, that the accident was the result of the neglect of the defendant to furnish a proper sling. It may be that in some cases it would be sufficient to prove that an accident occurred, in order to establish a *prima facie* case of negligence, and cast upon the defendant the burden of explaining away the inference resulting from such proof; and it may be conceded that such would have been the case here, if it had been shown that the sling was being properly used by the co-employees of the deceased, and in the ordinary way. It might be said that, if a railroad train were being properly and carefully run and operated, and that, notwithstanding, some part of the machinery broke, and an accident occurred, negligence would be inferred. *Griffin v. Railroad Co.*, 148 Mass. 143, 19 N. E. Rep. 166. But, as was said in the case cited, "no general rule can be laid down that the mere occurrence of an accident is, or is not, sufficient proof of the actionable negligence; for each case must depend upon its own circumstances." In this case there is no evidence as to what amount of freight this sling was intended to or should carry, or that it was being properly used at the time of the accident. It may have been intended to carry a weight of 500 pounds, and may have been entirely sufficient to carry such a weight, and, for aught we can tell from the evidence before us, it may have been overloaded, and the accident have happened from that cause alone. When it is said in some of the cases that the occurrence of an accident is *prima*

*facie* evidence of insufficiency of the machinery or appliance being used, it must be confined to cases, if the rule is conceded to be the correct one, where the machinery or appliance is shown to have been used in the usual and proper way, at least where the same is being used by the party injured, or his co-employees. This was not shown in this case, and therefore the rule contended for does not apply here.

A certain question asked by the defendant was objected to by the plaintiff, and the objection overruled. This is complained of. But, as the question did not in any way relate to or affect what we regard as the proper reason for granting the nonsuit, the ruling was harmless, conceding that it was erroneous. One of the grounds for the motion for a new trial was newly-discovered evidence, and certain affidavits in support of this ground are set out in the record. The evidence set out in these affidavits does not supply the facts necessary to make out the plaintiff's case, or tend to strengthen her case, where it needs support. Therefore the motion for a new trial on this ground was properly denied.

We concur: PATERSON, J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

(86 Cal. 433)

CORSON v. BERSON *et al.* (No. 12,604.)

(Supreme Court of California. Nov. 26, 1890.)

LANDLORD AND TENANT — RENT — FRAUDULENT OVERCHARGE—CLAIMS AGAINST DECEASED PARTNER.

1. A lease of a store for two years, at the monthly rental of \$300, gave the lessees the privilege of a renewal at the same rental. The lease also provided that if the lessees should hold over after the expiration of the two years, with the consent of the lessors, such holding should be construed as a tenancy from month to month. *Held*, that an oral agreement made after the expiration of the two-year term, which had not been extended, and while the lessees were holding as tenants from month to month, under which agreement they were to pay the same rent per month as the lessors should succeed in getting for an adjoining store, did not vary the terms of the written lease, as that had already expired.

2. Where the lease of the adjoining store on its face provides for a rental of \$300 per month, a written agreement, contemporaneously executed, under which the lessors agreed to allow the tenants of the adjoining store a rebate of \$100 per month, is admissible in an action by the lessees of the first store to recover the amount overpaid by them under the oral agreement.

3. Statements made by the lessors' agent on leasing the adjoining store, as to his reason for drawing the lease for \$300 per month, are competent evidence against the lessors.

4. Since the lessees of the first store were tenants from month to month, when the contingency happened on which they were entitled to a reduction of \$100 per month in their rent, the presumption, as provided by Civil Code Cal. § 945, is that the hiring was at the same reduced rent for each of the succeeding months that they continued their occupancy; and they are entitled to recover the entire overplus which they had been induced to pay for nearly a year by the deceit of the lessors.

5. A claim against a partnership, one of the members of which has died, does not come within Code Civil Proc. Cal. § 1493, which requires claims against a decedent's estate to be presented within a specified time, or be forever barred.

6. The executors of a deceased partner are not necessary parties defendant in an action on a claim against the partnership; and, though they have been joined, a judgment in plaintiff's favor is not erroneous because it does not require that the amount awarded thereby shall be paid in the due course of the administration of the deceased partner's estate.

Commissioner's decision. In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

*Lloyd & Wood and E. F. Preston*, for appellants. *Royce & Commings and C. E. K. Royce*, for respondent.

GIBSON, C. This action was brought by plaintiff Corson, as assignee, to recover from the firm of A. Berson & Son the sum of \$1,050, due for rent, for 3½ months, on a lease made and delivered to them by the firm of Ewing, Plum & O'Brien, plaintiff's assignors. A Berson & Son admitted by their answer that they occupied the leased premises during the period above mentioned, but denied that such occupation was under or pursuant to the lease relied upon by plaintiff, and averred that during that time they held under a verbal agreement with Ewing, Plum & O'Brien, by which they, A. Berson & Son, were to hold and pay rent for the premises, and did hold and pay for the same, at the rate of \$150 per month. With their answer, they filed a cross-complaint, bringing in, as parties to the action, Ewing and Plum, and Flood and Coleman, the executors of O'Brien, the deceased partner of Ewing and Plum. By this cross-complaint, they alleged that on or about March 1, 1884, Ewing, Plum & O'Brien let the premises to A. Berson & Son from month to month, upon the same rental that the lessors might get for an adjoining store which they, from and after said date and up to June 1, 1885, rented for the sum of \$150 per month, but fraudulently concealed the true amount of the rent thereof from A. Berson & Son, and fraudulently represented to them that the true rental of the adjoining store was \$300 per month, and thereby fraudulently induced A. Berson & Son to pay a greater amount of rent than they had agreed to pay. By reason of which Ewing, Plum & O'Brien became indebted to A. Berson & Son in the sum of \$150 per month, for every month's rent paid by the latter from March 1, 1884, to February 15, 1885, with interest thereon from the last day of each month, less 3½ months' rent from the latter date, at \$150 per month. After the commencement of the action, A. Berson died, and it was continued in the name of G. Berson as the surviving partner of the firm of A. Berson & Son. The case was tried without a jury, and the court found the facts in favor of G. Berson, as the said surviving partner, in accordance with the allegations of the cross-complaint, except that the rental of the adjoining store was found to be \$200 per month for one year from June 1, 1884, instead of \$150 per month from March 1, 1884; and that the rent due from A. Berson & Son for 3½ months from February 15, 1885, was at the rate of \$200 instead of \$150 per month. Judgment followed for

the cross-complainant, G. Berson, as surviving partner of A. Berson & Son, for \$178.50, overplus paid by the firm from June 1, 1884, to February 15, 1885, after deducting \$700 for rent due from the latter date until June 1, 1885, together with interest on the overplus from the date last mentioned. From this judgment and an order denying a new trial, the plaintiff Corson, and Ewing and Plum, and O'Brien's executors, viz., Flood and Coleman, appeal.

In order that the points made by appellants may be fully understood it is necessary to state the leading facts as shown by the evidence. A. Berson & Son, by a lease in writing, leased a store from Ewing, Plum & O'Brien for two years from May 15, 1881, at the monthly rental of \$300 per month, payable in advance each month, with the privilege of an extension of the term at the same rental up to the date of the expiration of the lease of Ewing, Plum & O'Brien, from J. G. Brooks. The lease also provided that, if the lessees should hold over after the expiration of the term of two years, with the expressed or implied consent of their lessors, such holding should be construed as a tenancy from month to month. On the expiration of the term on May 15, 1885, the lease was not extended, but the lessees continued to hold the premises as tenants from month to month at the same rate specified in the lease. While they were thus holding, the adjoining store, which also belonged to the lessors, became vacant in February, 1884, and Ewing, for his firm, in an answer to the repeated solicitations of A. Berson, of the firm of A. Berson & Son, agreed with the latter, as an inducement for them to remain as tenants, that, if the vacant store should be rented for less than \$300 per month, A. Berson & Son should have their store at the same rental. In May of the same year, the lessors leased the adjoining store for one year from June 1, 1884, at a monthly rental, expressed in the lease, of \$300 per month, and gave the lessee a separate paper in which the lessors stipulated to allow the lessee \$100 per month on the rent of \$300 per month, during the term. This stipulation was concealed from A. Berson & Son, to whom it was represented by their lessors that the tenants of the adjoining store were paying \$300 per month therefor. Believing this representation to be true, A. Berson & Son continued to pay \$300 per month, until February 15, 1885, about which time they discovered that the tenants of the adjoining store were, and had been, paying only \$200 per month instead of \$300, but continued to hold the premises until June 1, 1885.

Appellants' first point is that the court erred in overruling their objection to the following question put to G. Berson by his counsel: "What took place when the lease expired?—I mean the original two years, or the first term, of the lease,"—on the ground that it called for testimony that would tend to vary the terms of the written lease. It is obvious that, as the question related to matters that occurred after the lease had expired, the question was not designed to, and in fact did not,

elicit anything that tended to vary its terms; and the objection thereto was properly overruled. Appellants' exception to the court's refusal to strike out the testimony of the same witness, as to what was said relative to the reduction of rent upon the same ground upon which the objection was placed, cannot be sustained, because, when the verbal agreement was made with them regarding the reduction of rent upon the contingency, which happened, viz., of not obtaining \$300 per month for the adjoining store, they were holding as tenants from month to month, as provided for in the original lease which had expired; and it was competent for them to make any parol agreement as to the continuation of their tenancy for any period not exceeding one year. Besides, the testimony was relevant, and tended strongly to support the agreement for the reduction of rent, which constituted the gist of the cross-action.

Appellants' third objection is that the court erred in receiving, in evidence, the paper that had been given to the tenants who leased the adjoining store at the time they obtained a lease of it from Ewing, Plum & O'Brien, by which paper it was provided that such tenants should receive a rebate of \$100 on each month's rent, on the ground that the paper was signed by Ewing, alone, and could not bind his firm. The fact that the paper was given with the written lease to the tenants of the adjoining store, and formed a part of it, is sufficient to show that it was properly received in evidence; and the cases cited by us in support of our disposition of the next point of the appellants conclusively establishes that the trial court was right in its ruling in this respect.

After witness Connolly, who was a member of the firm that had leased the adjoining store, had testified: "I paid \$200 per month and no more. I had a conversation with Mr. Ewing and with Mr. Coffey, the young man with Easton & Eldridge at the time. He was the party with whom I negotiated the lease from Mr. Ewing,"—he was asked this question: "Well, now, what was the reason that the lease was drawn for \$300 given you then?" And it was objected to by the appellants, other than Corson, on the ground that anything said by Coffey not in the presence of Ewing, or any of the other parties to the lease as lessors, could not bind them. The objection was properly overruled, because, by the above testimony of the same witness, it sufficiently appeared that Coffey was acting as agent for the lessors in negotiating the lease; and anything he said while acting in that capacity, regarding the concealment of the true amount of rent from A. Berson & Son, under the direction of any member of the firm, was, we think, clearly admissible, for, no matter how slight the tendency of the evidence may be to prove fraud, it is not for that reason incompetent. *Hubbard v. Briggs*, 31 N. Y. 518. If the trial court had any doubt, at the time the question was asked, as to whether Coffey acted as agent for the lessors in negotiating the lease, it must have been removed by Coffey's own testimony given subsequent-

ly, in which he said: "I am the party mentioned in the testimony, who negotiated the lease from Messrs. Connolly & Borle for Mr. Ewing." He designated but one member of the firm, but as such partner was acting for the firm in the transaction of its business in effecting the lease referred to, any misrepresentations or concealments made or directed to be made by him in connection therewith were competent against the firm. *Mamlock v. White*, 20 Cal. 598; *Chester v. Dickerson*, 54 N. Y. 1; *Wolf v. Mills*, 56 Ill. 360.

Appellants further contend that, if they promised to reduce the rent at all, it was not for any stated period, but at most from month to month, and, in allowing A. Berson & Son to recover the overplus of rent paid for one year, the court committed error. The agreement for the reduction of rent was, it is true, for no definite period, but upon the letting of the adjoining store for but \$200 per month, A. Berson & Son became, under the agreement, entitled to have their rent reduced to that sum. And as they were at the time holding as tenants from month to month, the lessors, under section 1946, Civil Code, could, by proper notice, have terminated their tenancy, or, by giving the notice provided for in section 827, Civil Code, have increased their rent; but, thinking that, in all probability, A. Berson & Son would not discover their secret arrangement with the tenants of the adjoining store, and desiring to retain A. Berson & Son as profitable tenants, they did not deem it necessary to act under either of those provisions of the Civil Code. Section 1945 also provides: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor, in any case, one year." Now, as A. Berson & Son, at the time the contingency happened upon which they became entitled to a reduction of \$100 per month in their rent, were tenants from month to month, every month that their lessors accepted rent from them, the hiring was presumably on the same terms for each month; that is to say, for the same rent per month as that paid by the tenants of the adjoining store. This being so, the court correctly allowed the amount they had overpaid, by reason of the concealment from them of the true rent of the adjoining store, less the 3 1/2 months' rent that had accrued, from the time they stopped paying rent, upon discovering that they had been paying \$100 per month too much, which they were induced to pay by the deceit their lessors practiced upon them.

Another objection of appellants is that A. Berson & Son did not present their claim for rent overpaid, to the executors of the will of O'Brien, as required by section 1493 of the Code of Civil Procedure. That section provides that all claims arising upon contracts against the estate of a deceased person, whether due or not, must be presented within the time limited in the notice requiring such presentation, or be

forever barred, unless the claimant shall show that he was out of the state, and in fact had no notice, in which case his claim may be presented at any time prior to the final distribution of the estate. The claim of A. Berson & Son was not a claim against the estate of O'Brien, but against the firm of which he had been a member, and consequently did not come within the purview of that section.

For the same reason, the last point urged by appellants, to the effect that two of the appellants are sued in the cross-complaint as executors, yet the judgment against them does not require that the amount awarded thereby shall be paid in the due course of the administration of their testator's estate, must also fail. As there was no claim made against the estate of the deceased partner, the executors of his will were not necessary parties to the cross-action; and the same end could have been attained by proceeding against the two surviving partners alone. *Friermuth v. Friermuth*, 46 Cal. 42. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(36 Cal. 402)

Ex parte BECKER. (No. 20,763.)

(Supreme Court of California. Nov. 21, 1890.)

HABEAS CORPUS—WANT OF PROBABLE CAUSE FOR COMMITMENT.

A person charged with crime will not be released on *habeas corpus* before trial on the ground of want of probable cause for commitment, when there is some evidence, other than the extrajudicial admissions of the party himself, that an offense has been committed.

*Habeas corpus.*

*Carroll Cook*, for petitioner. *J. D. Page*, Dist. Atty., for respondent.

Fox, J. The point made in this case is that the prisoner has been committed without reasonable or probable cause; and that question turns upon whether or not a public offense has been committed triable within this jurisdiction. I deem it improper at this time to prejudice the case of the prisoner by any analysis of the evidence which has been presented, and which may be different at his trial, and of the law applied thereto. Whether it is sufficient to convict beyond a reasonable doubt, it is the province of the jury to say, and ought not to be determined in advance on *habeas corpus*. It is enough now to say that an examination of the sections of the Code bearing on the question, and of such evidence as has been presented, fails to show that the commitment is without reasonable or probable cause. The cases cited by the petitioner are not in point, for here there is some evidence, other than the extrajudicial admissions of the party, tending to show that an offense has been committed. Let the writ be discharged, and the prisoner remanded.

(86 Cal. 431)

**MCKAY v. SUPERIOR COURT OF SANTA BARBARA COUNTY.** (No. 13,928.)

(Supreme Court of California. Nov. 25, 1890.)

**APPEAL FROM JUSTICE OF THE PEACE—DISMISSAL—POWER OF SUPERIOR COURT.**

Code Civil Proc. Cal. § 129, gives courts of record power to make rules for their own government, not inconsistent with the laws of the state; and section 980 provides that for a failure to prosecute an appeal from a justice's court, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed. *Held*, that the superior court has power to make and enforce a rule that the record and transcript of a case tried in a justice's court must be filed in the superior court within 10 days after the perfection of the appeal, and that if not so filed, the appeal might, on motion, with notice, be dismissed.

In bank. *Certiorari* to superior court, Santa Barbara county; R. M. DILLARD, Judge.

R. E. Houghton, for petitioner. W. C. Stratton, for respondent.

McFARLAND, J. This is an original proceeding in *certiorari*, in this court, to review an order of the superior court, dismissing an appeal from a judgment rendered in a justice's court. The theory of the petitioner is, we suppose, that the superior court had no jurisdiction to dismiss the appeal. The Code does not prescribe any time within which an appellant, from a judgment in a justice's court, must file the record on appeal in the superior court. It merely provides that, after the filing of the notice of appeal and undertaking, and the settlement of the statement, if any, (and in the case at bar there was none,) and, "on the payment of the fees of the justice," the justice must, within five days, transmit to the clerk of the superior court certain papers which constitute the record. Section 977, Code Civil Proc. An appellant, therefore, by simply refusing to pay the justice's fees, might indefinitely postpone the presentation of the record in the appellate court,—so far, at least, as there is any specific statutory provision on the subject. But section 980 provides that, "for a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order an appeal to be dismissed, with costs." This is a matter which, we think, the superior court can regulate by reasonable rules; and, in the case at bar, the superior court (respondent here) had a rule that the record and transcript must be filed within 10 days after the perfection of the appeal, and that, if not so filed, the appeal might, on motion, with notice, be dismissed. We think that under section 129<sup>1</sup> the court had full power to make this rule. It was not "inconsistent with the laws of the state." In the case at bar, the appeal was perfected by filing and serving the notice of appeal, and filing the undertaking on appeal on April 24, 1890; and the transcript on appeal was not filed in the superior court until May 9, 1890, more than 10 days afterwards. For this reason the

appeal was, on motion, after notice, dismissed; and we see no tenable ground for denying the jurisdiction of the court to make the order of dismissal. This view makes it unnecessary to notice the other questions, both of fact and law, raised by respondent. The prayer of the petitioner is denied, and the writ dismissed.

We concur: PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; FOX, J.

(86 Cal. 465)

**KREILING v. MULLER.** (No. 13,488.)

(Supreme Court of California. Nov. 26, 1890.)

**LOCAL IMPROVEMENTS—ASSESSMENT.**

Act Cal. 1885 (St. 1885, p. 147,) an act relative to assessments for street improvements, provides that "whenever the estimated or actual cost of any work contemplated or ordered to be done by the council, and chargeable under the provisions of this act against any lot," shall exceed one-half of the assessed value of such lot, such excess shall be assessed against and paid by the city. *Held*, that a property owner was not liable for more than 50 per cent. of the assessed value of his property for work called for by one resolution of intention and order, though it be let out by separate contracts, and separate assessments be made therefor.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

D. H. Whittemore, for appellant. H. H. Loewenthal, for respondent.

HAYNE, C. This was a suit to foreclose the lien of a street assessment for \$145. The trial court gave judgment for the plaintiff upon demurrer to the amended answer, and the defendant appeals. The assessment in suit was for grading, macadamizing, etc., Noe street, from Twenty-Fourth street to Twenty-Sixth street; and the complaint alleges that the various steps leading up to and including an assessment were duly taken. The amended answer sets up, in substance, that the resolution of intention included other work than that for which the assessment sued on was made, viz., sewerage of the street for the two blocks mentioned, and work upon adjacent property; that the sum for which the defendant's lot has been and will be charged upon the plaintiff's theory amounts to more than one-half the sum for which it was assessed upon the preceding assessment roll for municipal taxation; and that he gave no consent to the imposition of such a burden. The law upon which the defendant relies is contained in the following provisions of the act of 1885, viz.: Section 3, p. 149: "Whenever the estimated or actual cost of any work contemplated or ordered to be done by the city council, and chargeable under the provisions of this act, against any lot or lots of land, or the owner thereof, shall exceed one-half of the assessed value of such lot or lots as borne upon the last assessment roll, whereon it was assessed, made for the levying of taxes for municipal purposes, the amount of the cost of said work, exceeding said one-half of the assessed value of said lot or lots, shall be paid out of the city treasury, unless the owner of such lot or lots shall, in writing signed by himself

<sup>1</sup> Code Civil Proc. Cal. § 129, provides: "Every court of record may make rules not inconsistent with the laws of the state for its own government and the government of its officers."

or his authorized agent, consent that the whole expense of said improvement may be made a charge against said lot or lots." Section 7, subd. 1: "The expenses incurred for any work authorized by section two of this act \* \* \* shall be assessed upon the lots and lands fronting thereon except as hereinafter specifically provided: Each lot, or portion of a lot, being separately assessed, in proportion to the frontage, at a rate per frontfoot sufficient to cover the total expenses of the work. But whenever the said assessment upon any lot or portion of a lot would exceed one-half the valuation of said lot, or portion of a lot, as it was last assessed for municipal taxation, then, unless the owner or his attorney in fact shall have previously filed with the superintendent of streets a written waiver of the partial exemption herein provided, the assessment and the lien thereof upon said lot, or portion of the lot, shall be only to the amount of one-half of said last preceding municipal valuation, and the proper remainder of said assessment shall be assessed to the city, and be payable out of the city treasury." Page 152. The position of the appellant is that, under the above provisions, the defendant's lot could not be assessed in a greater sum than one-half of its value upon the preceding assessment roll, for all the work called for by the resolution of intention relating to the property in question, while the position of the respondent is that, inasmuch as the work was let in separate contracts, and separate assessments were made, it was sufficient, if no one of said assessments exceeded one-half of the assessed value for municipal taxation. All other questions have been waived. A stipulation has been filed containing the following provision: "It is hereby stipulated and agreed that the only question for the court to decide is, can the city, under the provisions of the act of 1885, (St. 1885, p. 147,) order several different kinds of work in one order and notice of intention, and assess the owners of the property fronting on the work more than fifty per cent. of the assessed value of their lots, if the work be let at different times by separate contracts, and separate assessments be made therefor?" It is apparent that if this question be decided in favor of the appellant the city is liable for the amount of the exemption; and since the act purports to apply to all the municipalities of the state, and as there must be in the various cities and towns a large quantity of property to which the decision would apply, it is obvious that the question is one of importance. Having this in mind when the record was first sent to us for examination, we recommended that the case be set down for reargument, and that the city and county attorney be notified, which was done. No additional argument, however, has been made. The city and county attorney, after examining the briefs, has declared himself satisfied with the argument of the respondent; and the parties directly interested have resubmitted the case upon the same briefs. It is to be noted, with reference to the stipulation referred to, that it does not expressly say that, if the

question be decided in favor of the appellant, the judgment is to be reversed, and, if in favor of the respondent, to be affirmed. But we think that this is implied; for the court would not examine a mere moot question, nor do we suppose that counsel would attempt to present such a question. It is to be further observed that the question is somewhat broadly stated in the stipulation. Its language might include a case where the same resolution of intention called for work in different and distant localities. But it is hardly necessary to say that in such case the improvement of one locality has no relation to or dependence upon the improvement of the other, and that the cost of the former would not be chargeable upon the latter. And the provisions quoted exclude such a case: for the language is, "whenever the estimated or actual cost of any work contemplated or ordered to be done by the council, and chargeable under the provisions of this act upon any lot," etc. And, accordingly, we construe the stipulation to refer to work in one locality, and affecting the property of the defendant. And, with reference to the question as thus limited, we think that the position of the appellant is correct, and that the property owner cannot be made liable for more than 50 per cent. of the assessed value of his property for work called for by one resolution of intention and order. The language of the statute indicates this. Each of the provisions quoted has a direct relation to the question. One is to the effect that the excess mentioned shall be paid by the city. The other is, in substance, that such excess shall not be assessed upon the lot, but shall be assessed to the city. These two provisions must be read together, and they mutually depend upon each other, for what the city is to pay is not to be paid by the property owner, and what is to be assessed to the property owner is not to be assessed to or paid by the city. Now, the language of the first provision is, "any work contemplated or ordered" and chargeable, etc. It does not say, "any work contracted for, or for which an assessment may be made." And it would be straining the language to say that it does not mean the work contemplated by the resolution of intention, and ordered by the order, but such portion thereof as should be let out by a separate contract, and for which a separate assessment should be made. We do not think that the language should be strained to bring about such a result. The evident purpose was to provide a safeguard for the property owner. It is a matter of judicial history that at least once it was attempted to make the property owner personally liable for a deficiency which remained after taking his entire lot for the cost of an improvement. And, while this attempt was defeated, (by a divided court,) it still remained possible to take the whole property. It is just that there should be some limitation in this regard. The theory of local assessments for local improvements requires it. For, while the property owners of the locality are more benefited by the improvement than the other inhabitants of the city, they would not be more

benefited if all their property in the locality should be taken. In such case, they would be in exactly the same condition as the other inhabitants of the city so far as benefits are concerned, but in a far worse condition with reference to the burden. Some limit, therefore, is demanded by the theory of such assessments, and by common justice; and the limitation of 50 per cent. of the assessed value seems a fair one. Now, the act expressly provides that its provisions "shall be liberally construed to effect the ends of justice." And we do not think that the language should be strained in order to render a just and salutary provision valueless, by permitting the work to be split up into parts, and allowing the full limit to be taken out of each part. The policy of the act in relation to accepted streets does not (as we were at first inclined to think) make against our conclusion; for it is expressly provided, by section 26, that "the city council may, in its discretion, order that the whole or any part of the cost and expense of any of the work mentioned in section two of this act to be paid out of the treasury of the municipality." And what may be done directly may be done by the indirect method above shown. We think therefore that the question submitted must be resolved in favor of the appellant, and that under the stipulation the judgment must be reversed.

It is proper to add that no question is presented as to whether the provisions referred to cover the case of work called for by different resolutions or orders, made either at the same time or at intervals. Nor is any question before us as to the way the assessment should be made up; that is to say, whether the 50 per cent. for which the property is liable is to be distributed equally among these several assessments, or whether the one which happens to be made first is to take the whole sum, if it amounts to so much, leaving the others to be paid by the city. The stipulation precludes the court from determining these questions; and we neither express nor intimate any opinion concerning them. We merely say that, whatever may be the result in the respects mentioned, our conclusion as to the question submitted would be the same. We advise that the judgment be reversed, and the cause remanded, with directions to overrule the demurrer to the amended answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the amended answer.

(86 Cal. 459)

GREENBAUM v. MARTINEZ *et al.* (No. 12, 678.)

(Supreme Court of California. Nov. 26, 1890.)

JURISDICTIONAL AMOUNT—DAMAGES FOR CONVERSION—SALE—WHEN TITLE PASSES.

1. Civil Code Cal. § 3336, provides, as the measure of damages for the wrongful conversion of personal property, (1) the value of the property; (2) a fair compensation for the time and

money expended in pursuit of the property. The complaint alleged the conversion by defendant of certain property of a certain value, and that plaintiff had expended a certain amount for attorney's fee in pursuit of the property. The amount claimed in the *ad damnum* clause was the sum of these two items, and was above the jurisdictional sum of the court, though either item was below such sum. Held that, even if money paid for attorney's fees was not within the rule of damages, the words "for attorney's fees" could be treated as surplusage and it would leave an allegation of damages which, together with the value of the property, would bring the amount claimed within the jurisdiction of the court.

2. Plaintiff purchased, by sample, 250 sacks of wheat at \$1.07 per cental, taking a bill of sale, paying \$250, and agreeing to pay the remainder when he should be informed of the exact weight. The vendor, at time of sale, transferred to plaintiff certificates of weight of such of the wheat as was then in a warehouse, and agreed to deliver the remainder at the same warehouse for plaintiff. Immediately after the remainder was delivered at the warehouse, and certificates of weight were issued to the vendor in his own name, and just before such certificates were transferred to plaintiff, the wheat was attached by defendant. Held, in an action for conversion, that title had passed to plaintiff prior to the attachment, within Civil Code Cal. § 1140, providing that "the title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Monterey county: JOHN K. ALEXANDER, Judge.

Gell & Morehouse, for appellants. Wm. H. Webb and F. Sherwood, for respondent.

GIBSON, C. Action against defendant Martinez as constable, and the sureties on his official bond, to recover, as damages, the sum of \$262.84, the value of 160 sacks of wheat, alleged to have been wrongfully taken and converted by Martinez as constable under a writ of attachment issued in an action prosecuted in a court of a justice of the peace, and, also, the further sum of \$100, alleged to have been expended for an attorney's fee in the pursuit of the wheat. Trial was had before the court, without a jury, and resulted in certain findings, among others, that the wheat was taken as alleged, and was of the value of \$256.08; and that plaintiff had not properly expended the sum demanded by him for an attorney's fee. Judgment was entered in accordance with the findings. Defendants appeal from the judgment, and from an order denying their motion for a new trial. There is no brief for the respondent on file.

The first error appellants assign is that the court erred in overruling their demurrer to the complaint, in which they attacked the jurisdiction of the court over the subject-matter of the action, on the ground that the value of the property sought to be recovered was below the jurisdictional sum of \$300, and could not be brought up to, or above, the latter sum by tacking on a demand for an attorney's fee. The complaint plainly discloses that the object of the action is to recover damages for the wrongful conversion of the wheat, which damages are alleged to con-



sist of two elements, namely, the value of the wheat and money expended in pursuit of it. In order to give the superior court jurisdiction of the subject-matter of an action of this kind for unliquidated damages, the demand, exclusive of interest, that may be claimed under section 3336 of the Civil Code must amount to, at least, \$300. Const. Cal. art. 6, § 5; Code Civil Proc. § 76, subd. 3. It is therefore true, as urged by appellants, that the amount claimed here, to the extent of the value of the wheat alone, would not give the superior court jurisdiction, but to this is added the sum of \$100 expended in pursuit of the property, as an additional cause of damages, thereby making the whole sum claimed in the *ad damnum* clause of the complaint amount to \$362.84; and that clause, according to the settled rule in this state, constitutes the test of jurisdiction. *Dashiell v. Slingerland*, 60 Cal. 653; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. Rep. 349; *Lord v. Goldberg*, 81 Cal. 599, 22 Pac. Rep. 1126. It may be said that the true amount of the demand, exclusive of interest, if any, may sometimes be increased in a complaint for the purpose of bringing the case within the jurisdiction of the superior court. While this may occur, yet the inevitable consequence of not being able to recover the jurisdictional sum, so as to carry costs under section 1022 of the Code of Civil Procedure, will, we apprehend, be sufficient to prevent such a practice from becoming common; and the saving of costs will compensate the defendants in the rare instances in which they may be first brought into the superior instead of the justice's court. Both of the causes of detriment, complained of here, are within the measure of damages applicable to cases of this kind, which is provided for in section 3336 of the Civil Code, as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party. (2) A fair compensation for the time and money expended in pursuit of the property." In *McDonald v. McConkey*, 57 Cal. 325, which was an action like the present one for damages for the wrongful conversion of personal property, it is strongly intimated that money paid out for attorney's fees in pursuit of the property is not within the rule of damages declared in the above section. This is the language there used by the court: "The allegation of damages in each count of the complaint, with the exception of the words 'attorneys' fees,' is in the words of section 3336 of the Civil Code. The words 'attorney's fees' may be rejected as surplusage. The evidence is not before us, and it cannot be assumed that the jury included attorney's fees in their verdict." Whether the intimation in that case is well founded or not, we are not called upon to determine, as the same reasoning, applied therein, will dispose of the point under consideration here. The

allegation of the complaint here, in respect to the expenditure of an attorney's fee, is as follows: "That plaintiff has properly and necessarily expended the sum of one hundred (\$100) dollars, gold coin, for attorney's fee in pursuit of said property." Now, by treating the words "for attorney's fee" as surplusage, we have a sufficient allegation of the fact that plaintiff necessarily and properly expended \$100 in pursuit of the property, and within the proper measure of damages, which, in addition to the amount of the other damages claimed, brings the whole amount demanded within the sum of which the superior court has jurisdiction. A similar course was pursued in *Howard v. Valentine*, 20 Cal. 282. That was an action first brought in the justice's court, under the forcible entry and detainer act, for the restitution of certain premises, and \$500 back-rent for the same. The sum demanded was in excess of that which a justice's court could render judgment for in any action upon contracts, or for torts, except for damages for the unlawful detention of real property. The complaint was demurred to for want of jurisdiction, and overruled. The county court, to which the case was subsequently appealed, sustained the objection to the jurisdiction, and dismissed the action. Upon an appeal from the latter court to this court, it was ruled that the action of the county court was erroneous, because the objection only went to a part of the relief sought, and, although under the act mentioned rents that had accrued prior to the unlawful detention of the property were not recoverable in an action under said act, but only such rents, regardless of the amount, that had accrued during the unlawful detention, the court should either have excluded the objectionable matter and directed an amendment, or disregarded it. We are therefore of the opinion that the same objection raised by the demurrer in the present case was properly overruled.

The appellants' remaining contention is that the property attached had not been delivered to the respondent by the defendant in the attachment suit when the appellant Martinez levied upon it, by virtue of a writ of attachment regularly issued in that suit. The Civil Code provides: "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Section 1140. The respondent, it appears, on October 4, 1886, purchased of Hartman, the defendant in the attachment suit, according to samples, 250 sacks of wheat at the rate of \$1.07 per cental, taking therefor a bill of sale, and paid \$250 as part payment, and agreed to pay the remainder when Hartman should notify him of the exact weight of the wheat. A portion of the wheat, at the time of the sale, was in a warehouse, for which certificates of weight had been issued to Hartman, who, at the time of the sale, transferred them to the respondent, and, at the same time, agreed to deliver the remainder of the wheat at the same warehouse for the respondent. On the 9th of the same month,



he delivered the remainder of the wheat at the warehouse, and had it weighed and certificates of such weight issued to him in the name of Hartman & Co. Just after the last portion of this lot of wheat had been put in the warehouse, the appellant Martinez appeared and asked the warehouseman in whose name it was stored, and was informed that it was in the name of Hartman & Co. He thereupon levied an attachment upon 160 sacks of the wheat, and subsequently sold them. Before making the levy, he was told by the teamster who hauled the wheat to the warehouse that it belonged to the respondent here. Hartman went, immediately after the levy was made, to the respondent and transferred the certificates of weight to him in accordance with the terms of the previous sale. Hartman testified that, in addition to the \$250 received at the time of the sale, he got, as part payment of the wheat, 34 tons of hay and some lumber. There does not seem to be any material conflict in the testimony from which the foregoing facts are deduced. It is not shown, and neither can it be inferred from the evidence, that the respondent made any effort to defraud any of Hartman's creditors, or had any knowledge of his indebtedness to others, at the time of the sale. We think it evident, from the foregoing state of facts, that the parties agreed upon and intended a present transfer of the wheat at the time of the sale, and that the same, which consisted of 250 sacks, was at the same time identified. The court below was therefore justified in finding that the title to the wheat had passed to the respondent, prior to the attachment levy. The judgment and order appealed from should therefore be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

PATERSON, J., dissents.

(86 Cal. 390)

SIEBE *et al.* v. JOSHUA HENDY MACHINE WORKS. (No. 12,905.)

(Supreme Court of California. Nov. 15, 1890.)

APPEAL—RECORD—CORPORATIONS—AUTHORITY OF PRESIDENT—COMMERCIAL PAPER—INNOCENT PURCHASER.

1. Upon appeal there was no bill of exceptions, or settled and certified statement of evidence, but appellant filed in the trial court a document stating the points he would rely on in the appeal, but containing no statement of evidence. The transcript contained a copy thereof, and copies of the appellant's articles of incorporation, with a stipulation that the copies were correct and that the articles and by-laws were introduced in evidence. It contained no statement that no other evidence was introduced, that the record prescribed by law was waived, or that the evidence might be reviewed upon the papers mentioned. *Held*, that the evidence could not be reviewed upon such record.

2. The by-laws of a corporation engaged in "buying and selling machinery of various kinds, and kindred articles," authorized its president to "buy and sell the articles in which the corporation deals without first obtaining the sanction or consulting the board of directors." *Held*, that he

had authority to purchase a boiler on credit and give the corporation's note therefor.

3. That creditors of the seller obtained final possession of the boiler, thus causing a failure of consideration, was no defense to an action on the note by an innocent holder for value before maturity.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge. C. E. K. Royce, for appellants. Naphtaly, Friedenrich & Ackerman, for respondent.

HAYNE, C. This was an action upon a promissory note. The trial court gave judgment for the plaintiffs, and the defendant appeals. We do not think that upon the record before us the appellate court can consider the question whether the evidence supports the findings of fact. The record provided by statute for bringing up the evidence is a bill of exceptions or statement, to be served upon the successful party, and settled and certified by the judge. There is no bill of exceptions or statement in the transcript. It is plain, therefore, that, unless there is some equivalent or substitute for the statutory record, the evidence is not before us. What is relied on as such equivalent consists of the following proceedings: After the appeal was taken, appellant filed in the trial court a notice specifying certain points that it would rely on upon the appeal. This document did not contain any of the evidence given at the trial. It does not appear to have been even served upon the respondent, though we suppose that it was. Nothing further seems to have been done in the trial court. The transcript filed in the appellate court contains a copy of this notice, copies of the appellant's articles of incorporation and by-laws, and a stipulation, which states in substance that the copies mentioned are correct copies, and that the articles of incorporation and by-laws were introduced in evidence at the trial. This is all the stipulation states in relation to the matter in question. It does not state that no other evidence was introduced at the trial. Nor does it purport to waive the record prescribed by law, or to provide that the evidence may be reviewed upon the papers mentioned. The mere statement that certain copies are "correct," is of no more force than the usual certificate of the clerk in authentication of the transcript. *Wetherbee v. Carroll*, 33 Cal. 549. And the mere admission that certain documents were introduced in evidence at the trial does not show that there was no other evidence. For all that the court can know to the contrary, other by-laws, subsequently adopted, may have been introduced in evidence. While a stipulation may be so framed as to dispense with the record provided by law, there ought to be something which would enable the court to say with some reasonable degree of certainty that such was the intention. The respondent objects that there is no record upon which the evidence can be reviewed, and we think that the objection must be sustained. This leaves the appeal to be heard upon the findings. Two questions arise upon the findings.

1. The defendant was a corporation engaged "in the business of manufacturing, buying, and selling machinery of various kinds, and kindred articles." The note was given in payment of the price of a boiler purchased by the president for the corporation. There was no resolution of the board of directors authorizing the purchase; and it is contended that in the absence of such a resolution the president and secretary had no authority to execute the note. But we think otherwise. The buying of machinery was part of the ordinary business of the corporation. And the by-laws (as established by the findings) authorized the president to "buy and sell the articles in which the corporation deals without first obtaining the sanction or consulting the board of directors." So far, therefore, as the buying of machinery was concerned, the president (in the absence of any interposition by the board) had the same authority as the board had. The matter was left to him. This being the case, the authority to buy included authority to buy on credit, and to do such a usual thing as to give the note of the corporation as evidence of its obligation to pay. See *Castle v. Foundry Co.*, 72 Me. 170, 171; *Tappan v. Bailey*, 4 Metc. (Mass.) 536, 537. It is probable that this rule would not apply to an agent for a particular transaction, or even to certain kinds of general agents. We express no opinion as to that; but we think that it applies to such an agent as the president of a corporation, empowered to transact its ordinary business without consulting the board.

2. It is contended that there was a failure of consideration for the note. This is based upon the fact that the creditors of the vendor, after litigation, succeeded in obtaining the boiler. But the findings show that the plaintiff was an innocent purchaser of the note for value before maturity. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(86 Cal. 449)

*In re BARTER'S ESTATE.* (No. 13,588.)  
(Supreme Court of California. Nov. 26, 1890.)

RIGHTS OF HEIRS—CHILDREN OMITTED FROM WILL.

Civil Code Cal. § 1807, provides that when a testator omits to provide "for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate." Held that, where at the time of the making and publishing of testator's will, by which he disinherited his daughter and gave all his property to another child, she was still living, her children did not take as heirs, though she died before testator, and her children were not mentioned in the will.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

J. D. H. Chamberlin, for appellants. J. H. G. Weaver, for respondent.

FOOTE, C. This is an appeal from a decree of distribution under the will of John Barter, deceased. The findings are as follows: "(1) That, on the 4th day of June, 1887, the said deceased, John Barter, made, published, and declared his last will and testament in manner following: 'In the name of God, amen. I, John Barter, of the county of Humboldt, state of California, of the age of seventy-two years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish, and declare this my last will and testament in manner following, that is to say: *First*. I give, devise, and bequeath to my son, Howard Barter, a resident of Humboldt county, state of California, all my property, real, personal, and mixed, whether in possession or expectancy, whereof I shall die possessed, or to which I may be entitled. I have other children,—a daughter and a son,—but it is not my wish or desire to leave anything to them or either of them. *Lastly*. I nominate and appoint O. H. Spring the executor of this my last will and testament, and hereby revoke all former wills by me made. In witness whereof I have hereunto set my hand and seal this fourth day of June, one thousand eight hundred and eighty-seven. JOHN BARTER. [Seal.]'—Which said will was thereafter duly admitted to probate by this court. That said executor named in said will duly qualified and entered upon his duties as such executor, and thereafter such proceedings were had in the settlement of said estate. That on the 19th day of July, 1889, the said executor filed in this court his final account and petition for the distribution of said estate to Howard Barter, named in said will as sole residuary legatee. (2) At the execution of said will the said John Barter, deceased, had three living adult children, his heirs at law, to wit, John T. Barter, Dora C. Seldell, (wife of L. A. Seldell, and mother of said contestants,) and Howard Barter. (3) That the contestants, E. H. Seldell and L. A. Seldell, Jr., are the minor children of the said Dora C. Seldell. (4) That Dora C. Seldell died intestate on the 8th day of May, 1888, leaving, her surviving, her two said children, the said contestants. (5) That the said John Barter, deceased, died on the 1st day of January, 1889, not having revoked the will set forth in finding number one. (6) That L. A. Seldell was by this court duly appointed general guardian of the said contestants prior to August 8th, 1889, and duly qualified as such general guardian. Conclusions of law: That Howard Barter, named in said will as sole residuary legatee, is entitled to a decree distributing to him the whole of the residue of said estate to the exclusion of said contestants. Let a decree be entered accordingly." The appellants and contestants claim that as the grandchildren of the testator they are two of his heirs at law, and that, not being mentioned or provided for in his will, and nothing being contained in the will which shows such omission to have been intentional, as to them his estate is as if their grandfather had died intestate. Sec-

tion 1307 of the Civil Code, on which they rely, reads: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." At the time this will was made and published, and provision made for his son Howard Barter, the mother of these contestants was alive, and they were not "the issue of any deceased child." Their mother, then living, was intentionally omitted from the will and unprovided for, and was not therefore protected by the statute. The object of that section is not to protect any grandchildren except those who, as presumptive heirs at law, would be entitled, had no will been made, to inherit at the time the will is published and made. That is the time when the children of the testator or the children of a deceased child are supposed, if not mentioned in the will, to have been omitted by oversight, because, at such time, their mother being dead, they would be presumptive heirs at law of their grandfather. But if, at the time the will was published, the mother had been living, she would have been an heir at law at her father's death, unless intentionally omitted from the will. The statute intended to put a child, or the children of a deceased child, on the same footing at the time when the will is made and published, and when the intentions of the testator are to control in the construction of his will. When the will in question was made the testator had no need to remember or mention the children of a living child, in order to prevent them from inheriting, at his death, as his heirs at law. Having intentionally omitted their mother, alive at the making and publishing of the will, the children had no rights under the section quoted, and obtained none when she died before the testator. It follows then that the judgment appealed from should be affirmed, and we so advise.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(86 Cal. 449)

STANLEY *et al.* v. MCELDRATH. (No. 12, 187.)

(Supreme Court of California. Nov. 26, 1890.)

NEGOTIABLE INSTRUMENTS—RIGHTS OF INDORSER—JUDICIAL NOTICE—COUNTER-CLAIM.

1. Where one pays a note, on which he is indorser, by executing his own notes to the holder, who accepts them as payment, and either cancels or delivers up the former note so as to extinguish the maker's liability to him, this is such a payment of the note as will entitle the indorser to maintain an action against the maker for the amount so paid.

2. The requirement of notice of dishonor by protest or otherwise to the indorser of a negotiable note is for the indorser's own benefit and may be waived by him without prejudice to his right of recovery against the maker, in case he pays the note after such waiver.

8. Where a counter-claim is pleaded, the court cannot dispense with formal proof, and take judicial notice that the affirmative matters set out in the counter-claim had been formerly adjudicated by the same court in a different action.

In bank. On rehearing. For former report, see 22 Pac. Rep. 673.

William H. Fifield, (*Wilson & Wilson*, of counsel,) for appellant. Henry N. Clement, for respondents.

PATERSON, J. This action was brought to recover from defendant the sum of \$6,136.50, with interest thereon from March 28, 1883. It is alleged in the amended complaint that C. M. Hitchcock, plaintiff's testator, indorsed a promissory note, made by defendant, payable to said Hitchcock, for the sum of \$4,500, solely for the accommodation of defendant; that defendant assigned the note to the London & San Francisco Bank, limited, and received therefor the sum of \$4,500; that defendant paid on account of the interest due thereon the sum of \$231.25, but never paid any portion of the principal; that the note was duly protested, and notice thereof given to the indorser; that Hitchcock paid the sums of \$6,132.50, the amount due on the note, and \$4, costs of protest, to the bank on March 28, 1883; and that defendant has never reimbursed him for any part thereof. The defendant denied that the note was indorsed for his accommodation in any greater sum than \$3,631.28, the balance of said note being for money he had paid out for the use and benefit of said Hitchcock at his special instance and request; denied that the \$4,500 note was protested, or notice of dishonor given; and denied that plaintiff had ever paid the same or any part thereof. By way of counter-claim, defendant alleged that plaintiff was indebted to him in the sum of \$4,000 for services as attorney and counselor, performed at his special instance and request.

The court found that the note was made and assigned as alleged; that \$231.25 only had been paid on account of interest, and nothing on account of the principal; and that the offset to the note, and the counter-claim set up by defendant, had both been adjudicated against defendant in a former action. The court further found certain facts—which will be noted further along—showing demand, refusal to pay, protest, and notice thereof to Hitchcock, and payment by him to the bank. The court found that Hitchcock paid the defendant's note by giving his own note for the sum due thereon, including cost of protest, and that it was accepted and received by the bank, and an entry made in its books to the effect that the note had been paid. At the time of the trial, the note thus given by Hitchcock had not been paid; and appellant claims that, there having been no payment in money, an action for money paid out cannot be maintained. The payment of money is not necessary to the extinguishment of an obligation. A debt may be paid by the giving of a note, if it be offered and accepted as payment. *Weston v. Wiley*, 78 Ind. 54; 2 Daniel, Neg. Inst. p. 232. The evidence shows very clearly that the

Hitchcock note was offered by him and received by the bank upon the express understanding that it was a payment in full of the McElrath note.

Appellant claims that, in paying the \$4,500 note, Hitchcock was a mere volunteer, not having been duly "fixed" as an indorser by proper demand, protest, and notice of dishonor. As stated by him, "the question for the court to determine is precisely the same as if the same question arose upon an attempt by the bank to hold Hitchcock upon his indorsement." An indorser may be made liable either by showing demand, non-payment, and notice of dishonor, or by showing that, while the amount due on the note was an existing debt, enforceable against the maker, the indorser by his acts waived any want of or defect in demand, protest, and notice, and promised to pay the note. The record shows the proper demand and protest for non-payment, and we think the notice sufficient to "fix" Hitchcock as an indorser. The notice of protest directed to Hitchcock was sent by the notary in due time, and reached Mrs. Hitchcock at the residence of the family the next day. The notice was brought into court by the plaintiff, and identified by the notary as the notice sent by him on the day demand was made. The fact that Mr. Coyt and the mail clerk took the letter from the mail bag in violation of a regulation of the postal department, if such be the fact, is immaterial. It is sufficient that the notice reached its destination and served its purpose. Mrs. Hitchcock received it on Saturday evening, and on the following Monday visited the defendant, who promised then, and on several occasions afterwards, to pay the note. The officers of the bank acted with due diligence and care. They were told by Mr. Coyt that Mrs. Hitchcock actually attended to the doctor's business, and had his power of attorney. The notice was actually delivered to "a person of discretion [Mrs. H.] at the place of residence or business of such party [Hitchcock] apparently acting for him." This was sufficient. Section 3144, Civil Code; Kellogg v. Factory, 57 Cal. 327; McFarland v. Pico, 8 Cal. 626; Thompson v. Williams, 14 Cal. 160; Pierce v. Schaden, 55 Cal. 406; 2 Daniel, Neg. Inst. §§ 872, 1003. But as there was no post-office communication between San Francisco and Hitchcock's place of residence, and as Hitchcock—with knowledge of the fact—by his acts and his promise to pay waived any defect in the notice, his liability became fixed, and the bank could have recovered the amount of the note in an action against him. Section 3155, Civil Code; Keyes v. Fenstermaker, 24 Cal. 333; Curtis v. Sprague, 51 Cal. 239. Appellant admits that an indorser may waive his own rights so as to make himself liable to the holder, but claims that, if he be once discharged from liability by reason of the failure of the holder to give proper notice of dishonor, he cannot thereafter by any admission or promise prejudice the rights of the maker; and, if he pay the note, he does so as a stranger, and must be regarded as a volunteer. This contention is based upon an erroneous theory of the

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use and purpose of notice of non-payment of a negotiable instrument. An indorser's undertaking is not an absolute one. It is conditional; and notice of dishonor is provided for his benefit. It is intended to protect him from loss which may occur by reason of delay in making demand of payment of the maker, or which he may sustain by having no notice of the fact that his principal has failed or refused to pay. When he waives this right to notice, he does not create a new liability which requires a new consideration like the waiver of absolute and strict conditions precedent in contracts as they are construed at common law. He has the right to either affirm or disaffirm his liability, and, with the exercise of the right thus provided for his benefit and left to his discretion, no one can complain. *Burgh v. Legge*, 5 Mees. & W. 418; 2 Daniel, Neg. Inst. § 1147. The finding of the court that the defendant's claim of offset and counter-claim had been adjudicated in a former action prior to the trial of this action is not supported by the evidence. The court could not dispense with formal proof of its judgment in another action, and take judicial notice of the fact that the affirmative matters set out in defendant's counter-claim and offset had been therein adjudicated. As no evidence was offered, however, by defendant, in support of his claim of offset or counter-claim, the failure of the court to find on the merits of the issue thus raised was without prejudice to appellant, and the finding that was made was immaterial. The court allowed 10 per cent. interest on \$4,500 of the \$6,136.50,—amount of the note given by Hitchcock to the bank,—from March 28, 1883,—date of said note,—and interest on the residue at the rate of 7 per cent. This was error. Plaintiff is entitled to recover the amount paid on the Hitchcock note, with interest thereon at 7 per cent. only. *Waldrip v. Black*, 74 Cal. 409, 16 Pac. Rep. 226. The judgment is reversed, and the cause is remanded, with directions to the court below to enter judgment against defendant for the amount of \$6,136.50, with interest thereon at 7 per cent. per annum, from March 28, 1883, and costs of suit, including the costs of this appeal.

We concur: FOX, J.; SHARPSTEIN, J.;  
McFARLAND, J.; THORNTON, J.

(86 Cal. 471)

MOWRY v. HENEY. (No. 11,705.)

(Supreme Court of California. Nov. 26, 1890.)

QUIETING TITLE — INSUFFICIENCY OF FINDINGS—  
DEEDS—FAROL EVIDENCE.

1. In an action to quiet title by the grantee of a deed against a judgment creditor of the grantor, who had purchased the land at execution sale, a finding that the deed, made by a mother while ill, and in the expectation of early death, to her daughter, was made with the intention, on the grantor's part, that it should not take effect except in case of her death, and, in such case, that it should operate in lieu of a will, and take effect after her death, will not support a defense that it was made to defraud creditors, although coupled with a finding that, after the grantor's recovery, it was placed on record for the purpose of defrauding creditors.

2. A finding that the grantor intended that the deed should take effect only in case of her death, and that the grantee knew of such intention, was insufficient to support an allegation that the grantee agreed, in case of the grantor's recovery, to hold the title in trust, and to reconvey upon demand.

3. When a deed has been duly executed and delivered to the grantee, parol evidence is inadmissible to show that it was made in anticipation of death, and with an agreement that, in case of recovery, the grantee should reconvey.

McFARLAND, J., dissenting.

On rehearing. For former report, see 24 Pac. Rep. 301.

*R. Percy Wright and D. M. Delmas, for appellant. Cowdery & McCutcheon, for respondent.*

WORKS, J. This is an action to quiet title. The plaintiff claims title under a deed from her mother, Laura A. Mowry, and the defendant claims under a judgment and execution sale of the property against the same party, the judgment having been recovered against the said Laura A. Mowry subsequent to her conveyance to the plaintiff. The judgment of the court below was in favor of the defendant, and the plaintiff appeals from the judgment, and from an order denying her a new trial. The defendant pleaded two defenses to the action. The first was that the deed to the plaintiff from her mother was made when the latter was insolvent, and was made to defraud creditors, and that the defendant was then a creditor who subsequently recovered judgment against the grantor, and levied upon and sold the property in controversy, under execution, himself became the purchaser, and received a sheriff's deed therefor. The second set up the recovery of the judgment, the levy of execution, sale of the property, the purchase, receipt of a sheriff's deed by him, and alleges further: "That, on said 11th day of May, 1881, said Laura A. Mowry was the owner of the real estate described in said second count of said complaint; that the legal title of said real estate was, until the conveyance to plaintiff, as hereinafter alleged, in one Charles Mayne, who held said title in trust for, and as the agent of, said Laura A. Mowry, and had no other interest therein; that on — day of —, 1882, and while said undertaking, made and executed by said Laura A. Mowry, was in full force and effect, she, the said Laura A. Mowry, was dangerously ill, and in apprehension of immediate death, and in lieu of a last will and testament, and to avoid an administration of her estate in the event of her death, she, the said Laura A. Mowry, made and executed, and caused said Charles Mayne, the trustee, as aforesaid, to make and execute with her a deed to said plaintiff of, in, and to said real estate; that said plaintiff was and is the daughter of said Laura A. Mowry; and said deed was made to her, without any valuable consideration whatever, but the same was made, and caused to be made, by said Laura A. Mowry, in view of immediate death; and it was understood and agreed, by and between the plaintiff and said Laura A. Mowry, that said deed should only have effect in the event of her

death, and that, in the event of her recovery from said illness, the said plaintiff would hold and retain the legal title thereto in trust for her, and would convey the same to her upon demand; that said Laura A. Mowry did recover from her said illness, and the plaintiff held and retained the legal title of said real estate in trust for her until the levy thereon, and sale thereof, under an execution issued upon said judgment against said Laura A. Mowry, as hereinafter alleged."

It is contended by the appellant that the findings of the court do not sustain the issues in behalf of the defendant, or support the judgment rendered. The findings are clearly insufficient to support the defense that the deed was made to defraud creditors. It is found that the intention of the grantor was that the deed should not take effect at all except in case of her death, and that in such case it should operate in lieu of a will, and take effect after her death. This not only does not amount to a finding that the deed was made with the intent to defraud creditors, but is wholly inconsistent with such a defense. It is true that the court finds, upon the recovery of Mrs. Mowry, the deed was placed on record with the intent to defraud creditors, but such a finding did not meet the issue presented by the answer.

The finding on the other issue is no less unfortunate. It will be seen that the allegation of the answer is that the deed was made under an agreement between the plaintiff and her mother that the same should be effective in case of her death, and that if she should recover the plaintiff was to hold the property in trust for her, and reconvey the same upon such recovery. The court did not find any such agreement, but found as follows: "That, on said 2d day of February, 1882, said Laura A. Mowry was dangerously ill, and in apprehension of immediate death, and desired to make a disposition of her estate, to take effect after her death, and in lieu of her last will and testament, and to avoid administration of her estate in the event of her death, she signed and acknowledged, and caused Charles Mayne, her trustee, to sign and acknowledge with her, a deed of grant, bargain, and sale, to plaintiff, of, in, and to said real estate; that when said deeds were signed, acknowledged, and delivered by said Laura A. Mowry, she intended that they should only be operative in the event of her death from said illness, and that in the event of her recovery from said illness said deed should be inoperative, and of no effect, and that plaintiff should not claim any right or property by or under it; that said plaintiff was present when said deed was signed, acknowledged, and delivered by said Laura A. Mowry; the plaintiff knew that said Laura A. Mowry was then dangerously ill, and in apprehension of immediate death, and that she desired to make a disposition of all her estate, to take effect after her death, and that said deed was executed in lieu of her last will and testament, and to avoid an administration of her estate in the event of her death, and for no other purpose; and

plaintiff further knew that said Laura A. Mowry, when she delivered said deeds to plaintiff, intended that they should be operative only in the event of her death from said illness, and that, in the event of her recovery therefrom, they should be inoperative, and of no effect." This finding was insufficient for two reasons: *First*. It was not responsive to the issue presented by the answer. Instead of finding an agreement to hold in trust and reconvey, as alleged, it finds an intention on the part of the grantor that the deed should not take effect, except in case of her death, and that the plaintiff knew of such intention. The difference between the allegation and the finding is too apparent to need comment. We do not wish to be understood as intimating that if this finding had conformed to the allegation of the answer it would have warranted the conclusion reached by the court below. The *second* objection to this finding is that if it should be construed as sufficient to uphold the issue made by the answer it would not support the judgment. Here was an absolute deed to the property delivered to the grantee. Its legal effect was to vest in the plaintiff the title to the property free from any conditions. The effect of the finding, if upheld, is to vary the terms of the deed, and render it one upon condition, and defeat its operation by parol proof of an intention on the part of the grantor that it should have an effect different from that apparent on its face. This cannot be done. Mr. Devlin, in his work on Deeds, says: "Whether a deed passes the title or not must be determined by its legal effect. If it has been executed and delivered, its effect is determined by its language. When so executed and delivered, its legal effect, as to the passing of the title, is not altered by the fact that one object of the transaction was to save the expense and trouble of administration upon the grantor's estate after his death; and, where a grantor executed a deed for this purpose to his wife, the fact that she placed the deed, after delivery, where her husband equally with herself could have access to it does not change its legal effect as a conveyance." Devl. Deeds, § 284. And, again: "A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may be contrary to the intention of the parties. One of the grounds upon which the rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition. 'A deed,' says HARRIS, J., 'can only be delivered as an escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condi-

tion not expressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence. The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held as an absolute conveyance, operative from that time." Id. § 314. This is a rule of law well understood, and is amply supported by decided cases, many of which will be found in the section of the work on Deeds above cited. In this view of the case, we need not decide each point made or attempted to be made in the unnecessarily long and tedious brief of counsel for appellant. A great deal of space is taken up in an attempt to show that the findings are not sustained by the evidence, but, coming to the conclusion we have, this question becomes immaterial. Conceding that the findings were sustained by the evidence, as we have said, no defense was made out. It is further contended that the court failed to find on certain issues. This is no doubt true, but the appellant should not complain of this, as the failure to find some of the facts alleged in the first defense, mentioned above, leaves the judgment without sufficient support. The judgment of the respondent was recovered on an undertaking on appeal to this court, and was taken on motion without notice to Mrs. Mowry. It is contended that such a judgment, taken without notice, was void, and that, therefore, respondent's defense was without any foundation. But this point was decided against appellant in *Meredith v. Association of Baltimore*, 60 Cal. 617, and, however doubtful we may be as to the correctness of that decision, it has been acted upon as a correct exposition of the law, no doubt, in this very case, and we think it should be adhered to. There are other technical questions raised and discussed, but they do not deserve attention. Judgment and order reversed.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

I concur in the judgment: PATERSON, J.

McFARLAND, J. I concur in the judgment of reversal, because, after a more exhaustive examination of the evidence, I think that it does not support the findings as to the circumstances under which the deeds to plaintiff from the mother were made. I do not think, however, that the findings (that prolific source of artificial and needless troubles) are themselves insufficient to support the judgment. They find the real facts as alleged in the answer; and, if there is any difference between the answer and the findings, it is a difference only as to legal effects. But I dissent from that part of the prevailing

opinion which is to the point (as I understand it) that when one member of a family, being sick and apprehending immediate death, makes a conveyance of his real property to another member of the family, with the intention, and upon the understanding of both, that it is not to be operative in the event of the recovery of the grantor, if the latter passes the deed over into the hands of the grantee, then the latter has the title irrevocably; and, although the grantor recover his health immediately, he has, and can assert, no further interest, legal or equitable, in the land described in the conveyance, upon the ground that the terms of a written instrument cannot be varied by parole evidence. I do not think that what Mr. Devlin says in his chapter on "Escrows" has any applicability to the question here involved. As to the point under discussion, I think, in the first place, that the correct legal view is that in contemplation of law there was no delivery at all; and, in the second place, if it be assumed that there was a delivery, then, upon the recovery of the sick grantor, the grantee holds the legal title in trust for the grantor, who has the equitable estate. I do not see how such case can, in principle, be distinguished from *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689. I agree with the opinion on the point that a judgment may be taken against a surety on an appeal-bond (under our Code) without notice. My views on that matter were expressed in my opinion on the former hearing.

(86 Cal. 386)

BANK OF CALIFORNIA v. BOYD. (No. 12,-998.)

(Supreme Court of California. Nov. 15, 1890.)

ATTACHMENT—AFFIDAVIT—SECURITY FOR DEBT.

1. Plaintiff's affidavit for attachment alleged that defendant was indebted to him in a named sum on a certain promissory note of specified amount, date, and maturity, made to the order of K., and indorsed by defendants. *Held*, that the affidavit sufficiently alleges plaintiff's ownership of the note.

2. Defendant's motion to dissolve the attachment alleged that the debt was K.'s, and that he had died leaving a will, by which he made his wife executrix, and conferred on her full authority, without any order of court, to pay his just debts, for which purpose he bequeathed her a large estate. *Held*, that this did not give plaintiff a lien securing his debt, within the meaning of the California attachment law.

Department 2. Appeal from superior court, San Francisco; J. V. COFFEY, Judge.

O. P. Evans and James T. Boyd, in pro. per. for appellant. P. L. Benjamin (Pillsbury & Blanding, of counsel,) for respondent.

THORNTON, J. This appeal is prosecuted by defendant from an order refusing to dissolve a writ of attachment. It is urged that the affidavit on which the writ of attachment was issued was insufficient, and therefore the court below erred in its ruling. The insufficiency claimed is that the affidavit does not show that the promissory note, on which the indebtedness set forth has accrued, and which furnished the subject-matter for the issuance of the writ, was owned by the plaintiff.

We cannot concur in this contention. It does appear with sufficient certainty, in our judgment, by the statements of the affidavit, that the plaintiff owned the note. It is stated in the first portion of the affidavit that the defendants (naming them) are indebted to the plaintiff in a sum indicated, over and above all legal set-offs and counter-claims, upon an express contract, for the direct payment of money, viz., on a certain promissory note, which is described as being for \$20,000, dated March 14, 1887, payable May 13, 1887, made by the California Land & Timber Company to the order of Charles Kohler, and indorsed by defendants. Though, as argued on behalf of defendants, it is not stated that the note was indorsed by Charles Kohler to the defendants, or any one else, still, in our judgment, the manifest intentment of the language employed in the affidavit is that the plaintiff was the owner of the note. It is distinctly stated, as mentioned above, in the initial portion of the paper, that the defendants are indebted to plaintiff on a promissory note. This could not be the case if it did not own the note. Nothing in the affidavit is inconsistent with the ownership of the note by the plaintiff, and all its statements are consistent with and tend to show such ownership. In our opinion, the same particularity of statement showing title to the note in the plaintiff is not required in the affidavit for the issuance of the writ of attachment as in the complaint. It is sufficient if, by manifest intentment, the affidavit shows that the note is the property of the plaintiff. It is not necessary that it should be shown by direct averment. The indebtedness to plaintiff is the principal element required in the affidavit, and when that appears by direct statement, and there is nothing in the affidavit inconsistent with such direct statement of indebtedness, the affidavit as to such indebtedness should, in our judgment, be held sufficient. Consistent with the views above expressed are *Wheeler v. Farmer*, 38 Cal. 215; *Weaver v. Hayward*, 41 Cal. 117; and *Dunn v. Mackey*, 80 Cal. 104, 107, 22 Pac. Rep. 64. It is further urged that Charles Kohler was the payee of the note; that it was his debt; that Kohler died in April, 1887, nearly a year before this suit was brought, leaving a will, which was admitted to probate on the 6th day of May, 1887; that by this will he bequeathed a large estate to his wife, who was named executrix thereof, and conferring upon her authority, without any order of court, to settle and pay his just debts; that by the above provisions of his will Kohler created a trust for the payment of his debts, devoting his entire estate to that purpose, and constituting his widow and executrix, trustee of this trust; that thus the payment of the note was secured, within the meaning of the attachment law, and therefore the writ of attachment was improperly issued, and the court erred in refusing to dissolve it. It is assumed by defendant in this contention that Kohler was the debtor of the plaintiff when he died; but this does not so clearly appear as to authorize this court in so holding. *Non constat* but that



Kohler indorsed the note to the defendants without recourse and thus that he never became responsible to the plaintiff. We would not be justified in reversing the ruling of the court below by holding, on the evidence before us, that Kohler, when he died, was bound on this note to the plaintiff. To authorize such a conclusion as this case is here presented, the evidence of the indebtedness of Kohler to the plaintiff must be of a character more distinct and clear than any that appears in the record. But, conceding that Kohler was the debtor to plaintiff on the note, when he died, we are of opinion that no such lien securing the debt resulted on his death, upon the facts above stated, as to bar plaintiff of its right to an attachment. The lien, if there was any, was not one under the control of plaintiff. The debt had to be presented under the statute to the executrix and the proper superior judge for allowance, and when allowed filed in court, and paid in due course of administration as other debts of the estate. The plaintiff would have been thus compelled to await the course of administration, whether he desired to do so or not. In fine, though it may be conceded that, if Kohler had died indebted on the note mentioned to the plaintiff, the plaintiff would have had the security of a trust fund devoted to the payment of its debt, still, in our judgment, it had no lien on any real or personal property securing its debt, within the meaning of the attachment law. We find no error in the record, and, as the order must therefore be affirmed, the motion to dismiss the appeal is denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(86 Cal. 427)

*Ex parte GREEN.* (No. 20,768.)

(Supreme Court of California. Nov. 22, 1890.)

CONCURRENT IMPRISONMENT—SEPARATE CONVICTIONS.

A prisoner convicted in the superior court of libel was sentenced to six months' imprisonment. After four days' confinement he was released on bail, pending an appeal. Pending the appeal he was convicted in the police court of conspiracy, and sentenced to a year's imprisonment. After serving one day, he was released on bail, pending an appeal therefrom. The first sentence was affirmed, and on November 22, 1889, he was confined for six months, less the four days already served. March 8, 1890, the second sentence was affirmed, and a bench-warrant placed in the sheriff's hands for the prisoner, who was still in his custody. *Held*, that the second, and longer, term, did not commence to run on November 22, 1889, but on March 8, 1890, and the prisoner can be held until one year from that date, less the one day served before the appeal.

*Habeas corpus.*

Pen. Code Cal. §§ 669, 670, provides as follows: "Sec. 669. When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other

subsequent term of imprisonment, as the case may be. Sec. 670. The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment; and if thereafter, during such term, the defendant, by any legal means, is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term."

*Carroll Cook*, for petitioner. *J. D. Page*, Dist. Atty., for respondent.

*Fox, J.* June 3, 1889, the prisoner was convicted in the superior court of the city and county of San Francisco of libel, and sentenced to imprisonment for the term of six months. Under this judgment he was confined in the county jail for four days, when he was admitted to bail, pending an appeal to the supreme court. Pending this appeal, and on August 22, 1889, he was convicted in the police court of conspiracy, and sentenced to be imprisoned in the county jail for one year, and to pay a fine of \$500, with the further order that in default of payment of the fine he be further imprisoned in said jail at the rate of one day for each \$1 of such fine. On this judgment he was imprisoned for one day, when he was admitted to bail pending an appeal therefrom to the superior court. Afterwards the judgment in the first-mentioned case was affirmed in the supreme court, and on the 22d day of November, 1889, a bench-warrant was issued, upon which he was placed in jail on the judgment so affirmed, the term for which was six months, less four days already served. On the 8th day of March, 1890, the judgment of the police court was affirmed in the superior court, and a bench-warrant or commitment issued thereon, and placed in the hands of the sheriff, the prisoner being already in his custody on the former judgment. It being settled that he cannot be held in custody for the collection of the fine,—imprisonment and fine having both been imposed,—it is now claimed that the moment he was arrested and imprisoned under the bench-warrant of November 22, 1889, his sureties on the undertaking, given on the appeal from the police-court judgment, were relieved from liability, and that, as a consequence, the 364 days of the unexpired term of that judgment then commenced to run, notwithstanding the fact that the judgment itself was not affirmed until March 8, 1890; and that from that date, November 22, 1889, the unexpired term of imprisonment under both judgments commenced and ran together; and that, the longest of these terms having now expired, the prisoner is now entitled to his discharge. Sections 669 and 670 of the Penal Code are relied upon, and numerous authorities are cited in support of the proposition that the sureties upon the second appeal were discharged the moment the prisoner was rearrested on the first judgment. Even if that be true, it does not follow that his term of imprisonment for the unexpired portion of the judgment in the case wherein they were sureties then commenced to run. Nor is there



anything in the sections of the Penal Code cited which makes such term commence before the appeal in the case was decided. In my judgment, the term of imprisonment under the unexpired term of the police-court judgment did not commence until the 8th day of March, 1890. I think it did commence on that day, and that, for so much of the term of the first judgment of six months as had not then expired, the two terms ran together, and that the prisoner will be entitled to his discharge at the end of one year, less one day, from the 8th day of March, 1890, and not before. Let the writ be discharged, and the prisoner remanded.

(86 Cal. 495)

MOORE v. SUPERIOR COURT. (No. 13,661.)  
(Supreme Court of California. Nov. 28, 1890.)

VACATION OF FINAL ORDER—APPOINTMENT OF TRUSTEE.

1. Code Civil Proc. Cal. § 473, provides that for certain causes an order may be vacated within six months. *Held*, that a final order not void on its face cannot be vacated on motion after the expiration of such period.

2. Where a testator appoints his wife trustee to manage the estate, and in the event of her death before his grandchildren, who are to succeed her in the trust, come of age, then the trust to devolve upon his son, and the wife voluntarily renounces the trust, and procures an order substituting the son as trustee, such order is final as to the right of the widow and son to manage the property, and is not void because said infant grandchildren, who were not beneficiaries under the will, are not notified.

In bank.

*Baker & Grant* and *Grove L. Johnson*, for appellant. *E. R. Bush* and *C. W. Thomas*, for respondent.

WORKS, J. This is an application for a writ of *certiorari* to test the jurisdiction of the respondent, the superior court of Yolo county, to make an order vacating a former order of the same court in a probate proceeding. This same order was appealed from, and it was held that the order was not appealable. In *re Moore's Estate*, 24 Pac. Rep. 816. Most of the facts will be found stated in the opinion above referred to. The order there appealed from, and here attacked, on the ground that the superior court had no jurisdiction to make it, was made and entered more than six months after the former order, vacated by it, was made. It is contended that the court below had no power or jurisdiction to vacate its former order after six months, and that the order complained of is void. On the other hand, the respondent contends that the first order was void, because it appears from the record that the two minors, who were named as trustees upon the death of the widow, were not notified. But these minors were not beneficiaries under the will, or in any way interested in the question as to who should manage the water-ditch during the life of the widow. During that time, she and those persons who were beneficially interested in the property and its management were alone affected by the order made, and in the question as to who should act as such manager. It is apparent that the widow alone is now

complaining and objecting to the enforcement of an order voluntarily consented to and stipulated for by her. We think for these reasons that the first order was not void for the want of notice to the minor trustees. There are other objections made to the original order, but none of them affect its validity.

We are quite certain that the last order made was without authority of law, and was a nullity. The former order was not void on its face. It was final as to the right of the widow of the deceased, and the petitioner here, as to which of them should manage the property under the provisions of the will. The time within which such an order could be vacated must be held to be limited by section 473 of the Code of Civil Procedure. The court had no jurisdiction, after the expiration of six months, to vacate the order made on a mere motion for that purpose, the order not being void on its face. *Bell v. Thompson*, 19 Cal. 708; *Wakelee v. Davis*, 62 Cal. 514; *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, Id. 473, 477; *Wallace v. Center*, 67 Cal. 133, 7 Pac. Rep. 441; *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66; *People v. Harrison*, 84 Cal. 607, 24 Pac. Rep. 311. The order must be annulled, and it is so ordered.

We concur: *FOX, J.*; *SHARPSTEIN, J.*;  
*McFARLAND, J.*; *PATERSON, J.*

(85 Cal. 436)

ROACH v. CARAFFA *et al.* (No. 12,706.)  
(Supreme Court of California. Sept. 4, 1890.)

TRUSTS—ACTION TO ENFORCE—PARTIES—LIMITATIONS.

1. A *cestui que trust* who is seeking to enforce the trust in property that can still be "ear marked" as trust property, against the administratrix of the trustee, does not come within Code Civil Proc. Cal. §§ 1493, 1500, which require claims against decedent's estate to be presented within a specified time to the administratrix for allowance; for the *cestui que trust* is seeking his own property, and not to enforce a claim against the estate and property of the deceased trustee.

2. In an action by the administrator of a deceased partner to enforce a trust in property in the hands of the administratrix of the surviving partner, plaintiff's evidence showed that the deceased partner left the country on account of ill health in 1865, but that his death did not occur until 1874. The surviving partner continued the business, remitting a stated sum quarterly to the deceased partner during his life-time, and permitting the balance of his share of the profits to accumulate. On the deceased partner's death, the partnership affairs were not wound up, but the business was continued by the surviving partner the same as before. With a part of the accumulated profits belonging to the deceased partner, he purchased land in his own name, but confessedly for the benefit of his deceased partner. From the rents of this land, and from the dividends of the partnership business, other moneys came into his hands from month to month, which, by his letters, he admitted he had ready for delivery, on call, to the deceased partner. After the death of the surviving partner, which occurred in 1882, a large fund in coin was found secreted about his premises which he had kept separate from his other funds. *Held*, that the evidence was sufficient to make out a *prima facie* case of the existence of an express trust, and also to ear-mark the trust property, and that it was error to grant a nonsuit because of the insufficiency of the evidence.

3. The fact that the trust in regard to the land was not declared in writing, as required by Civil Code Cal. § 853, will not defeat the trust therein. The trust, being originally created in personal property, was provable by parol; and the character of the trust in this respect was not changed by the fact that, by the acts of the trustee and by operation of law, it now affects real estate.

4. The trust being a continuing one, the statute of limitations did not begin to run against the *cestui que trust* until repudiated by the trustee brought home to the knowledge of the *cestui que trust*.

5. The trust property, on the death of the surviving partner, having come into the hands of his widow as the survivor of the marital community, and also as administratrix of her deceased husband, it was proper to make her a defendant, in both her personal and representative capacities, in an action to enforce the trust.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Mr. Roach, as administrator, etc., of Domenico Caraffa, deceased, against Margaret Caraffa, administratrix, etc., of Giovanni B. Caraffa, and another, for an accounting and settlement of the affairs of a partnership of which Domenico Caraffa and Giovanni B. Caraffa had been the principal members. The court ordered a nonsuit at the close of plaintiff's evidence, and plaintiff appeals.

Code Civil Proc. Cal. § 1493, provides that all claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within a specified time, and any claim not so presented is barred forever. Section 1500 provides: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator," etc. Civil Code Cal. § 852, provides: "No trust in relation to real property is valid unless created or declared: (1) By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law." Section 853 provides: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

John A. Wright and Smith, Wright & Pomeroy, (Edward B. Young, of counsel,) for appellant. Winans & Belknap, (J. B. Harmon, of counsel,) for respondents.

Fox, J. Domenico Caraffa and Giovanni B. Caraffa, brothers, entered into business as partners, in San Francisco, in the year 1859. Shortly afterwards, they sold a one-third interest in their business to one Raggio and admitted him into the partnership, the business being continued, as before, in the firm name of D. Caraffa & Co. In October, 1865, Domenico, being in failing health, returned to Italy, where he continued to remain until his death, which occurred in November, 1874. It is claimed on the part of plaintiff, who is administrator of the estate of Domenico, that, when he, Domenico, went to Italy, the partnership was not dissolved; that he continued to retain his interest, his brother

representing him, and, as his trustee, receiving from month to month his share of the profits of the business, and when so received holding it as his trustee; out of his said share paying \$40 per month for a man to work in the business in place of Domenico, remitting quarterly to Domenico, out of his said share, sums amounting to about \$100 per quarter, and holding or investing the rest as he should deem best, for Domenico's benefit; and that this continued down to the time of Domenico's death. The evidence pretty strongly sustains this theory of the plaintiff. In January, 1873, Raggio, with the consent of the other partners, Giovanni acting for Domenico, sold out his interest to the defendant Guinasso, who was thereafter the third member of the said firm. It is further claimed that, upon Domenico's death, there was no person in this country entitled to administration upon his estate (except the public administrator, who had no notice or knowledge of the existence of such an estate,) other than his said brother and alleged trustee, Giovanni; that said Giovanni failed to disclose the existence of such estate, and neither administered upon the estate, nor closed the affairs of the partnership, but continued to carry on the business of the partnership, as before, for some time, but finally changed the firm name to G. B. Caraffa & Co., and that in that name the business was continued, until October, 1882, when said Giovanni died, and, subsequently, the defendant Margaret Caraffa was appointed administratrix of said estate. The action is for an accounting and settlement of the affairs of the partnership, and for an accounting for and of, and for the delivery of, the trust property remaining in the hands of Giovanni, at the time of his death. The defendants deny the allegations of the complaint, and plead laches, and the statute of limitations. At the close of plaintiff's case, the defendants moved the court for a nonsuit, which was granted, and judgment entered accordingly, from which plaintiff appeals. Plaintiff also moved the court for a new trial, which was denied, and from this order an appeal is also taken. This brings up the evidence upon which the nonsuit was granted. The defendant Guinasso does not appear to have joined in the motion. On behalf of Margaret Caraffa, both in her individual and representative capacity, the motion was made on the grounds (1) that no claim had been presented against the estate of Giovanni B. Caraffa, and, by reason thereof, the action was barred by the provisions of sections 1493 and 1500 of the Code of Civil Procedure; (2) that the evidence failed to establish the existence of a trust in any fund or property in the possession of Giovanni at the time of his death; (3) that the evidence failed to identify any particular fund or property as coming into the hands of the defendant in her individual or representative capacity, under any trust; (4) that, as to the real estate mentioned in the complaint, the claim of plaintiff was barred by the provisions of sections 318, 319, and 322 of the Code of Civil Procedure; (5) that the evidence failed to show that the action was cum-

menced within the time or times limited by section 353 of the Code of Civil Procedure; (6) that the plaintiff cannot sue the defendant in both her representative and private capacity, in the same action and count; and (7) that the evidence is insufficient to show that a trust was ever created in favor of Domenico Caraffa, his heirs or representatives, in any property which had come into the hands of the defendant.

1. The answer to the first of these points is that the plaintiff does not stand in the attitude of a creditor of the estate of Giovanni B. Caraffa. He is not seeking to enforce a claim as such, or for anything that belongs to the estate. The claim of plaintiff is that certain property that was in the possession of Giovanni in his life-time, and, by reason thereof came at his death into the possession of defendant, as the survivor of the marital community of which Giovanni was the head, and was, upon her subsequent appointment, as administratrix, inventoried by her as a part of his estate, did not, in fact, belong to the estate, but was held by Giovanni in trust for the estate of Domenico. Plaintiff attempts to ear-mark that property, and his evidence, it seems to us, goes far towards establishing the existence of the trust, and towards showing that certain of the real property designated was purchased with trust-funds, and certain of the moneys found upon the death of Giovanni also constituted a part of the trust-fund. The claim is not, therefore, one which is required to be presented for the allowance and approval of the administratrix and probate court. If there be a trust-fund, and in the mutations of business it had become so mingled with and absorbed into the property belonging to the trustee as to be no longer capable of being traced or identified, then the only remedy of the *cestui que trust* would be that of a creditor, and if he had failed to present his claim, as required by the probate law, he must fail in his action; but, if the trust property can still be ear-marked, or traced and identified, the *cestui que trust* may maintain his action against the administrator to enforce the trust; for he is seeking his own property only,—not to enforce a claim against the estate and property of the decedent. *Lathrop v. Bampton*, 31 Cal. 17; *Sharpstein v. Friedlander*, 54 Cal. 58; *In re Allgier*, 65 Cal. 228, 3 Pac. Rep. 849.

2, 3, and 4. As to these points, we have examined the evidence with some care. It is, of course, only that offered on the part of the plaintiff, and is open to rebuttal; but, as it now stands, it leaves no doubt in our minds of the fact of the creation of a trust, as early as the latter part of 1865, and that it was never closed during the life-time of either of the brothers. At first, so far as the evidence discloses, the trust-fund consisted wholly of money, but the evidence strongly tends to establish the fact that at a later period, as the trust-fund accumulated, the trustee invested a portion of the fund then in hand in certain real estate, in his own name, but confessedly, as it seems to us, for the benefit of his brother; that real estate is capable of identification, and is pretty

clearly identified by writing made by Giovanni himself. It does not appear to have consisted of an entire interest, but of an undivided interest, in the property. From the rents of this, and from the dividends of the partnership business, other trust-funds, in money, came into the hands of the trustee from month to month. By his own letters he gives proof of its accumulation, and of the fact that he had not invested it, but had it ready for delivery on call. In view of his sources of income, and of the investments he had made, it is difficult to account for the large fund found secreted in coin about his premises, and by him kept sacred and separate from the other funds which he had deposited in bank, upon the theory other than that it was the property of his brother. We do not say that the fact was established by the proof, but it makes a strong *prima facie* case,—so strong, at least, as that we think the court ought not to have granted the nonsuit, on the ground of want of evidence at that stage of the trial, but that it should have proceeded, upon a further inquiry, and an accounting; or, at least, to a finding of the facts in the premises.

5. The action, as against the defendant upon whose motion this nonsuit was granted, is one wholly in relation to trust property, and for the enforcement of the trust. The trust, if there was one, was created before the adoption of the Codes. It was an express trust, within the meaning of section 6 of the practice act, and related entirely to personal property. The provisions of the Code have not changed the character of the trust. Civil Code, §§ 2216-2224. Having been established in relation to personal property, it did not need to be created in writing, but could be proved by parol. *Silvey v. Hodgdon*, 52 Cal. 363; *Zuck v. Culp*, 59 Cal. 142. Under the code it could be created, and was continued, by the acts of the parties, as shown by the allegations of the complaint and the evidence so far adduced. *Id.* §§ 2219-2222. If now, it affects any real estate, as at present it appears to do, it has been made to do so because of the act of the trustee, and by operation of law, under sections 852 and 853, *Id.*, but this does not change its character of express trust. A resulting trust, under section 853, may still be an express trust. It was not alone an express, but a continuing, trust, and the statute of limitations would not run against the *cestui que trust*, until repudiation by the trustee, brought home to the knowledge of the beneficiary. *Ord v. De la Guerra*, 18 Cal. 67; *Schroeder v. Jahns*, 27 Cal. 280; *Hearst v. Pujol*, 44 Cal. 230; *Janes v. Throckmorton*, 57 Cal. 368; *Zuck v. Culp*, *supra*; *Speidel v. Henrici*, 120 U. S. 386, 7 Sup. Ct. Rep. 610. So far as the evidence now shows, no repudiation of this trust occurred until demand by this plaintiff upon this defendant, shortly before the commencement of this action, at least none that was brought home to the notice of the beneficiary.

6. The defendant Margaret Caraffa is the survivor of a marital community, the deceased member of which was the original alleged trustee. As such, upon his death, the alleged trust property came by

operation of law into her possession, charged with the same trust to which it was subject in the hands of her husband. Upon her appointment as administratrix of his estate she, as such, inventoried and returned the property as property of the estate of her deceased husband. It was, therefore, not only proper but necessary to make her a defendant, in her representative capacity, in any proceeding brought to determine the question of trust. If, as she claims, there was no trust, and the property was properly returned as a part of decedent's estate, then, inasmuch as his entire estate, as seems to be the case, was community property, of which she in her personal capacity is the owner of one-half, subject only to administration, she would seem to have such a personal interest in the result of the action as to make it at least proper, if not necessary, to make her a defendant in her personal as well as in her representative capacity. We think she was properly made defendant in both capacities.

7. In the statement of the grounds of motion for nonsuit, it was conceded that a trust can be created by operation of law. We have already cited both statute law, and judicial decisions, showing that such a trust, as that declared upon in this case, may be created otherwise than by deed or writing, and proved by parol, and do not need to consider the question further. In the case made we do not think it material, but it may become so on a new trial, and, for that reason, we notice one other point made by appellant. We think the court erred in ruling out the evidence offered on the question as to whether or not other members of the Caraffa family came to this country after the death of Domenico. On the question of laches, and the statute of limitations, it might become important to show, as was proposed to be done, that Giovanni was the only person in this country, (other than public officers who had no knowledge of the facts,) entitled to administer upon the estate of his brother, the *cestui que trust*. Judgment and order reversed, and the cause remanded for new trial.

I concur: PATERSON, J.

BEATTY, C. J. I concur in the judgment. In view of what the evidence tended to prove, a nonsuit was improper.

(15 Colo. 125)

# PLEYTE v. PLEYTE.

(*Supreme Court of Colorado*. Nov. 7, 1890.)

## ALIMONY ON APPEAL.

When the wife is involved in a suit against her husband for divorce, either as plaintiff or defendant, she should be allowed alimony and suit money out of the husband's estate or earnings, so as to place her upon an equality with him in the litigation until the same is finally determined; and these allowances may be extended to the pendency of the cause on appeal or error, whenever it is made to appear to the appellate court that the review is prosecuted in good faith, and that error has probably been committed to her prejudice. Such relief, however, will not be granted, except upon a showing that the wife is destitute, in whole or in part, of the means nec-

essary to maintain herself and carry on the litigation and that the husband is able to supply the same.

(*Syllabus by the Court*.)

Error to district court, Arapahoe county.

On motion to dismiss petition for alimony and suit money.

*Sullivan & May* and *Coe & Freeman*, for plaintiff in error. *Patterson & Thomas*, for defendant in error.

ELLIOTT, J. The plaintiff in error, having been defeated in her action for divorce in the court below, brings the record to this court by writ of error, and asks, upon petition and affidavits, that defendant in error be required to provide her with means to prosecute her suit, and for alimony while the same is pending in this court. Defendant's counsel deny the jurisdiction of this court to grant such relief. The practice in appellate courts in respect to applications of this kind is by no means uniform. By section 1098, Gen. St., the jurisdiction to grant alimony *pendente lite* is expressly conferred upon district courts, but counsel fees and suit money are not specified; nevertheless such allowances have also been sustained by this court. Hence, the jurisdiction does not depend upon statute. *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. Rep. 657. In support of its appellate jurisdiction, and for the purpose of making such jurisdiction effective, this court has expressed liberal views. In *Wheeler v. Irrigation Co.*, 9 Colo. 250, 11 Pac. Rep. 103, it is said: "One of the inherent powers of an appellate court is the right to make use of all writs known to the common law, and, if necessary, to invent new writs or proceedings, in order to suitably exercise the jurisdiction conferred." In *Friend v. Friend*, 65 Wis. 413, 27 N. W. Rep. 34, the language of Chief Justice Dixon is approved as follows: "The granting of temporary alimony and suit money, to enable a wife to prosecute her appeal, is not a matter of course in this court, and, when application is made, we think we must look into the record so far as to determine whether the appeal is obviously without merits, and, if it is, then the motion will be denied. Injury and a meritorious cause of action must appear." The reasonable rule would seem to be that when the wife is involved in a suit against her husband for divorce, either as plaintiff or defendant, she should be allowed alimony and suit money out of the husband's estate or earnings, so as to place her upon an equality with him in the litigation until the same is finally determined; and these allowances may be extended to the pendency of the cause on appeal or error, whenever it is made to appear to the appellate court that the review is prosecuted in good faith, and that error has probably been committed to her prejudice. Such relief, however, will not be granted, except upon a showing that the wife is destitute, in whole or in part, of the means necessary to maintain herself and carry on the litigation, and that the husband is able to supply the same. This doctrine is familiar, and it is unnecessary

to enter into a consideration of the reasons upon which it is founded. 2 Bish. Mar. & Div. (6th Ed.) § 393; Daniels v. Daniels, *supra*; Goldsmith v. Goldsmith, 6 Mich. 285; Lake v. Lake, 16 Nev. 364, affirmed, 17 Nev. 230. For the purposes of the relief sought by the petition before us, there is no substantial distinction between a case brought here on appeal and one brought by writ of error under such circumstances as would justify a *supersedeas*. We are not disposed to encourage applications of this kind. The application must show merits and probable legal injury, or it will be denied. The motion to dismiss petition for alimony, etc., is denied. But defendant in error will be allowed to answer and file counter-affidavits before the merits of the application are considered.

Motion denied.

(15 Colo. 416)

#### SQUIRES V. KING.

(*Supreme Court of Colorado*. Sept. 12, 1890.)

BROKERS—COMMISSIONS—BREACH OF CONTRACT.

Defendant wrote to plaintiff offering him a certain commission for securing him a loan at a named rate. Plaintiff secured the money, but when defendant was informed that it was ready for him he declined to receive it, giving as his reasons that the rate of interest was not satisfactory; that he could not invest the money at once; and that he had concluded that he did not want it. *Held*, that a right of action thereupon accrued to plaintiff to recover the stipulated commission.

Commissioners' decision. Appeal from Arapahoe county court.

C. A. Allen, *Hendrick & Phelps*, and C. A. Lott, for appellant. S. H. Ballard and C. P. Butler, for appellee.

RICHMOND, C. On July 6, 1886, appellant, who was defendant below, executed and delivered to appellee the following agreement: "Villa Grove, July 6, 1886. John C. King, Colorado—Dear Sir: If you will procure a loan for me of \$6,500 at 8 per cent. interest, interest payable semi-annually, both interest and principal payable in Boston in gold coin of present standard weight and fineness, for five years, on my 680 acres and improvements, I agree to furnish a clear title to the same and all mortgage papers free of expense, and pay you a commission of 10 per cent. for securing the loan. [Signed] Wm. B. SQUIRES." In pursuance of this agreement, appellee negotiated the loan, and had the sum mentioned forwarded to a Denver lawyer for the purpose of complying with the contract. The attorney, acting for the lender, communicated by letter to appellant the fact that he had received the money. To this letter, appellant responded as follows: "Villa Grove, July 17, 1886. E. O. Wolcott, Esq.—Dear Sir: Yours of the 9th is received, and contents noted. I have concluded that I do not want any money at the rate Mr. King wants to charge me. I have other reasons for not wanting it now. I could not invest it for the next sixty days, and, taking all in all, I have concluded I do not want it. Please send that decree to my address, Villa Grove, Colorado, and oblige Wm. B. SQUIRES." It is needless to consider the possible effect of inquiries made by the attorney concern-

ing the title and certain water-rights, for the letter of July 17th rendered appellee's right of action complete. This letter was written but 11 days subsequent to the date of the contract. It contains a positive refusal to comply therewith, and such refusal is predicated upon circumstances over which appellee had and could have no control whatever, viz.: *First*, a change of mind by appellant as to the rate of interest he was willing to pay; *second*, a discovery that he could not invest the sum borrowed within sixty days from the time of its receipt; and *third*, a resolve on his part that, "taking all in all," he did not want the money. The judgment of the court below in favor of appellee should therefore be affirmed.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

(19 Or. 535)

#### MCQUAID V. PORTLAND & V. R. CO.

(*Supreme Court of Oregon*. Nov. 10, 1890.)

REPORTER'S SHORT-HAND NOTES—BILL OF EXCEPTIONS—REVIEW.

1. The short-hand notes of the circuit court reporter, appointed under the act approved February 25, 1889, (Sess. Acts 1889, pp. 142-144,) when transcribed, certified, and filed with the clerk, as in the act provided, do not take the place of a bill of exceptions, nor can the supreme court review a question of fact in an action at law on said notes.

2. The ruling of the trial court in refusing a new trial presents no question for review on appeal.

(*Syllabus by the Court*.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

There is no bill of exception in this record, and yet the only question which the appellant seeks to make on the appeal arises out of the effect of certain statements made by the plaintiff when on the stand as a witness in his own behalf. On his cross-examination, defendant's counsel asked him to estimate the amount of his damages, and the reporter certifies that he answered \$1,000. The jury gave a verdict for \$1,495. The defendant in due time moved to set it aside, and to grant a new trial, which was refused, and this is the only assignment of error.

C. B. Bellinger, for appellant. E. O. Doud, for respondent.

STRAHAN, C. J., (*after stating the facts as above*.) There being no bill of exceptions in this case, the appellant relies upon the certificate of the official reporter. On February 25, 1889, an act entitled "An act authorizing the appointment of official reporters in the circuit courts, and prescribing their duties and fixing their compensation," was approved. Sess. Acts 1889, pp. 142-144. Under section 2 of that act, the reporter, when a full report is ordered, "shall cause accurate short-hand notes of the oral testimony or other proceedings to be taken." Section 3 provides for the reporter's compensation. Section 4, among other things, makes it the duty of the re-

porter when short-hand notes have been taken in any case, as in the act provided, if the court or either party requests a transcript of the notes, to cause a full, accurate, type-written transcript of the testimony, or other proceedings, which should be certified and filed with the clerk, for the use of the court or parties. Section 5 provides, in effect, that said report and proceedings, when transcribed and certified as correct, may thereafter be read in evidence as the deposition of a witness in the cases mentioned in section 829, Hill's Code.

These are the main features of the act on the subject presented by appellant's counsel, and we fail to discover anything in it that gives the reporter's notes the effect, or makes them perform the office, of a bill of exceptions. No doubt, the object of the act was to enable the parties to put in available form the proceedings at the trial, to enable them to make an accurate bill of exceptions, but it was never designed to thus make a substitute for that part of the record. If said notes could be so used, the transcript before us would be unavailable for another reason. It only purports to contain the plaintiff's cross-examination,—not all of his evidence,—and it does not purport to contain all the evidence given upon the trial.

We may add that, if the question which counsel for appellant seeks to make were before us, we could not, in the absence of controlling authority, give to the evidence of a party when on the stand as a witness the effect of an estoppel by record. He occupies, in a civil case, the same situation of any witness, affected by like motives and interest. The effect of his evidence and his credibility are for the jury, and it would be going too far for the court to declare, as a matter of law, that he is bound or estopped by every statement he makes. The verdict of the jury may have been excessive. If so, the court held had power to correct it by granting a new trial. That discretion is vested by law in the trial court, with which this court has never interfered. It presents no question for this court to review on this appeal. We find no error in the record, and the judgment appealed from must be affirmed.

(19 Or. 539)

#### MILLER v. BAILEY.

(*Supreme Court of Oregon.* Nov. 3, 1890.)

#### DISSOLUTION OF PARTNERSHIP—AGREEMENT TO PAY DEBTS—COMPOSITION WITH CREDITORS.

1. If, upon the dissolution of a partnership, it is agreed that the partner continuing the business shall pay the debts, such agreement is broken by mere non-payment, and the outgoing partner can maintain a suit for the breach, without having paid anything himself. And, if a clause be added to save harmless, the former is not merged in the latter, and the obligee can rest upon either.

2. When, by the terms of a dissolution agreement between B. & M., the latter retired from the firm, and B. was to pay the outstanding debts and liabilities of the firm, and made a composition agreement with the firm's creditors, whereby he was to pay 50 per cent. of the firm's debts, upon payment of which B. was to be discharged, but not M., and B. complied with the composition agreement, and thereupon went to the principal creditor of the firm, and asked him to sue B. &

M., and collect his money from M., and, upon the action being brought, he made no defense, and did not acquit M. of the composition agreement, or its terms, nor plead it himself as a defense, but made default, and M. paid a large sum of the partnership debts of B. & M., held that, when sued for failing to comply with the dissolution agreement, B. was estopped from relying upon the supposed release created by the composition agreement, and the court declined to decide whether such release existed or not.

(*Syllabus by the Court.*)

Appeal from district court, Multnomah county; E. D. SHATTUCK, Judge.

The substance of the complaint is that, on September 7, 1885, plaintiff and defendant were partners in a general retail grocery business in Portland, Or., under the firm name of Bailey & Miller; that on that day they were indebted to divers persons, and, among others, to Wadhams & Elliott in about the sum of \$1,500, about one-half of which was secured by note, and remainder an open account; that on that day plaintiff and defendant dissolved said partnership, and, by an agreement then entered into for a valuable consideration, the defendant, Bailey, agreed to pay and satisfy in full all debts then existing against said firm of Bailey & Miller, and all sums of money which were due or owing by said partnership, (except a debt due Folger & Co.,) including said \$1,500 due Wadhams & Elliott. And said defendant further agreed that he would at all times save and keep harmless and indemnify plaintiff against all and every person whatsoever to which said Bailey & Miller, or either of them, were indebted in relation to said partnership, and of and from all charges, actions, costs, damages, executions, judgments, and demands whatsoever, that might at any time arise against said plaintiff, by reason of any matter or thing respecting or relating to said partnership, including all or any claims that might arise against the plaintiff, or for which he might become liable, on account of said debt due the said firm of Wadhams & Elliott. It is then alleged that defendant failed and neglected to keep said agreement as to said debt due Wadhams & Elliott, or to pay same, and that, on August 19, 1889, William Wadhams, to whom Wadhams & Elliott had assigned their claim against Bailey & Miller, commenced an action against Bailey & Miller for \$1,162.90, then due on the promissory notes held by them against Bailey & Miller, and threatened to commence an action to recover the amount due on account; that defendant failed to pay said claims, or to secure the withdrawal of said action, and that for his own protection the plaintiff was compelled to pay, and did pay, to said Wadhams, on the 24th day of September, 1889, the sum of \$1,006.47; and that defendant fails and refuses to pay same, etc. The defendant's answer admits the agreement made on the dissolution of the firm of Bailey & Miller, and denies substantially all of the other material allegations of the complaint. The answer then alleges that, on the 24th of November, 1885, defendant fully satisfied, paid, and discharged all claims and debts owing, due, or to become due, from or on account of the firm of Bailey & Miller to the firm of

Wadhams & Elliott, and to other creditors of the said Bailey & Miller, mentioned in a certain writing as follows:

"This agreement, made and entered into this 24th day of November, A. D. 1885, between us, the creditors of J. W. Bailey, witnesseth: That whereas, the said J. W. Bailey does justly owe us, and is indebted to us, his several creditors, in the several amounts set opposite our respective names, but, by reason of losses and disappointments in business, he is unable to pay and satisfy us of our full debts and just claims and demands: Now, therefore, we, the said creditors, have resolved and agreed, and by this agreement do resolve and agree, to undergo a certain loss, and to accept of fifty cents for every dollar owing by the said J. W. Bailey to us, the several and respective creditors, to be paid in full satisfaction and discharge of our several and respective debts, as follows, to-wit: One-third of said indebtedness we agree to take in notes of Horace Ramsdell, dated of this date, payable on or before 18 months from date to each of us *pro rata*, without interest, and the balance of the fifty cents aforesaid, or one-sixth of our respective claims, we agree to take in notes of J. W. Bailey, dated of this date, payable on or before two years after date to each of us *pro rata*, with interest after one year, at the rate of eight per cent. per annum. And it is hereby further agreed that neither we, the said several and respective creditors, or any of us, nor the executors, administrators, partners, or assigns of us, or either of us, shall or will, at any time or times hereafter, sue, arrest, attach, or prosecute the said J. W. Bailey, or his property and chattels, for any debt or thing now due to us, or any of us, his respective creditors aforesaid, so as the said J. W. Bailey, his executors or administrators, do well and truly pay unto us his said notes. In witness whereof, we have hereunto set our hands and the amount of our several claims opposite our respective names, the day and year first above written. This is to be construed as in no manner releasing Edwin Miller from his liability to us on said indebtedness.

"WADHAMS & ELLIOTT, \$1,526.38."

Then follow the signatures of a large number of Bailey & Miller's creditors, with the amount due each firm set opposite.

It is alleged that the sum of \$1,526.38, set opposite the name of Wadhams & Elliott, was the amount due said firm by Bailey & Miller, and the identical claim a portion of which plaintiff alleges he paid on the 24th of September, 1889; that in compliance with said contract the defendant delivered his note for one-sixth the amount due Wadhams & Elliott, and has since paid the same, and has performed every part of said contract by him to be done; that Ramsdell, in compliance with said contract, executed and delivered his note to Wadhams & Elliott for one-third of said sum. The answer further alleges that Bailey paid his note to Wadhams & Elliott on the 5th day of October, 1889; that Wadhams & Elliott knew of the retirement of said Miller, and the agreement of defendant to pay them their claim; and

that they thereafter settled said claim with said Bailey, and for a new and valuable consideration extended the time of payment of the same. The reply denies the new matter in the answer, and then alleges that by composition agreement set out Miller was not released. It is also alleged that, at the time of Miller's payment to Wadhams, Bailey had not paid his note. It is then alleged that Bailey prompted and instigated Wadhams to sue Miller & Bailey on the partnership debt, which is relied upon as an estoppel. The plaintiff proceeded with his evidence, which tended to prove the material facts stated in the complaint, at the conclusion of which, on motion of defendant's counsel, the court nonsuited the plaintiff, for the reason he had failed to prove a case sufficient to be submitted to a jury. It may be proper to add that the witness, Wadhams, was allowed to state, on cross-examination, all facts in relation to said composition agreement, and what Bailey did under it. All the evidence is in the bill of exceptions. The remaining facts appear in the opinion.

A. L. Frazer, for appellant. F. A. E. Starr, for respondent.

STRAHAN, C. J., (after stating the facts as above.) In addition to the facts already narrated, it appears from the evidence that the defendant, Bailey, sent an attorney to Wadhams, who informed him that, by their suing Miller, he could collect the amount due from Bailey & Miller, and shortly afterwards the defendant himself called on Wadhams, and prompted him to sue Bailey & Miller, and at the time said to Wadhams that there was a judgment to be entered up against him in favor of Miller, or Miller's wife, and he would rather that Wadhams should have it as the balance of his claim against Bailey & Miller than that Miller should get it.

Before proceeding to consider the rule of the court in ordering a nonsuit, it is proper to ascertain some of the duties which Bailey owed Miller, by virtue of the terms of the agreement of dissolution. By that agreement he was to pay all debts of every kind then due by Bailey & Miller, with one exception, and at all times thereafter to save, keep harmless, and indemnify Miller against all and every person whomsoever to whom Bailey & Miller were indebted in relation to said partnership, (except one claim,) and of and from all charges, actions, damages, costs, etc., whatsoever, and what has heretofore, or shall at any time hereafter, arise and come against said Miller for, or by reason of, any matter or thing respecting or relating to said partnership. If the contract be to pay the debts, it is broken by mere non-payment, and the outgoing partner can maintain a suit without having paid anything himself. This is like a contract of indemnity, for it is affirmative. So is the covenant to pay the debts, and save harmless. Here are two stipulations, one to pay, and one to save harmless or indemnify, and the former is not merged in the latter, and the obligee can rest upon either. And the covenant to pay is broken by non-payment, and a suit lies, though the ob-



Hgee has not actually paid. 2 Bates, Partn. § 636. Bailey, then, being bound by the terms of the dissolution agreement to pay the Wadhams debt, and to hold Miller harmless, could not relieve himself by making a composition agreement with Wadhams, including other creditors, and keep the terms secret. If that agreement operated to discharge both Miller and Bailey from their liability to Wadhams, Bailey was bound, especially when he and Miller were sued for the same debt by Wadhams, to make known to Miller the terms of the agreement, so as to enable Miller to plead it as a defense to the action. This Bailey neglected to do. Not only so, but, contrary to his agreement with Miller, he prompted and instigated Wadhams to sue Miller, for the express purpose of compelling Miller to pay the debt which Bailey had covenanted to pay, and to indemnify Miller against. Bailey did not even plead the agreement in his own defense when jointly sued with Miller, but allowed that action to go by default as to him. Under these circumstances, we do not consider or decide whether the composition agreement discharged Wadhams' claim against Miller or not. Bailey would not plead that discharge against Wadhams when he had the opportunity, and when it was his duty to have done so, and he shall not now rely upon it for the purpose of defeating Miller's claim. The circumstances estop him. This view of the case requires a reversal of the judgment of the court below, and that the cause be remanded for a new trial, on principles not inconsistent with this opinion.

(19 Or. 538)

**CARTER V. MONASTES.***(Supreme Court of Oregon. Nov. 10, 1890.)***APPEAL FROM JUSTICE COURT—FILING TRANSCRIPT—TIME.**

Section 2125, Hill's Code, requires the transcript on appeal from a justice of the peace to be filed in the circuit court on or before the first day of the term next following the allowance of the appeal. This requirement is mandatory, and the circuit court has no authority to extend or enlarge the time.

*(Syllabus by the Court.)*

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The plaintiff recovered a judgment before the justice of the peace of North Portland precinct on the 12th day of December, 1889. Within the time allowed by law, the defendant served a notice of appeal from the judgment, gave a proper undertaking, and the justice allowed the appeal in his docket. Thereafter, on the 1st day of January, 1890, of the circuit court of Multnomah county, the appellant appeared in court, and obtained an *ex parte* order of said court allowing the appellant 10 days in which to file the transcript. The transcript was filed within the 10 days allowed by the court, but not by the first day of the term. Thereafter, the respondent moved to dismiss the appeal, for the reason that the transcript had not been filed in the appellate court within the time allowed by law, which motion was allowed, and the appeal dismissed. The appellant in the court below appeals.

*Johnson & Idleman, for appellant. John Ditchburn, for respondent.*

STRAHAN, C. J., (after stating the facts as above.) But a single question is presented by this appeal, and that is, whether or not the circuit court had power to make the order enlarging the time for filing the transcript. Hill's Code, § 2125, provides: "On or before the first day of the term of the circuit court next following the allowance of the appeal, the appellant must file with the clerk of such circuit court a transcript of the cause." The requirement is imperative, and a compliance with the statute was essential to give the circuit court jurisdiction of the cause. No doubt, as appears from the transcript, the appellant was hindered in the prosecution of the appeal by circumstances over which he had no control, and, if the circuit court had the power, its order enlarging the time was proper; but no provision of the statute conferring such power has been brought to our notice, and we know of none. 1 Amer. & Eng. Enc. Law, 621. We think the circuit court did not err in dismissing the appeal, and its judgment must be affirmed.

(10 Mont. 149)

**GARDNER V. FIRST NAT. BANK OF BILLINGS.***(Supreme Court of Montana. Oct. 10, 1890.)***POWERS—REVOCATION BY DEATH—APPLICATION OF BANK DEPOSITS.**

Where one borrows money of a bank on certain notes, and agrees to deposit money from time to time to pay them, and authorizes the bank to apply his deposits to the discharge of the notes before maturity, if it so desires, the authority thus given is a naked power, not coupled with an interest, which ceased at the depositor's death, and the bank has no authority, after notice of his death, to make such an application of moneys then standing to his credit.

Appeal from district court, Yellowstone county; GEORGE R. MIBURN, Judge.

The case was tried upon an agreed statement of facts, which, with the admissions of the pleadings, are as follows: On August 18, 1887, J. W. Story and one Jackson made a joint note to respondent, the bank, for \$1,000, and also a note with one Severance for \$1,200 to the bank, each at 60 days. That on these notes Story borrowed \$2,200 from the bank. That, at the time of the loan, Story stated to the bank that he would send to them, from time to time, deposits to meet the notes, and instructed the bank that they might apply such deposits towards the payment of the notes, and that such deposits might be so applied before the maturity of the notes, if the bank desired. The notes drew interest at 1½ per cent. per month. The deposits drew none. Story died September 12, 1887, and, September 29th, plaintiff became the administrator of his estate. On the date of his death, September 12th, Story had on deposit with the bank \$1,161.68, sent to the bank as aforesaid, and which had not been applied by the bank to the payment of the notes. That prior to September 17, 1887, the bank had notice of Story's death. That on that day the cashier of the bank, on a check signed for Story by himself, drew said money so on



deposit, and applied the same to the payment of the said notes, and this before the notes were due. On October 14, 1887, plaintiff, as administrator, demanded from the bank said money, which was refused. The pleadings in the case were filed after the notes became due. The bank has never presented said notes for allowance to the administrator. The plaintiff, administrator, sues the bank for \$1,161.68, the amount of money on deposit with the bank at the death of his intestate. The defendant denies the indebtedness, and its defense is its application of the money upon the notes, in pursuance to the instructions of the deceased in his life-time.

*M. J. Liddell, W. A. Burleigh, and John Tinkler*, for appellant. *I. F. Goddard*, for respondent.

DE WITT, J., (after stating the facts as above.) In the life-time of the deceased, J. W. Story, he gave the bank authority to apply his deposits to the payment of the notes, and before maturity, if the bank so desired. This was the creation of an agency, or a power of attorney, a power which was never exercised during the life of Story, or prior to the knowledge of the bank of Story's death. After death, and notice to the bank thereof, the power was exercised, or the agency acted upon, and the deposits applied. There is no question of consideration, or contract, or rights of innocent purchasers without notice, involved in the construction of the conduct of the bank in attempting to act under this agency or power. Nor was the power coupled with an interest. The interest, to be coupled with a power which will cause the power to survive the death of its grantor, must be an interest or title in the thing, which interest or title is conveyed with the power, and not left to be conveyed afterwards, with the exercise of the power. It must pass with the power, and then vest in the grantee of the power. *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174. Such is not the situation in the transaction under review. No title in the money vested in the bank with the passing to it of the power. No title could be in the bank until the power was exercised. The subject of powers coupled with an interest is one not free from difficulty; but that the power under consideration was not coupled with such an interest as secured its vitality after Story's decease is amply apparent upon a careful study of that luminous and convincing discussion of the subject by Chief Justice MARSHALL in *Hunt v. Rousmanier's Adm'rs*, cited above, from which opinion our views herein are taken. See, also, *Houghtaling v. Marvin*, 7 Barb. 412; *Norton v. Whitehead*, 84 Cal. 263, 24 Pac. Rep. 154; *Story, Ag. §§ 488, 496*; and *Mechem, Ag. §§ 241-244*; and the many cases cited in these text-books, which we will not review. We hence conclude that the authority of the bank was a naked power to apply, or rather to elect to apply, the money to the notes. The power was not exercised in the life of its creator, and perished with his death. "This is an ancient and well-settled doctrine of the common law." *Story, Ag. § 488*. See, also, *Hunt v. Rousmanier's Adm'rs*, su-

*pra*; *Story, Ag. §§ 349, 488, 490, 491, 496*, and generally, §§ 467-500; *Mechem, Ag. §§ 238-246*; and *Ewell's Evans, Ag. p. 87*; and numerous authorities cited in the text of these works.

Counsel for respondent suggest in argument that the bank had a lien upon the deposit for the indebtedness on the notes. But that defense is not made in the pleadings, nor was the case tried on that theory, and furthermore the indebtedness on the notes had not matured, for which a lien might be attempted to be set up, and this is not an action in equity to subject the money to a lien for unaccrued indebtedness. *Wilson v. White*, 84 Cal. 239, 24 Pac. Rep. 114; 1 *Morse, Banks, § 329*, and cases cited. The action of the bank in applying these deposits was without authority. The money belongs to the estate of J. W. Story. The judgment is reversed, and the case remanded to the district court, with directions to enter judgment in accordance with these views.

BLAKE, C. J., concurs.

HARWOOD, J., having been of counsel in this case in the court below, takes no part in this decision.

(10 Mont. 124)

#### FISHER V. BRISCOE.

(Supreme Court of Montana. Oct. 6, 1890.)

##### PAROL EVIDENCE—ACTION ON NOTE.

1. The maker and payee of two notes agreed in writing that certain stock had been deposited as collateral to secure the payment of the notes, and that on payment the stock should be delivered to said maker, but if the notes were not paid the stock should be delivered to the payee, to be by him held and disposed of as collateral security. *Comp. St. Mont. div. 1, § 623*, provides that, when the terms of an agreement have been reduced to writing, there can be no evidence of the terms of the agreement other than the contents of the writing. *Held*, that oral testimony that, at the time of making said notes and said agreement, it was understood by all the parties that said agreement obliged the payee to exhaust the collateral before suing on the notes was not admissible.

2. An agreement, independent and separate from said written agreement, that the collateral should first be exhausted before bringing suit would have to be supported by an independent consideration.

3. In an action on a note, a refusal to strike from the first amended answer an allegation that there was a written agreement that collateral should be exhausted before suit is in no way inconsistent with granting plaintiff judgment on the pleadings after a second amended answer had been filed which showed that said agreement was oral and varied, and contradicted the terms of a written agreement between the parties.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

This is an appeal from an order granting a motion for judgment on the pleadings, and from the consequent judgment. The complaint is on two promissory notes, each for \$5,000, and dated November 1, 1887, made by defendant, payable to plaintiff. The amended answer of defendant admits the making and delivery of the notes, and further alleges that each of said notes bears the following indorsement: "Collateral in Second National Bank to secure this note, to be first ex-

hausted." This answer then sets up the following matter as a separate defense: "That, prior to the execution of the notes, defendant bought from plaintiff 85,000 shares of stock in a mining company for \$20,000, of which he had paid \$10,000 at the time of making the notes; that as part consideration for the notes, plaintiff agreed to cause these shares to be transferred to defendant on the books of the company, and the certificates issued to defendant, and it was agreed in writing that the shares should be deposited as collateral for the notes, with conditions for the delivery of the shares to defendant, on payment of the notes, and if the notes were not paid, the stock was to be delivered to plaintiff, and by him sold as a pledge, and the proceeds applied to the payment of the notes." The answer further sets forth: "That plaintiff did not cause the shares to be transferred and issued to defendant, but the certificates were deposited as collateral, as agreed, except that they were not transferred and issued to defendant, or assigned to him, and the same remained subject to the order of the plaintiff; that plaintiff did not exhaust said security, and refuses to recognize any right of defendant in said stock; that it was agreed by plaintiff and defendant, at the time of making the notes, that said stock should be assigned to defendant, and delivered by defendant to plaintiff as collateral, and that the collateral should be exhausted before suit was commenced on the notes; that the stock is of value, and, if sold, and the proceeds applied, would pay all or part of the notes. Defendant prays that the action be abated until plaintiff has exhausted the security as contemplated." The written agreement referred to in the answer is as follows: "The inclosed 85,000 shares of stock in the Frohner Gold & Silver Mining Company are deposited as collateral security for the payment of two promissory notes of five thousand dollars each, executed by John O. Briscoe to Henry Fisher, one payable in six months, and the other payable in nine months, from date; upon the payment of the first note 45,000 shares to be delivered to the said Briscoe, and balance to be delivered to him on payment of the other said note, and if said first note is not paid at maturity the said 45,000 shares to be delivered to said Fisher to be held and disposed of as collateral security for said note and if said second note is not paid at maturity, then the residue of said stock to be likewise delivered to said Fisher for a like purpose. Nov. 1, 1887. J. O. BRISCOE. HENRY FISHER." A motion was made by plaintiff to strike out from the answer the matter set up as a separate defense. This motion was denied, and a replication filed, of which it is sufficient to say that it contained denials which formed an issue. With these pleadings, the case went to trial. The defendant was upon the stand as a witness, and his counsel asked him this question: "Go on and in your own way give a history in brief as to the consideration of these two notes. If they were notes given in renewal of notes, state the consid-

newal of." The plaintiff objected to this question, upon the ground that it is not contended in the answer that the notes were given in renewal of notes, and for the further reason that the latter part of the question says: "If they were notes given in renewal, state the consideration of the notes they were given in renewal of." The objection was sustained. Thereupon the defendant obtained leave, and amended his answer. This amended answer, which was the second amended answer in the case, states the facts alleged in the former amended answer, except that it alleges that the indorsements on the notes in suit were, "Secured by collateral of 40,000 shares of the capital stock of the Frohner Gold & Silver Mining Company," and a like indorsement upon the other note as to 45,000 shares of said stock. It pleads the same written instrument above set forth in full, and then alleges the following additional matter: "That the purchase of the stock was in June, 1887, on which defendant paid \$5,000, and the stock was deposited in the bank, to be delivered to defendant upon his paying the balance of \$15,000 within thirty days, and, upon his failure, he was to forfeit the \$5,000 and the stock. That on July 29th the parties made another contract, by which it was agreed that defendant should pay plaintiff \$1,000 in cash, and deliver four notes, one for \$5,000 due September 1st, one for \$5,000 due November 1st, one for \$3,000 due August 6th, and one for \$1,000 due August 15th, and defendant should still have the stock. The sum of these notes and the cash, make up the former sum of \$15,000. That the \$1,000 cash was paid. That it was then agreed that the stock should be deposited and held as collateral for the notes, and upon each of these notes was indorsed: 'Collateral in Second National Bank to be first exhausted;' and it was agreed that no action at law should be commenced until such collateral was exhausted. That the notes were paid, except the two \$5,000 ones. Then comes the transaction of November 1st. Defendant took up the two \$5,000 notes by giving the notes sued on. The notes given up had the indorsement as to exhausting the collateral, the new notes, the ones now in action, did not." Then follows the allegations as to the making of the written instrument above set forth, and defendant avers further: "That at the time of the execution of said written instrument the same agreement was made as on July 29th,—that is, that the stock should be first exhausted in the payment of the notes; that he, defendant, called the attention of counsel for plaintiff, who had drawn the instrument, to the fact that the language 'to be first exhausted in the payment of said notes,' was not inserted in said instrument, as by the agreement it should be, and that said counsel informed him it would have the same legal effect, and that it would be obligatory upon plaintiff to first exhaust the collateral before proceeding by action at law to collect the notes; that this was the mutual understanding between plaintiff and defendant at the time of the execution of said instrument, and

that such was their construction thereof." The further allegations of this second amended answer are the same as the first amended answer. No replication was filed to this last pleading of defendant. Plaintiff then moved for judgment on the pleadings, which motion was granted, and judgment entered accordingly, from which order and judgment defendant appeals.

*McConnell & Cloyberg*, for appellant.  
*Toole & Wallace*, for respondent.

DR WITT, J., (after stating the facts as above.) Appellant argues that the motion for judgment on the pleadings was error, for the reason that the court had theretofore taken a contrary view of the law in denying the motion to strike out the new matter in the first amended answer, which former view should constitute the law of the case on the motion for judgment on the pleadings. This argument is sufficiently answered, in that different facts were presented in the second amended answer than in the first. In the first, a written agreement to first exhaust the collateral was pleaded. In the second, it was not. In the second amended answer, it appeared that this agreement was by parol, and, as respondent claims, varying and contradicting the terms of the written instrument, Exhibit A. In this view, the court, in the ruling on the motion to strike out, did not establish any law of the case controlling its action in the motion for judgment on the pleadings. The second amended answer was the pleading of the case, as tried. The former one ceased to perform any further function as a pleading. *Barber v. Reynolds*, 33 Cal. 501. There is consequently no occasion here to revert to the action of the court and appellant's objection thereto, in excluding evidence under the first amended answer. *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. Rep. 333, is not in point. The court, in that case, examined a former pleading, which had been superseded by another, for one purpose only, and sought to make that purpose clear in the following language: "The old answer in the case at bar does not 'perform any further function as a pleading,' but we are not precluded from examining that answer, and the sustaining the demurrer thereto, for the purpose suggested *infra*." \* \* \* We, at this time, refer to that ruling, and review the same, not as if an appeal had been taken therefrom to this court, but for the purpose of ascertaining whether the court in such decision, together with his latter reversal of his position in the same case, did not deprive defendant of a substantial right, and exclude him from his day in court. If that be true, defendant has a remedy." No such purpose as appears in *Newell v. Meyendorff* impels us, in the case now before us, to review the ruling of the court in excluding evidence under a pleading which had been superseded by an amended one, on which the case was tried.

Appellant claims a failure of consideration for the notes in that, quoting the answer, "the plaintiff afterwards wholly failed to cause said 85,000 shares to be transferred and issued to this defendant,

and said shares still remain on the books of the company in the name of the plaintiff," but he goes on to admit "that the certificates representing said shares were deposited as collateral security in accordance with the terms of said agreement," thus placing them under the control of the defendant, when he paid the notes, as was agreed.

The last point which we will consider is the position taken by respondent in which he was sustained by the lower court, that the alleged parol agreement to exhaust the collateral before seeking aid in an action at law is pleading that which varies and contradicts the terms of a written instrument by parol evidence. The statute of this state is as follows: "Sec. 628. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing, except"—(the exceptions are not here material.) Comp. St. div. 1. Appellant meets this situation with two arguments, which we find some difficulty in reconciling: (1) He pleads that in conversation between appellant, respondent, and respondent's attorney, the parties gave a contemporaneous construction to Exhibit A, to the effect that it meant that the collateral should be exhausted before an action was commenced, and that such contemporaneous construction should now obtain. (2) He argues that the parol agreement was independent and separate from the written instrument, and relating to different subject-matter, and therefore competent to be proved separately and by parol. If the first position be good, the second must fall, for if the parol agreement can be construed into the written instrument, the former was not independent and separate from the latter. Again, if the second position be sustained, the first is faulty, for if the parol agreement is separate and independent, and relating to different subject-matter, its intent could not be construed or imputed into the written instrument. We are of opinion that the state of facts here presented is one intended to be met by the statute above cited. If the agreement to exhaust collateral before suit brought be valid,—and it may be doubted whether it would be a defense in this action, (*Creighton v. Vanderlip*, 1 Mont. 400,)—it must be supported by a consideration. If it be independent and separate from the written contract, and relating to different subject-matter, we search in vain for a consideration, and the agreement must be void. It can be sustained only on the ground that its consideration is found in the main agreement. This being concluded, it follows that it was part of the principal contract, and not independent therefrom. Further argument to this effect is found in the fact that the agreement to first exhaust collateral was written upon the original notes, of which these in action are renewals. Again, the parol agreement was practically contemporaneous with the writings. The written agreement is

the notes and the Exhibit A together, by which two writings it appears that the notes are absolute on their face, with no agreement for forbearance of suit. We cannot but conclude that the terms of the agreement were reduced to writing by the parties by virtue of the notes and the Exhibit A, and that there can now be no evidence of those terms other than the writings themselves. The judgment of the district court must therefore be affirmed.

BLAKE, G. J., and HARWOOD, J., concur.

(44 Kan. 514)

#### STATE v. WHITE.

(Supreme Court of Kansas. Nov. 8, 1890.)

#### RAPE—FEMALE UNDER AGE OF CONSENT—CONSTITUTIONAL LAW—PLEA IN ABATEMENT.

1. The amendment to section 31 of the act relating to crimes and punishments as enacted in 1887, which provides for the punishment of any male person having illicit sexual intercourse with any female person under 18 years of age, by confinement and hard labor for not less than 5 years nor more than 21 years, is not unconstitutional or void.

2. In such a case, where the information charges, among other things, that the defendant, Charles W. White, did "commit the crime of rape by then and there unlawfully, feloniously, and carnally knowing one Lottie Linden," etc., "contrary to the form of the statute," etc., the information is not insufficient for the reason that it does not allege that Lottie Linden was not the wife of Charles W. White.

3. The defendant filed a plea in abatement which contains, among other things, the following: "Defendant says that, at the date of filing the information in this case, he was not a fugitive from the justice of the state of Kansas, nor had he been at any time such fugitive. Defendant further says that no preliminary examination has ever, at any time, been given him in this action, nor did he at any time waive such preliminary examination." The court sustained a demurrer to the first sentence of the matter above quoted, and virtually struck it out of the plea. *Held error.*

(Syllabus by the Court.)

Appeal from district court, Norton county; G. WEBB BERTRAM, Judge.

L. B. Kellogg, Atty. Gen., and L. H. Thompson, for appellee. Louis K. Pratt and E. W. Norlin, for appellant.

VALENTINE, J. This is an appeal from a judgment rendered in the district court of Norton county, sentencing the defendant, Charles W. White, to imprisonment in the penitentiary for a period of five years for the commission of an alleged rape "by carnally and unlawfully knowing" Lottie Linden, in violation of the provisions of section 31 of the act relating to crimes and punishments, as amended in 1887. Laws 1887, c. 150, § 1; Gen. St. 1889, par. 2152. This section reads as follows: "Sec. 31. Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female under the age of eighteen years, or by forcibly ravishing any woman of the age of eighteen years or upwards, shall be punished by confinement and hard labor not less than five years nor more than twenty-one years." This section of the statute is now precisely the same as it was prior to the amendment in 1887, except that where the word "eight-

een" now occurs in the amended section, the word "ten" occurred in the original section, and between the words "female" and "under" in the amended section, the word "child" occurred in the original section. It is unquestionably true that in 1887, and before and since, our laws relating to illicit intercourse between the sexes, and for the punishment thereof, and for the protection of boys and girls, and others, and of society generally, greatly needed, and still need, amendment, but the amendment that was in fact made in 1887 may be subject to considerable criticism. It denominates certain conduct rape which is not in fact rape, and could not in the nature of things be such, unless the meaning of the word "rape" should be greatly changed. It attempts to accomplish a thing by the use of indirect language which might be much better accomplished by the use of direct language. It inflicts a punishment for mere fornication of vastly greater severity than was ever before inflicted for such a wrong, and much greater than the punishment imposed for the greater wrong of adultery, or of sexual intercourse coupled with seduction, where the female is over 18 years of age. In attempting to provide for the protection of girls, it wholly overlooks the protection of boys. It overlooks the fact that some girls under the age of 18 years are incorrigibly wicked and depraved,—even common prostitutes. It overlooks the fact that girls generally, whether good or bad, have intelligence and the capacity to think, to will, and to act, long before they arrive at the age of 18 years. It in effect presupposes that boys of the same age with girls, or even much younger than girls, are vastly their superiors in mental capacity, and in the power to exercise volition. It recognizes a greater difference between the sexes, and a greater superiority on the part of the males over the females, than has ever before been promulgated or admitted or believed by any person or set of persons, although it has generally been maintained that there always have been sufficient differences existing between the sexes to justify all the great differences in the powers, privileges, disabilities, and immunities which, by virtue of the laws, have heretofore existed between the sexes. The defendant in the present case was a boy 19 years of age, and the female with whom he had the sexual intercourse was a girl sixteen years of age. Each lacked just two years of having arrived at the age of majority. Their sexual intercourse with each other was had at divers times from April 15, 1889, up to May 25, 1889. Also, from the record brought to this court, it would seem that the girl had also had improper relations with other male persons besides the defendant. On February 12, 1890, the girl gave birth to a child, of which she testified that the defendant was the father. It also seems that, with regard to the intercourse between these parties, no conjugal right was violated, no force or fraud or seduction or promise of marriage has been imputed. They were not of kin to each other. Both willingly participated in the wrongful acts; both in fact consented, and each had ample capacity to know what he or

she was doing, and to consent; and none of the improper acts committed by them, whether of sexual intercourse or otherwise, were committed in public, or in the presence of others. Indeed, except for the foregoing statute, their acts would constitute nothing more than pure and simple fornication.

It is claimed on the part of the defendant that the foregoing statute either can have no application to this case, or, so far as it does apply to this case, it is unconstitutional and void, for the reason that it conflicts with section 9 of the bill of rights, because it inflicts cruel and unusual punishment, and is in conflict with the spirit of the bill of rights generally, and is in violation of common sense, common reason, and common justice; and the following authorities are cited in support of this claim: *Anderson v. City of Wellington*, 40 Kan. 173, 19 Pac. Rep. 719; 3 Amer. & Eng. Enc. Law, 674, note 3, and cases there cited; *Potter's Dwar. St.* 76-78.

It is claimed that the legislature cannot convert pure and simple fornication into rape, or provide a punishment for the same as though it were rape. The statutes of this state relating to illicit intercourse between the sexes, when such statutes are compared with each other, are peculiar. Under them sexual intercourse between unmarried persons, where no extraneous facts exist to magnify the wrong, is never as to the female an offense, and is never as to the male an offense, unless the female is under 18 years of age. And where the intercourse is procured under a promise of marriage, it is never an offense with regard to the female, and is only an offense with regard to the male where the female is under 21 years of age, and it is not then an offense with regard to the male, unless the female is either under 18 years of age, or is both under the age of 21 years, and of good repute. Gen. St. 1889, pars. 2152, 2157. And even where conjugal rights are violated, as in adultery, or where the sexual intercourse is coupled with acts of an openly lewd, lascivious, or indecent character, the acts of the parties constitute only a comparatively insignificant case of misdemeanor. The statute on the subject reads as follows: "Sec. 232. Every person who shall be guilty of adultery, and every man and woman (one or both of whom are married, and not to each other) who shall lewdly and lasciviously abide and cohabit with each other, and every person, married or unmarried, who shall be guilty of open, gross lewdness, or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding six months, or by fine, not exceeding five hundred dollars, or by both such fine and imprisonment." Act relating to crimes and punishments, § 232; Gen. St. 1889, par. 2369. Now why should adultery, where conjugal rights are violated, and where the parties are of mature age, be only a trivial misdemeanor, while fornication pure and simple between boys and girls should be a high crime, and a felony as to the boy?

Lord Macaulay in his *History of England*, (volume 1, c. 2,) in speaking of the Puritans, who were generally the most austere moral and religious people that ever existed, while they were in power in the time of Cromwell, says: "Against the lighter vices the ruling faction waged war with a zeal little tempered by humanity or by common sense. \* \* \* The illicit intercourse of the sexes, even where neither violence nor seduction was imputed, where no public scandal was given, where no conjugal right was violated, was made a misdemeanor." In this state, instead of making the acts of which Lord Macaulay makes mention a misdemeanor only, they are, if the female is under 18 years of age, made a high crime and a felony as to the male, for which he may be imprisoned in the penitentiary at hard labor for a period of 21 years. From the earliest times in Kansas, it has been the tendency of legislation and of thought to consider female persons as having some intelligence, some mental capacity, and some power of volition, and to make them as nearly equal with males with regard to their lives, liberties, persons, property, vocations, rights, powers, privileges, and immunities as it is possible to make them. Under the laws as they now exist, they are as much entitled to their children as males, and may carry on business as freely as males, and the elective franchise has been greatly extended to them, and yet the statute which we are now considering inaugurates a theory of vast inequality between them. Under this statute a boy and girl, both under the age of 18 years and of the same age, or the boy the younger, may engage in an act for the doing of which the boy may be imprisoned at hard labor in the penitentiary for 21 years, while the girl has committed no offense, and this for the reason that in contemplation of law she has no mental capacity to consent to the act, no intellectual volition. It is true she may be the older of the two, the more intelligent and aggressive of the two, the real actor in the transaction, and the seducer,—if either is a seducer,—and yet, under the law, she has no mental capacity to consent or will power to act, and therefore has not committed any offense, not even a misdemeanor, while the boy has committed a great crime, and if he is over 16 years of age may be sent to the penitentiary, and be there confined at hard labor for 21 years as aforesaid; but if he is under 16 years of age, he would be confined in the county jail only, or be sent to the state reform school, and it would make no difference that the girl might be a common prostitute, his punishment would be the same. Now, if it is necessary that such a severe punishment should be inflicted upon a boy for committing pure and simple fornication, it would seem that some slight degree of punishment might properly be inflicted upon the girl; and, if it is necessary that such a severe punishment should be inflicted upon either, it would seem that some slight degree of punishment might properly be inflicted upon any person, male or female, guilty of illicit sexual intercourse, although the same might be only fornication and the

female be over 18 or over 21 years of age; and, if such a severe punishment may properly be inflicted upon any person for pure and simple fornication, it would seem that the greatest of punishments would not be too severe for any person of full age who should commit the greater wrong of adultery or of sexual intercourse coupled with seduction.

We agree with counsel for the defendant that "it is not competent for the legislature to make that rape which, in the very nature of things and common justice and sense, is not," but courts in construing statutes do not look at mere forms or phrases, or even at the improper use of language, but they look at the substance of things, and try to ascertain what was the real intention of the legislature; and evidently the legislature, in passing the foregoing statute, intended that in all cases of illicit intercourse, where the female is under 18 years of age, the male should be punished by imprisonment at hard labor in the penitentiary for a period of not more than 21 years, nor less than 5 years, although the act might be pure and simple fornication, and nothing else. Instead of enacting this, however, in direct terms, the legislature chose to accomplish the same result in an indirect manner, and by amending that section of the act relating to crimes and punishments (to-wit, section 31) which relates to rape. When this section was first enacted, in the earlier days of Kansas, it was evidently believed by the legislature that the girls of Kansas then had the capacity to give their consent to sexual intercourse at the age of 10 years, and that they had not such capacity at any earlier age; and hence the age of 10 years was fixed as the age of consent; but when the section was amended, in 1887, so as to make it read as it now reads, it would seem that the law-makers believed that the girls of Kansas at that time had no capacity to give any intelligent consent to sexual intercourse until they arrived at the age of 18 years. In substance, however, the law-makers simply intended to punish any male person by imprisonment in the penitentiary at hard labor for a term not exceeding 21 years who might be guilty of any kind of illicit sexual intercourse with any girl under 18 years of age, whether she consented or not, and whatever might be the surrounding circumstances, and although the intercourse might be pure and simple fornication. With respect to the severity of the punishment, while we think it is true that it is a severer one than has ever before been provided for in any other state or country for such an offense, yet we cannot say that the statute is void for that reason. Imprisonment in the penitentiary at hard labor is not of itself a cruel or unusual punishment, within the meaning of section 9 of the bill of rights of the constitution, for it is a kind of punishment which has been resorted to ever since Kansas has had any existence, and is a kind of punishment common in all civilized countries. That section of the constitution probably, however, relates to the kind of punishment to be inflicted, and not to its duration. Although the

punishment in this case may be considered severe, and much severer indeed than the punishment for offenses of much greater magnitude, as adultery, or sexual intercourse coupled with seduction, yet we cannot say that the act providing for it is unconstitutional or void.

It is also claimed on the part of the defendant that the information does not charge a public offense, and this for the reason that it does not charge that the prosecutrix, Lottie Linden, was not the wife of the defendant. Now while it does not in terms charge any such thing, yet it does so by the clearest of implications. It charges as follows: "That on or about the 12th day of May, A. D. 1889, in said county of Norton and state of Kansas, one Charles W. White did then and there unlawfully and feloniously commit the crime of rape, by then and there unlawfully, feloniously, and carnally knowing one Lottie Linden, she, the said Lottie Linden, then and there being a female under the age of eighteen years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas." Now, if Lottie Linden had been the wife of the defendant Charles W. White, her name would have been White, and the intercourse charged would not have been a "crime" or "rape" nor committed "unlawfully and feloniously," as charged, and other matters are also charged, which could not have been true if Lottie Linden had been the wife of the defendant. The charge is for constructive rape, and is stated substantially in the language of the statute, and in a prosecution for rape it was never necessary to state that the person ravished was not the wife of the defendant.

It is further claimed on the part of the defendant that the court below erred in sustaining a demurrer by the state to a portion of the defendant's plea in abatement. The prosecution was upon an information filed by the county attorney, and the offense charged therein was and is a felony. The second paragraph of the plea in abatement reads as follows: "Defendant says that, at the date of filing the information in this cause, he was not a fugitive from the justice of the state of Kansas, nor had he been at any time such fugitive. Defendant further says that no preliminary examination has ever at any time been given him in this action, nor did he at any time waive such preliminary examination." The state demurred to this paragraph of the plea in abatement, upon the ground that it did not state facts sufficient to entitle the defendant to a hearing thereon, and the court below sustained the demurrer. It seems to be understood, however, that the demurrer was sustained only as to the first sentence of the second paragraph, but whether it was sustained only as to the first sentence of the paragraph or as to the whole of the same, we think the ruling was and is erroneous. It was necessary that the whole of the paragraph should be true, in order to entitle the defendant to have the action abated. It was necessary for the abatement of the action that he

should not have been a fugitive from justice, that he should not have had a preliminary examination, and that he should not have waived the same; and striking out the first sentence of the paragraph which alleged that he was not a fugitive from justice rendered the whole of the paragraph insufficient, and the entire plea in abatement insufficient. The striking out of the first sentence of the second paragraph of the plea was as fatal to the sufficiency of the plea as the striking out of the whole of the plea would have been. Section 69 of the Criminal Code, so far as it is necessary to quote it, reads as follows: "Sec. 69. No information shall be filed against any person for any felony, until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination: provided, however, that informations may be filed without such examination against fugitives from justice, and in misdemeanor cases not cognizable before justices of the peace." This is sufficiently clear without further comment. For the error of the court below in sustaining the aforesaid demurrer, the judgment of the court below will be reversed, and cause remanded for a new trial.

JOHNSTON, J., concurring.

HORTON, C. J. I concur in the syllabus of the foregoing opinion, and also in the judgment to be rendered, but I do not concur in many things stated in the opinion itself.

(44 Kan. 596)

STATE V. MATTHEWS.

(Supreme Court of Kansas. Nov. 8, 1890.)

FALSE PRETENSES—BLANK DEED—FILLING IN NAME OF GRANTEE—MORTGAGE BY FRAUDULENT GRANTEE.

1. The charge of committing the offense of obtaining money or property under false pretenses cannot be maintained in any case unless it appears not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that such person was in fact cheated or defrauded to his or her injury.

2. Where a deed of conveyance of real estate, perfect in form, except that the grantee's name is left blank, is duly executed and acknowledged, and afterwards the blank is filled contrary to the instructions of the grantor, and to his or her injury, with the name of a person not intended by the grantor to be the grantee, and with full knowledge on the part of such substituted grantee, *held*, that the deed is void as to such substituted grantee, or as to any one with notice of the fraud.

3. But where, afterwards, such deed is recorded, and then the substituted and fraudulent grantee procures a loan of money from an innocent person, and executes a mortgage on the property conveyed by the deed, and such innocent person loans the money on the strength of such deed, and of the false pretenses made by such grantee that he had purchased the real estate conveyed by the deed, and that he was then the owner thereof in fee, *held*, that the mortgage will be held to be valid.

4. Whenever one of two innocent persons must suffer loss on account of the wrongful acts of a third, he who has enabled the third person

to occasion the loss must be the person who shall suffer.

5. Where such substituted and fraudulent grantee is afterwards prosecuted criminally for obtaining the money from such innocent person upon the false pretenses that he had purchased the real estate conveyed by the deed, and that he was then the owner thereof in fee, *held*, that the defendant cannot be legally convicted, for the reason that under the circumstances he did not and could not cheat or defraud the innocent mortgagee or person who loaned him the money.

(Syllabus by the Court.)

Appeal from district court, Shawnee county; A. H. VANCE, Judge *pro tem*.

This was a criminal prosecution upon an information containing two counts in which the defendant, M. E. Matthews, was charged with obtaining a check and signature and money upon false pretenses. A trial was had before the court and a jury, and, at the close of the evidence for the state, the prosecution elected to rely for a conviction upon the second count of the information, and entered a *nolle prosequi* as to the first count. The aforesaid second count, omitting title and signature, reads as follows: "And in the name and by the authority of the state of Kansas, I, R. B. Welch, county attorney in and for the county of Shawnee, in the state of Kansas, who prosecutes for and on behalf of said state, in the district court, sitting in and for the county of Shawnee, and duly empowered to inform of offenses committed within said county of Shawnee, comes now here and gives the court to further understand and be informed that M. E. Matthews, late of the said county of Shawnee, at the county of Shawnee in the state of Kansas aforesaid, and within the jurisdiction of said court, on the 29th day of November, A. D. 1887, then and there being, and then and there intending and devising to cheat and defraud one Jonathan Thomas, did then and there knowingly, unlawfully, fraudulently, feloniously, falsely, and designedly pretend and represent to said Jonathan Thomas that he, the said M. E. Matthews, had bought of Mary J. Wallace, the undivided one-fifth interest in the following described real estate, to-wit: The north-west quarter of section number twenty, (20,) in township number eleven (11) south, of range number fifteen (15) east, of the sixth (6th) principal meridian, situated in Shawnee county, state of Kansas, and that he was the owner in fee of the same. Whereas, in truth and in fact, he, the said M. E. Matthews, had not bought of Mary J. Wallace the undivided one-fifth interest in the said real estate, and he, the said M. E. Matthews, was not the owner in fee of the same, as he, the said M. E. Matthews, then and there well knew, and said M. E. Matthews well knew that each and all of said representations and pretenses were false and fraudulent, and without foundation in fact. And said M. E. Matthews then and there requested of the said Jonathan Thomas a loan of money, and the said Jonathan Thomas then and there believing and relying upon said pretenses and representations as true, the said M. E. Matthews then and there, and by the said false pretenses, designedly made as aforesaid, designedly, fraudulently, and feloniously



obtained from said Jonathan Thomas an order, and the signature of the said Jonathan Thomas by the name of 'J. Thomas' to said order, whereby the said Jonathan Thomas, by the name of 'J. Thomas,' requested and ordered the Citizens' Bank of Topeka, Kansas, to pay to the said M. E. Matthews, or order, the sum of \$382.00, which said order was in the following words and figures, and of which the following is a copy, to-wit: 'No. ——. North Topeka, Kansas, November 29th, 1887. Citizens' Bank, pay to M. E. Matthews, or order, three hundred and eighty-two dollars, (\$382.00.) J. THOMAS.' Which said order so as aforesaid obtained was then and there of the value of \$382.00, and was the personal property of said Jonathan Thomas; that the said Citizens' Bank was then and there a corporation duly organized and existing under and by virtue of the laws of the state of Kansas; and said M. E. Matthews on the same day took said order to said Citizens' Bank, and indorsed and surrendered the same to said bank, and received from said bank the sum of \$382.00 in current money, of the value of \$382.00, the personal property of said Jonathan Thomas; and all of this the said M. E. Matthews did designedly, knowingly, fraudulently, and feloniously, for the purpose and with the design to cheat and defraud the said Jonathan Thomas, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Kansas." The first count was substantially the same as the second count, except that it alleged that Jonathan Thomas acted as the agent of Louisa Havens in loaning the money; that the money loaned belonged to her; and that it was she whom Matthews intended to and did cheat and defraud. There are also some other allegations in the first count which were not included in the second count, to-wit, allegations concerning an abstract of title, and a note and mortgage executed by Matthews to Havens as evidence of and security for the aforesaid loan. The defendant was found guilty, and sentenced to imprisonment in the penitentiary for the term of two years; and he now appeals to this court.

*W. C. Webb, W. P. Douthitt, and Z. T. Hazen, for appellant. L. B. Kellogg, Atty. Gen., and R. B. Welch, for appellee.*

VALENTINE, J., (after stating the facts as above.) The principal facts involved in this case, as the evidence on the part of the prosecution tended to show, and as was evidently found by the trial court and the jury, stated briefly, are substantially as follows: Prior to 1886, A. C. Wallace died intestate, leaving as his heirs his widow, Phoebe J. Wallace, and two children, Mary J. Wallace and Phineas Wallace, and also leaving real and personal property. Afterwards, and on July 15, 1886, the widow, Phoebe J. Wallace, died intestate, leaving as her heirs five children, Mary J. Wallace, Phineas Wallace, Jonathan W. Blossom, David Blossom, and a daughter, the last three being children by a former husband; and she also left real and personal property. Mary J. Wallace

had a claim against her mother's estate of \$800, which was contested, but which was allowed to her by the probate court on October 28, 1886. She also desired to have both the estates settled, and to have all her interest therein separated from the interests of the other heirs by partition or otherwise, and for this and other reasons she employed the defendant, M. E. Matthews, who was an attorney at law, to assist her in her business. On November 14, 1887, Matthews wrote and sent to her a letter requesting her to call that day at his office at 10 or 11 o'clock. She did not receive the letter in time to call at that time, but called the next day, when she was told by him to call on the 16th, and that he would then tell her what he wanted. On the 16th she again called, and he stated to her that, on the day on which he sent for her, Jonathan W. Blossom, Phineas Wallace, and David Overmyer, another attorney at law, had been at his office waiting for her, and proposed to buy her interest in the land belonging to her mother's estate, except the Harrison-Street property, but that she did not come, and that they were compelled to go away, and that they had left a deed, perfect in form in every respect, except that the grantee's name therein was left blank, for her to execute if she would accept their proposition; and that the blank was to be filled so as to make it a deed to one of her half-brothers, either Jonathan W. Blossom or David Blossom, for which they would pay her \$2,500. After some talk about the price, and to save litigation, she agreed to execute the deed for the said sum of \$2,500, and it was agreed between her attorney, the defendant, and herself, that if the transaction should be consummated the name of her half-brother should be inserted in the deed, and the deed should then, on the payment of the \$2,500, be delivered to such grantee, but that, if neither of her half-brothers should take her interest at that price, then the deed was to be destroyed. With this understanding, she signed and acknowledged the deed, blank as aforesaid, and left the same with the defendant, Matthews. Afterwards, Matthews filled up the blank in the deed with his own name as grantee, and afterwards, and on November 29, 1887, deposited such deed in the office of the register of deeds for record, and then procured an abstract of title showing that Mary J. Wallace's interest in the land had been transferred to himself, and that he was then the owner in fee thereof, and he then went to Jonathan Thomas, who carried on the business of loaning money for himself and others, and sought to procure a loan from Thomas, and offered to secure the loan by mortgaging the aforesaid property, and he showed to Thomas the aforesaid abstract of title, showing title in himself, and he represented to Thomas that he had purchased the interest of Mary J. Wallace in the aforesaid estate, and that he owned the same in fee. Thomas at the time had authority to loan \$400 in money for Louisa Havens, and he concluded to make the loan to Matthews upon the aforesaid security. He therefore accepted from Matthews a promissory



note executed by Matthews to Louisa Havens for that amount, and also accepted from Matthews a mortgage of the foregoing real-estate interest of Mary J. Wallace executed by Matthews to Louisa Havens to secure the loan. But Thomas, at the time, not having that amount of money on hand belonging to Louisa Havens, advanced the same out of his own money. He charged Matthews \$18 for consummating the loan, and then delivered to Matthews a check on the Citizens' Bank of North Topeka for \$382, and Matthews presented the check to the bank, and drew the money it called for on the same day. The check reads as follows: "No. \_\_\_\_ North Topeka, Kansas, November 29th, 1887. Citizens' Bank, pay to M. E. Matthews, or order, three hundred and eighty-two dollars, (\$382.00.) J. THOMAS." The defendant, Matthews, testified as a witness in the court below, and testified to a different state of facts from those above given, but evidently the court and jury did not believe him.

We shall decide this case upon the theory that the defendant, Matthews, in fact, made the aforesaid statements to Mary J. Wallace which the state claims he made concerning the alleged statements made to him by her brother, half-brother, and Overmyer, about purchasing her interest in the Wallace estate, and concerning their leaving the blank deed with him for her to execute so as to make it a deed to one of her half-brothers, but that all such statements and representations of Matthews were false and fraudulent; that at the time when he made the statements to Mary J. Wallace, and when the blank deed was signed and acknowledged by her, he intended to cheat and defraud her, and intended to fill up the deed so as to make it a deed to himself for the property; and that by making the statements, and procuring the deed, and filling up the blank so as to make it a deed to himself, he himself at that time committed a crime. And we shall also decide the case upon the theory that when he represented and pretended to Jonathan Thomas that he had purchased the aforesaid interest of Mary J. Wallace in the Wallace estate, and that he was then the owner thereof in fee, he well knew that his representations and pretensions were false and fraudulent, and that he thereby intended to cheat and defraud some person; but the questions then arise, whom did he intend to cheat and defraud, and who was in fact cheated and defrauded? The defendant was in fact tried only upon the second count of the information, as a *nolle prosequi* was entered as to the other count before he was called upon to introduce any evidence; and in this second count upon which he was tried the only false pretenses alleged were and are as follows: "He, the said Matthews, had bought of Mary J. Wallace the undivided one-fifth interest in the following described real estate, to-wit, [and here follows a description of the property,] and that he was the owner in fee of the same." It is also alleged in the said second count that these false pretenses were made to Jonathan Thomas, and for the purpose of cheating and defrauding him; and there is no al-

legation in such count that such false pretenses were made to any one else, or for the purpose or with the intention of cheating or defrauding any one else. It is not alleged that any false pretense was made to Mary J. Wallace or to Louisa Havens, nor is it alleged that either Mary J. Wallace or Louisa Havens was cheated or defrauded or intended to be cheated or defrauded; hence, the only questions presented to us for consideration are whether the false pretenses made to Jonathan Thomas were made with the intention of cheating or defrauding him, and whether by means thereof he was in fact cheated or defrauded. As before stated, we shall decide this case upon the theory that all the false pretenses alleged in the information or which the evidence tended to prove were in fact made; but still the questions remain to be considered as to whether they were in fact made for the purpose of cheating or defrauding Jonathan Thomas, and whether he was in fact cheated or defrauded by them. The charge of committing the offense of obtaining money or property under false pretenses cannot be maintained in any case unless it appears not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that such person was in fact cheated or defrauded to his or her injury. These are elementary principles, and really require no citation of authorities; but still we might refer to the following cases as instructive: *In re Snyder*, 17 Kan. 542; *In re Payson*, 23 Kan. 757; *State v. Lewis*, 26 Kan. 123; *State v. Metach*, 37 Kan. 222; <sup>1</sup>*In re Schurman*, 40 Kan. 533, 20 Pac. Rep. 277; *In re Cameron*, 44 Kan. —, 24 Pac. Rep. 90; *State v. Asher*, 50 Ark. 427, 8 S. W. Rep. 177; *People v. Wakely*, 62 Mich. 297, 28 N. W. Rep. 871. In the case last cited the following language is used by the court: "The object of the statute is to punish cheats, and it must be made to appear, not only that some person has been defrauded, but that the person making the representations intended to defraud the person by the representations made. \* \* \* It is true that there need be but one false pretense, and, though several are set out in the information, yet, if any of them are proved which amounts in law to a false pretense, the information is sustained. But it does not amount in law to a false pretense unless made with a fraudulent intent, and the person parting with the property is actually defrauded. In all cases of this kind three things, at least, must concur: The intent to defraud, the false pretense made with the intent, and the fraud accomplished." See 62 Mich. 302, 303, 28 N. W. Rep. 873. Was Jonathan Thomas cheated or defrauded? He received from Matthews a promissory note and a mortgage executed by Matthews to Louisa Havens which were all that he desired or expected to receive. Of course, however, he expected the note and mortgage to be legal and valid, and, if they were not, then he may have been cheated and defrauded; but, if they were, then he was not cheated or defrauded. Were they legal and

<sup>1</sup> 15 Pac. Rep. 251.

valid? As to Matthews they were undoubtedly unimpeachable instruments, and could unquestionably be enforced against him as such. In fact the note was and is an absolutely valid note as to all the world, but is the mortgage a valid instrument? This is really the only material question in the case. We suppose that it will be conceded by all that a deed or mortgage or any other instrument affecting real estate, where the name of the grantee, mortgagee, or vendee is left blank, is void, so long as such blank remains. Some courts hold that if the instrument is afterwards filled up in accordance with the directions of the maker it is valid, whether it is filled up in his presence or absence, whether before or after its delivery, whether such directions are in writing or only in parol, and whether with or without the knowledge of the party holding under the instrument; but other courts hold otherwise. Upon these questions the decisions of the courts are not uniform. We believe, however, that all the courts hold that if the instrument is filled up contrary to the directions of the maker and to his injury, and with full knowledge on the part of the party who takes and holds under it, the instrument will be held to be absolutely null and void as to him. *Ayres v. Probasco*, 14 Kan. 175; *Schintz v. McManamy*, 33 Wis. 299; *Upton v. Archer*, 41 Cal. 85. See, also, the following: *Drury v. Foster*, 2 Wall. 24; *Whitaker v. Miller*, 83 Ill. 381; *Sims v. Hervey*, 19 Iowa, 274. On the other hand, however, it is generally held that if the instrument is filled up in accordance with the instructions, written or oral, of the maker, in his presence or absence, before or after its delivery, and under it the property at that time or afterwards comes into the hands of some innocent and *bona fide* holder for value, the instrument will be held to be valid. *Knaggs v. Mastin*, 9 Kan. 532; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. Rep. 100; *McClain v. McClain*, 52 Iowa, 272, 3 N. W. Rep. 60; *Field v. Staggs*, 52 Mo. 534; *Ragsdale v. Robinson*, 48 Tex. 380; *Van Etta v. Evenson*, 28 Wis. 33; *Schintz v. McManamy*, 33 Wis. 299; *Pence v. Arbuckle*, 22 Minn. 417. But none of the foregoing cases is the present case. In the present case, the directions of the maker with reference to filling the blank were oral. The instrument was filled up in the absence of the maker, and not in accordance with, but contrary to, her directions, and to her injury; but the parties now claiming benefits under it, Louisa Havens and Jonathan Thomas, (she having acted through her agent, Jonathan Thomas, and he having acted personally and for her,) acted innocently and in good faith, and without the slightest knowledge of Matthews' fraud, or of the imperfections or infirmities of the instrument when it left the hands of the maker, Mary J. Wallace, and they parted with value on the strength of the instrument as it appeared when they or either of them first saw it, and as the maker, Mary J. Wallace, and her agent, Matthews, made it to appear. In all such cases the weight of authority is that the instrument will be held to be valid to the extent of the in-

nocent party's rights under it, or the rights which he or she would have under it if it were valid. *Chapman v. Veach*, 32 Kan. 167, 4 Pac. Rep. 100; *Pence v. Arbuckle*, 22 Minn. 417; *Garland v. Wells*, 15 Neb. 298, 18 N. W. Rep. 132; *Clark v. Allen*, 34 Iowa, 190; *Swartz v. Ballou*, 47 Iowa, 188. This is founded upon the general principle of law often announced by courts, and which has become axiomatic,—"That whenever one of two innocent persons must suffer loss on account of the wrongful acts of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer." *Jordan v. McNeil*, 25 Kan. 465; 2 Herm. Estop. §§ 766, 767, and the numerous cases there cited. Upon this same principle it is almost universally held that whenever an instrument is procured from one person by the fraud or villainy of another, even if such fraud or villainy should amount to a criminal offense, if all the rights which the instrument apparently gives should at that time, or afterwards, be transferred to another who should be an innocent and *bona fide* holder for value, the innocent and *bona fide* holder could enforce the instrument against the maker, although the maker might also be an innocent person. *Jordan v. McNeil*, 25 Kan. 459; *McNeil v. Jordan*, 28 Kan. 7; *Ort v. Fowler*, 31 Kan. 478, 2 Pac. Rep. 580; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. Rep. 100; *McNab v. Young*, 81 Ill. 12; *Tisher v. Beckwith*, 30 Wis. 55. In such a case the maker would be estopped from claiming that the instrument was void as against the innocent *bona fide* holder. There may be some authorities that hold a contrary doctrine, but, if so, we do not choose to follow them. The prosecution cites, among others, the following: *Ayres v. Probasco*, 14 Kan. 175; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. Rep. 257; *Drury v. Foster*, 2 Wall. 24; *Whitaker v. Miller*, 83 Ill. 381; *Upton v. Archer*, 41 Cal. 85; *Tisher v. Beckwith*, 30 Wis. 55; *Taylor v. Davis*, 72 Mo. 291; *Sims v. Hervey*, 19 Iowa, 274; *Wilcox v. Howell*, 44 N. Y. 398. While it is possible that some of these authorities are to some extent in conflict with the views herein expressed, yet generally, we think, they are not in conflict, but are in harmony therewith.

Returning to the alleged false pretenses made by Matthews to Jonathan Thomas, it is clear that, if the statements and representations made by Matthews were true and not false, Matthews should not be convicted; but, as before stated, we shall assume that all such statements and representations were false. Then if Jonathan Thomas knew that they were false, or, in other words, if he knew just how Matthews obtained the aforesaid blank deed from Mary J. Wallace, and just how the blank in the deed was filled up by Matthews so as to make the deed appear to be a perfect deed to himself, then Jonathan Thomas was not cheated or defrauded, and the defendant should not be convicted. But these are not the real facts of the case. Thomas did not have the slightest knowledge or suspicion concerning Matthews' fraud, and neither did Louisa Havens. Probably she never saw or

heard of Matthews until after the mortgage from him to her was executed. Thomas and Louisa Havens being innocent parties they obtained all that they expected to obtain, and were therefore not cheated or defrauded, and therefore and for that reason the defendant, Matthews, could not legally be found guilty. The defendant's counsel in their brief upon this subject use the following among other language: "Now, we repeat that the only person injured and defrauded in any respect, if the facts were and are precisely as claimed by the state, was Mary J. Wallace. Whether an information could be framed in proper and apt terms to charge false and fraudulent representations made to Thomas for the purpose of securing a loan of money from him, with intent to cheat and defraud Mary J. Wallace, is a question we need not discuss here. But it is plain beyond possibility of doubt that, upon the facts as proven by the state, defendant never had any 'intent to cheat and defraud Louisa Havens,' nor any intent 'to cheat and defraud Jonathan Thomas;' because, as to them or to either of them, the note and mortgage executed by him were and are perfect security for the money obtained, and he knew it. The record does not disclose a single word of testimony showing an 'intent on the part of the defendant to cheat or defraud Jonathan Thomas;' no proof that Thomas was in any respect cheated, defrauded, or injured; no evidence showing or tending to show that Thomas could in any wise be cheated or defrauded out of money loaned by him to defendant, or paid to defendant upon the order which he received from Thomas on account of that loan." Therefore, it is urged by the defendant's counsel that he cannot legally be found guilty of any criminal offense in this case. There are many other questions discussed in the briefs of counsel, but with the views which we entertain, and which we have already expressed, we do not think that further comment is necessary. In our opinion the defendant was erroneously convicted and sentenced, and therefore the judgment of the court below will be reversed. All the justices concurring.

(44 Kan. 628)

DAUGHERTY V. FOWLER.

(Supreme Court of Kansas. Nov. 8, 1890.)

SALE ON CONDITION—CASH PAYMENT—RIGHT TO RECLAIM GOODS.

The plaintiff below, a merchant at Kansas City, Mo., shipped 50 tubs of butterine to P., at Ft. Scott, to be paid for "cash on arrival." The merchandise was received, and freight paid thereon, but the buyer failed to remit the purchase price. The goods were stored, and within three days P. wrote the plaintiff that he was unable to make payment; that the property was his; that he had placed the property in the hands of a reliable party, who would take care of it until he could hear from the plaintiff. The letter was received on the morning of the following day at 8:30 o'clock, and the plaintiff then determined to take the property back. At noon of the same day, the butterine was attached by one of the firm creditors of P. *Held*, that the sale and shipment were on condition of payment in cash, upon

arrival of the goods, and, in an action of replevin, the plaintiff was entitled to recover the property.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

J. D. McCleverty, for plaintiff in error. Ware, Biddle & Cory and Ira D. Bronson, for defendant in error.

GREEN, C. This was an action in replevin, commenced by the plaintiff below, in the district court of Bourbon county, to recover 50 tubs of butterine from the sheriff, who held the same by an order of attachment issued against the property of T. W. Price and D. B. Fabyan, who had been doing business in Ft. Scott under the name of T. W. Price & Co., but had sold out their business some time before the attachment was issued. On the 24th of November, 1885, T. W. Price went to Kansas City, Mo., and made an arrangement with the plaintiff below whereby he was to have shipped to him at Ft. Scott 50 tubs of butterine, payable cash on arrival. The butterine was not made at the time. It was to be procured from other parties, and there was no selection of the article, except by sample. The butterine was shipped on Friday the 27th of November, and reached Ft. Scott the following morning, and was immediately received by Price, and the freight paid, and stored in a cellar. The goods were invoiced in the usual way, followed by detailed weight of each separate tub, and written on the bill were the words, "Terms cash." On Monday, the 30th of November, Price caused the butterine to be moved into a different part of the cellar from where it had been previously stored, and removed all the shipping tags, and on Tuesday morning, December 1st, wrote the plaintiff that he was unable to pay for the butterine; that the goods belonged to the plaintiff; and he had placed them in the possession of a reliable party, who would take care of them until he could hear from the plaintiff. It appears from the testimony that this letter reached the plaintiff below at 8:30 o'clock on Wednesday morning, December 2d, who concluded to accept the proposition contained in the letter, and take back the shipment of butterine. It was in evidence that Price had owed the plaintiff below \$10.70 upon some other dealings, and had paid out for freight on the merchandise \$8.05. At noon of the same day, the butterine was attached at the suit of one of the creditors of T. W. Price & Co. A trial was had in the district court, and, upon the conclusion of the evidence, the court instructed the jury to return a verdict for the plaintiff.

The first complaint the plaintiff in error makes is to the introduction of the letter written by Price on the 1st of December. He contends that it could only be made competent by proof of the genuineness of the signature. The objection to the introduction of this letter was because it was incompetent and irrelevant. This objection in the court below does not reach the objection counsel now seeks to raise,—the

genuineness of the letter. No objection was there interposed that sufficient preliminary proof had not been offered to admit the letter in evidence. This should have been done to entitle him to raise the question here. An objection to the introduction of evidence should be specific. *Abbott v. Colman*, 22 Kan. 250; *Railway Co. v. Cutter*, 19 Kan. 83.

It is further insisted that "mental conclusion" reached to take the goods back was not competent; that the only way to prove that the goods were taken back was what was in fact done. The acceptance of Price's offer was an affirmative act, and not a mere mental conclusion, as assumed by the court below. This we regard as the decisive question in this case. Let us consider it. The facts are virtually undisputed. The goods were shipped to be paid for upon arrival. They were received by Price, and the freight paid, and stored by him. Before the rights of any other parties intervened, the vendee said to the vendor: "I cannot pay you for the goods, and I have placed them in charge of a party who will take care of them until he hears from you. The goods are yours. I have done what I thought best." Does this proposition, made by the vendee and received by the vendor, require affirmation upon the part of the vendor to make the transaction complete? An answer to this question is a decision of this case. If this proposition stood alone and in no way connected with what had preceded it, and was an independent offer to sell certain goods, it would be less difficult of solution. We would say that an acceptance was necessary upon the part of the plaintiff in error, to make the offer binding, and the transaction complete. But we must consider the whole transaction, from its inception until the transmittal of the letter, and say whether the title of the property in question ever passed to Price. The terms of the sale were "cash on arrival," or "cash," as expressed in the invoice. Now, the rule is that, if goods be delivered before the price is paid, in compliance with the usage of trade, the delivery is conditional, and, until the condition is performed, the vendee holds the goods in trust for the vendor, against all persons except *bona fide* purchasers without notice. *Story, Sales*, § 813; *Hussey v. Thornton*, 4 Mass. 405; *Marston v. Baldwin*, 17 Mass. 606; *Corlies v. Gardner*, 2 Hall, 345; *Reeves v. Harris*, 1 Bailey, 563.

It seems, from the evidence in the case, that there were two concurrent conditions to make the sale complete; delivery upon the part of the vendor, and payment upon the part of the vendee. This frequently occurs where goods are shipped by common carriers, as in this case, to be paid for upon arrival; and the failure to make payment will be regarded as a non-performance of the condition precedent, upon the part of the vendee, and will entitle the vendor to reclaim his goods. *Newm. Sales*, § 227. In *Stone v. Perry*, 60 Me. 48, it appeared that the plaintiffs were merchants in Boston, and a broker called and inquired the price of flour, and plaintiff asked whom it was for, and the broker replied, "Butler, of Portland." Plaintiff

answered that he did not know him, but would sell the flour at \$8.75 for cash. The broker went away and soon returned, and said he would take the flour, which was shipped, and the next day a bill was forwarded to Butler & Co., with the words "Terms cash" printed on the margin. On the following Monday, one of the plaintiffs went to Portland, and upon ascertaining that Butler & Co. had failed, and the flour had been attached, replevined it from the officer. In that case the court said: "If goods are sold conditionally, and delivery made, according to the custom of the trade, before the conditions are complied with, in expectation of compliance, the delivery is also conditional, and no title vests in the purchaser until the performance of the condition; and, if he steadily refuse compliance, the seller may recover the goods by action of replevin." *Bauendahl v. Horr*, 7 Blatchf. 548. In *Russell v. Minor*, 22 Wend. 659, the court said: "Where, under a contract for the sale of chattels, a delivery of a portion of the property sold was made to the purchaser under an agreement that a note should be given for the whole quantity upon the delivery of the residue at a future day, the delivery of the first parcel was held to be conditional, and that, on the delivery of the residue and the refusal of the purchaser to give the note and to deliver up the first parcel on demand, an action of replevin for the wrongful detention might be sustained. Where goods are sold to be paid for on delivery, if, on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods; and if, during the delivery and before it is completed, the purchaser sells or pledges them to a third person for a valuable consideration, but without notice to the original vendor, the lien of the latter will not be affected, and he may recover them from such subsequent purchaser." In *Palmer v. Hand*, 18 Johns. 434, the court stated: "When goods are sold to be delivered by the vendor without any stipulation for credit, it is his right to demand payment immediately upon their delivery, and payment being refused, he may reclaim the goods. Ordinarily this right to reclaim should be exercised promptly after refusal of payment." In *Morris v. Rexford*, 18 N. Y. 552, it was said: "I consider it a proposition plain in principle and sanctioned by authority that a vendor may reclaim his goods after delivery upon a sale for immediate payment, if the vendee, on getting the property in his possession, refuses to make the payment. If there be no term of credit expressed or implied in the dealing, the delivery in such cases is deemed to be conditional, and subject to revocation on the refusal or failure of the purchaser to pay the price." Mr. Justice STRONG, in the *Elgee Cotton Cases*, 89 U. S. 180, quotes approvingly the rule from Benjamin on Sales, which he regards as well settled law in England, and also this country: "Where the buyer is, by contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the con-

ditions be fulfilled, even though the goods may be actually delivered into the possession of the buyer." Benj. Sales, (Corb. Ed.) 359, 397, and authorities there cited. The doctrine of this rule seems to be almost universally sustained by the American courts. We reach the conclusion in this case that, by the terms of the contract, there was a concurrent condition of payment upon the part of the buyer, to be performed before title passed to him. The buyer having notified the plaintiff below that he could not pay, he was entitled to the possession of the property, and there was no necessity of his making any reply to the buyer's letter in regard to his inability to pay, so that he exercised the right to reclaim the goods, within a reasonable time, which it seems from the evidence he did. It follows from this view of the law that there was no error upon the part of the court below in instructing the jury to find a verdict for the plaintiff. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 656)

POWELL *et al.* v. WALLACE *et al.*

(Supreme Court of Kansas. Nov. 8, 1890.)

BEST AND SECONDARY EVIDENCE—CONDITIONAL SALE.

1. Letterpress copies may be introduced as secondary evidence, when it has been shown that the original letters have been directed and mailed in the usual course of business, and there is preliminary proof, from the party to whom they were addressed, that he had made diligent search for them, and they could not be found.

2. In an action for the recovery of personal property consigned to another, upon the condition that the title was to remain in the consignor until paid for, the plaintiff is not required to prove a failure of payment to entitle him to recover.

3. The evidence and findings of the trial court examined, and found sufficient to support the judgment.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Greenwood county; A. L. L. HAMILTON, Judge.

T. L. Davis, for plaintiff in error. W. S. Marlin, for defendant in error.

GREEN, C. On the 16th day of March, 1888, the defendants in error commenced this action in the district court of Greenwood county to recover certain personal property, being a bill of boots, shoes, and rubber goods, which they claim had been consigned to J. F. Myers, who was engaged in the boot and shoe business at Eureka. The plaintiffs below, being engaged in the wholesale trade at Kansas City, Mo., shipped the goods, as they allege, on the 2d day of November, 1887, to Myers, to be sold by him at retail, but with the understanding that they were to hold the title to the same, excepting what should be sold in the usual course of the retail trade, until the 15th of February, 1888, when the goods were to be paid for, or returned to them as consignors. Upon the receipt of these goods, they were placed in the store of Myers, at Eureka,

with a stock of goods which he had removed from Olathe, where they remained, except such as were sold in the usual course of business, until the 27th day of January, 1888, when the entire stock was sold to the plaintiff in error S. E. Powell. A jury was waived, and a trial had before the court, at the May term, 1888, and judgment was rendered for the plaintiffs below for the possession of the goods. It is insisted by the plaintiff in error that the judgment of the district court should be reversed, for a number of reasons, which we will notice in their order.

1. It is first claimed that the court below permitted press copies of letters, purporting to have been written by the plaintiffs below to J. F. Myers to be read in evidence, over the objections of the defendants below, when no proper foundation had been laid for their admission. The evidence disclosed the fact that, before the shipment of the goods in controversy, the traveling salesman of the plaintiffs below had called upon the manager of Mr. Myers' store, before the removal of the stock of goods from Olathe, and prevailed upon him to go to Kansas City, and make a selection of goods to be sent to Eureka. After the selection of the goods, the balance of the negotiations took place by correspondence. Two letters were written, one on the 29th, and another on the 31st of October, 1887, and addressed to Mr. Myers, at Eureka, Kan.; and press copies of these letters were introduced, of which plaintiffs in error complain. It seems from the evidence that these letters were mailed, as stated by one of the witnesses, with the regular office letters; that they had been given to the office boy, whose duty it was to mail the letters; and that they were mailed with the other correspondence. From the evidence of J. F. Myers, it appears that a correspondence was had with the plaintiffs in error in regard to his dealings with them. One letter, dated November 2, 1887, and an invoice of the bill of goods, showing a consignment by R. G. Wallace & Co. to J. F. Myers, of certain merchandise, were admitted in evidence, without objection. And it was shown from the testimony of the witness that he had received a letter, or letters, prior to the date of November 2d; that he had made diligent search for all the correspondence between him and the plaintiffs below, and had been unable to find the letters; that he had only received the shipments he had testified to from Wallace & Co., and had had no other dealings with the firm. From another witness, it appeared that there was a letter dated October 29th, addressed to "J. F. Myers, Eureka, Kan.," and that the evidence offered was the original copy of that letter; that he saw Mr. Wallace write the letter dated October 31st; and that it was mailed with the office letters. The letter-book containing the original copies of these letters was before the court below, and we think there was sufficient foundation laid for admitting the copies in evidence. "The principle, based as it is upon the assumption that, as absolute certainty in such proof cannot be obtained, it is enough, in order to make out a *prima facie* case."

to show that a letter is forwarded in a way in which letters are usually received, applies to other than post-office delivery." 2 Whart. Ev. § 1327; Tayl. Ev. 202.

2. It is next insisted that the court below should have sustained the demurrer of the defendants below to the evidence, for the reason that there was no evidence to prove that the goods replevied had not been paid for. We do not think this was necessary. The invoice offered in evidence, and the letters introduced, showed clearly that the goods were consigned to Myers to be sold, in the usual course of business, by retail, and title was to remain in the consignors until the goods were paid for. The transfer of the title depended on the payment, and no evidence of payment was necessary to entitle the plaintiffs below to recover.

3. The plaintiffs in error again contend that the findings of fact, made by the court below, are not sustained by the evidence; that there was no proper evidence on the trial to show that the goods were consigned to J. F. Myers, with the understanding that the title to the goods was to remain in the plaintiffs below until paid for, or sold in the regular course of trade as a retail merchant. This raises substantially the same question we have already decided. We think there was sufficient evidence upon which to base the finding the court made. The evidence of the plaintiffs below was to the effect that the goods were consigned to J. F. Myers. The invoice of the bill of goods read: "Consigned by R. G. Wallace & Co. to J. F. Myers." It is true that it also contained a memorandum: "Sold by Berry;" but this only indicated the salesman who took the order. The letters of October 29th and 31st also indicated that goods had been consigned to Myers. Now, the word "consigned" has a well-defined legal meaning. "To consign, in the mercantile law, is, ordinarily, to send or transmit the goods to a merchant or factor for sale, and a consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted." 3 Amer. & Eng. Enc. Law, 667. "Consigned" implies "agency." *Rolker v. Insurance Co.*, 42 N. Y. 17. We do not think the defendants below were in a position to raise the question of estoppel. The goods were shipped to be sold by retail, and this gave no authority to dispose of the goods of plaintiffs below with the stock previously owned by Myers. The power to sell in the regular retail way does not create a scope of authority to sell at wholesale, or to trade the stock of goods. 1 Lawson, Rights & Rem. § 65. We find no reversible error in the record of this case, and recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 639)

PRICE v. KING.

(Supreme Court of Kansas. Nov. 8, 1890.)

SALE OF LAND BY EXECUTOR—TITLE OF PURCHASER.

Where a person pays to an executor about 1-40 of the value of a tract of land, and in con-

sideration therefor procures from him a quitclaim deed for such land, although in fact and in law the executor, as such, had no power or authority to sell or convey the land, or to execute any kind of deed therefor, and no fraud, deception, concealment, mistake of facts, or accident occurred or intervened, and it was not the intention that any interest in the land, except such as the executor, as such, had power to convey, should pass to the grantee by such deed, *held* that no title or interest in or to the aforesaid land passed to the grantee by the deed, or by way of estoppel, ratification, or otherwise, although the executor may, at the time of the execution of the deed, or afterwards, have had some interest in the property as heir or devisee.

(Syllabus by the Court.)

Error from district court, Atchison county; B. F. HUDSON, Judge pro tem.

This was an action in the nature of ejectment brought in the district court of Atchison county, on July 28, 1883, by John M. Price against Samuel C. King, to recover certain real estate, hereafter described. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and upon such findings and conclusions rendered judgment in favor of the defendant and against the plaintiff for all the property in controversy except two lots, and the plaintiff, as plaintiff in error, brings the case to this court for review. The findings and conclusions of the court below, so far as it is necessary to give them, read as follows:

"(1) On December 1, 1864, and until May 1, 1868, Charles Gould, of New York city, was the full fee-simple owner of lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, in block 43, and lots 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, and 20, in block 44, in L. C. Challis' addition to the city of Atchison, Atchison county, Kan., together with other property in said addition, by deed, which was duly recorded in the office of the register of deeds of this county, December, 1864. (2) On May 1, 1868, said Charles Gould and Henrietta S. Gould, his wife, conveyed to Courtland Palmer, of New York city, an undivided one-half of said lots, and other property, by deed, which was duly recorded in the office of the register of deeds of this county on June 15, 1868. (3) On June 24, 1880, a deed was executed in which the parties were described as follows: 'Courtland Palmer, Charles P. Palmer, and Henry Draper, executors of the estate of Courtland Palmer, deceased, and Henrietta S. Gould, executrix of the estate of Charles Gould, deceased, parties of the first part, and R. F. Smith, party of the second part.' The consideration named in the deed was \$225, and for said sum, the receipt of which was acknowledged in said deed, it was stated that the parties of the first part did remise, release, and quitclaim unto said party of the second part, his heirs and assigns forever, all of block 43, being lots 1 to 30, inclusive, all of block 44 east of lots 10 and 11, being lots 1 to 20, inclusive,—which included the property in controversy, and also other property; all in Challis' addition to the city of Atchison, Atchison county, Kan. Said deed was without covenants or recitals as to ownership of any kind, and it did not pur-

port to have been executed by the authority of any court, and it was signed as follows: 'Courtland Palmer, Ex'r, Charles P. Palmer, Ex'r, Henry Draper, Ex'r, Henrietta S. Gould, Executrix.' Said deed was duly acknowledged, and, on February 7, 1881, the same was duly recorded in the office of the register of deeds of this county. (4) On June 25, 1881, said R. F. Smith and his wife executed and delivered to the plaintiff, John M. Price, a quitclaim deed for all the property described in said deed of June 24, 1880, and the same was duly recorded in the office of the register of deeds of this county on July 5, 1881. (5) It further appears from the evidence introduced upon the trial in aid of the plaintiff's claim of title that, prior to the execution of said quitclaim deed of June 24, 1880, the said Charles Gould, mentioned in conclusion of fact 1, and the said Courtland Palmer, referred to in conclusion of fact 2, had died, both testate. Said Charles Gould died prior to November 4, 1870, and his last will and testament was admitted to probate in the surrogate's court of the county of New York, in the state of New York, on November 22, 1870. By said will, Henrietta S. Gould, widow of Charles Gould, was made his sole devisee, in case she survived him, and she did survive him, and the said Henrietta S. Gould was also made the sole executrix of said will. Said will did not contain any provision as to the sale of any real estate or other property by his executrix as such. An exemplified and duly authenticated transcript of the record of said will, and the probate thereof, was admitted to record by the probate court of this county on April 1, 1882, and duly recorded on page 99 of the proper record book. Said Courtland Palmer died prior to May 14, 1874, and his last will and testament was admitted to probate in the surrogate's court of the county of New York, in the state of New York, on June 2, 1874. By the terms of said will, after certain specified provisions not material in the consideration of this case, the residue of the estate of said Courtland Palmer, deceased, real and personal, was devised in four equal shares to Courtland Palmer, Jr., Chas. Phelps Palmer, Mary Anna Draper, and the children of Richard S. Palmer, deceased; and said Courtland Palmer, Jr., Charles Phelps Palmer, and Henry Draper, the husband of Mary Anna Palmer Draper, were named as executors of said will. All of said devisees were living at the time of the probate of said will, and at the time of the execution of said quitclaim deed of June 24, 1880, there being two children of the said Richard S. Palmer, deceased, they being minors, and Mrs. Fanny Arnot Haven, their mother, being their guardian. Said will did not contain any provision as to the sale of any real estate, or other property, by the executors as such. An exemplified and duly authenticated transcript of the record of said will, and probate thereof, was admitted to record by the probate court of this county, on April 1, 1882, and duly recorded on page 103 of the proper record book. The said Courtland Palmer and Charles Phelps Palmer, who executed said quitclaim deed of June 24, 1880, were two of the devisees

under said will, and the said Henry Draper, who joined in the execution of said deed, was the husband of another of the devisees under said will, and the said Henrietta S. Gould, who executed said quitclaim deed, was the sole devisee under the will of said Charles Gould, deceased. (6) It further appears from said evidence that Charles W. Gould, son of said Henrietta S. Gould, a practicing attorney of New York city, entered into correspondence with Thomas M. Pierce, an attorney at law of the city of Atchison, Kan., who had been the agent of the said Palmer and Gould estates, as to the management of certain real estate in Atchison, regarding the proposed sale of the interests of said estates in blocks 29, 30, 43, and 44, in L. C. Challis' addition, which had been previously sold at tax-sale, and were involved for taxes, interest, penalty, and costs. Said Henry Draper and said Courtland Palmer had conferred with said Charles W. Gould, and authorized him to act in the interest of said Palmer estate, and the said Henrietta S. Gould authorized him to act in the interest of said Gould estate. The question as to whether the devisees or executors were the proper persons to sell and convey any interest in said property which had been owned by said Charles Gould, deceased, does not appear to have been discussed or considered by any of the parties who executed said quitclaim deed of June 24, 1880, and in the said correspondence the property was referred to as belonging to the Gould and Palmer estates at the time of the transmission of said quitclaim deed of June 24, 1880, which transmission was on July 8, 1880, by said Charles W. Gould to said Thomas M. Pierce, for delivery to said R. F. Smith. Such exemplified and authenticated copies of said two wills, and of the probate of the same, were also transmitted. Said quitclaim deed was delivered by said Thomas M. Pierce to said R. F. Smith early in February, 1881, at which time the said R. F. Smith paid the said Thomas M. Pierce the said sum of \$225, which was soon afterwards remitted by the said Thomas M. Pierce to said Charles W. Gould, and he paid the same to the executors of said Palmer estate and the executrix of said Gould estate. Shortly after the delivery of said quitclaim deed to said R. F. Smith, the question was raised as to the authority of said executors to sell and convey said real estate, and some correspondence followed, and on April 18, 1881, said Courtland Palmer, Charles Phelps Palmer, and Henry Draper filed in the office of the surrogate's court of said New York county, and state of New York, a petition for the confirmation of said sale to R. F. Smith, and on May 23, 1881, said Charles W. Gould appeared in behalf of said petitioners in said court, and an order was thereupon made by said court purporting to sanction and confirm said sale." The findings of fact, from the seventh to fourteenth, inclusive, have relation to the defendant's claim of title, and to two lots not now in controversy, and need not be given. "(15) That on June 24, 1880, and until the delivery of the deed in February, 1881, the property described as in the



said four blocks in said deed, of date June 24, 1880, was worth from \$10,000 to \$12,000, and the incumbrance thereon, by reason of the tax-sales herein described, then amounted to about the sum of from \$300 to \$500."

Conclusions of law: "Said quitclaim deed, of date June 24, 1880, did not convey to said R. F. Smith, under whom the plaintiff claims, any property of the estate of Courtland Palmer, deceased, and Charles Gould, deceased, nor of the grantors as executors and executrix of said estates respectively, and the decree of said surrogate's court, of date May 23, 1881, was of no validity as a decree, and was inoperative as a confirmation of said conveyance. (2) Said deed of June 24, 1880, and the receipt of the consideration from the said R. F. Smith by the executors of said estates, was insufficient to convey to the said R. F. Smith the title, legal or equitable, of the said Courtland Palmer, Charles Phelps Palmer, Mary Anna Palmer Draper, the two children of said Richard S. Palmer, deceased, and Henrietta S. Gould in said premises." The third and fourth conclusions of law have reference to the defendant's title, and need not be given. (5) The plaintiff is entitled to recover the possession of said lots Nos. 23 and 24, in block 43, as described in the petition herein, upon the payment to the defendant of the sum of \$31.91, and interest thereon, according to law, from April 21, 1880, being the amount of taxes, penalties, and costs paid by said defendant. The plaintiff is also entitled to judgment for his costs herein. (6) That said defendant is entitled to judgment against plaintiff for all of the said described property other than lots 23 and 24 in block 43, L. C. Challis' addition."

The aforesaid quitclaim deed, dated June 24, 1880, and delivered in February, 1881, reads as follows:

"This indenture, made this twenty-fourth day of June, in the year one thousand eight hundred and eighty, between Courtland Palmer, Charles P. Palmer, Henry Draper, executors of the estate of Courtland Palmer, deceased, and Henrietta S. Gould, executrix of the estate of Charles Gould, deceased, parties of the first part, and R. F. Smith, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of two hundred and twenty-five dollars lawful money of the United States of America to them in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and by these presents do remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all of block twenty-nine, (29,) being lots one (1) to twenty-six, (26,) inclusive; all of block thirty, (30,) being lots one (1) to twenty-six, (26,) inclusive; all of block forty-three, (43,) being lots one (1) to thirty, (30,) inclusive; all of block forty-four (44) east of lots ten (10) and eleven, (11,) being lots one (1) to twenty, inclusive. All of said property being in that part of the city of Atchison known as 'Challis' Addition' to the City of Atchison,"

and in the county of Atchison, and state of Kansas, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all of the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, that the said parties of the first part have in or to the above-described premises, and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written. COURTLAND D. PALMER, Ex'r. [Seal.] CHAS. P. PALMER, Ex'r. [Seal.] HENRY DRAPER, Ex'r. [Seal.] HENRIETTA S. GOULD, Executrix. [Seal.] Sealed and delivered in the presence of JOHN J. BECKER, witness as to the three executors, J. THAIN EASTON, as to Henrietta S. Gould, executrix.

"State of New York, city of New York, county of New York—ss.: On the twenty-fourth day of June, in the year one thousand eight hundred and eighty, before me personally came Courtland Palmer, Charles P. Palmer, and Henry Draper, known to me to be the executors of the last will and testament of Courtland Palmer, mentioned and described in the within conveyance, and they severally, each for himself, acknowledged before me that he executed the same as such executor, as aforesaid. [Seal.] JOHN J. BECKER, Notary Public—170—N. Y. C.

"State of New York, city and county of New York—ss.: On this 25th day of June, in the year one thousand eight hundred and eighty, before me personally came Henrietta S. Gould, known to me to be the executrix of the last will and testament of Charles Gould, deceased, mentioned and described in the within conveyance, and she acknowledged before me that she executed the same as such executrix as aforesaid. [Seal.] J. THAIN EASTON, Notary Public, N. Y. C."

This deed was indorsed upon its back at the time of its execution as follows: "Executors' deed. From Courtland Palmer, Charles P. Palmer, Henry Draper, and Henrietta S. Gould, executors, to R. F. Smith."

*L. F. Bird and Jackson & Royse*, for plaintiff in error. *W. W. & W. F. Guthrie and Henry Elliston*, for defendant in error.

VALENTINE, J., (after stating the facts as above.) This was an action in the nature of ejectment, brought in the district court of Atchison county to recover certain real estate. The plaintiff, John M. Price, claims under a certain deed of conveyance, a quitclaim deed, executed to R. F. Smith by the three executors of Courtland Palmer's estate, to-wit, Courtland Palmer, Jr., Charles P. Palmer, and Henry Draper, and by the sole executrix of Charles Gould's estate, to-wit, Henrietta S. Gould, and a cer-



tain quitclaim deed from Smith and wife to himself, together with certain other facts and circumstances which he claims create in himself an estate in the property, either legal or equitable, or both. The defendant, Samuel C. King, claims the property under certain tax-deeds executed to him by the county clerk of Atchison county, and also by virtue of being in the actual possession and occupancy of the property. With respect to nearly all the property, the judgment of the court below was in favor of the defendant and against the plaintiff, upon the ground, principally, that it was not shown, even *prima facie*, that the plaintiff ever had any title or estate, either legal or equitable, in or to the property. The deed under which the plaintiff claims was evidently intended by all the parties thereto to be the deed only of the aforesaid executors and executrix, executed in the capacity only of executors and executrix, and not executed in any other capacity, or by any other person or persons. All the evidence upon the subject tends to show this. The deed was indorsed on its back, "Executors' deed." It was executed in the name of the executors and executrix as such. It was signed by them as executors and executrix. It was witnessed by the subscribing witnesses to the same effect, and it was also acknowledged by the grantors only as executors and executrix. And, as a matter of fact, according to all the extrinsic evidence upon the subject, the grantors intended to execute the deed only as executors and executrix, and afterwards, with the desire and wish of all the parties, it was confirmed by the surrogate's court of the city and county of New York, and state of New York, as the deed of the executors and executrix; and afterwards, at the instance of the plaintiff and Smith, authenticated copies of the wills under which the executors and executrix attempted to execute the deed, and the proceedings of the said surrogate's court showing the probate of the wills, etc., were filed and recorded in the office of the probate court of Atchison county, Kan.—the county in which the land supposed to have been conveyed, including the land in controversy, is situated. And further, each of the parties executing the aforesaid deed was actually an executor or executrix, and all together they were all the executors and the only executrix of the Palmer and Gould estates, and one of such executors, Henry Draper, had no possible interest in the property supposed to be conveyed except as executor, and as the husband of one of the heirs and devisees, and the grantors mentioned in the deed included the names of only three of the heirs or devisees, and there were three of the heirs and devisees of the Palmer estate, and the six heirs of the Gould estate, who were not mentioned in the deed as grantors or otherwise.

If the foregoing deed shall be construed to be only the deed of the foregoing executors and executrix, then it must unquestionably be held to be absolutely null and void as a conveyance; and we think it must be so construed and so held. No one of the executors or the executrix, as such, had any title or estate in or to

any part of the property. The wills under which they attempted to act did not give to them, or to any one or more of them, any title or estate in or to the property as executors or executrix. Nor did such wills confer upon them, or upon any one or more of them, or upon any one else, any power or authority to sell or convey the property, or any part thereof, or to alienate the same in any manner whatever. Nor did any court ever attempt to give to them, or to any other person or persons, any such power or authority. And there was always an abundance of personal property on hand belonging to each estate with which to meet all demands that might be presented against such estate. Hence, no fact existed authorizing any court to grant any such power or authority. The plaintiff, however, claims that, even if the aforesaid deed is void as a conveyance, and even if for that reason the plaintiff has no legal title to the property in controversy, still, under all the facts of the case, and in equity, he has the paramount equitable title thereto. Now in what does the plaintiff's equities or his equitable title consist? His title, so far as any writing is concerned, is founded solely upon a quitclaim deed to himself from Smith, the grantee of the aforesaid executors and executrix, and hence, so far as his written title is concerned, he claims only under a quitclaim deed from a party (Smith) whose title was founded upon a void executors' and executrix's deed, which also was and is only a quitclaim deed; and under a quitclaim deed the grantee therein cannot claim to be a *bona fide* purchaser or holder of the property, or an equitable owner thereof as against outstanding equities in other claimants of the property. *Johnson v. Williams*, 37 Kan. 179, 14 Pac. Rep. 537. Indeed, the grantee in a quitclaim deed gets nothing except what his grantor in fact owned at the time of the execution of the deed, which, in the present case, was nothing, as the executors and executrix, as such, owned nothing in the present case. And such a deed will not stop the maker thereof from afterwards purchasing or acquiring an outstanding adverse title or interest in or to the property, and holding it as against his grantee. *Simpson v. Greeley*, 8 Kan. 586, 597; *Bruce v. Luke*, 9 Kan. 201, 207, et seq.; *Scoffins v. Grandstaff*, 12 Kan. 469, 470; *Young v. Clippinger*, 14 Kan. 148, 150; *Ott v. Sprague*, 27 Kan. 624; *Johnson v. Williams*, 37 Kan. 180, 181, 14 Pac. Rep. 537. It is possible that there might be cases where a party claiming only under a quitclaim deed would have equities beyond the mere terms of his quitclaim deed, but we do not think that this case falls within any of such cases. It is possible, where a party purchases real estate, and pays a full consideration therefor, and takes only a quitclaim deed as a conveyance, that his claim of title to the property should be treated at least with favor; but such is not this case. The real estate claimed by the plaintiff to have been conveyed in this present case was worth, at the time of its supposed conveyance, from \$10,000 to \$12,000, with an incumbrance on it for taxes amounting to from \$300 to

\$500, and yet the plaintiff's grantor, Smith, paid only \$225 for such real estate,—less than 1-40 of the actual value of the property,—and the plaintiff in fact, as well as presumptively, knew all this. Also, where there is fraud on the part of the vendor, or a mutual mistake of the parties, or some accident intervening, it is possible that the holder of a quitclaim deed might obtain equities beyond the terms of his deed; for instance, where the deed is defective, or does not fully express what the parties intended that it should express, equity might reform it, or might consider it as reformed, so as to make it express or accomplish what both the parties intended that it should express and accomplish. But that is not this case. The deed in the present case is just what the parties intended that it should be, and, if it were changed in its form or effect in any particular, it would be what the parties intended it should not be. It is true that Smith desired a different kind of deed, and at the instance of Smith, two different deeds were sent to the agent of the grantors for execution, but they refused to execute the same, and would not execute any other or different kind of deed than the one which they did in fact execute; and the negotiations with reference to the matter were going on and pending between the parties for about eight months before any final agreement was reached, and, after all the parties were well informed as to the facts, Smith finally agreed to take, and knowingly did take, the very deed which is now in controversy in this case, and afterwards paid the aforesaid \$225 for the same. He took it knowing what it was, and that he could not obtain any other or different kind of deed. And the plaintiff knew the same. There was no fraud, no concealment, no misrepresentation, no deception on the part of the grantors, or their agents, and no mistake with reference to the facts on the part of any one. A quitclaim deed was executed by the grantors merely as executors and executrix, and all the parties knew it; and this quitclaim deed really conveyed nothing, leaving the entire title to the property in the heirs and devisees. By this deed Smith got nothing, and he conveyed nothing to the plaintiff by his quitclaim deed to the plaintiff. And the facts were not such as to create or vest such equities or equitable title in the plaintiff that he may now disturb the rights of the defendant who holds and claims by a separate and independent title adverse to both the plaintiff and his grantors. There are also cases where an agent or trustee attempts to bind his principal, but from some lack of authority, or from irregularity, he fails to do so, and in effect binds himself. But such is not this case. The executors and executrix in this case did not attempt to bind any person. They merely quitclaimed any interest which they might have as executors and executrix in the property, and, as before stated, no party was deceived or defrauded or mistaken as to the facts, but all were fully and completely cognizant of the same. Smith got all he purchased or paid for when he got his quitclaim deed. He did not purchase or

pay for the individual rights of any person. Of course, in the beginning, there was some talk of conveying the title to the property, and Smith at all times desired that such should be the case; but the executors and executrix refused, and consented only to quitclaim as to any interest which they might possibly have in the property as executors and executrix. They did not agree to sell or convey any interest which they or others might have in the property in any other capacity; and, in the capacity of executors and executrix, they will probably never dispute the plaintiff's title. Indeed, all the parties will at all times admit that Smith got by his quitclaim deed, and conveyed to the plaintiff by another quitclaim deed, all interest which the executors and executrix ever possessed in the property, which in fact was nothing.

The defendant makes the claim that no title passed to Smith or to the plaintiff for the further reason that neither the wills nor the probate thereof, nor any of the proceedings of the surrogate's court of the city and county of New York, were filed or recorded in the office of the probate court of Atchison county, Kan.,—the county in which the land in controversy is situated,—until long after the aforesaid deed from the executors and executrix to Smith, and the deed from Smith to the plaintiff, were executed, delivered, accepted, and recorded. The first of the foregoing deeds was executed in New York on June 24, 1880. It was transmitted to Kansas on July 8, 1880, but on account of disputes between the parties, it was not accepted by Smith until about February 7, 1881, when it was accepted by him, paid for, and then recorded in the office of the register of deeds. It was confirmed in the surrogate's court of the city and county of New York on May 23, 1881. The deed from Smith to the plaintiff was executed on June 25, 1881, and was recorded on July 5, 1881. The wills were never probated in Kansas, and no proceedings, with reference thereto, were ever had in Kansas until April 1, 1882, when authenticated copies of the wills, and the records of the proceedings of the aforesaid surrogate's court, were filed and recorded in the office of the probate court of Atchison county, Kan. Now it is claimed by the defendant that no will can be effectual to pass title to real estate unless the same has been probated or recorded in Kansas, according to the statutes of Kansas, and sections 24 and 29 of the act relating to wills, and section 1 of chapter 102 of the Laws of 1879, (Gen. Laws 1889, par. 2932,) are referred to as sustaining this claim. Said section 29 reads as follows: "Sec. 29. No will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate, or recorded, as provided in this act."

Upon the foregoing facts and statutes referred to, it is claimed by the defendant that no title had ever passed to any one under the wills when the foregoing deeds were executed and delivered, and therefore that no title could have passed to Smith or to the plaintiff because of the wills or otherwise when the foregoing deeds were

executed, for at that time neither the executors nor the executrix, nor the devisees, nor any one else who might claim title under the wills, had any such title under the same to pass to any one; and that, as both such deeds were merely quitclaim deeds, which could not operate to pass future-acquired titles, no title could ever subsequently have passed under them, and the cases heretofore cited are referred to as authority for such claim. With reference to these claims of the defendant just mentioned, we shall express no opinion, as we do not think it is necessary for the decision of this case.

We decide in this case, however, the following: The first quitclaim deed executed by the executors and executrix to Smith did not, of itself, and at the time it was executed, convey to Smith any title or interest in or to the property described in the deed, for at that time the grantors, as executors and executrix, had no such title or interest to convey, nor any power or authority to convey any such title or interest, and nothing afterwards passed under such deed, or by virtue of its terms, for it was only a quitclaim deed, and such is and always has been the law with respect to quitclaim deeds; and nothing at any time passed by virtue of any of or all the facts and circumstances taking place prior to, contemporaneous with, and subsequent to the execution of the deed, for no fraud, deception, concealment, mistake of facts, or accident occurred or intervened, and it was not the intention of the parties that anything but the interest of the executors and executrix as such, or the interest which they might have had the power to convey, should pass. And we might further say that a party can never obtain by way of estoppel or ratification or otherwise what it was never expected or intended that he should obtain. Finding that the plaintiff's supposed legal title founded upon the aforesaid quitclaim deeds is void, and not finding any equities in favor of the plaintiff sufficient to create an equitable title, we think the judgment of the court below is correct. There are a few other questions presented in this case, but we do not think that they need comment. The plaintiff may pay the taxes due on the two lots adjudged to him at any time, and may then obtain the possession thereof. The judgment of the court below will be affirmed. All the justices concurring.

(44 Kan. 669)

**BEESON *et al.* v. BUSENBARK.**

(Supreme Court of Kansas. Nov. 8, 1890.)

**INJURIES TO SERVANTS — LIABILITY OF RAILROAD CONTRACTORS.**

1. Chapter 93, Sess. Laws 1874, entitled "An act to define the liability of railroad companies in certain cases," (paragraph 1251, Gen. St. 1889,) applies to every railroad company organized in this state, and to every railroad company doing business in this state; but its provisions do not include firms, partnerships, or individuals having servants or employees engaged in work upon the road or trains of a railroad corporation.

2. A firm or partnership, composed of private persons, not being a railroad corporation, or a *de facto* railroad corporation, having a subcontract to construct a part of the road of a railroad corporation, organized under the laws of this

state, and operating cars and trains on the road in the prosecution of their work, and having servants and employees at work upon the road, and in charge of their trains, are not within the terms of chapter 93, Sess. Laws 1874, (paragraph 1251, Gen. St. 1889.)

(Syllabus by the Court.)

Error from district court, Saline county; S. O. HINDS, Judge.

*H. M. Jackson*, for plaintiffs in error.  
*Garver & Bond*, for defendant in error.

HORTON, C. J. This was an action in the court below for damages for personal injuries, received by Harry E. Busenbark while in the employ of the defendants, Beeson & Selden. The jury returned a verdict for the plaintiff for \$12,000, and judgment was entered for that amount against the defendants. They complain, and bring the case here. It appears from the record that the Kansas & Colorado Railroad Company, an auxiliary of the Missouri Pacific Railway, is a corporation organized under the laws of this state, and doing business as a railroad company in this state. W. V. McCracken & Co. were the original contractors with the railroad company for the construction of its road through Saline, McPherson, Rice, Barton, and other counties of the state. McCracken & Co. sublet the construction of the road to Beeson & Selden between Salina and the east line of Ness county. McCracken & Co. were to furnish all the locomotives, not to exceed three, and cars, including boarding-cars, for the use of Beeson & Selden in carrying out the contract. Beeson & Selden were to receive all material at Salina, and transport the same at their own cost and expense, including all unloading, loading, and reloading of such material, under direction of the engineer in charge, and as he should deem necessary. After 15 miles of track had been laid from Salina, west, Beeson & Selden sublet a portion of the work to Bracey & Harris. Bracey & Harris were to do all work in the track—laying and to load and unload material, but Beeson & Selden were to transport the material, and provide the train service. Beeson & Selden employed and paid the trainmen, including the plaintiff. Trains were operated on the road by Beeson & Selden. About October 25, 1886, the Missouri Pacific Railway Company began running trains over the road between Salina and Geneseo. Beeson & Selden retained their own trains in completing the construction of the road. On October 27, 1886, just after dark, Harry Busenbark, a fireman in the employ of Beeson & Selden, while at Geneseo with his engine, getting ready to go with a train of cars to Salina after material, under the order of his engineer, went under his engine for the purpose of cleaning the ash-box. While in that position, another train operated by Beeson & Selden was backed against the train to which the engine was attached, under which Busenbark was cleaning the ash-box. This caused the engine to move. Busenbark's foot was crushed by one of the wheels of the engine. Subsequently it was amputated. The petition alleged, and the evidence tended to prove, that a brakeman or employe of Beeson & Selden,

whose duty it was to attend to the displaying of warning lights, failed to display any light or signal at the end of the train against which the other one backed. The petition alleged, and the evidence tended to prove, that both trains were negligently handled by the employes in charge thereof, and that the collision was caused by the negligence of such employes, as well as the failure to display any warning lights or signals. The petition alleged that J. H. Beeson and H. P. Selden were partners as Beeson & Selden in the work of construction. The petition nowhere alleged that Beeson & Selden were a railroad company organized under the laws of this state, or any other state, or that they were a *de facto* railroad company. The evidence upon the trial did not tend to show that Beeson & Selden were a railroad company of this state, or of any other state. The court, among other instructions, gave the following: "If the defendants were, at the time of the injury complained of, operating the Kansas & Colorado Railroad, or running trains upon said road for the purpose of carrying construction material, as well as freight and passengers when offered, not connected with the road, they would be liable, under the statute, for any injury which one employe of defendants might receive because of the negligence of another employe, without regard to who or what such negligent employe may be. The statute reads as follows: 'Every railroad company, organized or doing business in this state, shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damages.' And, in order to be doing the business of a railroad company, and to be liable under this statute, it is not necessary that they should hold themselves out to be common carriers, or that they should be required to carry all freight and passengers presented. It is the character of the work done rather than the particular manner in which it is done, or the quantity done, that should determine this question. Neither is it necessary that defendants should have absolute control and management of the road. It is sufficient that they actually operate trains upon the road, either by themselves, or with the co-operation of others." This instruction was not applicable under the petition or the facts disclosed upon the trial, and therefore was erroneous. Not only was it erroneous, but it was greatly prejudicial to the defendants. The statute referred to was passed in 1874. Its title is "An act to define the liability of railroad companies in certain cases." The statute so far modifies and changes the common law that a servant or employe of a railroad company may maintain an action against such railroad company for any injury received, while in the line of his employment, through the negligence of a fellow-servant or employe engaged with him in the same common work of the master or employer, unless such injured servant or employe has himself been guilty of negligence or want of ordinary care, which

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has directly contributed to produce the injury complained of.

Previous to the statute of 1874, the rule of law which prevailed in this state exempted from liability all employers, including railroad companies, for injuries to their employes, caused by the negligence or incompetency of a fellow-servant, unless they had employed such negligent or incompetent servant without proper inquiry as to his qualification, or had retained him after knowledge of his negligence or incompetency. *Dow v. Railway Co.*, 8 Kan. 642; *Railway Co. v. Salmon*, 11 Kan. 83; 24 Amer. Law Rev. 175. This was the rule of the common law; but this rule of the common law was abrogated by the statute of 1874, so far as it related to railroad companies organized in this state, or railroad companies doing business in this state. The statute of 1874 fixes a new liability upon railroad companies organized in this state, and railroad companies doing business in this state. This statute is in derogation of the common law, therefore it is not to be extended by implication or construction. "As a rule of exposition, statutes are to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the legislature had had that design, it is naturally said they would have expressed it." Chancellor Kent says: "This has been the language of courts in every age, and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright, and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction." *Potter's Dwar. St.* 185. The statute of 1874 is to be construed strictly. It cannot apply to masters or employers not within its terms; neither can it be construed to give protection to persons not in the employ of a railroad company. The statute has reference to servants and employes of railroads, not to servants or employes of other masters, companies, or corporations. The statute does not include partnerships, or persons in the employ of partnerships; it does not include construction companies, or persons in the employ of construction companies; it does not include bridge companies, or persons in the employ of bridge companies,—although such partnerships and companies construct railroads, build bridges, and do other public work. Statutes similar to the one referred to, changing the common-law rule between masters and servants, employers and employes, are in force in a number of the states of this country: but, with one exception, these statutes are all confined in their operation to railroad companies. The single exception—the Rhode Island statute—embraces only the cases of common-law carriers. 7 Amer. & Eng. Enc. Law, 859; 24 Amer. Law Rev. 181, (1890.)

The legislature has full authority to extend the operation of the statute to all corporations, companies, masters, or employers of every occupation or business. It has not seen fit to do so. It might very properly have extended the operation of the statute to all partnerships, masters, or others engaged in the work of operating trains upon railroads, or in constructing railroads, or other like work. It has not done so. In various opinions of this court, we have frequently held that the statute applied to persons engaged in the hazardous work of operating trains upon a railroad, but, in all those cases, we had reference to the employees of a railroad company organized in this state, or of a railroad company doing business in this state. *Railway Co. v. Haley*, 25 Kan. 35; *Railway Co. v. Mackey*, 33 Kan. 298, 6 Pac. Rep. 291; *Bucklew v. Railway Co.*, 21 N. W. Rep. 103.

Again, we have held that when a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company, at the time the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. *Railway Co. v. Fitzsimmons*, 18 Kan. 34; *Railroad Co. v. Willis*, 38 Kan. 330, 16 Pac. Rep. 728. If the statute of 1874 were extended so as to include the firm of Beeson & Selden and their employees, it must also be extended so as to include every firm, partnership, contractor, or private person having servants or employees at work on the track, or in the yard, of a railroad company. *Trust Co. v. Thomason*, 25 Kan. 5; *Railroad Co. v. Harris*, 33 Kan. 416, 6 Pac. Rep. 571; *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. Rep. 567. The statute does not go so far. The courts construe laws, but do not make them. The trial court attempted to fix a liability on Beeson & Selden under a statute which has no application to them as masters or employers; they not being a railroad company organized in this or any other state. The general rule is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are no exception to this rule. If Beeson & Selden used due diligence in the selection of competent and trusty servants, and furnished them with suitable means to perform the service in which they employed them, and did not retain negligent or incompetent servants, after knowledge or notice of their negligence or incompetency, they are not answerable to Busenbark, or any other employee, for any injury received by them, or either of them, in consequence of the carelessness of any co-servant or co-employee, while they were engaged in the same service. Outside of the statute, Beeson & Selden were required to assume the duty, towards their servants and employees, of exercising reasonable care and diligence in providing them with a reason-

ably safe place at which to work, and also in furnishing them proper means or instrumentalities, such as engines, cars, oil, lights, etc., to work with. *Railroad Co. v. Holt*, 29 Kan. 152; *Railroad Co. v. Moore*, Id. 632; *Railway Co. v. Fox*, 31 Kan. 586, 3 Pac. Rep. 320; *Railway Co. v. Weaver*, 35 Kan. 434, 11 Pac. Rep. 408; *Railway Co. v. Dwyer*, 36 Kan. 69, 12 Pac. Rep. 352; *Railroad Co. v. Wagner*, 33 Kan. 660, 7 Pac. Rep. 204; *Railroad Co. v. McKee*, 37 Kan. 592, 15 Pac. Rep. 484. As the instruction complained of did not place the liability of Beeson & Selden upon the duty of master and servant under the common law, but solely upon a statute which has no application to them, and applies only to railroad companies organized in this state, and to railroad companies doing business in this state, the case was not correctly submitted to the jury. The judgment of the district court must be reversed. All the justices concurring.

(86 Cal. 594)

STONESIFER *et al.* v. ARMSTRONG, Judge.  
(No. 13,989.)

(*Supreme Court of California*. Dec. 4, 1890.)

MANDAMUS—BILL OF EXCEPTIONS—SETTLEMENT.

A judge of the superior court, who has exercised his discretion in refusing to settle a bill of exceptions not presented to him within the time prescribed by law, owing to the mistake or excusable neglect of appellant's attorneys, cannot be compelled so to do by writ of mandate, conceding that he has the power to relieve against such mistake under Code Civil Proc. Cal. § 473, which confers on the superior court discretionary power to relieve a party from a "judgment, or order, or other proceeding" taken against him through his mistake or excusable neglect.

In bank. Application for writ of *mandamus*.

*Edward J. Pringle* and *Stonesifer & Minor*, for petitioner. *William Matthews* and *Wright & Hazen*, for respondents.

PER CURIAM. This is an application for a writ of mandate to compel the respondent to settle a bill of exceptions in a case tried before him in Stanislaus county entitled "*Stonesifer et als. vs. Kilburn et als.*" The bill was not presented to the judge for settlement within the time prescribed by law, or by any order or stipulation extending the same. Upon presentation, although the judge found, and in his order certified, that the same was not served in time by reason of the mistake, inadvertence, and excusable neglect of one of the attorneys of the plaintiffs who had charge of the matter, he sustained the objection of the other party to the settlement thereof, on the ground that the same was not served in time, and that he had no power to relieve the party from such mistake, inadvertence, and neglect, and refused to settle the bill. In *Bunuel v. Stockton*, 83 Cal. 320, 23 Pac. Rep. 301, this court, in bank, said: "The moving party must prepare and serve his statement within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered, either at the hearing of the motion or on appeal to this court." The same rule of law, in this regard, applies to bills of exceptions as to

statements. When the objection was interposed in the court below, the plaintiff, upon notice and affidavits, moved to be relieved from the objection on the ground of mistake, inadvertence, surprise, and excusable neglect, and it was upon the hearing of that motion that the order was made, and the settlement of the bill refused. Assuming that the court has the power to grant this relief, under section 473, Code Civil Proc.,<sup>1</sup> (which, however, we do not now decide, for we do not think the case a proper one in which to determine the same,) whether it shall do so or not is a matter resting in the discretion of the court. We cannot command what its action shall be. At most, we could only command it to act. It has already done so. If there was error or abuse of discretion in its action, the same may be reviewed on appeal, but we cannot reverse its action by mandate. The writ must be denied.

(86 Cal. 589)

**TAYLOR v. BLACK DIAMOND COAL MIN. CO.**  
(No. 12,965.)

(*Supreme Court of California*. Dec. 4, 1890.)

**ATTORNEY'S CONTRACT—ASSIGNMENT.**

The principle that an attorney cannot assign a contract for his services, and substitute another attorney in his place, without the client's consent, has no application where the attorney has practically rendered all the services he contracted to do before the assignment was made; and in such a case the assignment of the contract is valid, being substantially the assignment of a debt due.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. H. L. Barnes, for appellant. Wm. M. Pierson, for respondent.

McFARLAND, J. This action was brought by plaintiff, as assignee of Hoyt & McKee, attorneys at law, to recover from defendant a balance due for professional services. Judgment went for plaintiff in the court below, from which, and from an order denying a new trial, defendant appeals. Hoyt & McKee made a contract with defendant by which they were to receive a certain compensation for their services as attorneys, provided they should accomplish certain results. Afterwards McKee, as surviving member of the firm of Hoyt & McKee, (Hoyt having died before the services were quite all rendered,) assigned to the plaintiff Taylor all the right and title of said firm in said contract, and all the moneys due or to become due thereunder. Appellant contends that the assignment was invalid upon the ground that an attorney cannot assign a contract for his services, and substitute another attorney in his place, without the consent of his client, such contract being special, and founded upon personal qualities. The general principle thus invoked is no doubt sound, but we do not

think that it applies to the case at bar. A careful examination of the pleadings, the evidence, and the findings shows that the services which Hoyt and McKee promised to render, and the ends which they agreed to accomplish, were all practically rendered and accomplished before the assignment to plaintiff; and that appellant had received the full benefit of those services and the accomplishment of those ends before said assignment. The assignment, therefore, was substantially the assignment of a debt due. The judgment and order are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(86 Cal. 580)

**PERKINS v. WAKEHAM.** (No. 13,670.)

(*Supreme Court of California*. Dec. 3, 1890.)

**QUIETING TITLE—SERVICE BY PUBLICATION—VALIDITY OF JUDGMENT.**

A judgment, in an action to quiet title, is binding against a non-resident defendant, who does not appear or answer, and who is served by publication only while absent from the state, under Code Civil Proc. Cal. §§ 412, 413, providing that where a person on whom service is to be made resides out of the state, or has departed from the state, and the fact appears by affidavit to the satisfaction of the court, and it also appears that a cause of action exists against such person, such court may order that the service be made by publication of the summons.

Department 1. Appeal from superior court, Los Angeles county; W. P. GARDNER, Judge.

Wells, Guthrie & Lee, for appellant. Victor Montgomery, J. W. Townner, and A. W. Hutton, for respondent.

PATERSON, J. The appeal from the order denying the motion for a new trial, so far as it affects the respondent, town of Santa Ana, must be dismissed. The notice of intention to move for a new trial was not served on said respondent. There was an attempt to serve the statement, but the attorney upon whom it was served had no authority to accept service, which fact was known to appellant at the time of service. The motion of respondent, the town of Santa Ana, to dismiss the appeal from the order denying a new trial is granted, and said appeal, in so far as it affects said respondent, is dismissed. A motion was made on various grounds, also, to dismiss the appeal from the judgment, but as the findings support the judgment, and no error appears on the face of the roll, we deem it best not to pass on the motion to dismiss, but to affirm the judgment. The court found that in a former action, brought by Wakeham against Perkins and others to determine all adverse claims to the property described in the complaint herein, judgment was entered in favor of said Wakeham, defendant herein, adjudging him to be the owner of the property. It is claimed by appellant that the decree in the former action to quiet title is *in personam*, and not *in rem*, and that as the service of summons was by publication while he was absent from the state, and as he did not answer or appear, the judgment is void. If it be true that a state has no power by

<sup>1</sup> Code Civil Proc. Cal. § 473, provides that the court may, in its discretion, relieve a party from "a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

statute to provide for the determination of adverse claims to real estate lying within its limits, as against non-resident claimants, who can be brought into court only by publication; if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents, who will not voluntarily submit their claims to her courts for adjudication,—great evil must result. Certainty and security in the titles of real estate, and convenient and effective procedure for the determination of individual rights in such property, are essential to the prosperity of the community. If those who cannot be reached by the process of the courts may assert adverse claims to real estate, and hold unlawful clouds over the title of the owner, every homestead and lot in the state may have a cloud cast upon it for all time. We do not think that a sovereign state is so limited in its power. The state is paramount in power over all things real within its territorial boundaries, except so far as its authority is limited by the constitution and laws of the United States; and the courts of the state, acting within that limitation, have and may exercise all the jurisdiction over all persons and things which the constitution and laws of the state confer upon them. The manner of obtaining such jurisdiction, and the procedure for its exercise, are matters of state legislation. The legislature of this state has provided that: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Section 738, Code Civil Proc. It has also provided: "Where the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation, having no managing or business agent, cashier, or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable,—at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months." Sections 412, 413, Id. Unless the method of giving notice above prescribed is unreasonable, or is in conflict with some provision of the constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity,

which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. *U. S. v. Fox*, 94 U. S. 315. While a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem*. But it is not necessary, in support of a judgment in such an action, where service has been had by publication, to determine the question whether it is a judgment *in personam* or one *in rem*. This precise point has recently been decided by the supreme court of the United States. Mr. Justice BREWER, speaking for the court, said: "The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate?" *Arndt v. Griggs*, 134 U. S. 320, 10 Sup. Ct. Rep. 557. There the power of the state to quiet title as against non-residents by constructive service is upheld, and the cases upon which appellant herein chiefly relies are fully considered and elaborately reviewed. In that case, it is true, the statute of the state of Nebraska, which was under consideration, expressly provided for service by publication "in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or foreign corporation," but the authority conferred by the legislature of this state in section 412, *supra*, is as great as that given by the Nebraska statute. While our statute is general, and in terms applies to all actions, it is not invalid because it includes in its provisions proceedings purely *in personam*. If the judgment in the action of Wakeham is valid and binding,—and we hold that it is,—other questions raised by appellant need not be noticed. The judgment and order are affirmed.

We concur: FOX, J.; WORKS, J.

(86 Cal. 574)

CUTTING PACKING CO. v. PACKERS' EXCHANGE. (No. 12,337.)

(Supreme Court of California. Dec. 2, 1890.)

ASSIGNMENT—RIGHT OF ASSIGNOR.

While the assignment, by the purchaser, of a contract for the purchase of fruit at a specified rate will not relieve him from his obligation to the seller, who has not consented to the assignment, as provided by Civil Code Cal. § 1457, yet, as between the purchaser and his assignee, the latter is bound to receive and pay for the fruit, under section 1589, which provides that "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it;" and the purchaser, who paid the seller the full contract price for the fruit on



his assignee's refusal to accept it, and who then sold it in the open market at a loss, is entitled to recover the difference from his assignee.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by the Cutting Packing Company against the Packers' Exchange of California for refusal to accept fruit under a contract assigned by plaintiff to defendant. There was a judgment for plaintiff, and defendant appeals. Civil Code Cal. § 1457, provides: "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise."

A. N. Drown, for appellant. Olney, Chickering & Thomas, for respondent.

WORKS, J. This appeal is brought here on the judgment roll, which includes a bill of exceptions, from a judgment rendered in favor of plaintiff in an action for damages for breach of contract, tried before the court without a jury. In September, 1881, the plaintiff and one William C. Blackwood made the following contract of purchase and sale:

"San Francisco, September 17, 1881. Bought of W. C. Blackwood his crop of apricots, at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons, and not exceeding two hundred tons, per annum, at three cents per pound f. o. b. Haywards. CUTTING PACKING COMPANY. By A. D. CUTTER."

"San Francisco, September 17, 1881. Sold Cutting Packing Company my crop of apricots, at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons, and not exceeding two hundred tons, per annum, at three cents per pound f. o. b. Haywards. WM. C. BLACKWOOD."

Plaintiff assigned its interest in the contract to the defendant about March 15, 1882, but Blackwood refused to accept the defendant in place of plaintiff. Blackwood, between July 10 and August 15, 1884, in performance of the contract upon his part, delivered to plaintiff, in different lots, 235,693 pounds of apricots, which the plaintiff, from time to time as they were delivered to it, tendered to the defendant, which refused to accept or pay for each or any lot so tendered. Plaintiff, as each lot was refused, placed it on sale in open market, and realized from the whole, after the cost of freight and seller's commissions were deducted, the net sum of \$4,770.50. This sum was \$2,300.29 less than the amount it was compelled to pay Blackwood. The two papers above set forth were construed in Blackwood v. Packing Co., 76 Cal. 212, 18 Pac. Rep. 248, to be a contract of purchase and sale. It was a non-negotiable contract in character, but, under section 1459, Civil Code, it could be transferred by indorsement the same as a negotiable instrument. "Such indorsement," the same section further provides, "shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement." But the burden of the obligation that rested upon the plain-

tiff—that is to say, to pay to Blackwood three cents per pound for any quantity of apricots between 75 tons and 200 tons for the seasons specified in the contract—could not be transferred without the consent of Blackwood. Civil Code, § 1457. And, as he refused to consent to a novation by accepting the defendant in place of plaintiff, so as to release the latter, which he might have done, (Id. § 1531, subd. 2,) the relations of himself and the plaintiff as to such burden were not affected by the assignment of the contract. Section 1457 is only intended to protect the party to be benefited from the effects of an assignment of an obligation. So far as the parties to this suit are concerned, the appellant contracted with the respondent to accept and pay for the fruit Blackwood had contracted to deliver to the latter. It could make no difference, therefore, whether the fruit was delivered to the appellant by Blackwood directly, or by the respondent. As between the parties to this suit, the appellant was bound to receive and accept the fruit, and it cannot relieve itself from this obligation by showing that Blackwood had refused to relieve the respondent from its obligation to him. As the fruit contracted to be sold was to be the product of trees presumably owned by Blackwood at the time the contract was made, it must be considered as having had a potential existence at that time, and was therefore subject to sale. Arques v. Wasson, 51 Cal. 620. This being so, although the contract was construed in Blackwood v. Packing Co., supra, as not having passed the legal title to the fruit before the same was delivered, the plaintiff here at least acquired the right to purchase the fruit, and the assignment of the contract transferred such right to the defendant, whereby it became alone entitled to purchase the fruit for each of the seasons that occurred subsequent to the assignment. Myers v. Water Co., 10 Cal. 579. Now, while the plaintiff was not released, as we have seen, from the burden of the contract by the assignment of it, yet when the defendant took the right to purchase the fruit, which was the benefit of the contract, it also assumed the burden of paying for the fruit, in accordance with the following principle of section 1589, Civil Code: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." The obligation thus assumed was apparent on the face of the contract. We therefore think it plain that as the plaintiff, as assignor, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligation, the plaintiff, as between it and the defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows that from the assignment an implied contract arose between the plaintiff and defendant, whereby the latter became bound to the former to receive and pay for the apricots, according to the terms of the original contract. This is,



we think, the proper construction of section 1457 of the Civil Code, under which the assignment of the non-negotiable contract in question was made. Although the liability of an assignee to his assignor under that section has never been determined by this court, still we are fortified in our conclusion by the analogous doctrine prevailing in the state of Ohio, where a similar liability arises upon the transfer of shares of the capital stock of a corporation. There, as in this state, the transferor of shares by constitutional and statutory provisions continues liable to the creditors of the corporation, who became such while the transferor held the shares. And in the recent case of *Harpold v. Stobart*, 21 N. E. Rep. 637, the supreme court of the state stated the doctrine under such provisions thus: "In construing these provisions, the holdings in this state are to the effect that the individual liability of stockholders attaches in favor of creditors at the time the debt is contracted, or the liability incurred by the corporation, and that such liability is not discharged by the subsequent assignment or transfer of the stock; but the successive assignees impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock." See, also, 2 Mor. Priv. Corp. §§ 879, 888. This doctrine, it seems to us, is just and reasonable, because, if the transferee should be insolvent, the creditors of the corporation whose claims attached while the transferor held the shares would not be affected by the transfer; while, on the other hand, if the transferor, after the transfer, pays his proportion of any indebtedness of the corporation that he was liable for, such payment certainly adds that much to the value of the stock he transferred, and the transferee should reimburse him for the outlay. This last consideration would not apply in Ohio with the same force as in this state, for it appears, in *Harpold v. Stobart*, supra, that the liability of stockholders "is not a primary fund or resource for the payment of the debts of the company, but is collateral to the principal obligation which rests on the corporation, and is to be resorted to only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process." But in this state, such liability is a primary fund or resource to which creditors of a corporation may resort, regardless of the solvency of the corporation. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. Rep. 354, and *Mitchell v. Beckman*, 64 Cal. 117. It is clear that a breach of the implied contract, thus created, between the parties here, was made when the defendant refused to accept and pay for the crop of 1884; and the plaintiff, upon the breach being so made, having stepped in and received and paid for the crop pursuant to the original contract, as it was obliged to do, thereby acquired the right to recover, as damages, from the defendant, the difference between the price paid under the contract to Blackwood and that realized from the sale of the fruit in open market at current rates. As the solution of this question is decisive of this appeal, we

do not deem it necessary to discuss the other points made by the appellant, but will add that we discover no error in the record. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

(86 Cal. 591)

WOLVERTON v. BAKER *et al.* (No. 13,766.)

(Supreme Court of California. Dec. 4, 1890.)

#### RES ADJUDICATA.

1. A judgment to the effect that a conveyance of land by a mother to her son was free and clear of any condition for the mother's support and maintenance, though palpably erroneous on the facts found, is a bar to another action between the same parties for a relitigation of the matters determined by such judgment.

2. In California, where both law and equity are administered by the same court, and where a party may have any relief called for by the case made by his complaint, whatever he may have denominated his suit, a decree in equity may, in a proper case, be pleaded in bar to a subsequent action at law.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

J. H. G. Weaver and E. W. Wilson, (John F. Crowe, of counsel,) for appellant. J. D. H. Chamberlin, for respondents.

HAYNE, C. This was a suit for a reconveyance of real property conveyed by a woman over 70 years of age to her son, Erastus J. Baker, upon condition that he would apply to her support and maintenance so much of the rents and profits as should be sufficient to support and maintain her in a suitable manner during the rest of her life, and for the cancellation of certain deeds and mortgages made by the son, and a homestead declared by him. The trial court gave judgment for the defendants, and the plaintiff appeals upon the findings.

The findings show that the conveyance was without consideration, and upon the condition mentioned; that, for nearly two years before the commencement of the suit, the son has not applied any portion of the rents and profits to the support of his mother; that he declared a homestead upon the property, and conveyed half of it to other persons without consideration; and that he mortgaged it, "with the intent, on his part, to prevent the plaintiff from recovering anything from him." If these were the only facts, we should have no doubt of the right of the plaintiff to the relief she seeks, upon the ground of the breach of the condition, without reference to the other grounds alleged in the complaint. See *Blake v. Blake*, 56 Wis. 392, 14 N. W. Rep. 173; *Humphrey v. West*, 40 Mich. 597; Civil Code, § 1109. But the defendants have pleaded a judgment obtained in a former suit between the same parties, and we are constrained to say that, in our opinion, it is a bar to the present suit. The substance of the grounds of relief alleged in the complaint in the former suit are as follows: (1) That the plaintiff reposed confidence in her son. (2) That she was old and infirm. (3) That the property was conveyed "upon the sole

and only consideration that the said defendant should hold the same in trust for said plaintiff, and that the rents, issues, profits, and proceeds thereof should be applied in providing for, and maintaining, said plaintiff during her natural life, in a manner suitable to her station," etc. (4) That the son accepted the conveyance with the intent of defrauding the plaintiff. (5) That he failed to furnish her any support whatever, but declared a homestead upon the property, mortgaged it, and conveyed away portions of it without consideration. The prayer was for a reconveyance of the property, and for the cancellation of the homestead, and the subsequent deeds and mortgages, "and that the plaintiff have such other and further relief in the premises as to the court shall seem meet and equitable." The allegations of that complaint were put in issue; and after a trial a judgment was entered by which it was "ordered, adjudged, and decreed that the plaintiff is not the owner of the lands and premises described in the complaint herein, but that the defendants, as against the plaintiff, are the owners in severalty in fee-simple of the several distinctive pieces or parcels of land mentioned and described in the complaint herein, free and clear of any and all of the trusts, exceptions, limitations, and conditions set forth and alleged in the complaint." This judgment was palpably erroneous upon the facts found, but nevertheless it prevents a relitigation of the matters determined.

The complaint here is substantially the same as that in the former case. It alleges the plaintiff's confidence in her son, her age and infirmity, the want of consideration for the deed, and that it was made and accepted upon condition of support, etc., the fraud of the son, the failure to furnish support to the plaintiff, the declaration of homestead, the conveyance to other persons without consideration, and the other incumbrances. And the prayer is, in substance, for a reconveyance of the property and the cancellation of the incumbrances, etc., "and for such other and further relief in the premises as to the court shall seem meet and equitable." The counsel for the plaintiff says that the first suit was in equity and proceeded "upon the theory that the deed was void *ab initio*," and that the present suit is at law and proceeds "upon the theory that the deed was valid *ab initio*."

We think that the counsel is mistaken as to the character of the second suit. It is a suit in equity. But if it were otherwise the result would be the same. It is said that, strictly and technically, a decree in equity under the old chancery practice could not be pleaded as an estoppel or bar at law, but that resort must again be had to equity which would take measures by attachment and fine to prevent the defendant from proceeding at law. See 2 Smith, Lead. Cas. (8th Ed.) p. 918, 919. But however this may have been, we think that, under the practice in this state, where both law and equity may be administered by the same court, and in the same case, and where a party may have any relief called for by the case made by his com-

plaint, whatever he may have denominated his suit, a decree in equity may, in a proper case, be pleaded as an estoppel or bar to a subsequent action at law. See *Parnell v. Hahn*, 61 Cal. 131. So far as this case is concerned, the result reached is to be regretted. It is a shameful thing that a son should refuse to support his aged mother after obtaining her property without consideration upon the condition mentioned. But the law must be declared. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(86 Cal. 556)

KITTLE v. BELLEGARDE *et al.* (No. 12,873.)

(Supreme Court of California. Dec. 2, 1890.)

DEATH OF PARTIES—SUBSTITUTION—JUDGMENT BY DEFAULT—QUIETING TITLE.

1. No notice of the substitution of an executor as plaintiff on the death of the original plaintiff need be given to defendants already in default for want of an answer; and, though it be conceded that their time to answer is extended, by the original plaintiff's death, until after the executor's substitution, yet, where judgment by default is entered in the executor's name, and recites the fact of substitution, the presumption is that the substitution was made at a date early enough to justify the entry of the judgment, in the absence of any showing to the contrary.

2. The failure to serve defendants with a notice of the entry of judgment by default is no ground for granting their motion to set it aside, made 20 months after the entry of the default, and 12 months after the entry of the judgment, of both of which facts they had actual knowledge at the time.

3. An action to quiet title may be maintained, though the complaint shows that the adverse claim of defendants rests on a sale of the land by a city for the non-payment of street assessments void on their face, under Code Civil Proc. Cal. § 738, providing for an action by any person against another claiming an adverse interest in real property.

4. Where the purchaser at such sale will become entitled to a deed if plaintiff does not redeem from the invalid assessment within a specified time, it is proper to grant an injunction against the execution of the deed as incidental to the main relief,—the annulment of the invalid assessment and the cancellation of the certificate of sale.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

R. Perry Wright, for appellants. Taylor & Haight, for respondent.

WORKS, J. When this action was before the department, the following opinion was prepared by Commissioner VANCLIEF:

"This is an appeal from an order denying a motion to set aside a judgment by default, and also from the judgment. The action was commenced by plaintiff's testator, September 29, 1886, against J. B. Bellegarde, and against William Patterson, as superintendent of public streets, etc., of the city and county of San Francisco. The complaint is in the usual form of complaints to quiet title to land under section 738 of the Code of Civil Procedure, and seeks to have determined the adverse

claim of defendants to two lots of land situate in said city, of which plaintiff's testator is alleged to have been the owner. The complaint avers the nature of the adverse claim to be that of an alleged lien upon the lots acquired by and through proceedings of the board of supervisors, and the superintendent of streets, under the act entitled 'An act to provide for the improvement of streets, lanes, etc., within municipalities,' approved March 6, 1883; (St. p. 32;) that, to satisfy this lien, the superintendent of streets had sold the lots to defendant Bellegarde, and had given him a certificate of sale, and threatens to execute to him a deed in pursuance thereof, and will execute such deed if plaintiff fail to redeem from the sale within 12 months from the date thereof, unless enjoined from so doing; and that the defendants and each of them claim that Bellegarde will be entitled to such deed if no redemption is made, and also claim that such deed will convey to Bellegarde the title to said lots. The complaint further avers facts which, if true, show that the assessment upon the lots, to satisfy which the lien is claimed, is utterly void; and, consequently, that no such lien as claimed exists. The prayer of the complaint, in substance, is that the defendants be required to set out such claim or lien as they have upon the lots; that such claim and lien be deemed to be of no force or effect; that said assessment be annulled and set aside; that said certificate be canceled; and that defendant Patterson, as superintendent, etc., and his successors in office, be enjoined from executing any deed purporting to convey the lots to Bellegarde, or any other person. After having been duly served with summons, the defendants procured an order from the judge extending their time to answer until November 18, 1886. The plaintiff's testator, N. G. Kittle, in whose name, as plaintiff, this action was commenced, died, November 15, 1886. On December 8, 1886, the clerk of the court entered the default of the defendants, and nearly eight months thereafter, on July 29, 1887, the court rendered judgment in favor of plaintiff, as prayed for, but without costs, which judgment was preceded by the following recitals:

"Jonathan G. Kittle, as Executor of the Last Will and Testament of N. G. Kittle, Deceased, Plaintiff, vs. J. B. Bellegarde et al., Defendants. No. 18,593.

"JUDGMENT.

"In the above-entitled action, it appearing to the satisfaction of the court that each of the defendants in said action was duly served with the summons and complaint therein; that neither of said defendants, within the time required by law, appeared in said action or demurred to the complaint or answered the same; and that the clerk of the court has duly entered the default of each of said defendants, for not so appearing or demurring or answering. And it further appearing that plaintiff is entitled to the relief prayed for in his complaint. And it appearing that N. G. Kittle, the original plaintiff in said action, died after the commencement of said action, being at said time a resident of said

city and county of San Francisco, and leaving a document purporting to be a last will and testament, wherein Jonathan G. Kittle was named as the executor thereof; that said document was, in the probate department of this court, duly admitted to probate, as the last will and testament of N. G. Kittle; and that letters testamentary were issued accordingly to said Jonathan G. Kittle; that the court thereafter, in this action, on motion duly made in open court, ordered that said Jonathan G. Kittle, as such executor as aforesaid, be substituted as the plaintiff in said action in the place and stead of said N. G. Kittle, and that said action be continued in the name of said executor as such plaintiff.

"Nearly one year after the entry of the judgment, to-wit, on July 27, 1888, the defendants moved the court to set aside the default and judgment on the ground that they were irregularly entered, because the defendants were not in default at the time said default was entered, nor at the time the judgment was rendered, and because the court had no jurisdiction to render a judgment in favor of the executor of the deceased original plaintiff, N. G. Kittle. The motion was heard upon the judgment roll, and the affidavit of the attorney of the defendants, of which affidavit the following is a copy: 'Percy Wright, being duly sworn, deposes and says: "(1) That he is an attorney and counselor at law, admitted to practice in all the courts of this state, and resides at No. 310 Pine street, in said city and county. (2) That he has examined the papers on file in the above-entitled action, originally entitled, 'N. G. Kittle vs. J. B. Bellegarde et al.,' also the papers on file in the office of the clerk of said superior court in the action therein entitled, 'No. 18,588, B. M. Hartshorne vs. J. McMullen et al.,' and also the papers on file in the office of the clerk of said superior court in the proceedings entitled 'No. 5,732, In the Matter of the Estates of N. G. Kittle, Deceased.' (3) That said N. G. Kittle, the original plaintiff in this action, died on the 15th day of November, 1886. (4) That at the time of the death of said plaintiff, N. G. Kittle, the time allowed for the defendants in this action, J. B. Bellegarde and William Patterson, superintendent of public streets, highways, and squares, in and for the city and county of San Francisco, to answer the complaint therein, had not expired, said time having been extended by an order of a judge of said superior court up to and including the 18th day of November, 1886, which said order was duly filed and served previous to said 15th day of November, 1886. (5) That, since the death of said plaintiff, N. G. Kittle, the complaint filed in this action has never been amended, nor has any amended complaint ever been filed therein. (6) That the only complaint filed in this action is still entitled: 'In the Superior Court of the City and County of San Francisco, State of California. N. G. Kittle, Plaintiff, vs. J. B. Bellegarde and William Patterson, as Superintendent of Public Streets, Highways, and Squares in and for the City and County of San Francisco, Defendants.' (7) That, since the death of said plaintiff, N. G. Kit-

tle, no notice or paper whatever in this action has ever been served on either of said defendants, nor has there ever been served on either of said defendants notice of the entry of judgment in this action in favor of Jonathan G. Kittle, executor of the last will and testament of N. G. Kittle, deceased, nor has there ever been any appearance by or on behalf of either of said defendants in this action." There was no affidavit or showing of merits, and no motion or request for leave to answer.

"1. On the appeal from the judgment, it is contended that the judgment is not warranted by the complaint, as it is not in favor of a person mentioned in the complaint. But it is in favor of a person substituted, by an order of the court, for the person named as plaintiff in the complaint, on suggestion and proof of the death of the latter, and qualification of the former as successor in interest; and such suggestion and proof may have been made *ex parte*, (Taylor v. Railroad Co., 45 Cal. 336;) and no notice thereof to the defendants in default was necessary, (Farrell v. Jones, 63 Cal. 194.) In Gregory v. Haynes, 13 Cal. 592, a judgment quieting title in favor of one Wenborne was attacked collaterally. Wenborne, the plaintiff, had died before the trial and verdict. The complaint, however, was not changed, and the judgment was entitled and rendered in favor of the original plaintiff, by name, but contained this recital: 'This action having been continued, in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for the plaintiff, it is now ordered,' etc. The court, by Mr. Justice BALDWIN, said: 'We think this recital clearly shows, whether with formality or not, the suggestion of the death of the original plaintiff, and a continuance of the case, or a revival of it, in the name of the executor. If there was any irregularity in all this, it cannot be corrected in this collateral way.' This judgment was again brought in question between the same parties in 21 Cal. 443, where the court, by Mr. Justice NORTON, said of it: 'The continuing of the name of Wenborne, instead of inserting that of Webb (executor) as plaintiff, in the title of the judgment order in which this recital is contained, and also in the more formal judgment, was an error of form, not rendering the judgment void.' The irregularities here admitted were that the judgment was entitled and rendered in favor of the deceased plaintiff by name, and that the recital did not expressly show that any order of substitution of the executor had been made by the court before trial and judgment. In the case at bar, however, no such irregularity appears. The recital in the judgment expressly shows that the death of the plaintiff, and the appointment and qualification of the executor, had been proved, and the order of substitution made before the rendition of the judgment, although the date of the order of substitution is not made to appear; and the judgment is entitled and rendered in favor of the executor by name, as the substituted plaintiff. In all this there appears to have been no irregularity if the defend-

ants were in default before and at the time the judgment was rendered; and that they were so in default is expressly admitted, unless the time allowed them by the court in which to answer was extended by the death of the original plaintiff until after service of notice upon them of the substitution of the executor. But we have seen that no such notice was required, and therefore the failure to serve it could not have had the effect to prolong the time to answer. The substitution of one party for another, by order of court, is not such an amendment of a pleading as is required to be made on notice, or to be engrossed otherwise than to be entered in the minutes of the court; so held in case of the substitution of the real name of a defendant for a fictitious name, (Brock v. Martinovich, 55 Cal. 516,) although all proceedings, after the order of substitution, should be in the name of the substituted party. The court's minutes of an order of substitution of parties is a part of the judgment roll which will always show and account for a change of parties by order of court more intelligibly than would a mere change of names in the pleadings. An order of court substituting a party is different from an order of court allowing 'a party to amend any pleading \* \* \* by adding or striking out the name of any party' by authority of section 473 of the Code of Civil Procedure. The substitution is made by the court, whereas the amendment is allowed to be made by the party. A substitution may be made on suggestion and proof of the requisite facts, at the instance of either party, and might have been made on the suggestion, and at the instance of, the defendants in this case; whereas, an amendment by adding or striking out the name of a party is only allowed at the instance of the party whose pleading is to be so amended. Again, the substitution of a party plaintiff necessitates no change in the defense; whereas, the addition or striking out of a party by amendment may require or admit of a different defense. Conceding, without deciding, that, as contended by counsel, the death of the original plaintiff extended the time allowed the defendants to answer till after the substitution of the executor, still, the presumption must be that the substitution was made at a date early enough to justify the judgment, since the date of neither the order of substitution, nor of the qualification of the executor, is made to appear by the record. In the absence of a showing of the true date of the order of substitution, it is enough that the record expressly shows it to have been prior to the judgment. It devolved upon the appellants to show that it was not long enough prior to the entry of the judgment, if the fact was so. This they have failed to do. The same presumption should be indulged in favor of the ministerial act of the clerk in entering the default, if necessary to sustain the judgment; but, admitting that the default was entered by the clerk too soon, still the entry of the judgment was a sufficient entry of the default. (Montgomery v. Tutt, 11 Cal. 316; Miller v. Miller, 33 Cal. 355;) and from that alone,

in the absence of a showing to the contrary, it must be presumed that the defendants were actually in default before the rendition of the judgment.

"2. It is contended that the complaint does not warrant any relief, because it shows that the adverse claim of the defendants rests upon proceedings which are void upon their face; but this objection is not available in an action to determine an adverse claim, under section 738 of the Code of Civil Procedure. Such an action may be maintained against a person who claims under a void tax-deed. *Harper v. Rowe*, 53 Cal. 234; *Hearst v. Egglestone*, 55 Cal. 365; *Pearson v. Creed*, 78 Cal. 144, 20 Pac. Rep. 302; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. Rep. 1134. A judgment in such an action that the defendants have no right, title, or interest in, or lien upon, the land in question, is equivalent to a judgment canceling all papers and proceedings upon which the adverse claim is founded, and has the same effect; and therefore the defendants, having no right, title, or interest in or lien upon the lots in question, are not injured by this part of the judgment which purports to cancel the assessments and certificates of sale upon which their adverse claim is alleged to be founded, and which the objection itself admits to be void upon their face. *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Head v. Fordyce*, 17 Cal. 149; *Pom. Eq. Jur.* § 1399.

"3. It is also objected that the injunction against executing deeds in pursuance of the certificates of sale is inappropriate and unwarranted. The injunction was merely ancillary to the principal relief, and was proper if necessary to make that relief effectual. *Axtell v. Gerlach*, 67 Cal. 484, 8 Pac. Rep. 34; *Brooks v. Calderwood*, 34 Cal. 563. If unnecessary to make the relief effectual, the injunction was superfluous, and did not injure the defendants, as they were simply enjoined from executing void deeds.

"4. Assuming that the defendants were in default when the judgment was rendered, the motion to set aside the default and judgment was entirely destitute of merit. It is not pretended that defendants did not have actual knowledge of the entry of the default by the clerk, and of the judgment by the court, at the times they were respectively entered, but only that 'no notice or paper whatever in this action has ever been served on either of said defendants;' yet, the motion was delayed nearly 20 months after the entry of the default, and nearly 12 months after the entry of the judgment. There is no affidavit of a meritorious defense, or of any supposed defense, and no intimation that the defendants desired to make any defense to the action, in any event."

We have re-examined the case in bank, and are satisfied with the above opinion, and, for the reasons therein stated, the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

KITTLE V. McMULLEN *et al.* (No. 12,874.)

(*Supreme Court of California.* Dec. 2, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

R. Percy Wright, for appellants. Taylor & Haight, for respondent.

WORKS, J. This case is the same in all material respects as *Kittle v. Bellegarde*, ante, 55, (just decided,) and on the authority of that case the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

(86 Cal. 566)

QUONG TUE SING V. ANGLO-NEVADA ASSUR. CORP. (No. 12,873.)

(*Supreme Court of California.* Dec. 2, 1890.)

INSURANCE—CANCELLATION OF POLICY.

1. An insurance broker does not become the agent of the insured for the purpose of accepting a cancellation of the policy, by the mere fact that he acted as the agent of the insured in procuring the insurance.

2. The conditions on which an insurance company is allowed to cancel the policy must be strictly complied with; and a policy which provides that it shall be terminated only on notice by the company to the insured of its intention to cancel, and a return of the full amount of the unearned premium, is not canceled by the fact that the company's agent notified the broker who procured the insurance that the policy had been canceled, and paid him a part only of the unearned premium, and delivered to him a policy in another company for one-half of the original risk.

3. The insured, who refused to accept the second policy, and who declined to take anything less than the full amount of the unearned premium, does not waive a strict compliance with the conditions of the original policy by finally keeping the second policy on the broker's erroneous representation that the original policy had been canceled, and that his property was entirely without insurance.

Fox, J., dissenting.

In bank. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

Lamar & Castle, for appellant. T. L. Bergin, for respondent.

WORKS, J. This is an action on a policy of fire insurance. The only question in the case is whether the policy sued on was canceled before the fire occurred or not. The policy was procured by one Brandon, acting as a broker, from the local agent of the respondent, and was paid by such agent a commission of 15 per cent. The company was not satisfied with the risk, and the local agent was notified to cancel it. The policy contained this clause: "This insurance may also be terminated at any time, at the option of this corporation, on giving notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of this policy, to any person named in this policy, whether as owner, mortgagee, or otherwise. It is a part of this contract that any person other than the assured, or the duly-authorized agent of this corporation, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in this policy, and not of this

corporation, under any circumstances whatever, or in any transaction relating to this insurance." The local agent attempted to cancel the policy through Brandon. Brandon represented to him that the appellant wanted other insurance, and the agent reported to him that he could place a part of the insurance for \$750, which was half of the amount of the original risk, in another company. He accordingly did so. The amount of the premium on the policy sued on, which had been paid by Brandon for the appellant, was \$110. The local agent gave Brandon the policy of insurance in the other company, the premium for which was \$60, and paid him the balance of the \$110 in money. What took place between Brandon and the appellant is best told in his own words. He testified: "I went down to see Quong Tue Sing. I did not see him there. He was not in, and next morning I went down and informed him that his policy was canceled; that the company would not carry it any longer. He seemed somewhat aggrieved over the matter, and he and several other Chinamen that were in the place at the time talked the matter over, and said they wanted their insurance; wanted to carry their insurance. I told them I would go and place it if I could." He then tells of his efforts to place the insurance, and the fact that he procured the \$750 policy above mentioned, and testified further: "I started to go to the Chinamen to deliver to the firm of Quong Tue Sing & Co. the money and the policy. I met Mr. William Patterson, the county license collector, on the road, and asked him to accompany me, which he did. I went in and talked to the one of the firm which was the butcher, and the one that was the book-keeper, both of which have been on the stand this morning, (the one that sits with the dark blue clothes, and the one this side of him,) and I stated to them,—neither of which could talk very plain English, but I always got along with the Chinamen well enough. I told them the condition of affairs. There was some little talk between them as to the matter. I tendered them at that time, in the presence of Mr. Patterson, the \$750 policy that I received from Mr. Wright, to which was added the amount of my premium, which would make it \$50. I tendered them \$60 in a policy for \$750, together with \$50 in coin, a portion of which was in silver. The Chinamen would listen to nothing. I asked the one that has not been on the stand, who is sitting back there, who seemed to understand English more than the rest, or better than the rest, to go for Charley and bring him in; that is, Quong Tue Sing. He went out and tried to find him, and could not find him for quite a little while. They came in and talked about the matter, and the Chinamen told me that it was a unanimous opinion of theirs that they wanted it all in one company, and then came back and they said that they wanted it right away. I came back and I saw Mr. William Stewart,—William D. Stewart. Mr. Patterson left me, though I told them at that time that they had better let this amount remain, as they had no insurance whatever. I

told them that there was no insurance on their stock of goods, and they had better receive this \$750; and they did take it. Quong Tue Sing was not present when the policy was taken, but the other two members of the firm were present. They accepted the policy; but they would not accept the money, and wanted nothing at all to do with it,—they wanted all one policy." The court, on this point, finds as follows: "Thereafter, and on the 28th, or 29th, or 30th of April, 1887, and certainly before the 1st day of May, 1887, the said Brandon visited the store of plaintiffs, at said San Jose, and then and there delivered to plaintiffs aforesaid policy of insurance for \$750, which plaintiffs, after they were told by Brandon that they then had no insurance on their said property, accepted and received and kept, and which neither they nor their assignee have ever since returned to said Brandon or to said Wright, or to said Prussian National Insurance Company of Stettin; that said Brandon also then and there, and at the same time that he delivered said \$750 policy to plaintiffs, tendered to plaintiffs, as part of the return premium due them upon the cancellation of the policy of insurance sued on, the sum of fifty dollars, of which forty-five dollars was in lawful gold coin of the United States, and five dollars in lawful silver coin of the United States. Plaintiffs did not then and there receive said fifty dollars, so tendered them by said Brandon; but they then and there authorized him to procure for them \$1,500 of insurance on the same personal property insured by the policy sued on herein, and, when he had obtained such \$1,500 insurance, they authorized him to cancel said \$750 policy of insurance." And the court, as a conclusion, found that, by the transaction between the local agent of the respondent, and between Brandon and the appellant, as above set out, "the policy of insurance sued on was properly canceled, and a correct proportion of the unearned premium thereon returned to plaintiffs before the destruction of the insured property by the fire mentioned in the complaint."

It is contended by the appellant that neither the evidence nor the findings of the court sustain or justify this conclusion. To maintain the conclusion reached by the court below, it must have been shown either that the conditions upon which the company was allowed to cancel the policy were strictly complied with, or that the insured, knowing all the facts, waived such compliance. *Bennett v. Insurance Co.*, 115 Mass. 241. It is an undisputed fact that the agent of the company did not act directly with the insured. The tender of so much of the unearned premium as was returned was tendered, not to the appellant, but to Brandon. Therefore, in order to render this tender effective, if otherwise sufficient, it was necessary to show either that Brandon was, at the time, the authorized agent of the insured for the purposes of the cancellation of the policy, or that, not being authorized at the time, his acts were ratified by the insured. There is an entire lack of any evidence even tending to show that Brandon had

any authority to receive the unearned premium under the policy, or to accept a cancellation of it, on any terms, unless such agency is established by a mere showing that he was the appellant's agent in procuring the insurance. That an agent authorized to procure insurance is not thereby made the agent of the insured to cancel the policy is well settled. *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. Rep. 341; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Broadwater v. Insurance Co.*, 34 Minn. 465, 26 N. W. Rep. 455; *White v. Insurance Co.*, 120 Mass. 330; *Insurance Co. v. Hartwell*, 100 Ind. 566. This being so he was not the agent of the insured, and had no authority to bind him either by the acceptance of a strict tender of the unearned premium or the waiver of such tender, by the acceptance of an insufficient one. The tender in this case was not sufficient. There must have been an actual tender to the appellant, or his authorized agent, of the full amount of the unearned premium. *May, Ins. § 69*; *White v. Insurance Co.*, 120 Mass. 330; *Insurance Co. v. Hartwell*, 100 Ind. 566. This tender was not made. There was a tender of only a part of the premium, and another policy of insurance in another company. It only remains to inquire, therefore, whether the appellant in any way waived the repayment of the unearned premium. We are quite clear that he did not. Two things were necessary in order to effect the cancellation, viz., notice of intention to cancel, and the return of the unearned premium. The notice required was not given. Brandon, who, as we have seen, was not the agent of the appellant, simply informed the latter that his policy had been canceled, and that he had no insurance, neither of which statements were true.

It is contended by the respondent that because the appellant accepted a policy in another company he thereby waived the notice and strict tender required by the policy. But the evidence shows conclusively that he did not consent to accept the policy for \$750 tendered him, but refused to do so, although it was left with him, and insisted upon having \$1,500 insurance all in one company, and that he refused to accept the money tendered him. He did express a desire and willingness to procure and accept another policy for \$1,500, and, perhaps, if such a policy had been procured for him he would have been willing to accept it, and surrender the one sued on. But such a policy was not procured for him. He never at any time consented to accept anything else in lieu of the policy sued on, or to accept less than the full amount of the premium due him on a cancellation, or to deliver up the policy. He kept the \$750 policy on the strength of the erroneous statement of Brandon that the policy sued on had been canceled, and that he had no insurance. Counsel for respondent rely mainly on the case of *Hillock v. Insurance Co.*, 54 Mich. 531, 20 N. W. Rep. 571, to sustain the position that the appellant waived a strict compliance with the conditions necessary to effect a cancellation of the policy. But that case differs materially from this. The

conclusion reached by the court in that case was that actual tender of the unearned premium was unnecessary to the cancellation of the insurance policy, because the "minds of the parties had met on the point that the policy was to be canceled." Here the minds of the parties had not met. No assent on the part of the insured is shown. Judgment and order reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

I dissent: FOX, J.

(36 Cal. 542)

FOLTZ v. COGSWELL. (No. 12,787.)

(Supreme Court of California. Nov. 29, 1890.)

ASSUMPSIT—PLEADING—COMPENSATION OF ATTORNEY—LOBBYING.

1. The complaint alleged that defendant retained plaintiff as his attorney, and agreed to pay her fully for her professional services, "to-wit, the sum of \$5,000;" and further that she rendered specified services which "were and are reasonably worth \$5,000." Held, that the complaint as a whole showed that the action was on an implied contract, and evidence was admissible thereunder in support of a demand on a *quantum meruit*.

2. The evidence showed that a part of the services rendered by plaintiff consisted in personal solicitation of members of the legislature to act favorably on a bill she was seeking to have passed for defendant; but there was nothing to show that she used dishonest, secret, or unfair means, and there was evidence that such members knew she was acting for defendant. Held, that she was not "lobbying," within the meaning of Const. Cal. art. 4, § 35, which declares that "any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means, shall be guilty of lobbying."

3. The evidence showed that the legislation procured by plaintiff was to enable the board of regents of the University of California to reconvey to defendant land which he had donated to them; that, when the regents refused to reconvey, she prepared and submitted arguments designed to induce them to do so; and that she had prepared and was ready to bring an action to compel them to reconvey the land, when defendant discharged her. Held, that the fact that the legislation secured failed to accomplish the object of her employment—to procure a reconveyance of the land—will not bar her recovery of the reasonable value of her further services to that end.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

W. C. & Isaac Burnett and Garber, Boalt & Bishop, for appellant. J. C. Bates, for respondent.

WORKS, J. This cause was submitted in department 2, and the following opinion prepared by GIBSON, C.:

"Assumpsit to recover for services rendered as an attorney and counselor at law. Plaintiff alleges in her complaint that, between the 27th day of January, 1883, and the 9th day of March, 1883, at the special instance and request of defendant, who promised to fully pay her for her professional services, 'to-wit, the sum of \$5,000,' she devoted her



entire time and skill as a lawyer in the preparation of an act entitled 'An act authorizing and empowering the regents of the University of California to convey certain lands,' designed to enable the defendant to obtain from said regents a reconveyance of certain real property in San Francisco that he had donated to the university, and in making the legislature acquainted with her bill, and in making arguments before the various committees of that body, in order that the justice and merits of defendant's demand for the passage of the bill might be fully understood, all of which services resulted in the passage of the bill into a law, entitled as above, on the 9th day of March, 1883; that between the latter date and March 17, 1885, she counseled with and advised defendant as to various legal questions concerning the property, and prepared for and submitted to the regents of the university written arguments in relation to the same property: that on the date last mentioned defendant gave her notice that her services were no longer desired; that all of the said services rendered to defendant were and are reasonably worth \$5,000, no part of which has been paid. Defendant, in his answer, denies any agreement for any sum greater than \$200 for her professional services; and avers that on December 12, 1882, plaintiff contracted with defendant to perform all the services mentioned in the complaint, and, in addition, to conduct and prosecute a suit, then intended to be commenced against the regents of the university to recover the property referred to in the complaint, through the trial and appellate courts, for the sum of \$200; that all the services ever performed by plaintiff were pursuant to her own judgment as a lawyer, and in accordance with said agreement; and, as a further defense, that long before the present action was commenced defendant paid plaintiff in full for all services performed by her for him. The jury, upon the issues thus presented, rendered a verdict for plaintiff for \$1,450. From the judgment entered thereon, and an order refusing a new trial, defendant appeals. The appellant asserts that the claim of plaintiff is based upon an express contract for the sum demanded for her services, and that it was error to admit evidence in support of a demand upon a *quantum meruit*. The complaint, it is true, states in one place that she was to be fully paid for her services, to-wit, \$5,000, but reading the complaint as a whole, the substance of which we have set out above, we think it clearly shows that the action is upon an implied contract for the reasonable value of her services, alleged to be reasonably worth the sum demanded, and not upon an express contract for that sum. This construction was properly given to it by the trial court, and the evidence in support of it was admissible. Appellant, in his answer, does not deny that the services for which respondent seeks to recover were rendered substantially as alleged, but avers that they were rendered pursuant to an express contract, by the terms of which she was to receive, and did receive, \$200, and that all services rendered by her were fully paid for. The con-

tract referred to was in effect as above set forth in the substance of defendant's answer. But after visiting Sacramento, where the legislature was then in session, the respondent testifies that she found that she could not spend the time necessary to procure the passage of the act desired by the defendant, and upon returning to San Francisco, and informing him of that fact, he urged her to return to Sacramento and remain until the act was passed, believing that she could accomplish it, and agreed to pay her well for her services. She said they would be worth \$5,000. He did not assent to this amount, but assured her that she would be fully compensated. There is sufficient testimony in the record, aside from that of the plaintiff, strongly tending to establish this agreement, and to show that it took the place of the original written contract. It is admitted in the answer that plaintiff, between the 27th of January, 1883, and the 9th of March, 1883, 'devoted some time, and her professional skill, ability, and learning,' in acquainting the legislature and its committees with the merits of the act that defendant desired, which resulted in the passage of the act on the date last mentioned, and that since the date last referred to, at divers times and occasions, and prior to September 14, 1883, after which date defendant refused to accept any further services from her, she counseled with and advised defendant in relation to the property he was seeking to regain from the regents of the university, and prepared written arguments concerning the same property, and placed the same before the said regents, but denies that the latter were placed before said regents until April 10, 1884, about seven months after defendant had refused to accept any further professional services from her. There is testimony tending to prove that she prepared the bill, which afterwards became a law, and made arguments in support of it, and caused it to be introduced in both departments of the legislature, appeared and argued the measure before at least one committee of that body, and also before the governor when the bill reached his hands for consideration; and further, that the written arguments she sent before the regents of the university after the passage of the act were sent before she was informed by defendant that he no longer required her professional services; and according to her own testimony and that of another witness, the services she so rendered were of a greater value than the amount awarded by the jury. The only expert witness called for defendant on this point placed the value as high as \$1,000. Therefore, we do not feel justified in disturbing the verdict, unless, as claimed by defendant, the agreement relied upon by plaintiff was an agreement for compensation contingent upon success, and consequently void as against public policy. A sufficient answer to this objection is, that a careful review of the testimony fails to show, nor can it be fairly inferred therefrom, that plaintiff's compensation depended solely upon her success in obtaining the passage of the act. She, it is true,



insisted in her testimony that she was to and should receive five thousand dollars for her services; and, when the act became a law, she demanded that amount, but there is not a word indicating that, in the event of her failure to secure the passage of the act, she should receive nothing for her services; consequently we cannot say that she was to be compensated only in the event of success.

"It is further contended by defendant that a portion of her services, in connection with the passage of the act, consisted not of arguments addressed to the legislature or any committee thereof when in open session, but of personal solicitation of individual members of the legislature, which is contrary to public policy, and that such illegitimate services were so blended with what may have been legitimate as to taint the whole, and prevent a recovery. In *Miles v. Thorne*, 38 Cal. 335, an action to enforce a trust that arose upon an agreement, by which Thorne and Miles agreed that if a franchise for a toll-road could be obtained from the legislature in Thorne's name, for which Miles should draw a bill, that upon the passage thereof, each would construct one-half of the road, and be equal owners thereof, and divide the tolls between them, the court said: 'We find nothing in the contract, as alleged in the complaint, which sustains the point made by the defendant that it is against public policy, and therefore illegal and void. The point is founded upon the idea that by the agreement the plaintiff was to use his influence to obtain from the legislature a grant of the franchise in question. The complaint furnishes no ground for such a charge. The plaintiff was to draft a bill for the franchise and place it in the hands of some member of the legislature, to be introduced by him to that body; but there was no promise or undertaking on his part to labor, either secretly or openly, with the members of the legislature to secure its passage. Yet, having by virtue of the agreement an equal interest with the defendant in obtaining the franchise, he had a legal right, equally with him, to urge its passage by all honorable means, provided he did not conceal, but openly acknowledged, his interest in the measure. Even had he agreed to act as the advocate of the defendant, the agreement would not have been illegal, if it was understood that he was to act openly as such, and did so act when the time came.' Citing *Marshall v. Railroad Co.*, 16 How. 334. In the latter case, the court draws a distinction between the use of personal, or any secret or sinister, influence upon legislators by one who seeks the passage of an act which it holds to be contrary to public policy, and the open advocacy of the same before the legislature or any committee thereof in open session. Article 4, § 35, of our constitution defines 'lobbying' as follows: 'Any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or any other dishonest means, shall be guilty of lobbying, which is declared a felony.' \* \* \* Now while the evidence does show that the plaintiff endeavored

to persuade some of the members of the legislature, individually, to act favorably upon the bill she was seeking to have passed, it does not show that she used any dishonest, secret, or unfair means to accomplish her object. Besides, if she did not tell them that she was acting as an agent for pay, they must have known from the character of the bill that she was acting as the agent of Dr. Cogswell, which fact was sufficient of itself to disclose her motive. Hence, this contention cannot be sustained. It is further urged that, as plaintiff acted upon her own judgment as to what course to pursue to regain the property for defendant, and the legislation procured having turned out to be ineffectual, her services in procuring it were consequently worthless, and she cannot recover upon a *quantum meruit*. In support of this position, *Timberlake v. Crosby*, 81 Me. 249, 16 Atl. Rep. 896, and *Bridges v. Paige*, 13 Cal. 640, are cited. In the first case, which was to recover a balance due for professional services, it was held that the unnecessary services rendered by the attorney could not be recovered for, and that his failure to expend the few minutes necessary in the examination of the Revised Statutes and Digest, the former of which contained a reference to, and the latter the substance of, a case which would have shown him the futility of the additional course he pursued, amounted to negligence. This is in accordance with the rule stated in *Weeks, Attys.* § 335. In *Bridges v. Paige*, an action on a *quantum meruit* to recover for services rendered as an attorney in a suit, in which the attorney was successful, evidence offered by the defendant, which tended to show negligence and want of skill in the conduct of the case, was excluded. This was held to be erroneous, because a trial might result successfully, and yet the attorney, by his negligence or want of skill in conducting the case, might put his client to great expense to redeem his blunder, and evidence of such negligence or want of skill should be received to reduce the value of his services. Neither of those cases, it is to be noticed, goes to the extent of holding that, where services rendered are made up in part of those which were proper, and those which were negligently or unskillfully rendered, no recovery can be had for the former. In the case at bar, the evidence to the effect that the legislation procured through the assistance of plaintiff was useless must therefore have been considered by the jury in estimating the value of her services, which not only consisted, as we have seen, of the legislation she obtained, but of arguments prepared and submitted by her to the regents of the university, designed to accomplish the object the defendant desired to attain. She also had made preparations, and was ready, to commence and prosecute an action against the said regents to compel a reconveyance of the property when she was discharged by the defendant. This being so, then, in the absence of any showing that the amount awarded by the jury is excessive, the last exception must also be overruled."

Subsequently, the case was ordered into

bank, and the same has been orally argued and resubmitted. Having given the case this further consideration, we are satisfied with the opinion of the learned commissioner, and the conclusion reached therein. Judgment affirmed.

We concur: SHARPSTEIN, J.; FOX, J.; PATERSON, J.; MCFARLAND, J.

(96 Cal. 531)

GIBBS v. RANARD. (No. 12,631.)

(Supreme Court of California. Nov. 29, 1890.)

CONTRACT TO PURCHASE—BREACH—EVIDENCE—DAMAGES.

1. Plaintiff agreed to sell to defendant his newspaper business, and defendant agreed to purchase it for a named sum, on condition that he should be able to make satisfactory arrangements with certain daily newspapers. Defendant refused to close the contract on the ground that he could not make such arrangements, whereupon plaintiff, after notifying defendant of his intention, sold out to the highest bidder, and sued defendant for the difference between the amount obtained, and that specified by their contract. There was evidence that defendant, before making the contract, knew of the arrangement subsisting between plaintiff and such newspapers, and expressed himself satisfied with the same; and that the newspapers agreed to continue the arrangement with defendant. Defendant himself testified that the objections of members of his family had some weight in inducing him to repudiate the transaction. *Held*, that the evidence warranted a verdict for plaintiff.

2. Evidence of what defendant stated to plaintiff with regard to the latter's arrangement with the newspapers was competent to show that he would be satisfied with a continuance of it, and that his repudiation of the contract was not in good faith, whether he made such statement before or after the execution of the contract to purchase.

3. As the contract was only an agreement to sell, and not a sale, and as title never passed to defendant, Civil Code Cal. § 1749 et seq., relating to the measure of damages in actions to rescind a sale or to enforce liens for purchase money, do not apply to plaintiff's action for the breach, and it is not necessary to prove the value of the property, as that was fixed by the contract.

In bank. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

W. B. Haskell and E. S. Lippitt, for appellant. Rogers & Munday, for respondent.

WORKS, J. The parties to this action entered into the following contract: "This agreement, made and entered into this 28th day of June, in the year of our Lord, one thousand eight hundred and eighty-six, between J. D. Gibbs, of the city of Petaluma, county of Sonoma, and state of California, the party of the first part, and J. H. Ranard, of the same place, the party of the second part, witnesseth: That the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained agrees to sell and convey unto the said party of the second part, and said second party agrees to buy the newspaper route, business, goodwill of said business, as carried on and conducted by the party of the first part, in said city of Petaluma, state and county aforesaid, and more particularly de-

scribed as follows: The buying and selling of daily and weekly newspapers; the buying and selling of magazines; the buying and selling of other reading matter, and the delivery of the same; and the buying and selling of stationery, books, and other goods, as conducted and sold at his newspaper stand, in the Masonic block, situate on Western avenue, in said city of Petaluma, for the sum of five thousand dollars, lawful money of the United States. And the said party of the second part, in consideration of the premises, agrees to pay to the said party of the first part the sum of five thousand dollars, lawful money, as follows, to-wit: One dollar in hand paid, the receipt whereof is hereby acknowledged, and the balance, four thousand nine hundred and ninety-nine dollars, (\$4,999,) by note on demand, drawing interest from date, at the rate of ten per cent. per annum, interest payable quarterly. It is understood and agreed on the part of both parties hereto that, in the event that such arrangements as shall be satisfactory to the party of the second part cannot be made with all the San Francisco daily papers, then this agreement shall be null and void. It is also understood and agreed that, on making a bill of sale of this said business by the party of the first part, he will enter into a written agreement not to go into the same kind of business in said city of Petaluma for the period of five years from this date. It is understood that this sale shall take place on the 1st day of July, A. D. 1886, and that the note shall be dated July 1, 1886. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties. In witness whereof, the said parties to these presents have hereto set their hands and seals, the day and year first above written. J. D. GIBBS. [Seal.] J. H. RANARD. [Seal.] Signed, sealed, and delivered in the presence of H. P. BRAINERD." The complaint alleges the making of the contract; that the defendant, after the execution of said contract, made satisfactory arrangements with the proprietors and publishers of all the San Francisco papers; that he failed and refused to comply with the terms of the contract, and refused to pay the money or execute the note provided for therein. It is also further alleged: "That after the said defendant refused to perform his said contract as aforesaid, and refused to accept the said property and business as aforesaid, or to pay therefor, or to deliver his promissory note, as by him agreed, and to accept the said bill of sale as aforesaid, the plaintiff on the — day of July advertised the said property and business described in said contract by publication in the San Francisco Daily Chronicle, and offered the same for sale; and, after such publication and notice and advertisement, one J. E. Jewell offered to purchase the same, and pay therefor the sum of twenty-two hundred and fifty dollars. That, before selling the same to other parties than the defendant, the plaintiff notified the defendant of his (the plaintiff's) intention to sell the same; and, in case he could not within a reasonable time find a purchaser

ready and willing to pay as much as the defendant agreed to pay, that he (the plaintiff) would sell the same for the best price obtainable, and hold the defendant liable for all loss and damage by reason of his said refusal to take and pay for the said property and business, and for the difference between the contract price, and the amount which he (plaintiff) should and could obtain from the other purchasers; and plaintiff receiving no other or better offer than the offer of said J. E. Jewell, and the defendant still refusing to perform his contract, sold and delivered, at Petaluma, said property and business to the said J. E. Jewell for the highest market price obtainable, to-wit, the sum of twenty-two hundred and fifty dollars, (\$2,250,) to the plaintiff's damage in the sum of \$2,750, being the difference between the sum of \$2,250, the price at which J. E. Jewell purchased, and the contract price agreed to be paid by the defendant." The plaintiff recovered a verdict and judgment in the court below for \$2,749. A motion for a new trial was denied, and the defendant appeals.

The appellant contends that the evidence fails to show that he was able to make satisfactory arrangements with the San Francisco papers, and that therefore the verdict is against law. But the evidence tends to show that the appellant was buying the route for his son and one Dickenson; that, at the time the contract was being made, the terms upon which these newspaper agencies were held by the respondent were stated by him; that such terms were satisfactory to the defendant, if the same rights could be transferred to him, or his son and Dickenson, for whom he was buying; that it was understood that the appellant's son was to go to San Francisco with the respondent, and see if such arrangements could be made; that they did visit the different newspaper offices, and found that the arrangements could be made; that the arrangements were then and there made by the son, and each and all of the papers instructed to change the agency, and forward the papers thereafter to the address of the appellant, which was done. The respondent also testified that when the appellant refused to carry out the contract he simply said he was not going to have anything more to do with it, and assigned no reason therefor; and, although the appellant denies this, he testifies himself that some of his family were objecting to his going into the transaction, and that these objections had some effect in inducing him to repudiate the purchase. Taking all of the evidence, it is quite clear to our minds that the defendant did not refuse to comply with his contract for the reason that satisfactory arrangements could not be made with the newspapers. The contract cannot be construed as giving him the right to say, arbitrarily, that the terms to be procured from the papers were not satisfactory, if they were reasonable and just, as appears to have been the case. It is true counsel for the appellant contend that this testimony was incompetent, for the reason that it tended to show that what was said was a part of the negotia-

tions, and was merged in the contract when executed. The evidence is somewhat conflicting as to whether this conversation occurred before or after the contract was executed; but we think it makes no difference. It was competent for the purpose of showing that the defendant knew what the present arrangement with the papers was; that he would be satisfied with a renewal of the same arrangement; and that his refusal to consummate the agreement was not in good faith, and for the reason now assigned therefor.

It is further contended by the appellant that the respondent did not take the proper steps to fix the amount of damages he was entitled to recover from the appellant under section 1749 of the Civil Code and other sections relating to the enforcement of liens in such cases. But here there was no sale of the property, and therefore the sections of the Code relied upon have no application. The contract, a breach of which is alleged, was not one of sale, but an agreement to sell upon certain terms. This contract was never consummated by the execution of the bill of sale provided for, or the payment of the purchase money, or any part of it, or the execution of the note provided for therein. This action is not to rescind a contract of sale, or to enforce a lien, but to recover damages for the failure to execute a contract of sale as provided in the contract sued upon. The property not having been sold, the title thereto remained in the respondent, and he could not enforce a lien against his own property, or sell it as the property of appellant as provided in the Code. The evidence shows that the appellant, having refused to consummate the purchase, was notified by the respondent that he would sell the property to some one else for what he could get for it, and hold him responsible for the difference; that he advertised the route for sale in a newspaper, and finally sold it for \$2,250; and that that was the greatest sum he could procure for it. We think this evidence was competent as tending to show the amount of damage resulting from the breach of the contract, and that the jury were justified, from the evidence, in finding for the respondent in the amount of the verdict. It was not necessary for the appellant to prove the value of the property. That was fixed as between these parties by the contract. For these reasons the court did not err in overruling the motion for a nonsuit, and the verdict of the jury was not against law, and was sustained by the evidence. Judgment and order appealed from affirmed.

We concur: SHARPSTEIN, J.; FOX, J.; PATERSON, J.; MCFARLAND, J.

(86 Cal. 500)

WATSON v. SUTRO. (No. 12,596.)

(Supreme Court of California. Nov. 29, 1890.)

VENDOR AND VENDEE—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE—TRUSTS—ESTOPPEL—LIMITATIONS.

1. Tenants in common of land conveyed it to a trustee by a deed absolute on its face, which was duly recorded; the trustee executing a dec-

laration of trust, which was not recorded, reciting that the deed to him by the parties, naming them, had been made to facilitate the perfecting of title. Subsequently one of the tenants in common was substituted as trustee, and he also executed a declaration of trust to the same effect as the first, but omitting the name of one of the tenants in common, owning an undivided five acres, and crediting his share to one of his co-tenants. *Held*, that a purchase of this five acres by the substituted trustee from the co-tenant did not constitute him an innocent purchaser, as it was his duty, when he accepted the position of trustee, to know for whom he was acting.

2. In an action by the owner of the undivided five acres to charge the substituted trustee as a purchaser with notice, it appeared that the co-tenant who sold them had acted as administrator of the estate of plaintiff's father-in-law, and had acquired 15 acres, as tenant in common, during such administration. Long before the conveyance in trust, he had conveyed the five acres now in dispute to plaintiff, whose deed was duly recorded. After the conveyance in trust, plaintiff with his wife and other heirs, in settlement of the administration, executed to the co-tenant a written instrument reciting that the latter, during the course of his administration, had acquired land, "the legal and equitable title to which is now in him," and empowering him to sell such land. *Held*, that this instrument conferred no authority on the co-tenant to sell the five acres previously conveyed to plaintiff, as the co-tenant had neither the legal nor the equitable title thereto; the legal title being in the trustee, and the equitable title in plaintiff.

3. The distinct statement in the power of sale that it embraced only such lands, "the legal and equitable title to which is now" in the co-tenant, will limit a subsequent general description of such land as "15 acres or thereabout," and these general words will not enlarge the power of sale previously conferred.

4. Where the attorneys for a purchaser from the substituted trustee have examined all the various conveyances under which he claims the five acres now in dispute, their knowledge is the purchaser's knowledge, and he is chargeable with constructive notice of all that appears on the face of the instrument; and the fact that the attorneys made a mistake of law in interpreting the power of sale, and advised the purchaser that it embraced the five acres now in dispute, does not constitute him an innocent purchaser thereof.

5. As plaintiff deceived neither the substituted trustee, nor the purchaser from him, the power of sale, which was accessible to both, and which was actually examined by the attorneys for the latter, does not estop plaintiff from asserting his title to the land.

6. Code Civil Proc. Cal. § 752, which permits an action of partition to be brought by a tenant in common having an estate of inheritance, does not confine the right of action to the holder of the legal title, but a tenant in common having an equitable estate of inheritance may establish his right to the land, and have a partition thereof, in one and the same action.

7. As plaintiff was ignorant of the omission of his name from the second declaration of trust, and of the conveyance by his co-tenant to the substituted trustee, the possession of the substituted trustee, who was also plaintiff's co-tenant, must be deemed to have been for his benefit; and hence Code Civil Proc. Cal. § 319, which provides that plaintiff in an action affecting the title to land must have been in possession thereof within five years of bringing the action, and section 322, which provides that the possession of land by one entering under a written instrument purporting to convey it shall be deemed to be adverse, have no application to the case.

BEATTY, C. J., and Fox and McFARLAND, JJ., dissenting.

*Lloyd & Wood*, for appellant. *Stanley, Stoney & Hayes*, for respondent.

PER CURIAM. We have heard this case the second time, and upon a further examination of the record, and the briefs of counsel, we feel constrained to adhere to the reasoning of the former opinion, and the conclusion therein reached. The order appealed from is therefore affirmed.

We dissent: MCFARLAND, J.; FOX, J.

BEATTY, C. J. I dissent. The deed executed in quadruplicate in April, 1870, by Watson, Sullivan, and the Davis heirs contains a distinct declaration—a solemn admission—by Watson that Sullivan was at that time the owner of the equitable interest here in controversy. The conduct of Watson, and of all parties to these transactions, was for many years consistent with that declaration, and inconsistent with any serious claim of ownership on the part of Watson. The holder of the legal title with knowledge of that admission, bought in the equity, and transferred both to Sutro. I do not think that Watson should now be heard to deny the truth of a solemn admission upon which others have acted.

(86 Cal. 497)

WILLIAMSON *et al.* v. TOBEY. (No. 12, 885.)

(*Supreme Court of California*. Nov. 29, 1890.)

NUISANCE—INSTRUCTIONS—EVIDENCE—NEW TRIAL.

1. In a suit to restrain defendant from operating his foundry in such manner as to constitute a nuisance to plaintiff's dwelling, plaintiff alleged that he was the owner of the dwelling which he had occupied ever since it was built, 30 years before, and that its foundations had never been changed. The only evidence in rebuttal was that of defendant that the house was nine inches over on his land. *Held*, that it was proper to refuse an instruction that if the house was nine inches over on defendant's land, and that if the shaking complained of was due to this, and would not occur if the house was wholly on plaintiff's land, then plaintiff cannot recover damages.

2. Where this proposition was included in a single request with others that may have been proper, it was not incumbent on the court to separate the proper from the improper parts; and hence it was not error to refuse the whole request.

3. The error, if any there be, in allowing a witness to refresh his memory from a memorandum of the action of a committee of the board of supervisors which once investigated the alleged nuisance is immaterial where other witnesses testified as to the action of such committee, and defendant himself testified to substantially the same facts as did the witness who used the memorandum.

4. Affidavits of persons who did not testify on the trial that the acts complained of did not constitute a nuisance are merely cumulative evidence, and are no ground for a new trial.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*Joseph Hutchinson, Frank Otis, and Hutchinson & Campbell*, for appellants. *T. J. Crowley*, for respondent.

On rehearing. For former report, see 24 Pac. Rep. 172.

v.25P.no.2—5

HAYNE, C. The complaint in this action was for an injunction to restrain the defendant from operating his foundry in such a manner as to constitute a nuisance to the adjoining dwelling, and for damages. The case was submitted to a jury, and a general verdict in favor of plaintiffs for \$500 was rendered. The judgment did not award any injunction, but was for the damages only. The appeal is by the defendant.

1. It is contended that the court erred in refusing to instruct the jury as requested by the defendant. As we construe the transcript, the defendant requested one instruction involving several distinct propositions. The transcript is not substantially clear upon this point. But it is incumbent upon the appellant to show error; and we do not think that upon this record the court would be justified in saying that each proposition in the paragraph referred to was requested as a separate instruction. This being the case, if any one of the propositions contained in the request ought not to have been given, the court was justified in refusing the whole instruction. *Smith v. Richmond*, 19 Cal. 485; *Preston v. Keys*, 23 Cal. 194. And we think that at least one of such propositions was in this category. The plaintiffs alleged that they were at all times the owners of the premises described in the complaint, and the evidence was that they had been in possession for about 30 years. The house in which they lived was of that age, and its foundations had not been changed since it was built. From this the presumption certainly arose that the plaintiffs were the owners of the said premises. This presumption was not rebutted by the general statement of the defendant that the "house described in the complaint is nine inches over on my own property," and there is no other evidence on the subject. In this condition of the evidence it certainly would have been improper for the court to have instructed the jury that "if the plaintiffs' building stands nine inches or any other distance over upon the property leased by Mr. Tobey, and if the shaking of the house, claimed by the plaintiff to exist, is produced because of the fact that the plaintiff's house stands upon Mr. Tobey's ground, and if the Williamsons' house was upon their own ground, said shaking would not occur, then the plaintiffs cannot recover damages caused by the said shaking;" and, as above stated, it was not incumbent upon the court to separate the improper part of the instruction from the remainder, even if it be assumed that the remaining propositions were correct and applicable.

2. It is argued that it was error to allow the witness Farnsworth to refresh his memory from a memorandum as to the action of a committee of the board of supervisors who once looked into the question of the alleged nuisance. The objection shown by the record seems to go more to the admissibility of the memorandum than to the propriety of the evidence of the witness. Evidence as to what the action of the committee actually was, was given by several other witnesses

without objection; and the defendant himself, when called to the stand, testified to substantially the same facts testified to by the witness Farnsworth from his memorandum. Under these circumstances, if there was any error in allowing the witness to look at the memorandum, it was immaterial. Similar observations apply to the reading of the memorandum by counsel in his argument to the jury.

3. Assuming, as must be done at this stage of the case, that the plaintiffs' evidence was true, we have no doubt that the defendant's foundry was a nuisance; and under the circumstances we cannot say that the damages were excessive.

4. The court did not err in refusing a new trial on the ground of newly-discovered evidence. The affidavit of Gates was in relation to the action of the committee of the board of supervisors above mentioned. If this was relevant at all, it was thoroughly gone over at the trial, as is above stated. The affidavit of the attorney relates to the same subject, and to the question of diligence. The affidavit signed by 10 other persons was merely to the general effect that the acts complained of did not constitute a nuisance. It is too clear for discussion that all this was merely cumulative, and not such as to render a different result probable, if a retrial should be had. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(86 Cal. 554)

CREW V. DILLER *et al.* (No. 13,572.)

(*Supreme Court of California*. Dec. 1, 1890.)

APPEAL—TIME OF TAKING.

A judgment was rendered in December, 1887, and an order denying a new trial filed September, 1889. A notice of appeal was filed October 25, 1889. The undertaking recited the appeal from the judgment, but made no mention of the appeal from the order. *Held*, that the appeal from the judgment was too late, under the laws of California, and the appeal from the order was not perfected.

Commissioners' decision. In bank. Appeal from superior court, Butte county; JOHN GALE, Judge.

*John Gale*, (A. P. Catlin and W. C. Betcher, of counsel,) for appellant. *Park Henshaw*, for respondents.

HAYNE, C. This is a motion to dismiss an appeal from a judgment, and an appeal from an order denying a new trial. The judgment was entered in December, 1887. The order was made in September, 1889. The notice of appeal was filed on October 25, 1889, and was served the next day. The undertaking recited the appeal from the judgment, and was conditioned to pay the damages on "the appeal," but made no mention of the appeal from the order. In May, 1890, the plaintiff presented a new undertaking, sufficient in form, to one of the justices of the supreme court, and it

was approved by him, and filed. The appeal from the judgment was too late. The appeal from the order was not perfected. In this regard, the case is precisely like *Schurtz v. Romer*, 81 Cal. 245, 22 Pac. Rep. 657. The counsel for the plaintiff say that this case should be overruled; but we think that it is in accord with the statute, and in the line of previous decisions. We therefore advise that the attempted appeals be dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the attempted appeals are dismissed.

(86 Cal. 552)

DALY *et al.* v. PENNIE *et al.* (No. 13,805.)  
(Supreme Court of California. Dec. 1, 1890.)

JUDGMENTS—EQUITABLE RELIEF.

1. Mere error, either as to the law or the facts, in the decree of a probate court distributing an estate, is no ground for relief in equity; the remedy being by appeal, as provided by Code Civil Proc. Cal. § 963.

2. The dismissal of an appeal from the decree because of the inadvertent omission of the appellant's attorneys to file an undertaking on appeal within the time required by law is not a ground for equitable relief.

3. The fact that some of the heirs were not personally notified of the proceedings in the probate court, and that they failed to appear therein, does not authorize a court of equity to set aside the decree of distribution, as Code Civil Proc. Cal. §§ 1633, 1634, do not require personal notice of the final settlement and distribution of a decedent's estate, but only the posting of notices in three public places in the county.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*John F. Burris*, (Henry E. Wills, of counsel,) for appellants. *A. H. Loughborough*, for respondents.

HAYNE, C. The defendants had final judgment upon demurrer to the second amended complaint, and the plaintiffs appeal. The material facts shown by the pleading are as follows: Anna J. Skerrett died in London, England, being a resident of said place at the time of her death, and leaving a will. This will was proved in an English court, and an administrator with the will annexed appointed there. A duly-authenticated copy was filed in the probate court of San Francisco, and the defendant Pennie was appointed administrator with the will annexed here. In due course, the San Francisco court made a decree of settlement of the final account of the administrator, and of final distribution of the property remaining in his hands. This decree recited, among other things, that there were unpaid creditors in England whose claims had not been presented here, that the estate in England was not sufficient to pay such claims, and that all the legatees and devisees resided in England, except one whose legacy had lapsed, and another who had received his share, and contained a provision that the sum remaining in the hands of the administrator here should be delivered to the admin-

istrator in England. See Code Civil Proc. § 1667. The plaintiffs are the successors in interest of certain heirs at law, and the suit is for the review of the decree of distribution, and for a decree of distribution in accordance with the plaintiffs' views of what is proper under the circumstances, and for an injunction to restrain the defendants from obeying the decree of the probate court. The main ground upon which relief is sought is that the decree of distribution is erroneous both as to the law and as to the facts; that the bequests were void under the law of this state and of England; and that upon a proper construction of the will the persons to whose interests the plaintiffs succeeded would be entitled to portions of the estate. But an appeal from the decree is provided by the statute, (Code Civil Proc. § 963,) and on such appeal the whole decree can be reviewed. If it be erroneous either as to the law or the facts, the remedy is by appeal. Mere error is not a ground for relief in equity.

It is alleged, however, that an appeal was taken, but that "the clerk having charge of such matters in the office of the plaintiffs' attorneys inadvertently omitted to file an undertaking on appeal within the time required by law, and said appeal was for that reason dismissed by the supreme court without hearing the merits thereof." This is not a ground for relief in equity. *Barnett v. Kilbourne*, 3 Cal. 327.

It is further alleged that the plaintiffs' assignors "received no notice of said proceeding, and did not appear therein." But the statute does not require that personal notice should be given. Code Civil Proc. §§ 1633, 1634.<sup>1</sup> And it is not alleged that the notice which is required was not given. In *re Griffith*, 84 Cal. 109, 23 Pac. Rep. 528, 24 Pac. Rep. 381.

The other matters do not require special notice. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(86 Cal. 538)

REYNOLDS v. BOREL. (No. 12,616.)

(Supreme Court of California. Nov. 29, 1890.)

VENDOR AND VENDEE—PERFECT TITLE—RECOVERY OF EARNEST MONEY.

Where a vendee makes a deposit to bind his purchase, upon an agreement that it shall be returned if the title is found to be "imperfect, and cannot be made good," he is entitled to recover the deposit when it is shown that one claiming an interest in the land adverse to the vendor's has conveyed that interest to a third person, who still holds it, and also that the land was conveyed to the vendor's grantor by her husband when he was heavily indebted, and while suits were pending to enforce his indebtedness.

<sup>1</sup> Code Civil Proc. Cal. §§ 1633, 1634, require the clerk of the court to cause notice of the final settlement and distribution of an estate to be given either by posting copies of the same in at least three public places in the county, or by publication, as the court may direct.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*Sidney V. Smith*, for appellant. *George D. Shadburne*, for respondent.

PER CURIAM. This action was brought to recover a deposit of money made by the plaintiff, Reynolds, to bind his purchase of land from the defendant, Borel. A part of the contract was that the plaintiff, the purchaser, should be allowed 20 days from the date of the contract, within which to search the title to the property, and if the title was found to be "imperfect, and cannot be made good, said deposit will be returned." The plaintiff submitted a proper abstract of title to the land to his attorney, who, within the specified time, pronounced the title imperfect, and objected to it on these grounds: "On the 4th day of June, 1880, Eugene Casserly, was the owner of the block of land including said land, and on said day conveyed the same to one R. Emmett Doyle in trust for the separate use and benefit of his wife, Theresa Casserly, in consideration of the love and affection he, Casserly, bore to his said wife, and to be conveyed to her in fee-simple as her separate property by said trustee whenever thereunto requested by her; and on the 5th day of June, 1880, the said R. Emmett Doyle did convey said block of real property to the said Theresa Casserly by grant, bargain, and sale deed,—consideration one dollar; and the title thus conveyed remained in said Theresa Casserly from thence until the 21st day of November, 1884, when she conveyed the same to Antoine Borel, but the deeds to Doyle, and from Doyle to Theresa Casserly, aforesaid, were not recorded until January 13, 1884. That on the 6th day of February, 1886, John Treat, who claimed to have some interest in said real property, conveyed the same to John Center, who still holds the interest thus conveyed to him. That at the time of the conveyances to Doyle and Casserly, aforesaid, to-wit, on the 4th and 5th days of June, 1880, said Eugene Casserly was subject to the following debts, claims, judgments, and liabilities: The claim and demand of J. F. Eagan for \$15,225, and the claim and demand of Charles Mayne for \$1,713.85. And upon these claims and demands actions were brought, judgments obtained, and appeals therefrom taken, without stay-bonds, or stay of proceedings affected, as follows, viz: 'In the fifteenth district court, San Francisco. Eugene Casserly, Plaintiff, vs. McNevin, et als., Defendants. (No. 10,227.) Action commenced September 28, 1877. Judgment entered therein against said Eugene Casserly on May 29, 1883, for the sum of \$15,225, and costs, in favor of J. F. Eagan, as intervenor in said action; which judgment was appealed from to the supreme court of California, on the 7th day of February, 1884, and was not decided at the commencement of this action. An action in the nineteenth district court of San Francisco entitled "Charles Mayne, Plaintiff, vs. Eugene Casserly, Defendant. (No. 6,891.)" Commenced May 31, 1879, and judgment therein entered on the 13th day of February, 1882,

against said Eugene Casserly, for \$1,713.85, and costs; which judgment was appealed from to the supreme court of the state of California on the 21st day of February, 1882, and was not decided at the time of the commencement of this action.' And said claims, demands, judgments, and liabilities have in no wise been satisfied, vacated, or set aside, and are still in full force and effect against the property and estate of said Eugene Casserly, who died on the 14th day of June, 1883. But said defendant, Antoine Borel, purchased said block of land, inclusive of said real property described in plaintiff's complaint, without knowledge of any intent on the part of said Eugene Casserly to defraud his said creditors by the conveyances to said Doyle, and from him to said Theresa Casserly, other than from the record thereof, and of the actions aforesaid, and purchased the same for a valuable consideration. That at the time of the conveyances from Casserly to Doyle and from Doyle to Casserly, aforesaid, and by such conveyances, the block of land aforesaid, bounded by Twenty-Fifth street, Folsom street, Treat avenue, and Twenty-Sixth street, including the property in question, was transferred to said Theresa Casserly. That, upon the demise of said Eugene Casserly, his estate was appraised by the appraisers thereof at the sum of \$12,091.46." These imperfections were duly reported to the defendant, and a demand made that they be removed and the title made good, or that the defendant warrant the same against all demands, which, being refused by the defendant, the plaintiff demanded the return of his deposit of \$360, with which the defendant refused and still refuses to comply. The court below gave judgment for the plaintiff, from which, and an order denying a new trial, the defendant appeals.

There is nothing in the record to explain a claim of John Center to an interest in the land beyond the allegations of the complaint, and the finding of the court that at the time Eugene Casserly conveyed this property to R. Emmett Doyle, and Doyle to Mrs. Casserly, "one John Treat, who claimed to have some interest in said real property, conveyed the same to John Center, who still holds the interest thus conveyed to him." As it seems to us, this fact, existing with reference to a title, would not constitute it free from reasonable doubt, or make it improbable that litigation might grow out of it. Again, there is a state of facts presented from which a prudent man might infer that, at the time Eugene Casserly made this conveyance to Doyle, he was not able to pay his debts; for a conveyance is made in trust to Doyle, who carries out the trust the next day by making a deed to Mrs. Casserly. These deeds were delayed to be recorded for several years,—until after Eugene Casserly's death. Meanwhile, certain large judgments, which were rendered in suits brought before his death, are in existence, unstayed, but on appeal, and unpaid, which amount to more than the value of Casserly's whole estate at his death. Can it be said that, under this condition of things, (even ad-



mitting that the defendant here knew nothing but the fact that these judgments were existing and unsatisfied at the date of his purchase, and the delay of recording the deeds from Casserly to Doyle and Doyle to Mrs. Casserly,) these judgment creditors will not hereafter probably commence litigation with Borel as to his title to the premises, if they have not already done so? We think not. As it seems to us, it is very doubtful but what they may litigate. Is, then, the plaintiff here to be required to take the title of Borel as a perfect one, when this sort of reasonable doubt exists? "A perfect title must be one that is good and valid beyond all reasonable doubt. Whether the particular title is good or not is a question which it is often difficult to determine, and one upon which the lawyers and judges sometimes disagree." *Turner v. McDonald*, 76 Cal. 179, 18 Pac. Rep. 262. "A title to be good 'should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record.'" *Id.* 76 Cal. 180, 18 Pac. Rep. 264. It seems to us, under the facts of this case and the refusal of the defendant to warrant the title, the plaintiff here was warranted in considering the title imperfect, and subject to grave doubts. For the foregoing reasons, the judgment and order are affirmed

(20 Or. 70)

## STEEL V. HOLLADAY.

(Supreme Court of Oregon. Nov. 17, 1890.)

## PLEADING—COMPLAINT—JURISDICTION OF COUNTY COURT—DEVASTAVIT AGAINST EXECUTOR.

1. In an action by an administrator with the will annexed against his predecessor in the trust for a *devastavit*, in failing to redeem certain stock in a private corporation belonging to said estate, and which had been sold under a decree of the United States circuit court, and by the terms of sale subject to redemption within six months, the complaint must allege that there were assets in the executor's hands available and applicable to the purpose of redemption, and that the proper county court ordered the redemption to be made.

2. Section 895, Hill's Code, confers upon the county court exclusive jurisdiction, in the first instance to direct and control the conduct and to settle accounts of executors, administrators, and guardians, and this includes the power to inquire into a case of *devastavit*, and to charge the delinquent with the amount thereof.

3. *Devastavit* is a violation of duty by the executor or administrator such as renders him personally responsible for mischievous consequences; a wasting of the assets; a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets, contrary to the duty imposed on the executor or administrator.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The defendant demurred to plaintiff's amended complaint, which being sustained a final judgment was entered in favor of the defendant, from which this appeal is taken. The plaintiff sues as administrator with the will annexed of Ben Holladay, deceased. The amended complaint, after setting forth at length the plaintiff's appointment and qualification, the previous appointment of Joseph Holladay as executor, the provisions of the will, and the

condition of said 10,000 shares of the capital stock of the Oregon Real Estate Company, that they had been sold under the decree of the circuit court of the United States for the district of Oregon for \$334,000, and that the executor had been given by said court the right to redeem said stock within six months from the date of the decree, to-wit, July 30, 1888, by paying the said amount for which the stock had been sold, and that there were no other liens or incumbrances thereon, and that the same were owned by said Ben Holladay, deceased,—alleges as follows. "That the said real estate so standing in the name of said Oregon Real Estate Company was, at the date of said sale, and during the time said right of redemption existed, and is now, of the value of not less than \$1,200,000, and that said shares of stock were, during all of said time, of the value of not less than \$1,000,000, and that the redemption of said stock would have been vastly to the interest of said estate of Ben Holladay, deceased, and not in any way prejudicial to any of the creditors of said deceased, or other persons interested in said estate. That it became and was the duty of said Joseph Holladay, as executor of the will of said Ben Holladay, deceased, by virtue of his trust to pay off the amount of said claims against said deceased, for which said stock had been sold, as aforesaid, and redeem the same for the benefit of said estate, and to prevent said property, worth over \$1,000,000, from being sold and taken away from said estate for said sum of \$335,000, all of which, with due and reasonable diligence on his part, he could have done. That during the period allowed for such redemption, as aforesaid, there was real estate belonging to said estate of Ben Holladay, deceased, of the probable value of \$200,000, which, under the provisions of said will, he had as such executor the power to sell and convert into cash, and that, in addition thereto, he had under his control as such executor personal property belonging to said deceased to the amount and value of over \$500,000, out of the proceeds of which he could have easily procured funds sufficient to make such redemption of said stock, or that he could have pledged the same as security for the money with which to have made such redemption, without in any way impairing or affecting the claims or interest of any person in or against said estate, and thereby secured possession of said stock for the purposes of administration, all of which he failed, neglected, and refused to do. That it became and was the duty of said Joseph Holladay, as executor of the will of said Ben Holladay, deceased, within one month from the date of his appointment, or such further time as the court or the judge of the county court of Multnomah county, state of Oregon, might allow, to make an inventory, verified by his own oath, of all the real and personal property of the deceased which should come to his possession or knowledge, and, before filing the same with the clerk of said county court, cause the property therein specified to be appraised at its true cash value by three disinterested and competent persons ap-



pointed by said court or judge, and that said county court did appoint three competent and disinterested persons appraisers of said property. That it would have then been the duty of said Joseph Holladay, as such executor, upon the filing of said inventory, or at the next term of the court, to-wit, the first Monday in November, 1888, to have made an application to sell the said personal property of the estate, or so much thereof as was necessary, to pay the funeral charges, expenses of administration, and the claims against said estate, including said claims mentioned in said decree, and it would then have been the duty of the county court to have ordered such sale, and of the said Joseph Holladay, as such executor, to have sold the same and applied the proceeds thereof, or so much thereof as was necessary, to the payment of said claims for which said stock was sold, as aforesaid, and redeem the same as provided in said decree of confirmation. That it became and was the duty of said Joseph Holladay, as such executor, by virtue of the statute in such case made and provided, to apply to the county court of Multnomah county, state of Oregon, for an order directing him, as such executor, to redeem said stock out of the proceeds of the other personal property belonging to said estate; and if, upon such application to the county court, such redemption had been deemed not proper or expedient, said county court would have been bound to have ordered said property sold in the manner provided by law, subject to the lien of said decree, and that he was offered and could have sold said stock during the said period allowed for redemption thereof for the sum of \$500,000 or \$165,000 subject to the lien of said decree and for an amount largely in excess of said \$335,000. But said Joseph Holladay, in violation of his duty under the law as such executor, willfully, purposely, and maliciously failed, neglected, and refused to make and file an inventory and appraisal of the property belonging to said estate, or any part thereof, or of said shares of stock; purposely, willfully and maliciously failed, neglected, and refused to apply for an order of sale of said property, or any part thereof, or to sell the same, or any part thereof, or to apply for an order to redeem said shares of stock out of the other personal property of said estate, or for an order to sell said stock subject to the lien of said decree; purposefully, willfully, and maliciously failed, neglected, and refused to redeem said stock, or to borrow the money with which to redeem the same, when offered to him at reasonable figures, or to sell or pledge or mortgage the property of said estate to raise the money with which to pay said indebtedness for which said shares of stock had been sold, and redeem the same, or otherwise to comply with his duty as such executor in the premises; but wrongfully, maliciously, purposely, and through his gross negligence and carelessness, suffered and allowed the time given for making such redemption of said stock to expire without redeeming the same or selling the same as aforesaid, whereby the same was wholly lost to said estate. That by rea-

son of the premises said estate suffered loss and injury, and has been damaged in the sum of \$500,000. That, upon petition of said Esther Holladay and said Linda and Ben Campbell Holladay, the county court of Multnomah county, state of Oregon, in the Matter of the Estate of said Ben Holladay, Deceased, on the 31st day of May, 1889, duly made and entered an order and decree in said matter finding and adjudging that said Joseph Holladay had been unfaithful to, and neglected his trust to the probable loss of, the petitioners therein, as alleged and set forth in said petition, and removing him from said office of executor, and revoking his letters as such executor, and that this plaintiff is his successor in office. And that it is necessary for the complete administration of said estate, and to enable the plaintiff to secure funds with which to pay the claims, debts, and charges against said estate, that said defendant should make good to this plaintiff the said loss, and that, unless he does so, plaintiff will be unable out of the remaining assets to pay the debts, claims, and charges against said estate in full, or to pay the legacy provided for in said will. Wherefore plaintiff, as administrator with the will annexed of the estate of Ben Holladay, deceased, prays judgment against said defendant in the sum of \$500,000, and for costs and disbursements of this action." Defendant demurred to the amended complaint upon the grounds (1) that the said amended complaint did not state facts sufficient to constitute a cause of action; and (2) that the court had no jurisdiction of the subject-matter of the suit alleged in said complaint.

A. H. Tanner, for appellant. C. H. Carey, for respondent.

STRAHAN, C. J., (*after stating the facts as above.*) The only question presented on this appeal is the sufficiency of the complaint. It appears that Joseph Holladay had been the executor of Ben Holladay's will, and for cause was removed from his trust. While he was acting as such executor, the property described in the complaint was sold under a decree of the circuit court of the United States for the district of Oregon, and a time specified in the decree of the federal court within which a redemption might be had. The amount for which the property sold was more than \$330,000. Independently of the provision of the Code conferring exclusive jurisdiction on the county courts to settle the accounts of executors and administrators, presently to be noticed, does the complaint state a cause of action? We do not think it does, for two reasons: *First.* It is not alleged in the complaint that the county court of Multnomah county made any order authorizing or directing the defendant to make such redemption. Manifestly, the executor had no power or authority without the direction of the county court, or at least he was under no legal duty to act and apply so large an amount of the estate under his control, to the redemption of the stock in question. The value of such stock fluctuates, and at boom prices it might appear to be worth a very

large sum, and yet, if subjected to the true test of its actual market value in cash, it might not appear to be so desirable as an investment. At least there is room for differences of opinion, and, in the absence of a positive direction by the county court on the subject, the executor might lawfully forbear making the redemption without subjecting himself to the charge of the *devastavit*. *Second*. It does not appear from this complaint that there were any assets in the hands of the executor available and applicable to the purposes of such redemption. The fact that he had property is not enough. Whether the county court would have ordered it converted into money, and applied to the exclusive purpose of this redemption, without regard to all other claimants, cannot be known; and to assume that it would have been so ordered, and that the money necessary could have been realized by a sale of the property in time to have made the redemption, would be going further to sustain this action than the facts would justify.

But there is another objection equally fatal to this complaint. The constitution, § 12, art. 7, provides: "The county court shall have the jurisdiction pertaining to probate courts \* \* \* as may be prescribed by law." And Hill's Code, § 895, provides: "The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, \* \* \* (3) to direct and control the conduct and settle the account of executors, administrators, and guardians."

The complaint attempts to charge the defendant with what would have constituted *devastavit* at common law. It is defined to be a violation of duty by the executor or administrator such as renders him personally responsible for mischievous consequences, and which the law styles a *devastavit*,—that is, a wasting of the assets; or, to take the definition of the courts, a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets contrary to the duty imposed on him. For a *devastavit* the executor or administrator, it is said, must answer out of his own means, so far as he had, or might have had, assets of the deceased. Schouler, Ex'rs, § 383. To the same effect is 7 Amer. & Eng. Enc. Law, 346, where the authorities are very fully collated. For a *devastavit* an executor or administrator is liable to be called to an account in the county court. 2 Woerner, Admin', § 534; Schouler, Ex'rs, § 383; In re McEvoy's Estate, 3 N. Y. Supp. 207; Stiles v. Burch, 5 Paige, 132; Brown v. Brown, 53 Barb. 217; Irwin v. Backus, 25 Cal. 214. And the decision of this court in Adams v. Petrain, 11 Or. 304, 3 Pac. Rep. 163, very fully sustains the exclusive jurisdiction of the county courts in such matters, to the authority of which we fully accede. Counsel for appellant argued that it was the defendant's duty to have gone into the county court and endeavored to obtain an order for the redemption of this stock, and that his failure to do so constituted a *devastavit*. But the defendant may have honestly believed that method of procedure to have been impracticable, or that the

money could not have been thus raised, or even that the interest of the estate would not have been promoted by the redemption; in either of which cases, if he honestly exercised his best judgment, he would not be personally responsible for a mistake. Besides this, if other persons interested in the estate differed with him on this subject, it was their right to apply to the county court and obtain its direction in relation to the redemption which, when given, the defendant would have been bound to obey. It follows that the judgment appealed from must be affirmed.

(19 Or. 523)

STATE v. TAMLER *et al.*

(Supreme Court of Oregon. Nov. 10, 1890.)

INTOXICATING LIQUORS—ILLEGAL SALE—INDICTMENT.

1. In an indictment for selling spirituous liquor without a license, under the act of 1889, it is not necessary to allege in the indictment that such sale did not take place within an incorporated town or city.

2. A motion asking the court to direct an acquittal in a criminal case on account of the failure of proof on the part of the state unless such failure is a total one, must specify wherein it is claimed such proof fails.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The defendants were jointly indicted, tried, and convicted of the crime of selling spirituous liquors without first having obtained a license therefor, as provided in the act of 1889. The charging part of the indictment is as follows: "M. Tamler and Joseph Petty are accused by the grand jury of the county of Multnomah, state of Oregon, by this indictment of the crime of selling spirituous liquors in this state in less quantities than one gallon, without having first obtained a license from the county court of the county of Multnomah for that purpose, committed as follows: That said M. Tamler and Joseph Petty on the 5th day of July, A. D. 1889, in the county of Multnomah, and state of Oregon, did unlawfully and willfully sell spirituous liquors in this state, namely, whisky, in less quantities than one gallon, to-wit, about one gill of whisky, to one Timothy Maloy for ten cents, the said M. Tamler and Joseph Petty not having first then and there obtained a license from the county court of Multnomah county for that purpose, namely, for the purpose of selling that quantity of liquor, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon. Dated at Portland, in the county aforesaid, this 15th day of July, 1889."

*Sears & Beach* and *Ed. Mendenhall*, for appellants. *T. A. Stevens*, Dist. Atty., for the State.

BEAN, J., (after stating the facts as above.) The bill of exceptions in this case contains several assignments of error, but, upon the argument, they were all abandoned by counsel except that the indictment does not state facts sufficient to constitute a crime, and the refusal of the

court to sustain defendants' motion for a judgment in favor of the defendants on the ground of the insufficiency of the evidence to justify a verdict made at the close of the testimony of the state. The appellants contend that the indictment is insufficient, in that it does not allege that the sale therein charged was not made within an incorporated town or city. The contention is that, as section 11 of the act of 1889 provides that "nothing in this act shall be so construed as to apply in any manner to incorporated towns and cities of this state," it is necessary that the indictment should negative this section. The general rule on this subject is that where the exception or proviso is stated in the enacting clause it is necessary to negative them in order that the description of the offense may in all respects correspond with the statute, but where such exception or proviso is contained in another or subsequent section of the statute it is a matter of defense; and need not be negated in the indictment. 1 Bish. Crim. Proc. §§ 631, 633; *Mills v. Kennedy*, 1 Bailey, 17. While this seems to be the general rule, there is much diversity of judicial utterances, as to the proper application, and to attempt to reconcile the authorities would be a useless, if not hopeless, task. When the exceptions or provisos are a material part of the description of the offense, it is necessary to negative them in the indictment. The indictment must contain such averments as show affirmatively an offense; and, where the exceptions or provisos are a material part of the description of the offense, the indictment must aver that the act charged does not come within the exception or proviso. The exceptions should be negated only when they are descriptive of the offense, or a necessary ingredient of its definition; but, when they afford matter of excuse merely, they are matters of defense, and therefore need not be negated in the indictment. The offense defined in the act of 1889 is that of selling spirituous, vinous, or malt liquors in certain prescribed quantities, without first having obtained a license in the manner prescribed by law. The provision of section 11 is no part whatever of the description of the offense, nor a necessary ingredient of its definition, but is simply a limitation in the application of the provisions of the act. The description of the offense of selling liquor without a license is full and complete without reference to the provisions of this section; and, since it forms no part of the definition thereof, it is mere matter of excuse or defense, and need not be negated in the indictment.

As to the remaining point urged by counsel for appellants, we are of the opinion that the record before us does not properly present the same for our consideration. The record discloses the fact that, after the state had rested, "counsel for defendants moved the court for a judgment in favor of the defendants on the ground of the insufficiency of the evidence to justify the verdict." This motion being overruled, an exception was duly taken, and this ruling is now assigned as error. This motion was no doubt intended to follow the practice provided in civil cases where

the plaintiff fails to prove a case sufficient to be submitted to a jury, but we have already held in *State v. Jones*, 18 Or. 256, 22 Pac. Rep. 840, that such practice is not applicable to criminal cases; but the proper practice is to ask the court to direct an acquittal. But, treating this as a motion to direct an acquittal of the defendants, we still think it is insufficient to raise the question argued by counsel in this court. As this is an appellate tribunal, constituted to revise and correct the errors committed by the trial court, it is only when that court has acted, and the act is claimed to be error, and disclosed by the record, that such error becomes the subject of our power and duties. The motion in this case is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence upon a motion of this kind. The only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. In a motion asking the court to direct an acquittal, where it is claimed that the evidence is insufficient to prove the crime charged, it ought to specify the particulars in which it is claimed the evidence is insufficient, unless there is a total failure of proof, otherwise the attention of the trial court will be directed to the evidence as a whole, that is, whether there is any evidence upon which a verdict may be founded, and wholly omit to consider the particular matter in which the alleged insufficiency consists, and which is relied upon in this court, and perhaps subsequent research may have suggested. It is true, unless there is some evidence upon which a jury can find a verdict for the party producing it, such verdict ought not to stand, nor will it, under a motion of this kind, when the evidence considered as a whole reveals a total failure of proof, or want of any evidence upon which to found a verdict. But where there is some evidence tending in a general way to prove the offense charged, but its alleged insufficiency lies in some particular matter or specific objection which requires to be designated or specified to make apparent in what particular that insufficiency consists, and to attract the attention of the court to it, it ought, as a general rule at least, to be specified in the motion of nonsuit, to be entitled to consideration in this court. The evidence in this case tends to show that three and one-half miles from Portland, on the MacAdam road, there is a place known as the "Blue House;" that it is fitted up as a saloon, with bar and other fixtures, with glasses and bottles on the shelves; that it is known as a "saloon;" that defendant Petty usually had charge of the place in the forenoon, and sometimes defendant Tamler in the afternoon, and the general reputation was that the defendants, Tamler and Petty, were the proprietors thereof; that about the 5th day of July, 1889, defendant Petty sold to one Malloy a drink of liquor, which the witness supposed to be whisky, and that Malloy paid for the same; that neither Petty nor Tamler had a license to sell spirituous liquors. A witness by the name of Timothy Malloy was

called, and testified in the case, and said he had purchased liquor at different times, and about July 5, 1890, in the saloon claimed to belong to defendants, and had paid for the same. A cursory examination of this testimony would naturally lead a court to think there was sufficient evidence to be submitted to a jury; and while there may be a failure in some particular, unless the particular instance in which the failure occurs is pointed out, it would probably escape attention. The contention of counsel on this appeal is that the evidence is insufficient in this: (1) There is no sufficient evidence of the value of the liquor alleged to have been sold by defendants; (2) no sufficient evidence that the sale was made to Timothy Malloy named in the indictment; and (3) there is no sufficient evidence that the liquor sold was spirituous liquor, as alleged in the indictment. These objections are technical in their character, and do not go to the general sufficiency of the evidence. If counsel for defendants relied upon the grounds urged here for asking the court below to direct an acquittal of his clients, he should have so stated, and thereby given the court an opportunity to have passed upon them, and, if the ruling was against him, preserve the same on the record, so we could be advised thereof. It is very possible that the grounds upon which the appellant now contends the motion should have been granted might have been obviated at the trial, had they been stated. We are not advised from the record what reason, if any, was assigned in the court below, why this motion should have been allowed, nor what question the court actually did decide. We have repeatedly held that error is never presumed, but must be made to affirmatively appear; and, in a case of this kind, the motion should direct the attention of the court and opposite counsel to the precise point made, and the grounds thereof. In other words, as was said by FIELD, J., in *Killer v. Kimbal*, 10 Cal. 267: "The party must lay his finger upon the point of his objection." To the same effect, *McGarrity v. Byington*, 12 Cal. 429: "It is a wholesome rule," says CHURCH, C. J., in *Schile v. Brokhahus*, 80 N. Y. 620, "that the attention of the court must be drawn to the precise point intended, otherwise an exception will not prevail." In *Edwards v. Carr*, 13 Gray, 238, SHAW, C. J., says: "It is very important that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that if it had been brought to the attention of the judge and adverse counsel it might have been avoided by an amendment, or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matters of law, if well founded, either by a ruling in his favor or by an allowance of the exception, and the rights of both parties be secure." This court, in the case of *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. Rep. 309, has announced substantially the same rule. These rules have their foundation in a due regard to the fair adminis-

tration of justice, which requires that, when an error is supposed to have been committed, there should be an opportunity to correct it at once before it has had any consequences. The law should not permit a party to make a general motion, as in this case, and lie by without making the particular grounds of his motion known to the court, and take the chances of success, on the grounds which the judge may think proper to put his ruling, and then if he fails to succeed, with either court or jury, avail himself of an objection, which, if it had been stated, might have been removed. This works no injustice to a party, for if there be merit in his motion or objection, he has the full benefit of it, and if there be no merit he certainly ought not to succeed. In the midst of a trial *ad hoc*, the judge is necessarily compelled to rule upon many questions of law without the opportunity for deliberation the importance of the questions demand, and it is but an act of justice to him that such rulings be not reversed, unless his mind was specifically drawn to the point upon which the reversal was asked and acted upon as deliberately as time and circumstances would admit. In this case, how can we say that the court below committed an error in overruling the motion, unless we knew upon what grounds he was asked to allow it? His attention was not called to the points upon which we are asked to reverse the judgment, nor was there any suggestion as to what counsel would have him hold. Had the court below been asked to sustain this motion upon the grounds argued before us, we cannot say how it would have ruled, and certainly, before we can be asked to reverse this judgment, it must sufficiently appear that the court committed some error justifying such reversal. It follows, therefore, that the judgment below must be affirmed.

(20 Or. 86)

MEIER v. KELLY *et al.*

(Supreme Court of Oregon. Nov. 17, 1890.)

## MORTGAGES — DESCRIPTION — REFORMATION — STATUTE OF LIMITATIONS.

1. Where the terms used in the description contained in a deed or mortgage are clear and intelligible, the court will put a construction on those terms, and parol evidence is not admissible to control the legal effect thereof.

2. In a suit to reform a deed or mortgage on the grounds of mistake, complaint must allege distinctly what the original agreement was, and point out with clearness wherein there was a mistake, and that it did not arise from gross negligence of the plaintiff.

3. Section 2840, p. 1314, 2 Hill's Code, does not apply to land sold for delinquent street assessment.

## (Syllabus by the Court.)

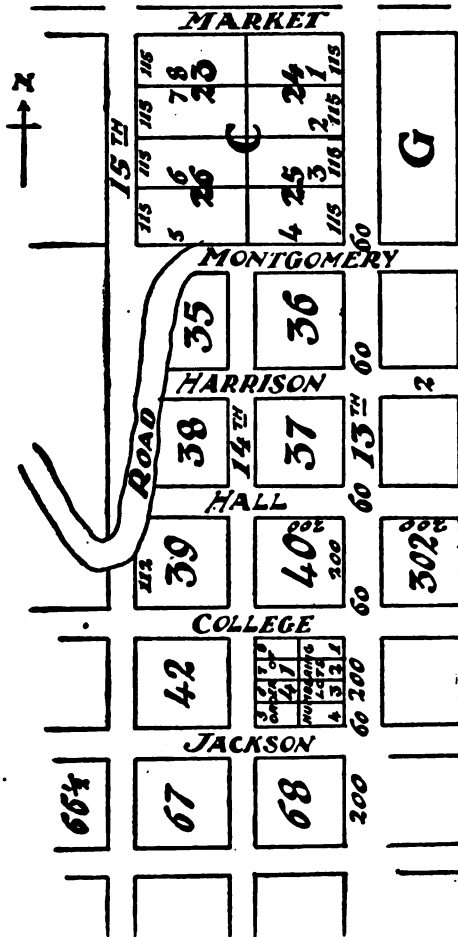
Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

This was a suit for injunction, and to quiet title to certain land in subdivision block 26, of large block C, of Carter's addition to the city of Portland. The only defendants served were Penumbra Kelly, the sheriff, V. B. De Lashmunt, H. B. Oatman, and Sidney Dell, judgment creditors. A temporary injunction was had which, on

final hearing, September 27, 1889, was made perpetual. The defendants above-named appeal. The amended complaint alleges that the plaintiff is the owner in fee-simple, and in possession of the south-east quarter of block 26, of Carter's addition to the city of Portland, Or., which land was, on and prior to June 12, 1876, owned by C. M. Carter; that it was known and designated upon a map, duly filed in the office of the county clerk, as the east 115 feet of lot 5, in subdivision block 26, of large block C, in Carter's addition to the city of Portland, and, according to other maps filed in the office of the county clerk, and by common usage, it is known and designated as lots 3 and 4, block 26, in Carter's addition, there being no block of the number 26, except said block of which said parcel forms the south-east quarter; that prior to June 12, 1876, on February 16, 1876, C. M. Carter made a mortgage to Catherine Quinney upon said property, describing the same as lots 3 and 4, in block 26, in Carter's addition to the city of Portland, that being all the property owned by him in that block or vicinity,—mortgage recorded same day; that, on July 19, 1877, Carter was adjudged a bankrupt; that A. J. Fleurot (assignor of defendant Dell) obtained judgment against Carter, June 12, 1876, and proved her claim in the bankrupt court as a secured claim, by virtue of said judgment lien; that Knapp, Burrell & Co., (assignors of defendant Dell,) and defendants V. B. De Lashmutt and H. B. Oatman, obtained judgments against C. M. Carter subsequent to said mortgage, and proved the same in the bankrupt court in like manner; that Quinney, by leave of the bankrupt court and on notice to the said judgment creditors, who were made parties, foreclosed said mortgage upon lots 3 and 4, block 26, in Carter's addition, which is the same property afore described; that the sheriff, upon an order of sale thereunder, sold the same to D. J. Malarkey, who afterwards conveyed to Quinney, who afterwards obtained a sheriff's deed for said land described therein as lots 3 and 4, block 26, Carter's addition; that afterwards, on notice to said lien creditors, Quinney, by order of the bankrupt court, obtained a deed from Carter's assignee for said land, describing it as the E.  $\frac{1}{4}$  of lot 5, in block C, in Carter's addition to the city of Portland; that since July 20, 1878, Quinney and her grantees have been in possession of said land; that on September 25, 1888, C. M. Carter and wife made to said Meier a deed for said land, reciting that in said mortgage it was their intention to describe a parcel of land correctly described as the E.  $\frac{1}{4}$  of lot 5, in subdivision 26, in block C, in Carter's addition; that on June 23, 1885, the chief of police of the city of Portland, upon due proceedings had for assessment for street improvements, sold and conveyed to the city of Portland the said property described as lot 5, in block C, in subdivision 26, in Carter's addition to the city, and afterwards said city conveyed same to plaintiff; that plaintiff and his assignors have been in possession of, and paid taxes upon, said tract of land for more than 10 years last past, and neither of defendants have been in

possession for 10 years last past; that large sums have been paid on the judgment of A. J. Fleurot; that said and the other judgments constitute a cloud on plaintiff's title. The answer to the original complaint was, by stipulation, to stand as an answer to the amended complaint in so far as it applied, and all further allegations of amended complaint to be considered as denied. It alleges that the sheriff, P. Kelly, had levied upon "the east 115 feet of the south 100 feet of subdivision block 26, of large block lettered C, in Carter's addition to the city of Portland, Multnomah county, Oregon." It denies that Carter, on June 12, 1876, owned the S. E.  $\frac{1}{4}$  of block 26, or that he executed a mortgage thereon to Catherine Quinney; denies that the mortgage description was a correct one of the land in controversy, or was in common use, or so described in the maps in common use; denies notice of proceedings in bankrupt court as to said land; denies possession and adverse possession by plaintiff and grantors, and payment of taxes, except as upon lots 3 and 4 of block 26; admits that whatever title Catherine Quinney and Carter's assignees had is owned by plaintiff; also other formal denials. The answer further alleges that on and prior to June 12, 1876, C. M. Carter was the owner of said land levied upon; that previously, in 1871, said C. M. Carter and others, then the owners of said Carter's addition, laid out and platted it into blocks and lots according to law, and caused it to be duly recorded on said date; that there was never at any time, and is not now, any other or further or different description of the lots and blocks of said addition, so far as C is concerned, by any plat of said property than as is in said plat, found on page 490 of Book P of deeds; alleges the making of a mortgage prior to June 12, 1876, by Carter to Quinney upon lots 3 and 4, of block 26, of Carter's addition to the city of Portland, Oregon; the foreclosure of said mortgage without any allegation of mistake, describing the property as above; the sale thereof in 1878, and the sheriff's deed on July 30, 1880; the assignee's deed on October 14, 1880, without notice to the judgment creditors; and thereafter the said Quinney and her successors were in constructive possession only of said land, which is now and always has been, vacant land. The answer further alleges the amounts due upon the said several judgments, and that they have been kept alive; that said judgments are liens upon said land; and pray for a decree therefor. The reply to original answer was also stipulated to stand. It denies that there was never any other or further description of said lots than as set forth in the answer, but alleges that all the blocks in Carter's addition, including said block 26, were so divided into lots that the south-east quarter comprised lots 3 and 4; denies that there were no such lots as 3 and 4, in said block 26; denies that the judgments are a lien on the land; denies knowledge of existence of judgments and of the amounts due thereon; alleges notice at all times to defendants of the rights and claims of plaintiff and his

grantors, and that they understood that said mortgage was intended to and did include this tract of land in controversy. Aaron Meier, plaintiff, having died pending suit, his heirs, administrator, and assign under bond for title, were, by stipulation, made parties plaintiff. The plat of Carter's addition to the city of Portland referred to in the pleadings and evidence in this case, is as follows:



The evidence shows that there is no block or subdivision of a block in Carter's addition to the city of Portland numbered 26, except the subdivision 26 of lettered block C, and that, at the time Carter made the mortgage to Quinney, he owned, of record, no property in large block C, except the property in dispute in this suit. The plaintiff, having succeeded by mesne conveyance to the title of Quinney and Carter to the property in dispute, brings this suit to enjoin defendants from selling said property under their judgments, and to quiet their title to the same. A decree was entered by the court below in favor of plaintiff, from which this appeal is taken.

Sidney Dell, for appellants. H. H. Northup and H. B. Nicholas, for respondents.

BEAN, J., (after stating the facts as above.) The property in controversy in

this suit is the S. E.  $\frac{1}{4}$  of subdivision 26, of block C, of Carter's addition to the city of Portland. Plaintiff claims that the description of the property in the mortgage from Carter to Quinney as lots 3 and 4, block 26, Carter's addition to the city of Portland is a good and sufficient description of the property in dispute, and that, when this mortgage was foreclosed and the property sold, the purchaser obtained a title thereto, free from the liens of defendants, while defendants claim that the mortgage did not describe this property, and, although they were parties to the foreclosure suit, their lien, as against this particular property, was not affected thereby. The plat of Carter's addition, being referred to in the mortgage to Mrs. Quinney, becomes a part of the description contained therein, and is considered as incorporated in the mortgage itself. 2 Devl. Deeds, § 1020. A reference to the plat is therefore necessary in order to determine the sufficiency of the description of the mortgaged property, and whether such description includes the property in dispute in this case. This plat shows a large block lying north of Montgomery street, 480 feet square, with streets all around it. It appears to be subdivided by two lines, one running east and west, and the other north and south, and intersecting each other in the center of the block, forming four subdivisions or smaller blocks, each 230 feet square. In each of these subdivisions are the numbers 23, 24, 25, and 26, respectively, commencing at the north-west corner of the block. This block C is also subdivided by four parallel lines running east and west, which, by their intersection with the north and south lines, make eight smaller subdivisions, or lots, in the block, and are numbered consecutively from 1 to 8 inclusive, commencing at the north-east corner of the block, thus making two of these smaller subdivisions or lots in each of the larger subdivisions, the two in subdivision 26 being numbered 5 and 6. This plat also shows a number of blocks lying south of Montgomery street, each being designated by numbers. The greater portion of the numbered blocks are 200 feet square. One of these blocks, No. 41, is subdivided into eight equal parts, and these parts are numbered consecutively from 1 to 8 inclusive, commencing at the north-east corner of the block. In the center of this block are written the words: "Order of numbering lots." The contention of plaintiff is that subdivision 26 of block C should be deemed one of the blocks of Carter's addition, and that the order of numbering blocks, as indicated in block 41, should be applied to this block, thus making the description of the property in dispute, lots 3 and 4, of block 26, of Carter's addition to the city of Portland, the same as in the mortgage from Carter to Quinney. It appears from the evidence that there is no other block 26 in Carter's addition, except this subdivision of block C, and that, at the time of the mortgage, Carter owned no other property of record in block C, except the property in dispute in this case. I think, from the evidence before us, we may safely assume that, when Carter made the mortgage to Mrs. Quinney, he fully intended to describe therein that property,

and that the description of the property in the mortgage was intended to do so; so that if we could disregard the language of the instrument, and construe it according to the actual intention of the parties, whether expressed in the mortgage or not, we would have no difficulty with this branch of the case. But in our construction of the mortgage we are confined to the intention of the parties, as gathered from the contents. As a matter of construction, we cannot change or vary the description actually contained in the mortgage, although it may be plain that it is not the description intended to be inserted therein. Where the terms used in the description contained in a deed or mortgage are clear and intelligible, the court will put a construction on the terms, and parol evidence is not admissible to control the legal effect of such description, (*Waterman v. Johnson*, 13 Pick. 261; *Bond v. Fay*, 12 Allen, 86;) but when the description is uncertain and ambiguous, parol evidence will be admissible to fit the description to the thing described, but not to add to or change the words of the description, (*Radford v. Edwards*, 88 N.C. 347.) In this case we find no uncertainty or ambiguity in the description, but it is definite and certain, and in every way clear and intelligible; and therefore there is no room for the admission of parol evidence. Nor can we agree with respondents' counsel in the construction of the plat. There are two classes of blocks shown in this plat,—one numerical, and the other lettered; and there is indicated on the plat a key for the numbering of the lots in the numerical blocks, and it is sought to apply this key to the subdivisions of the lettered blocks. It would seem from the plat that, after platting that portion of the addition south of Montgomery street into numerical blocks of a given size, and indicating on block 41 the manner in which these blocks should be divided into lots, the parties making the plat, for reason sufficient to themselves, laid off and platted another, and much larger, block south of Montgomery street, and designated it by the letter C. They also took the precaution, it seems to us in order to avoid any question as to the division of the block, to indicate on the plat itself the manner in which it should be done. This block is completely divided and subdivided, and there can be no reason, as we can conceive, why the order of numbering lots as indicated in block 41 should be applied to it, nor could it be done without doing violence to the expressed intention of the parties as indicated on the plat itself, and besides such a division would be impracticable, to say the least. If the order of numbering lots as indicated in block 41 should be applied to each subdivision of block C, there would be eight lots in the center of the block, abutting on neither street nor alley, and with no public way of ingress or egress, a condition evidently never contemplated by the parties making the plat. This is a case where the parties simply made a mistake in the description in the mortgage, that can only be corrected in a proper proceeding.

Plaintiff insists that, if we should be of the opinion that the property in contro-

versy is not described in the Quinney mortgage, we ought, nevertheless, in this suit to reform it so as to make it conform to the actual intention of the parties; but we are precluded from the consideration of that question by the fact that the complaint contains no allegation upon which such a decree could be based. It has been repeatedly held by this court that, in a suit to reform a written instrument on the ground of mistake, the complaint must allege, distinctly, what the original understanding and agreement was, or point out with clearness and precision wherein there was a mistake, and that it did not arise from the gross negligence of the plaintiff, and the mistake must appear to have been mutual. *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Ramsey v. Loomis*, Id. 367. The complaint in this case contains no allegation of a mistake in the mortgage, but is drawn up on the theory that there is no mistake, but an uncertain description. If we should undertake to reform this instrument under the present complaint, we would do so without any allegations to support the decree, and would be deciding a case not presented by the record. The defendants claim to be *bona fide* lienholders, but have not so framed their answers as to avail themselves of this defense if the facts are with them. The reason assigned for this is that they, relying on the allegations of the complaint, were not called upon to do so, or the complaint does not indicate a suit to reform this mortgage.

It is also claimed that the deed of the chief of police, made to the city of Portland for this property under the sale for delinquent street assessments, having been recorded more than three years prior to any of defendants' executions, defendants are barred from enforcing their liens, by virtue of the statute of limitations. This claim is based upon section 2840, p. 1314, 2 Hill's Code, which reads as follows: "Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax-deed of sale, and not thereafter." The contention is that this section, applies to land sold for delinquent street assessments, as well as to that sold for general taxes. Assuming, for the purposes of this case, that the statute of limitations will run in favor of the holder under a tax-deed against a mere lienholder, a question we do not undertake to decide, we are of the opinion that section 2840 cannot be held to apply to sales made for delinquent street assessments. The language of the section is "land sold for taxes" and the section is a part of the general revenue system of the state. General taxes are a burden imposed upon property for the common good, and for the purpose of raising the ordinary revenues of a country, without regard to any special benefit to the owner, except such as may be anticipated from the general administration of the laws for individual protection and the general good. They are exactions from him for the purpose of either carrying on the general government



or some subordinate department thereof, while special assessments, such as those made for street improvements, are founded upon the theory that a portion of the community is to be specially benefited in the enhancement of their property by reason of the contemplated expenditure of the public funds, and is therefore, in addition to general levy, required to make special contributions for the intended improvements. In theory at least, the property assessed is supposed to be benefited in an amount corresponding to the assessment, by its increased value on account of the improvement. *Cemetery v. City of Buffalo*, 46 N. Y. 506; *Sharp v. Speir*, 4 Hill. 76; *King v. City of Portland*, 2 Or. 146. There must be special legislative authority for imposing these special assessments, and land cannot be sold therefor, without specific legislation for the purpose. The ordinary authority to sell land for taxes is not applicable to an assessment for street improvements, nor can the statute of limitations provided for the holder under a general tax-deed, be considered applicable to such sales. *Cooley*, Tax'n, 469; *Blackw. Tax-Titles*, §615. Since there are important questions between the parties to this suit, as disclosed by this record, which cannot be litigated under the pleadings, we have concluded to dismiss the complaint without prejudice, neither party to recover costs on this appeal.

(19 Or. 517)

## STEEL v. HOLLADAY.

(Supreme Court of Oregon. Nov. 10, 1890.)

## SALARY OF RECEIVER.

When the parties to a litigation, by their attorneys, ask the appointment of a person as receiver who is an interested party, and represent to the court that his appointment would save the salary to the estate of the receiver then in office, and the court makes such appointment, and he serves as such receiver until removed, without making any claim for compensation, upon an application to the court, after such removal, to be allowed a salary during the time he so served, where the court below refused to make such allowance, *held*, that no error was committed.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

R. & E. B. Williams and C. H. Carey, for appellant. Williams & Wood and Mitchell & Tanner, for respondent.

LORD, J. This is an application of Joseph Holladay for compensation as receiver for services performed as such, in the care, custody, and management of certain property, during the period named therein. The petitioner was appointed jointly with George Weidler, as such receiver, and alleges that a reasonable compensation for his services would be the sum of \$250 a month, which aggregates, for the period during which he performed such services, in all the sum of \$9,500, etc. After issue was joined, the evidence taken, and the courtfully advised in the premises, it found the following facts: "First, that, at the time of the appointment of said Geo. W. Weidler and Joseph Holladay receivers herein, by the order and decree of this court, it was the understanding and

agreement, and it was so represented to the court at the time of their appointment, that, in case they should be appointed such receivers in place of D. P. Thompson, they should not receive or claim any compensation for their services as such receivers, they both being interested in the property of which they were appointed receivers,—the said Joseph Holladay as mortgagee in possession thereof, and the said Geo. W. Weidler as the owner of three-eighths of the capital stock of the Willamette Steam-Mills Lumbering & Manufacturing Company; and that said Joseph Holladay continued to be, while he was such receiver, a mortgagee in possession of said property of which he was appointed receiver, and having and holding a lien thereon to the extent of \$346,686.46, and was largely interested in said property as such mortgagee, and was also the principal party defendant to the said suit to which he was appointed such receiver, and would not have been appointed a receiver therein without the consent of Benjamin Holladay; and that he consented thereto with the understanding that said Joseph Holladay, if appointed such receiver, would not claim or be entitled to any compensation as such receiver; and that, in order to be appointed one of said receivers, he consented to act without compensation, and continued so to act during the whole time he was such receiver, without ever having filed or made any claim herein for compensation as such receiver," etc. The evidence upon this finding tends to show that there never was any agreement that the petitioner Holladay should not receive any compensation for his services as such receiver, but it does tend to show that there was a general understanding among the attorneys who represented the parties to the suit, and that it was so represented to the court, that the appointment of the petitioner and Mr. Weidler would result in saving to the estate the salary of the receiver then in office. The petitioner was a heavy lienholder against the estate, and his appointment would hardly have been asked or allowed by the court, unless the consent of the adverse party was understood, at least, to have been obtained. Judge Bellinger, who was of counsel for the adverse party, after admitting some conversations in which it was talked over by the attorneys, in respect to an understanding or agreement among themselves, that the appointment of the petitioner and Weidler would save the estate the expense that was incurred in keeping D. P. Thompson in office, was asked: "Question. I think you and Mr. Strong and others were present at these conversations, and all parties were represented? Answer. Yes, we were present in court here when the matter was presented to the court. Q. Wasn't it stated to the court when this matter was submitted . . . that it would result in a saving to the estate? A. I think I so stated to the court myself. I think I urged it upon the court. Q. Saving the salary of the receiver? A. Yes."

It seems to me that these facts indicate that the matter of saving the expenses of a receiver had been talked over by the at-



torneys of the respective parties; that they were present in court when the appointment was asked, and when Judge Bellinger stated and urged upon the court, as a reason for the appointment, that it would result in saving the salary of the receiver; and that such representation so made became one of the material facts upon which the order for the appointment was predicated. It is true that, in this connection, Judge Bellinger immediately adds that it was then thought by them that the estate would soon be settled up; that he had no idea that it would continue in the way it has, and involve the labor it has imposed upon the receivers, and expresses the opinion that his statements in this regard ought not to preclude the petitioner, or especially Mr. Weidler, from his right of compensation; "for the fact is," he says, "at that time I supposed the thing would be over in a very little while. We were already negotiating, thinking we could raise the money, and sell this whole property out to a syndicate in the course of a few months, and straighten it all up." This is undoubtedly true, for all the evidence, so far as I have examined it, tends to corroborate it. The reason then, at the time the appointment of the petitioner was asked, that the matter of saving the salary was urged in favor of that appointment, was based on the supposition, honestly entertained and which circumstances seem to justify, that an arrangement could be made by which a speedy settlement of the estate could be effected and the whole matter cleaned up in a few months. This expectation was doomed to disappointment. Instead of requiring only a few months to settle the estate, over three years elapsed, in which the petitioner performed duties in regard to its custody and management prior to his removal, and the estate was not then settled. It perhaps might be inferred from an agreement in which all the parties had joined, which had been made two days previous to the appointment of the petitioner and Weidler, and in which it was stipulated that the court might remove the receiver then in office, and appoint the petitioner and George Weidler receivers to take charge of, manage, and dispose of the property mentioned in the memorandum specified during the term of three years provided in that agreement, that a longer period than a few months was understood and anticipated for the settlement of that estate. But, I take it, the time specified in the agreement was not considered, nor inserted, with reference to the time it was expected that such receivers, if appointed, should serve, so much as to make sure that, no matter what unforeseen complications might arise, enough time should be provided for other purposes for which that agreement was executed. In this view, it is not consistent with the expectation entertained that the estate might and would be speedily settled. Considering, then, that such was the expectation, that only a short period of service was anticipated when it was suggested to the court that the appointment of the petitioner and his co-receiver would

save the expense of the salary of the receiver then in office, it does not appear that the court was cognizant of that expectation or calculation; or, however that may be, ought such consideration to influence us to obviate the effect of such representation if it induced the court to act and make the appointment, and grant the allowance prayed for by the petitioner, when he continued to serve during all that time without complaint or compensation? The circumstances already indicated present the parties *pro* and *con*, by their attorneys, before the court, all favoring the appointment asked for, and during the consideration of which it is represented and urged upon the court that the making of such appointment would result in saving the salary of the receiver to the estate, and the court, acting upon such representation, makes the order for the appointment. Is not such representation a foundation stone upon which that order of appointment was made, as much so as if the court had so stated in its order, and ought not the petitioner to be bound by it in the absence of any complaint or application for its modification and allowance of reasonable commissions or salary? Was not the court, and those interested in the preservation of the estate, justified in assuming, at least, under such circumstances that compensation was expected, and that the services were continued on the terms which induced and secured his appointment? When it is considered that the appointment lies with the court below, who is supposed to be familiar with the transaction or litigation requiring it, and the reasons for it, the ineligibility of the petitioner without the consent of the adverse party, the representation of saving expenses to the estate to secure it, the many reasons, family and otherwise, which will readily occur for his serving without compensation, the admission to others that he was so serving, the corroborating circumstances that he did continue to serve from the appointment to his removal without any claim for compensation, and the seeming want of any other object to be served by the removal of the receiver then in office, without some such reason, it seems to us no sufficient cause is shown for our interference, or to authorize us to remand the proceeding for the ascertainment of the value of such services. It results that, in our judgment, the decree must be affirmed.

(15 Colo. 176)

## KNIGHT V. FISHER.

(Supreme Court of Colorado. Nov. 19, 1890.)

## DISMISSAL OF ACTION—VERDICT—MISCONDUCT OF JURY.

1. Authority to dismiss an action for failure to file the complaint within the time prescribed by the Code rests in the sound legal discretion of the court.

2. The action of the court upon motion to require security for costs from a plaintiff unable to pay, etc., under the statute, is discretionary.

3. Where the verdict states the facts fully and definitely, in reference to all matters at issue between the parties, it will not be disturbed, even in an action for the recovery of money, on the ground that it does not state the amount of the recovery.

4. Affidavits relating to improper arguments alleged to have been made use of by jurors among themselves while considering of their verdict are clearly inadmissible.

5. An agreement, in advance, by jurors to arrive at a verdict by each juror marking the amount on paper, he is willing to allow, and by adding the said several amounts together, and dividing the same by 12, and that the quotient, or result, shall be the verdict, is manifestly and essentially wrong; and whenever it is proved by competent evidence that a verdict has been obtained as the result of such an agreement, it should be promptly set aside. *Quere*, whether a verdict thus rendered is a chance verdict such as may be proved by the affidavits of jurors.

6. Jurors are bound upon their oaths and consciences to act intelligently, not blindly. They cannot discharge this responsibility by agreeing that the verdict, or any material part thereof, shall be determined by any process the result of which is unknown to them at the time of the agreement. Each juror must, at all times, be perfectly free to assent to, or dissent from, every material matter proposed to be incorporated into the verdict. They should take into consideration, and give due weight to, the judgment of their fellows; and they may properly be influenced thereby to change their own opinions. They may, in proper cases, base their verdict upon the average judgment of the whole jury, if such verdict finally commends itself to the judgment and conscience of each juror, and is not against the evidence, nor in conflict with the instructions of the court.

(Syllabus by the Court.)

Appeal from district court, Ouray county.

Appellee, Fisher, plaintiff below, brought suit in the county court, stating, in his complaint, his demands against the defendant, Knight, in substance as follows:

For work and labor, 14 mos., at \$40 per mo.....	\$560 00
For money lent, and sundry other demands.....	223 60
Total.....	\$783 60
The complaint admits sundry credits, aggregating.....	573 83
Leaving balance in favor of Fisher.....	\$209 77

—For which he claims judgment against Knight. Knight, by his answer, admits the correctness of the demands and credits as stated in the complaint, except the claim for work and labor. As to that claim, he alleges that Fisher worked for him only 12 months at the agreed price of \$25 per month. Thus, by the answer, a balance is shown in favor of Knight, for which he claims judgment against Fisher. Fisher, in reply, traversed the new matter set forth in the answer. On the trial in the district court, the jury found, "as a matter of fact, that the plaintiff worked for the defendant thirteen months, and that the reasonable value of such services was \$36.50 per month." Taking the facts found by the jury in connection with the matters admitted by the pleadings, and the account stands thus:

Due Fisher for work and labor, 13 mos., at \$36.50 per mo.....	\$474 50
And for other demands.....	223 60
Total.....	\$698 10
Less credits.....	573 83
Balance due Fisher.....	\$124 27

Judgment was rendered in favor of plaintiff for \$124.25. The defendant brings this appeal.

*E. I. Stirman* and *Karr & Kincaid*, for appellant. *Story & Stevens*, for appellee.

ELLIOTT, J., (after stating the facts as above.) The summons in this case was issued November 29, 1887, and served the next day. The complaint was not filed in the county court until January 3, 1888. On account of this delay, defendant's counsel, on December 21, 1887, moved to dismiss the action. This motion was based upon section 32 of the Code, which provides that, "the complaint must be filed within ten days after the summons is issued, or the action may be dismissed," etc. The court would undoubtedly have been justifiable in dismissing the action for failure to file the complaint within the time prescribed by the Code. Upon this point, the only case cited by counsel is *Coombs v. Parrish*, 6 Colo. 296. If the motion to dismiss had prevailed, the *Coombs* Case might have some bearing in support of the dismissal; but it certainly does not require the words "may be dismissed" in section 32 of the Code to be construed as equivalent to "shall be dismissed." The phrase "may be dismissed" is not the language of a command, nor of a penalty. It indicates rather that the authority of the court to dismiss the action rests in sound legal discretion. It should be accordingly so exercised.

The defendant, also, moved for a rule for security for costs on the ground that plaintiff was unable to pay costs, and so unsettled as to endanger the officers of the court in respect to their legal demands. That portion of the act of 1885, (Sess. Laws, p. 156,) upon which this motion was based, is the same as the statute of Illinois, where it has been held that the action of the court thereunder is necessarily discretionary, and cannot be assigned for error. It is clear that such discretion should not be overruled by the appellate court, unless it has been clearly abused; and no such abuse appears in this record. *Gesford v. Critzer*, 2 Gilman, 698; *Selby v. Hutchinson*, 4 Gilman, 319.

It is objected that the verdict of the jury is not in conformity with the requirements of the Code, and that it is not sufficient to support the judgment. Section 200 of the Code provides: "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter-claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery." It may be said in answer to this objection that the verdict in this case was not found "for the plaintiff," nor "for the defendant." It was a special verdict which the jury, in their discretion, were authorized to render, under section 199 of the Code, leaving to the court, as its legitimate province, the duty of pronouncing the sentence of the law upon the matter contained in the record. We are not disposed to commend the verdict as a model. Nevertheless, the admissions of the answer left nothing

ing in controversy between the parties, except the length of time which Fisher had worked for Knight, and the wages he was to receive per month; and the court so charged the jury. The verdict states the facts fully and definitely in reference to both these matters at issue between the parties. Hence, considering the whole record,—the pleadings, as well as the verdict,—which the court is presumed to do in rendering judgment, the determination of the "amount of the recovery" was a matter of mere mathematical computation. There was no error in the charge of the court, nor in the verdict of the jury, prejudicial to the substantial rights of the parties. The difference between \$124.27 and \$124.25 cannot be regarded as substantial under the maxim, "*de minimis non curat lex.*" *Burritt v. Gibson*, 3 Cal. 396; *American Co. v. Bradford*, 27 Cal. 360.

The overruling of the motion for a new trial is assigned for error. Among other grounds of the motion was the alleged misconduct of the jury. It was urged that some of the jurors were induced to consent to the verdict, as rendered, by improper arguments advanced by their fellow-jurors, and also that the verdict was the result of a resort to the determination of chance. Affidavits of several jurors, in reference to these charges of misconduct, were introduced upon this motion. The affidavits relating to improper arguments were clearly inadmissible. The courts would have their hands full, if they should undertake to guaranty that only proper arguments should be made use of by the jurors among themselves while deliberating upon the matters submitted to their consideration. The Code (section 217) permits the use of affidavits of jurors to prove that one or more jurors "have been induced to assent to any general or special verdict, or to a finding on any question, or questions, submitted to them by the court, by a resort to the determination of chance." The affidavits of several jurors bearing upon this subject were introduced. One affidavit states: "Finally, the jury determined to arrive at a verdict by each juror marking the amount on paper they were willing to allow, and by adding the said several amounts together and dividing the same by twelve, and that the quotient, or result, should be the verdict. This was done, and the result was the amount placed and brought in as the verdict in the cause." Five of the jurors concur in the following affidavit: "That there was quite a disagreement as to the amount per month to be allowed; \* \* \* that, for the purpose of seeing if the said jurors could not arrive at a verdict, they did from time to time put on their respective ballots the amount which they thought the plaintiff entitled per month, but these affiants distinctly say that it was never agreed that any amount so arrived at should be the verdict of the jury, or that the sum total of said amounts should be divided by twelve, and that the result should be adopted as the verdict of the jury; that, on the contrary, the said jurors, from time to time, resorted to different processes to see if they could not ar-

rive at a conclusion, but under none of said attempts to arrive at a conclusion was there any agreement beforehand that the result of any such attempt should be the verdict of the jury; that the last two ballots were taken upon the question as to whether the rate of \$36.50 per month should be adopted as the rate to be paid or allowed the plaintiff, and on the last ballot all of the jurors voted in the affirmative, and the said rate was then for the first time agreed upon as the verdict of the jury."

The remaining affidavit is silent as to any agreement by which the verdict should be determined. From the affidavit first above quoted, counsel for appellant contend that the determination to arrive at a verdict by the method therein stated, was agreed upon in advance of the marking and casting of the ballots; and that each juror, in consequence of such agreement, felt himself bound to abide by the result. Such may be the natural, but is not the necessary, inference to be drawn from the affidavit. We do not hesitate to declare that an agreement in advance by jurors to abide the result of such a method of arriving at a verdict is manifestly and essentially wrong; and whenever it is proved by competent evidence that a verdict has been obtained as the result of such an agreement, it should be promptly set aside. Such means of determining a controversy would enable jurors to entrap, deceive, and defraud each other, and thereby work the grossest injustice upon litigants. Jurors are bound upon their oaths and consciences to act intelligently, not blindly. They cannot discharge this responsibility by agreeing that the verdict, or any material part thereof, shall be determined by any process the result of which is unknown to them at the time of the agreement. Each juror must, at all times, be perfectly free to assent to, or dissent from, every material matter proposed to be incorporated into the verdict. We are aware that the supreme court of California has decided under a statute similar to section 217, *supra*, that a verdict rendered in pursuance of an agreement, as above indicated, though "vicious and irregular," is not a chance verdict, within the meaning of their statute, and that the affidavits of the jurors rendering such a verdict cannot be admitted to impeach it. *Turner v. Water Co.*, 25 Cal. 399; *Boyce v. Stage Co.*, *Id.* 460. These California cases, if followed, are decisive against receiving the affidavits of the jurors to prove their alleged misconduct. But, as might be expected, there is considerable conflict of authority upon a question so important to the proper administration of justice. Hence, we postpone further consideration of the question until its determination shall be more imperatively required. *Warner v. Robinson*, 1 Root, 194; *Smith v. Cheetham*, 3 Caines, 57; *Crabtree v. State*, 3 Sneed, 302.

Fortunately, in the case at bar, whether we accept or reject the affidavits, the attempt to show misconduct on the part of the jury, as charged, must fail. The affidavits do not prove that there was an agreement among the jurors that the ver-

It should be determined by chance, or that it should depend upon any unknown result. The preponderance of the evidence is so clearly against such charge that we are inclined to think the juror making the affidavit first above quoted, did not intend to convey such inference. As indicated by the majority of the affidavits, the jury were merely desirous of ascertaining the average judgment of the several jurors as to the monthly wages which should be allowed. We see no objection to the method adopted for procuring such information, so long as each juror felt at perfect liberty to adopt or reject the result, after it became known. Jurors should take into consideration and give due weight to the judgment of their fellows; and they may properly be influenced thereby to change their own opinions. They may, in cases like the one now under consideration, base their verdict upon the average judgment of the whole jury if such verdict finally commends itself to the judgment and conscience of each juror, and is not against the evidence, nor in conflict with the instructions of the court. The evidence as to the length of time Fisher was employed by Knight, and the monthly wages he was entitled to receive, was conflicting; so the verdict cannot properly be disturbed on the ground that it is not sustained by the evidence. It was not error to overrule the motion for a new trial. This disposes of the various assignments of error, so far as they require consideration. The judgment of the district court is affirmed.

(15 Colo. 147)

ARTHUR V. ISRAEL.

(Supreme Court of Colorado. Oct. 17, 1890.)

WIFE'S INTEREST IN HUSBAND'S ESTATE—DIVORCE—ESTOPPEL.

Where a wife abandons her husband to live in adultery with another man, whom she marries, after learning that her husband has procured a divorce, then, although after her first husband's death the decree is, at her instance, adjudged void for want of jurisdiction, she is estopped, by having accepted the benefits of such decree, from claiming any share in her first husband's estate as his widow.

Error to Larimer county court.

The case at bar was once before considered upon writ of error by the supreme court. *Israel v. Arthur*, 7 Colo. 5, 1 Pac. Rep. 438. It was then reviewed, and reversed, upon a record presenting the following facts: Defendant in error in May, 1881, filed her petition in the county court alleging that John Arthur died intestate and without children; that petitioner was his widow; that plaintiff in error, as administrator, being in possession of the property, was speculating with the funds in his own business, and, failing to account for interest, profits, etc.; that certain other parties, as brothers, sisters, and descendants of a deceased sister, claimed to be entitled to the estate, as heirs at law; that petitioner was, on the contrary, sole heir and distributee, under the statute, of said estate. She demanded that her rights in the premises be recognized, and the administrator be required to render his accounts accordingly. An answer was

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duly filed by the defendants named, in which petitioner's relationship and right to inherit, as the widow of Arthur, deceased, and the misappropriation of the estate, were denied. As a separate defense, defendants, admitting the intermarriage of petitioner with Arthur, alleged that on February 9, 1875, a decree of divorce was entered by the probate court of Larimer county, in favor of the said Arthur and against petitioner. And, for a further defense, defendants alleged that on June 12, 1877, a second decree of divorce was duly made and entered in said court, in favor of said Arthur, and against complainant. Replication was filed denying the new matter in the answer. The proofs upon the trial were confined to the issues thus made. The two decrees of divorce mentioned in the answer were offered and received, in evidence, over petitioner's objection. A judgment was duly rendered in favor of the defendants. Upon reversal by the supreme court, of the case thus presented, and by leave of the county court to which it had been remanded, petitioner filed an amendment or supplement to her original petition, in which the facts of such proceeding, on error and reversal, together with the conclusion reached by the reviewing tribunal in the premises, were duly set forth. Afterwards, plaintiff in error, also by leave of court, filed a supplemental answer to the original and supplemental petitions. In this supplemental answer, it was averred, among other things, that after the divorce decrees were entered, the said petitioner, with full knowledge thereof, and under and in pursuance thereof, and in the life-time of the said Arthur, "entered voluntarily into a contract of marriage with one James H. Israel, and caused and procured the said contract of marriage to be duly and legally solemnized, and, thereunder, took upon herself and assumed the relations of wife to the said James H. Israel, and thenceforward, and at all times thereafter, continuously, by virtue of the said solemnization of said marriage contract, lived and cohabited with the said James H. Israel, as his wife, until, and ever since, the death of the said John Arthur." That prior to the reversal of said cause, although plaintiff in error had continuously, from the commencement of the suit, made diligent and persistent efforts to ascertain the exact relationship existing between petitioner and the said Israel, he had been wholly unable to discover the foregoing facts, and for this reason alone did not plead them in bar at an earlier period. That he would sooner have ascertained these facts, but for the following reasons, viz.: That, in October, 1873, petitioner abandoned the said Arthur, and eloped and fled to remote and unknown parts with the said Israel, and thereafter, and until the divorce decrees were entered, and the marriage contract was solemnized, lived and cohabited with said Israel in a state of adultery, representing herself as his wife. That upon learning of the decrees of divorce, and procuring the solemnization of marriage, as aforesaid, both petitioner and Israel refrained from making the same public because of the desire to conceal and secrets

"from their acquaintances and neighbors the illicit and adulterous relations previously sustained toward each other, and to prevent the scandal and disgrace which must necessarily have arisen from a public marriage, or from a marriage taking place at their usual place of abode," and in the usual way. And, finally, that it was only through confidential confessions of petitioner to certain friends, which were kept secret until after the determination of her writ of error, that plaintiff in error became aware of the facts connected with her said marriage to Israel. To the matters contained in said supplemental answer, petitioner demurred on the ground that they were not sufficient in law to constitute a defense. Upon the hearing, the court below sustained this demurrer; and, as leave to plead over was not requested, entered final judgment against plaintiff in error. To reverse this judgment, the present proceeding was instituted.

*L. S. Dixon, E. A. Ballard, T. M. Robinson, and Eph. Love, for plaintiff in error. Decker & Youley and S. B. A. Haynes, for defendant in error.*

HELM, J., (after stating the facts as above.) The present controversy has been once before submitted to this court for adjudication. There was then, however, nothing in the record to show that Mrs. Israel, after deserting Arthur, and prior to the divorce decrees, had been guilty of immoral conduct; neither was there anything, aside from these decrees, to indicate that she had not, up to the commencement of proceedings therefor, conducted herself as a good, true, and affectionate wife, or that subsequent to the entry thereof, and with knowledge of the same, she had, during Arthur's lifetime, remarried, and lived and cohabited with another man as his wife. The single question then presented, wholly unembarrassed by any of these considerations, was whether or not the decrees, which were void because the records showed affirmatively that there was no jurisdiction over the person, should have been received in evidence and given the same force and effect as if valid and binding. The court held that they should not; and, for error in their admission, reversed the judgment.

The record now before us, on the contrary, discloses a voluntary acceptance by petitioner of the privileges resulting from the divorce decrees, as well as antecedent conduct on her part, that is highly reprehensible from both a legal and a moral standpoint. That petitioner's purpose was to secure the estate of deceased, was known then as now; but the question as to whether she may accomplish this purpose obviously rests at the present time upon very different considerations from those formerly brought to our attention. We cannot accept the assertion of counsel for defendant in error that the decision of the court upon the former case is decisive of the present review. We still adhere to the opinion that the decrees in question were void and not merely voidable; but assuming such invalidity, and giving to the dec-

laration of this court reciting that fact all the force and effect of a final adjudication thereof, we feel warranted in holding that petitioner's right to the estate of Arthur may still be inquired of. It is to be hoped, for her sake, that the conduct of petitioner is not correctly set forth in the supplemental answer; but the averments of this pleading in that behalf are, by the demurrer, temporarily confessed, and for the purposes of the present decision must be treated as true. The question, therefore, now presented for determination may be stated as follows: When the wife, without cause, deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, may she, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void, for want of proper service of process, and successfully assert against other heirs, her right under the statute of descents and distributions to the deceased's estate, as his widow? An affirmative answer to this question would be so shocking to good morals, to sound public policy, and to the simplest principles of justice, that we shall decline to give it unless coerced into doing so by cogent and firmly established rules of law. As a matter of law, petitioner must, under the circumstances, be presumed to have known before Arthur's death that the divorce decrees were invalid; and it is fair to assume that such in fact was the case, as, besides the grounds upon which the legal presumption rests, she so promptly after that event asserted their invalidity. Had she properly challenged those decrees during the lifetime of Arthur, she would have incurred the hazard of a restoration of conjugal relationship, or of his procurement of a binding divorce. Either of these results was evidently objectionable to her, and both were carefully avoided. She voluntarily elected to postpone action until such time as she might secure all the benefits of the marriage contract, without discharging any of its burdens. Abandoning for years the performance of every marital obligation and duty, she awaited until death had rendered such performance impossible, and then boldly hastened to seize all the pecuniary advantages conferred by law upon the faithful wife and bereaved widow. Under these circumstances, petitioner cannot complain if we insist upon treating the present controversy as one relating solely to property rights, unaffected by those legal considerations which give to marriage and the family their peculiar status, with accompanying special privileges and protection. *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. Rep. 831. But if the divorce decrees receive the same treatment as judgments, or decrees in ordinary controversies relating to damages or property, petitioner's action must fail; for one who accepts and retains the fruits of a void judgment cannot afterwards repudiate his action and take advantage of its invalidity. *Water Co. v. Middaugh*, 12

Colo. 434, 21 Pac. Rep. 565, and cases cited; *Duff v. Wyncoop*, 74 Pa. St. 300. The foregoing principle has numerous other salutary applications,—as, for instance, that one, having accepted the benefits of an unconstitutional law, cannot, as a general rule, rely upon such unconstitutionality as a defense, even though the invalidity has been adjudicated in another suit. *Daniels v. Tearney*, 102 U. S. 415, and cases. Also, that a corporation, having exercised the privileges of its franchise, when sued for its negligent or malicious tort, shall not successfully invoke, as a defense, the plea of *ultra vires*. *Bank v. Graham*, 100 U. S. 699. And that in many cases the same inhibition applies after the benefits of otherwise binding corporate contracts have been enjoyed. *Railway Co. v. McCarthy*, 96 U. S. 258. We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage with Israel during Arthur's lifetime, she accepted, so far as was within her power, the benefits or privileges of the divorce decrees. The fact that she did not then know that those decrees were void, is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law. That, at the time of her marriage with Israel, she understood the decrees to be valid, is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow. Besides, had she believed them void, her obliquity would be even deeper than it is; because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage. We are not unmindful of the fact that the analogy between accepting the fruits of void judgments at law, and accepting the pecuniary benefits, if any there be, together with the privileges of void divorce decrees, is not perfect in all respects. But the importance and justice of recognizing an estoppel in the latter case may be far more weighty than in the former. The immediate parties are not alone concerned. The public is always, and other individuals are usually, profoundly interested. Public policy, as well as private interest, requires that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife, and the illegitimacy of her children, if any she have by him. Were petitioner attempting, in the light of the present record, to have the divorce decrees held void, her attempt would be futile. And the fact that upon another and different record this court was induced to declare such nullity is, as already suggested, not conclusive of her

right to the property in question. It clearly appears from the admitted averments of the supplemental answer that petitioner herself is responsible for the failure of defendant to sooner plead in bar the facts which operate in the nature of an estoppel by conduct; and since, if these matters had been known in the first instance, petitioner would not, for the purpose of securing Arthur's estate, have been permitted to show the invalidity of the divorce decrees, we unhesitatingly conclude that she should not now be allowed to take advantage of such invalidity, in order to accomplish the same result.

The application of a doctrine analogous to that of equitable estoppels to cases which, in essential particulars, strongly resemble the one at bar, is by no means a novelty. *Ellis v. White*, 61 Iowa, 644, 17 N. W. Rep. 28; *Garner v. Garner*, 38 Ind. 139; *Prater v. Prater*, 87 Tenn. 78, 9 S. W. Rep. 361; *Duke v. Reed*, 64 Tex. 705; *Odiorno's Appeal*, 54 Pa. St. 175; *Bourne v. Simpson*, 9 B. Mon. 454; *Bally v. Bally*, 44 Pa. St. 274; *Richeson v. Simmons*, 47 Mo. 20; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Sedlak v. Sedlak*, 14 Or. 540, 13 Pac. Rep. 452; *Nichols v. Nichols*, 25 N. J. Eq. 60. In two or three of the foregoing cases, the principle of estoppel was applied where wives had abandoned their husbands and formed adulterous relations with other men, or had simply renounced the marriage tie and forsaken the marital obligations, but where in fact no divorce proceedings were instituted. In at least two of the others, the learned judges who prepared the opinions dwell upon laches as well as acquiescence. These decisions are, in the main, well considered, and we have no disposition to reject the particular reasons, so far as applicable, given in support thereof, but we prefer to rest our conclusion especially upon the specific grounds hereinbefore considered. Petitioner's demurrer to the supplemental answer should have been overruled. The judgment of the court below is accordingly reversed, and the cause remanded for further proceedings.

(15 Colo. 184)

COFFEY et al. v. EMIGH et al.

(Supreme Court of Colorado. Nov. 7, 1890.)

MINING—CROSS-VEINS—BONA FIDE PURCHASER—SPECIFIC PERFORMANCE.

1. Rights to cross-veins may be changed by contract, and the settlement of a dispute between the owners of such veins, though ignorant of their legal rights, if entered into in good faith, is a sufficient consideration to support a voluntary agreement for the amicable adjustment of the controversy. The law upholds and favors such consideration.

2. A purchaser of real property must take notice of the rights of those in possession when the circumstances of such possession are sufficient to put a reasonable person upon inquiry in respect thereto.

3. In an action for specific performance relating to real property, the doctrine of laches cannot be invoked by a party out of possession against a party in possession; and the latter is not prejudiced by delay in commencing suit so long as his possession is undisturbed.

4. When the contract upon which relief by specific performance is sought is certain, fair, reasonable, and just, and is proved substantially as alleged, the same may be enforced by decree

when both parties are able, if the plaintiff is ready and willing to perform it.

5. The provisions of the Code in reference to uniting causes of action are liberal. Suits should not be unnecessarily multiplied, and statements of fact in pleadings should be in ordinary and concise language, without unnecessary repetition.

(*Syllabus by the Court.*)

Error to district court, Boulder county.

Three causes, involving claims by the same parties to the same mining property, were argued and submitted before this court at one hearing, with the understanding that they would be considered and disposed of together. The causes bear the same title and are numbered 2,213, 2,241, and 2,768 respectively. The first cause is of the nature of an action of trespass *quare clausum fregit*. It was commenced in the court below in October, 1885, by Henry N. Coffey, Nelson K. Smith, and John W. Blackburn, as plaintiffs, against Charles C. Emigh, as defendant. Subsequently Alpheus Jackson became a co-defendant with Emigh. The allegations of the parties so far as they are necessary to an understanding of this opinion are in effect as follows: Plaintiffs complaining allege that, at the commencement of said action, and for 11 years prior thereto, they were and had been the owners and in possession and entitled to the possession of the Western Slope lode, a parcel of mineral lands situate in Boulder county, Colo., and they further allege that in September, 1885, defendants wrongfully and unlawfully entered upon said Western Slope lode against the consent of plaintiffs, while they were so in possession thereof, and dug, extracted, removed, and carried away valuable ore therefrom. Defendants answering admit the plaintiffs' ownership of the Western Slope lode, with certain exceptions, but deny the entry, trespass, and damage as charged. Defendants further allege that they are and at the time of the alleged trespass were the owners of a certain parcel of mineral lands called the "Emancipation Lode," and that the location of the Emancipation lode crosses the location of the Western Slope lode almost at right angles; that the veins of the two locations are cross-veins; that defendants have a right of way through and across the Western Slope lode for the purpose of working the vein of the Emancipation lode; that they own in their own right all ore taken from the Emancipation vein between north and south side lines of the Western Slope location, except within the space of intersection of the two veins; that prior to and since September, 1885, they have worked the Emancipation vein beneath the surface of the Western Slope location, and within the boundaries of the Emancipation location, but have not touched the vein of the Western Slope location within its side or end lines. Plaintiffs replying, among other things, allege that in January, 1880, there was a dispute and controversy existing between the owners of the Western Slope lode and the owners of the Emancipation Lode as to the ownership of the Emancipation vein where the same crosses the territory of the Western Slope lode claim; that, for the purpose of set-

ting such dispute and controversy, the owners of said claims entered into a written agreement whereby it was mutually and definitely agreed that a certain portion of the intersecting territory of the two claims should be owned and possessed by the Western Slope owners, and a certain portion by the Emancipation owners respectively; and that the several owners entered into and took immediate possession of their several and separate portions as described in said written agreement, and have owned, possessed, and occupied the same continuously by themselves or their several grantees successively until the committing of the trespass complained of in September, 1885; that said trespass was committed upon that portion of the Western Slope territory crossed by the Emancipation territory as aforesaid, not within the space of intersection of the said cross-veins, but within that portion which by the written agreement was to be owned and possessed, and which was at the time of said trespass owned and possessed, by plaintiffs as owners of the Western Slope lode claim; and that defendants well knew of the existence and terms of the said written agreement, and of the rights of the several parties thereunder, at and before they acquired any interest in the said Emancipation lode claim. The foregoing portion of plaintiffs' replication was struck out on motion of defendants, and on the trial evidence of the alleged written contract was disregarded.

The next record discloses an action for specific performance. It shows that in June, 1886, the same plaintiffs commenced an action against the same defendants based substantially upon the matters struck from their replication as above set forth. The complaint states more circumstantially the making of the written agreement for the purpose of adjusting and forever settling the controversy as to the conflicting territory of the Western Slope and Emancipation lodes; it alleges the taking of open, notorious, peaceable, and undisputed possession of these several portions of the conflicting territory thus divided, and the continuous occupation and possession thereof by the several parties, according to the terms of said written agreement, from and after January, 1880; it alleges also that the parties agreed to perfect said written agreement by proper deeds of conveyance at as early a day as practicable; and also avers that plaintiffs are and ever have been ready, able, and willing to convey according to the terms of said written agreement; and concludes with the prayer that defendants may be required to specifically perform such contract by executing proper conveyances, etc.

The third record appears to be in the nature of an action of ejectment. It seems to have been originally a part of the trespass suit, but by order of the district court was separated therefrom, and given a different number, and was tried and determined separately. It is brought to this court as a distinct suit on error. On the trial of the action for specific performance, the court below submitted certain interrogatories to a jury, who found in response thereto that the owners of the



Emancipation lode did, about January 1, 1880, enter into a contract in writing with the owners of the Western Slope lode, which writing was signed by all the parties, in which it was agreed that the portion of the vein of the Emancipation included within the side lines of the Western Slope should be divided as follows: The first 50 feet north of the south side line of the Western Slope to belong to the owners of the Emancipation, and the balance to belong to the owners of the Western Slope; and that the parties should exchange deeds in the fulfillment of said agreement as soon as they respectively acquired title from the government. The jury also found that the defendant Emigh did not have notice of the written agreement when or before he purchased an interest in the Emancipation mining claim. The court in its final decree found that the contract in writing was made as returned by the jury, but nevertheless found the equity of the cause with the defendants Emigh and Jackson, and dismissed the plaintiffs' complaints, without prejudice, however, to the trial of the issue at law as joined between the parties. On the last trial of the trespass case, which occurred some time after the trial of the action for specific performance, the court directed a verdict in favor of defendants. The ejectment proceeding shared substantially the same fate. The plaintiffs in error, Coffey, Smith, and Blackburn, assign for error, *inter alia*, the action of the court below in disregarding their rights under the written agreement.

*Geo. S. Adams, John W. Blackburn, Bedford & Wikoff, and J. Berkley, for plaintiffs in error. L. C. Rockwell and S. A. Griffin, for defendants in error.*

ELLIOTT, J., (after stating the facts as above.) The three records before us are very voluminous. Nevertheless, as they have been argued and submitted together by counsel, and as the parties and the property involved are the same in each case, we shall endeavor to consider and dispose of them in one opinion. It is conceded that the territory of the Emancipation lode crosses the territory of the Western Slope lode almost at right angles, and that the veins therein are cross-veins. The Western Slope lode is the prior location. Hence, the owners of the Western Slope are entitled to the mineral within the space of intersection of the two veins; but, in the absence of contract, the owners of the Emancipation are entitled to a right of way through the territory of the Western Slope location for the purpose of working their own vein, and are entitled to all the ore found therein except within the space of intersection. Such is the law as declared in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. Rep. 669; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. Rep. 77. See, also, the latter case in 13 Colo. 174, 22 Pac. Rep. 436.

It is further conceded that the acts of defendants complained of were committed upon the conflicting territory,—that is, within the limits where the two locations cross each other, and within that portion of such limits which by the written agreement was to be owned and possessed

as a part of the Western Slope location, though not within the space of actual intersection of the two veins; hence the question whether or not defendants were guilty of trespass depends upon whether or not the written agreement and the conduct of the parties thereunder, as set forth in the replication, controlled the rights of the parties in reference to the conflicting territory. In January, 1880, when the alleged written agreement was entered into for the division of the territory embraced within the conflicting locations, the law was unsettled as to the rights of owners of cross-veins within the limits of conflicting locations. The case of *Branagan v. Dulaney* was not decided until 1885, and up to this time we are not aware of any decision by the supreme court of the United States construing the act of congress relating to the precise question now under consideration. Rev. St. U. S. § 2336. We see no reason to doubt that the dispute between the owners of the respective mining claims as to their several rights within the space of the conflicting locations was caused by an honest difference of opinion in relation thereto, and that all parties acted in good faith in endeavoring to settle the same. There was, therefore, sufficient consideration to support the voluntary written agreement for the amicable settlement of such controversy. The law upholds and favors *bona fide* settlements based upon such considerations. 1 Pars. Cont. 438; 2 Pom. Eq. Jur. § 850. In *Hoge v. Hoge*, 1 Watts, 216, 217, Chief Justice Gibson says: "The compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights." Plaintiffs having alleged that they had taken and continued in possession of their several portions of the disputed territory in pursuance of said written agreement, were entitled to prove the same in support of their claim of lawful possession, and for the purpose of showing that the entry by defendants without license was unlawful. It was, therefore, error to strike from the replication in the trespass suit the averments respecting the written agreement, and the conduct of the parties in reference thereto. In the action for specific performance, the court and jury concurred in finding that the owners of the conflicting mining locations did enter into the contract in writing to divide the disputed territory, and to exchange deeds in fulfillment of such contract as soon as they should respectively acquire the government title. This finding corresponds substantially with the allegations of the complaint, and is abundantly sustained by the evidence. The defendant Jackson was a party to the written agreement, and joined in its execution; hence, as to him, no question of notice can arise. The jury, however, found that defendant Emigh did not have notice of the written agreement when he purchased an interest in the Emancipation lode; but the decree of the court does not in express terms confirm such finding. Whether Emigh had such notice or not before purchasing, the evi-



dence is strong and convincing that after acquiring such interest he repeatedly recognized the title of the Western Slope owners under the written agreement. It is clearly established, also, that the owners of the Western Slope lode, immediately upon the execution of the written agreement, and in pursuance thereof, entered into possession of that part of the Emancipation territory so acquired by them, and proceeded to sink a shaft at the 50-foot division line designated in the written agreement, erected a shaft-house there, and thereafter continued their possession and working of that portion of the vein as a part of their own mining claim. Emigh himself testifies that he saw this shaft at the time he visited the property with a view of purchasing, and other witnesses testify that the shaft-house was in plain sight, and that the dump and evidences of fresh workings were observable there at the time. The court, therefore, should have found, notwithstanding the verdict of the jury, that plaintiffs were entitled to the premises thus acquired and occupied. Their possession under the written agreement, and the circumstances attending the same, were sufficient to put Emigh upon inquiry as to their rights in the premises. Besides, there is positive testimony from a witness, apparently disinterested, that before Emigh purchased he was expressly informed of plaintiffs' rights according to the terms of the written agreement. Emigh denies this, but his subsequent conduct indicates that he was not without satisfactory information upon the subject. *Wade, Notice, § 10 et seq.; Filmore v. Reithman, 6 Colo. 120; Doyle v. Teas, 4 Scam. 202.*

The contention that there were laches on the part of plaintiffs in not asking for a specific performance of the contract at an earlier date is without force. Plaintiffs were and had been in the undisturbed possession and enjoyment of the premises acquired by them under the written agreement for more than five years after the agreement was entered into, and until about one month prior to the commencement of this litigation. The agreement had thus been executed for all practical purposes, and, instead of plaintiffs' title becoming stale by delay, it was ripening by the continued acquiescence of defendants. See *Great West Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. —, 20 Pac. Rep. 771*. In *Bush v. Stanley, 122 Ill. 418, 13 N. E. Rep. 249*, it is said: "The doctrine of laches can only be invoked by one in possession against one out of possession." That there may have been secret under-ground trespasses upon plaintiffs' territory thus acquired does not militate against the correctness of these views. Nothing appears to have been wanting to complete the execution of the written agreement except the formality of passing the title-deeds.

As to the alleged variance between the allegations and the proof on the part of plaintiffs it is only necessary to say that in view of the loss of the written agreement and the resort to parol evidence the proof is remarkably clear, strong, and harmonious, and, in general,

corresponds with the substance of the issue as presented by the pleadings. This is all the law requires. It is true some testimony is contradictory of, and some is variant from, the terms of the written agreement as alleged, but such testimony is by no means sufficient to warrant an appellate court in setting aside the finding of the jury, confirmed as it is by the judgment of the trial court. *Railroad Co. v. Lindsay, 4 Wall. 650; Crary v. Smith, 2 N. Y. 60*. The failure of the trial court to confirm the finding of the jury as to want of notice to defendant Emigh, together with the dismissal of the complaint "without prejudice to the trial of the issue at law as joined between the parties," indicates, as we think, that the trial court considered that plaintiffs had established their right to the property in controversy as against defendants, but that the case was not a proper one for a decree of specific performance, and hence remitted them to their action for damages. The written agreement, as alleged and substantially proved, seems to us to be certain, fair, reasonable, and just. The parties had entered into and continued in possession of the property in pursuance of its terms for a long time. Both parties are still able to carry out the contract. Plaintiffs are willing so to do. No good reason has been shown why defendants should not be required to perform on their part. *1 Story, Eq. Jur. §§ 747-751; 3 Pom. Eq. Jur. § 1407; Crary v. Smith, supra.*

It is unnecessary to consider in detail the third record, which for convenience we have called the "action of ejectment." Its separation from the trespass case was an irregularity. In the course of this litigation there has been an unnecessary multiplication of suits, and in each case the pleadings have been excessively voluminous. The provisions of our Code of Procedure in reference to the uniting of causes of action are very liberal. The statements of fact in pleadings are required to be "in ordinary and concise language without unnecessary repetition." In all cases, equitable relief may be granted, and legal and equitable defenses may, if separately and properly stated, be set forth in the answer. *Code, §§ 49, 56, 59, 70; Bank v. Newton, 13 Colo. 245, 22 Pac. Rep. 444*. The three judgments under consideration are accordingly reversed and remanded for further proceedings in accordance with this opinion. As the multiplied records and increased costs of the so-called ejectment proceeding were occasioned by the action of plaintiffs in the court below, the costs thereof are adjudged against them.

(15 Colo. 257)

BERGUNDTHAL v. BAILEY et al.

(Supreme Court of Colorado. Nov. 7, 1890.)

INTEREST—ACCOUNT—BILL OF EXCEPTIONS.

1. Gen. St. Colo. § 1707, provides, among other things, that interest at the rate of 10 per cent. shall be allowed "on money due on the settlement of an account, from the day of the last just entry that may have been made" therein. Held that, where lime was sold in various shipments, a payment made thereon, and afterwards a bill was presented which showed the last ship-

ment, and thereupon the account was settled and the debtor agreed in writing to pay it, interest was properly allowed from the date of the last item.

3. When the sole error relied on is that the judgment is unsupported by the evidence, a bill of exceptions, signed and sealed by the trial judge, and exhibiting the testimony, is indispensable.

Commissioners' decision. Appeal from Arapahoe county court.

Gen. St. Colo. § 1707, provides, among other things, that interest at the rate of 10 per cent. shall be allowed "on money due on the settlement of an account from the day of the last just entry that may have been made in an account."

*Joseph N. Baxter*, for appellant.

**BISSELL, C.** The appellees, who were copartners in business, brought this action in 1887, before a justice of the peace, against Bergundthal, the appellant, to recover \$300, which they alleged to be due for lime previously sold to him. The trial resulted in a judgment for plaintiffs for the amount claimed, which was, on appeal to the county court, affirmed. The case might easily be affirmed in this court upon the record as it stands. There is no bill of exceptions in the record, signed and sealed by the judge before whom the case was tried, exhibiting the testimony introduced upon the trial.

It has been repeatedly held by this court that such a bill, signed and sealed under the statute, is absolutely indispensable to warrant a hearing, when the sole error relied on is that the judgment is unsupported by the evidence. But it is wholly unnecessary to put the decision upon that technical ground. There is nothing in the record, or in the testimony as it is contained in what purports to be a bill of exceptions, which would warrant a reversal of the action taken by the court below. The judgment is abundantly supported by the testimony, for there was no controversy whatever concerning the amount of lime shipped, or the price at which it was sold, and which the defendant agreed to pay for it. Had all the damages been allowed concerning which the appellant testified, the judgment would not have been reduced below the sum for which it was entered. But apparently it is not seriously contended by the appellant that the recovery is not abundantly sustained by the evidence. The reversal is insisted upon, on the sole ground that the court erred in allowing interest upon the account from the time of the sale of the lime to the date of the rendition of the judgment. The claim that interest should not have been allowed is not well founded. There is no question that, under the statute and the authorities in force at the time of the trial, interest could only be recovered in matters of contract when the case was brought within the general terms of the statute regulating its recovery. This case seems to come absolutely within the statutory provisions. The lime was sold by the car-load, prior to the 16th day of July, 1884. The last car-load was shipped about that time. On the account the defendant made a payment amounting to \$165 and

some cents. The balance he agreed to pay, and, in express terms, over his own signature, promised to pay interest thereon. The account was determined, and the amount settled and agreed upon on the presentation of the bill for what had been already sold. The bill itself was rendered at that time, and upon its face showed the date of the last item of the account as it existed between the parties. When the bill was presented, its accuracy was not disputed, and the defendant agreed to pay it as soon as he was able. From this it appears that the amount of money sued for was due upon the settlement of the account, and had so become on the date of the last entry in it, which was the date of the sale of the last car-load of lime. It is thus apparent that, even though there had been a good record, with a proper bill of exceptions filed in this court, the judgment must in any event have been affirmed. The judgment is affirmed.

**RICHMOND and REED, CC.**, concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment of the court below is affirmed.

(15 Colo. 193)

COLORADO M. RY. CO. v. BROWN *et al.*

(*Supreme Court of Colorado*. Nov. 19, 1890.)

EMINENT DOMAIN—COMPENSATION—EVIDENCE.

1. In proceedings under the act of eminent domain in this state, the proper measure of the owner's recovery is: (1) Compensation for the land or property actually taken equal to the true and actual value thereof at the time of the appraisalment. (2) Damages to the residue of the land or property equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put.

2. In arriving at the value of the property taken, and the damages, if any, to the residue, all evidence having a bearing upon the compensation and damages to be awarded is admissible. With proper instructions from the court we must presume that the jury do not draw improper inferences from competent evidence.

3. It would be an unsafe rule to prevent the owner from recovering the actual damages done to the residue of his premises by the mere declaration of a witness that it was the intention of the party doing the injury to repair the damage at some future time.

4. Where evidence in relation to certain damage is admitted without objection or exception at the trial, the propriety of including such damage, if any, in the assessment, cannot be questioned on appeal.

(*Syllabus by the Court.*)

Appeal from district court, Pitkin county.

This is an appeal from a judgment awarding compensation and damages to appellees for a strip of land through their premises taken for right of way for appellant's railroad.

*H. T. Rogers, A. E. Pattison, and Wilson & Stimson*, for appellant. *C. W. Franklin*, for appellees.

**ELLIOTT, J.** The assignments of error are very numerous, but counsel in their printed argument have very considerably abandoned most of them. This practice is to be commended. In the hurry of a trial *ad nisi prius* many exceptions are often

taken which counsel find are of no avail when they come to prepare briefs for the appellate court. By frankly withdrawing all assignments except such as are seriously relied on, counsel save themselves and the court of review much unnecessary labor, and secure attention more readily to the important matters involved in the record. It is often hard to find a kernel of wheat in a bushel of chaff. The matters discussed in the brief of counsel relate solely to the admission and rejection of evidence. From the evidence it appears that the premises through which appellant sought to condemn a right of way were situated on the Roaring Fork river, and were occupied and used by appellees for a planing-mill and lumber-yard, and that it was necessary to keep large quantities of lumber stored upon the premises. The location was peculiarly available and valuable as a mill-site on account of its water-power, which could be used for operating different kinds of machinery. Appellees were permitted to show the market value of the water-power, and its adaptability to the operation of mining machinery and electric motors in and about the city of Aspen, although such uses had not been actually arranged for at the time. They were also allowed to show the cost of making certain changes in the flume which it was claimed would be rendered necessary by the construction of the railroad at the place designated, and also to show the loss which would be thereby occasioned to the water-power. Evidence was also admitted showing the quantity and value of the lumber stored on the premises, and the cost of removing the same to a place less exposed to the increased danger from fire which the construction and operation of the railroad would occasion. To the admission of these several matters of evidence objections were interposed by counsel for appellant on the ground that the same were entirely speculative, and furnished no proper criterion for the assessment of compensation and damages.

In proceedings under the act of eminent domain in this state, the owner's recovery is not limited to the value of the property for the special use to which it is devoted at the time of the taking or trial, nor to any particular use. The value of property must necessarily be a matter of opinion, and is, therefore, always somewhat speculative. The proper measure of the owner's recovery is: (1) Compensation for the land or property actually taken equal to the true and actual value thereof at the time of the appraisement. (2) Damages to the residue of the land or property not taken, equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put; and in determining such damages the use to which the property taken is subjected, and the loss and inconvenience thereby occasioned, may be taken into consideration, as the construction and operation of a railroad. Eminent Domain Act, (approved February 12, 1877.) § 17; *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6; *Railroad Co. v. Allen*, 13 Colo. 229, 22 Pac. Rep. 605; *Lewis, Em. Dom.* §§ 478-

487; *Railway Co. v. Vance*, 115 Pa. St. 331, 8 Atl. Rep. 764; *Johnson v. Railway Co.*, 111 Ill. 413; *Weyer v. Railroad Co.*, 68 Wis. 180.<sup>1</sup> From the foregoing rules and decisions it will be observed that in arriving at the value of the property taken, and the damages, if any, to the residue, a wide range of evidence is admissible. It must be conceded that the matters admitted in evidence on the trial of this case, as above stated, have some bearing upon the compensation and damages to be awarded by the jury, though, without proper instructions from the court, the jury might be misled by such evidence. But as counsel do not urge in argument anything against the charge, and as upon examination the instructions appear to be full and fair, we must presume that the jury did not draw improper inferences from the evidence.

It was shown in evidence in behalf of appellees that appellant, while constructing its road-bed, rolled or deposited certain large boulders upon the land of appellees, some of them so large that it took six mules to move them out of the excavation. The amount of appellees' land covered by the deposit of the boulders is not shown in the record, though it was pointed out on the map at the trial. On the part of appellant, one witness testified that these boulders were deposited outside "temporarily, waiting for the track to be laid in order to take them off." The withdrawal of this latter testimony from the jury on motion of appellees is assigned for error. It would be an unsafe rule to prevent the owner from recovering the actual damages done to the residue of his premises by the mere declaration of a witness that it was the intention of the party doing the injury to repair the damage at some future time. No injustice was done by striking out this testimony. It was not shown nor offered to be shown that the boulders were ever removed by appellant; and, if appellees are allowed to recover for such damage, appellant cannot be required to remove the boulders. *Dorlan v. Railroad Co.*, 46 Pa. St. 520.

It has been suggested, though not in the briefs of counsel, that the damage occasioned by depositing the boulders upon the lands of appellees is not recoverable in a proceeding of this kind on the ground that such damage cannot be reasonably foreseen or anticipated as a consequence from the construction or operation of the railroad. *Water Co. v. Middaugh*, 12 Colo. 438, 21 Pac. Rep. 565. Undoubtedly, if the trial and assessment of damages in the proceeding had taken place before the construction of the road, and the boulders had afterwards been thrown upon the land, appellees would not have been precluded from maintaining an independent suit for the trespass. But, as the damage was thus occasioned before the trial, it is not so clear that appellees must resort to a separate action therefor. It is unnecessary, however, to determine this question, for the evidence in relation to the boulders having been admitted in behalf of appellees in the court below, without objection or exception, the propriety of includ-

<sup>1</sup> 31 N. W. Rep. 710.

ing such damage, if any, in the assessment, cannot be questioned on this appeal. Counsel doubtless desired that whatever liabilities appellant was responsible for should be settled in one suit, and so did not raise the question above suggested. The judgment of the district court is affirmed.

(15 Colo. 197)

**SAMPSON MINING & MILLING CO. v. SCHAAD.**

(Supreme Court of Colorado. Nov. 19, 1890.)

**MASTER AND SERVANT—NEGLIGENCE—QUESTION FOR JURY.**

1. It is the duty of employers engaged in extracting ores from the bowels of the earth to exercise reasonable diligence to keep their mines secure from danger to their employes, and miners engaging in such service assume the ordinary risks and perils incident to such employment.

3. When the precise position, which a fallen stull occupied in the roof of a mine before an accident, could not be shown with certainty so as to determine whether there was or was not negligence in placing the same in the roof, it was proper to admit evidence showing the construction of other parts of the roof adjacent thereto so far as such other parts could be shown to have been constructed in a similar manner.

3. Questions of negligence and contributory negligence are generally questions of fact to be determined by the jury under proper instructions from the court upon matters of law.

4. Where a person not skilled in timbering mines was employed as a "trammer" in and about a mine for a considerable period before he was injured by the falling of a defective roof, held, that his means of knowledge concerning the condition of the roof was simply a matter for the consideration of the jury in determining the question of contributory negligence.

(Syllabus by the Court.)

Appeal from district court, San Juan county.

Charles Schaad, plaintiff below, brought this action against the Sampson Mining & Milling Company for personal injuries suffered by himself while at work for defendant in the lower level of its mine. The injuries were very serious, and were occasioned by the falling of the roof of the mine, thus burying plaintiff under the roofing material and a great quantity of rock and other debris. The injuries are alleged in the complaint to have happened without any fault or negligence of plaintiff, and to have been caused by the improper construction and unsafe condition of said roof; that such unsafe condition was, at the time of plaintiff's injuries, and long prior thereto, known to defendant; and that said injuries happened in consequence of the failure of defendant to provide plaintiff with a place in which he could do his work with reasonable safety. The answer admits its employment of plaintiff, as set forth in the complaint, and that the roof of the mine fell upon plaintiff, but denies that the falling of the roof was caused by the negligence of defendant, denies the extent of plaintiff's injuries as alleged, and denies the other allegations of the complaint. The trial resulted in a verdict and judgment for plaintiff. Defendant brings this appeal. The only assignments of error insisted on are to the effect that the verdict is against the law and is not sustained by the evidence, and

that the court erred in admitting improper evidence on behalf of plaintiff against the objection of defendant.

*H. O. Montague, for appellant.*

ELLIOTT, J., (after stating the facts as above.) That it is the duty of employers engaged in extracting ores from the bowels of the earth to exercise reasonable diligence to keep their mines secure from danger to their employes, and that miners engaging in such service assume the ordinary risks and perils incident to such employment, are legal propositions which were accepted as correct in the court below as well as on this appeal. Considerable evidence was given at the trial by persons of learning and experience in timbering mines, showing how timbers should be placed in and about the walls and roofs of mines in order that the same might be reasonably secure from danger. This evidence was for the purpose of establishing, in the minds of the jury, a standard by which they could determine whether or not the defendant company had discharged its duty to its employes by providing them with a reasonably safe place to perform their service, considering the nature of their employment. Evidence was also admitted tending to show that the timbers in defendant's mine were not placed in proper position to make a reasonably strong and secure roof; and, in this connection, evidence was admitted against the objection of defendant showing the position or angle at which the stulls were placed in, upon, or against the walls of the mine adjacent to the place of the accident, as well as the position of the particular stull which gave way.

It might be impossible to show with certainty, by direct evidence, the precise position which the fallen stull occupied before the accident, so as to determine whether there was or was not negligence in placing the same in the roof. Hence, it was proper to admit evidence showing the construction of other parts of the roof adjacent thereto so far as such other parts could be shown to have been constructed in a similar manner. From such data a legitimate inference might be drawn as to the cause of the roof giving way as it did. It was not error to admit such evidence.

It is insisted by counsel for appellant that the evidence is not sufficient to sustain a finding of negligence against the defendant company; and that, even if the evidence would justify such finding, it also shows plaintiff to have been guilty of contributory negligence, inasmuch as he had been employed as a workman in and about the mine at different times for a considerable period before he was injured.

The plaintiff's employment was to haul ore from the interior of the mine to the ore-house by means of a vehicle called a "tram." In mining parlance, he was called a "trammer." He was not a skilled miner, but a common laborer. He did not profess to be skilled in timbering mines; nor does it appear that his duties required that he should be; neither does it appear that he had anything to do with constructing the roof which fell, or any part thereof. His means of knowledge concern-

ing its condition, therefore, was simply a matter for the consideration of the jury in determining the question of contributory negligence. *Wells v. Coe*, 9 Colo. 167, 11 Pac. Rep. 50. We have carefully examined the evidence. It is somewhat conflicting, and it may be admitted that the jury would have been warranted in rendering a different verdict. We do not, however, perceive any clear and substantial reason which would justify an appellate court in exempting this case from the application of the rule that questions of negligence and contributory negligence are generally questions of fact to be determined by the jury under proper instructions from the court upon matters of law. *Electric Co. v. Lubbers*, 11 Colo. 508, 19 Pac. Rep. 479; *Lord v. Refining Co.*, 12 Colo. 393, 21 Pac. Rep. 148. All questions of fact were fairly submitted to the jury by the charge of the trial judge. No objection whatever is urged on this appeal against the instructions. The judgment of the district court must accordingly be affirmed.

HAYT, J., having presided at the trial below, did not participate in this decision.

(15 Colo. 98)

**SUTTON V. DANA.**

(*Supreme Court of Colorado*. May 19, 1890.)

**CONVERSION—MEASURE OF DAMAGES—SALES BY INSOLVENT DEBTOR.**

1. The general rule is that the measure of damages in actions for the conversion of personality is the value of the property at the time of the taking, with legal interest thereon from the date of the taking to the date of rendering verdict.

2. When instructions prayed state the law applicable to the issues and the evidence with substantial accuracy, they should be given in substance.

3. Ordinarily, an extended charge to the jury is unnecessary; but when the question to be determined by them is complicated, and dependent upon a variety of circumstances and conditions, it is important that the jury should be guided in their deliberations by the learning and experience of the presiding judge.

4. The fact that a party at the time of making a sale is insolvent or unable to pay all his debts does not deprive him of the power or render it unlawful for him to make such sale. A debtor in such condition may lawfully sell and dispose of his property, provided he does so for a fair and adequate and valuable consideration paid or to be paid by the purchaser, and from lawful motives, or without fraudulent intent as respects his creditors. His motives will be presumed to be lawful, and his intent not fraudulent, until the contrary is shown. Insolvency, if it exists, is only a circumstance to be taken into consideration by the jury in determining the question of fraudulent intent, for which alone the sale may be set aside. Of itself, insolvency constitutes no obstacle to the sale, or to its lawfulness or validity, if fairly and honestly made.

5. An insolvent debtor may lawfully prefer some of his creditors to others, and pay some of them in full, leaving others partially or wholly unpaid so far as he shall be without means of payment, and may lawfully sell and dispose of his property for a fair, adequate, and valuable consideration, for the purpose of making such payment or payments. The law permits an insolvent debtor to make choice of the creditors he will pay, and the mode or means by which he will make such payment, and something beyond such preference or payment must appear before the

transaction is to be considered fraudulent. The preference of creditors by a failing debtor is not necessarily fraudulent.

(*Syllabus by the Court*.)

Appeal from district court, Douglas county.

The appellant was plaintiff below, and brought his action against defendant for the taking and conversion of a stock of merchandise, of which plaintiff claimed to be the owner. The defendant was sheriff of El Paso county, and justified the taking under judgment and execution against one Conant, the original owner of the property, pleading specially that the sale thereof to plaintiff was fraudulent and void as against the creditors of Conant. The evidence tended to show that Conant, being in the mercantile business, and in failing circumstances, sold the stock of merchandise in controversy to the plaintiff, Sutton, taking Sutton's notes therefor, and that Conant immediately transferred the notes to certain of his creditors other than the judgment creditors represented by the sheriff. The principal controversy at the trial was whether such sale of the goods to Sutton invested him with a good title as against such creditors. The defendant undertook to prove that Conant made the sale with intent to hinder, delay, and defraud his creditors, and that plaintiff had knowledge of such intent; and also that the sale was not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods sold. The plaintiff gave evidence tending to show that the sale was made in good faith for a valuable consideration, and with intent to apply the proceeds thereof towards the payment of Conant's indebtedness, and not for any unlawful purpose. The verdict and judgment were in favor of defendant. The assignments of error relate to the giving and refusing of instructions, and to the overruling of the plaintiff's motion for a new trial.

*L. S. Dixon*, for appellant. *Wolcott & Valle*, for appellee.

**ELLIOTT, J.**, (after stating the facts as above.) The general rule is that the measure of damages in actions for the conversion of personality is the value of the property at the time of the taking, with legal interest thereon from the date of the taking to the date of rendering verdict. It was error for the court to refuse to give an instruction to this effect, as requested by plaintiff's counsel. The error, however, is not material upon this review, unless it be found that other error was committed which may have improperly caused the trial to result in favor of defendant. *Refining Co. v. Tabor*, 13 Colo. 59, 21 Pac. Rep. 925; *Oppenheimer v. Railway Co.*, 9 Colo. 321, 12 Pac. Rep. 217. The charge of the court, as given, other than the matter relating to the measure of damages, appears to be unobjectionable. The principal matter complained of is the refusal of the court to charge the jury as requested by plaintiff's counsel. It is the right of a party to pray instructions in writing to be given to the jury at the proper time; and when instructions thus prayed state

the law applicable to the issues and the evidence with substantial accuracy, they should be given in substance. The instructions prayed in behalf of plaintiff were numerous and comprehensive. They were each and all refused. Ordinarily, an extended charge, such as was requested in this case, would be altogether unnecessary, and perhaps injurious to the ends of justice, in a trial by jury. But the question of fraudulent intent in actions of the kind under consideration is often a complicated one. The acts which a failing debtor, situated as Conant was, may or may not lawfully do, depend upon a variety of circumstances and conditions. The law relating to such transactions is familiar to the legal profession, and may be supposed to be generally understood by business men engaged in commercial pursuits. Nevertheless, a jury may be composed of men whose minds are comparatively uninformed upon the subject. Hence, it is important, in such cases, that the jury shall be guided in their deliberations by the learning and experience of the presiding judge.

We shall not undertake to review all of the instructions prayed in behalf of plaintiff; a few will suffice for the purposes of this opinion. Under the issues, evidence, and circumstances developed at the trial, if Conant, at the time of making the sale, was insolvent, or unable to pay all his debts, that fact did not deprive him of the power or render it unlawful for him to make such sale. A debtor in such condition may lawfully sell and dispose of his property, provided he does so for a fair and adequate and valuable consideration paid or to be paid by the purchaser, and from lawful motives, or without fraudulent intent as respects his creditors. His motives will be presumed to be lawful, and his intent not fraudulent, until the contrary is shown. Insolvency, if it exists, is only a circumstance to be taken into consideration by the jury in determining the question of fraudulent intent, for which alone the sale may be set aside. Of itself, insolvency constitutes no obstacle to the sale, or to its lawfulness or validity, if fairly and honestly made. An instruction to this effect was requested by plaintiff. It was error to refuse it. So, too, it was error to refuse to charge the jury in substance that a debtor, situated as Conant was, might lawfully prefer some of his creditors to others, and pay some of them in full, leaving others partially or wholly unpaid so far as he should be without means of payment, and might lawfully sell and dispose of his property for a fair, adequate, and valuable consideration for the purpose of making such payment or payments; that the law permits an insolvent debtor to make choice of the creditors he will pay, and the mode or means by which he will make such payment, and that something beyond such preference or payment must appear before the transaction is to be considered fraudulent. The preference of creditors by a failing debtor is not necessarily fraudulent. *Campbell v. Iron Co.*, 9 Colo. 60, 10 Pac. Rep. 248; *Bank v. Newton*, 13 Colo. 256, 22 Pac. Rep. 444.

It is not our province to pass upon the

weight of the evidence relating to the question of fraudulent intent, nor do we intimate that the verdict would have been different if the refused instructions had been given as prayed; neither must we be understood as saying that the trial court should have given all or any of the refused instructions in the precise form and manner as requested, but, as we have seen, since some of them correctly stated the law applicable to the issues and evidence, such correct instructions, or in their stead, others in substance like them, should have been given to the jury. *Boyce v. Stage Co.*, 25 Cal. 470. What we have already said will undoubtedly be sufficient to guide the court below on a retrial of the case without further expression of opinion as to the other instructions refused. We refrain from going further lest we might mislead rather than aid the trial court in so doing. Instructions should be appropriate to the evidence as introduced under the issues at the trial. They should be such as will properly guide the jury in their deliberations upon the particular matters brought before them for determination; hence, instructions cannot always be anticipated with safety, even where there has been one trial, inasmuch as the evidence may be different on the second trial. The judgment of the district court is reversed, and the cause remanded.

(44 Kan. 583)

#### STATE v. BENNINGTON.

(*Supreme Court of Kansas.* Nov. 8, 1890.)

##### CRIMINAL LAW—ORAL INSTRUCTIONS.

It is error for a trial judge to give a portion of his instructions to the jury orally, though they are taken down by the stenographer at the time, and afterwards copied and delivered to the jury, on retiring, with the other instructions.

(*Syllabus by Strang, C.*)

'Commissioners' decision. Appeal from district court, Barber county; C. W. ELLIS, Judge.

*Chester I. Long* and *E. C. Sample*, for appellant. *L. B. Kellogg*, Atty. Gen., and *R. A. Cameron*, for the State.

STRANG, C. This is an appeal from the judgment of the district court of Barber county. The appellant, who was there charged with grand larceny, was tried, convicted, and sentenced to three years in the penitentiary. He appeals to this court, and says the court below committed error in the trial of his case by giving a portion of its instructions to the jury orally. The bill of exceptions shows that the court gave some of its instructions to the jury in writing, and some of them orally, which latter were taken down at the time by the stenographer, and afterwards copied and delivered to the jury, on retiring, with the other instructions. Is this method of instructing a jury a compliance with section 236, Crim. Code, par. 5304, (Gen. St. 1889?) We think not. Paragraph 5304, so far as it relates to this question, reads as follows: "The judge must charge the jury in writing, and the charge shall be filed among the papers in the cause." The requirement of the statute seems to be imperative, and there is no

reason why it should not be followed. It is argued by the attorney general that, so far as this case is concerned, the statute was substantially complied with, because the portions of the charge which were given to the jury orally were taken down by the stenographer, and afterwards copied and delivered to the jury, with the other instructions, before they retired to consider the case. The bill of exceptions shows that the portions of the charge given orally, and afterwards copied and delivered to the jury, were copied and delivered to the jury as they were about to retire. What purpose had the legislature in view in requiring the judge to charge the jury in writing? We think the legislature required the charge of the trial court to be given in writing, and filed among the papers in the case, for the following, among perhaps other, reasons: *First.* To preserve the instructions for use in appeals to this court, so as to facilitate the making of a correct and satisfactory bill of exceptions. Every one knows how difficult, if not impossible, it is for the judge himself to remember the exact language of his charge when, some time after the trial, a bill of exceptions is sought to be made, and that a change of a few words, or a slight change in the phraseology, might give to the charge a different color and meaning, and thus deprive the accused of his right to have the exact charge of the trial court reviewed in this court. *Second.* That the jury may have the instructions of the court, which are, so far as they are concerned, the law of the case, with them in the jury-room that they may refer to them, and thus settle among themselves any misapprehension of the language of the court, or difference of opinion, or want of recollection as to what the instructions were. *Third.* That the attorneys trying the cause may have the instructions in that form so that they may, with greater facility and accuracy, apply the law to the facts in their arguments to the jury. That this latter object was considered of some importance by the legislature is evidenced by the fact that in paragraph 5295, Gen. St. 1889, that body, in regulating the order of trial, provides that the court shall charge the jury before the counsel argue the case, changing the old rule in that regard. This change of the order of trial from the old rule, under which the instructions of the court were given to the jury after counsel had argued the case, was not without a purpose, and the object was to aid the counsel in the presentation of the case to the jury. Thus it will be seen that the legislature considered it a matter of importance that the instructions should not only be given in writing, but that the counsel in the case should have them before they commenced to argue the case. We think the attorneys in the case are entitled to the instructions, in the form in which the statute requires them to be given to the jury, before they commence their argument to the jury, and we think this right is a substantial one. It follows, therefore, that it is not a substantial compliance with the statute to give instructions orally, though they are at the time taken down by the reporter,

and afterwards copied and handed to the jury with the rest of the instructions when they retire to consider the case. In Missouri, the court held, under a statute that requires the instructions to be given in writing, that it is error to instruct orally, even though the defendant consent that they shall be so given. Judge WAGNER, in promulgating the opinion of the court, uses the following pointed and forcible language: "The provisions of the law are express and positive. They were enacted for wise and beneficial purposes, and neither courts nor parties are allowed to substitute a different arrangement in their stead. Establish the practice pursued in the court below, and it will happen at the end of a wearisome trial, when the court and bar are anxious to terminate their labors, propositions will be made by the respective counsel to forego the work of drafting written instructions, and let the court deliver an oral charge. The jury are liable to misapprehend the language of the court; a full, perfect, and satisfactory bill of exceptions is unattainable; and thus a man's rights are invaded and frittered away through a violation of a law which was made for his protection. Public policy, and the uniform and explicit standard which should always prevail in the administration of criminal justice, demand that the statute should be literally construed, and rigidly adhered to and enforced." *State v. Cooper*, 45 Mo. 64. The same rule prevails in California. *People v. Ah Fong*, 12 Cal. 345; *People v. Woppner*, 14 Cal. 437; *People v. Denint*, 8 Cal. 423. Also in Texas and Alabama. *Clark v. State*, 31 Tex. 574; *Edgar v. State*, 43 Ala. 312. Then we have in our own state the cases of *State v. Potter*, 15 Kan. 302; *City of Atchison v. Jansen*, 21 Kan. 560; and *Rich v. Lappin*, 43 Kan. 666, 23 Pac. Rep. 1038, cited by counsel for defendant. We do not consider it necessary to review the other errors assigned. It is recommended that the judgment of the district court be reversed, and cause sent back for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(10 Mont. 154)

ANDERSON v. PERKINS *et al.*

(Supreme Court of Montana. Oct. 11, 1890.)

PROMISSORY NOTES—APPLICATION OF PARTIAL PAYMENTS—SUFFICIENCY OF EVIDENCE.

1. A note provided for the payment of "interest at the rate of one and one half per cent. per month from date till maturity; and, if this note is not paid at maturity, we will pay the same rate of interest upon the principal sum until the same is fully paid and satisfied." *Held*, that these words did not require that payments made after maturity should be applied first to the discharge of the principal, and then to the interest, but they should be applied first to the interest due.

2. The complaint alleged that two payments on a note were made, respectively on April 13, 1885, and September 29, 1886. The answer denied that the first payment was made on April 13, 1885, and averred that it was made on April 11, 1885, and denied that the second payment was made on September 29, 1886, but averred that it was made September 8, 1886. *Held*, that these



pleadings brought the question of dates to an issue, and no reply was required.

3. One of the defendants testified that he "remembered the circumstances of the payment of \$250 as stated in the complaint on April 13, 1885." Plaintiff testified that "the memoranda upon the note, 'Paid April 13, 1885, \$250, on interest,' was made on that day. The memoranda of September 29, 1886, was made on that day, and is in my own handwriting." This was all the evidence on the point. The payments were indorsed on the note as made on the 13th and 29th respectively. *Held*, to be sufficient evidence to support a finding of payment on those dates.

Appeal from district court, Gallatin county; FRANK G. HENRY, Judge.

*M. J. Liddell*, for appellants. *Armstrong & Hartman*, for respondent.

HARWOOD, J. The main question brought to this court for determination by this appeal relates to the computation of interest and the application of partial payments on a certain promissory note made and delivered by appellants to respondent, in the following terms: "\$1,250. Bozeman, M. T., February 6, 1883. On or before the first day of August, 1883, we, or either of us, promise to pay to the order of David Anderson twelve hundred and fifty dollars, for value received, negotiable and payable without defalcation or discount, with interest at the rate of one and one-half per cent. per month from date till maturity; and, if this note is not paid at maturity, we will pay the same rate of interest upon said principal sum until the sum is fully paid and satisfied. WILLIAM L. PERKINS. HOWARD STONE." It was admitted by plaintiff's complaint, and found by the trial court, that payments had been made on said note as follows: May 8, 1883, \$250; April 13, 1885, \$250; September 29, 1886, \$673.36. The appellants contend that, under the terms of said note, if the same was not paid at or before maturity, they had a right after maturity to apply their payments first upon the principal sum, and then upon the interest. If such payments were applied in that manner, the result would be that on the 20th day of February, 1890, prior to the commencement of this action, the defendants were indebted to the plaintiff in the sum of \$875 only, as a balance of interest and principal due on said promissory note. Said sum was tendered to plaintiff on that date in full satisfaction of the balance due on said note, according to the construction of defendants. The plaintiff applied said payments first upon the interest accrued on said note to the date of payment, before crediting any portion of the payments to the principal sum; and, as a result of such application, the plaintiff claimed, and the trial court found, that defendants were indebted to the plaintiff in the sum of \$1,256.52 at the time this action was commenced, April 25, 1890. In the absence of any conditions of the contract to the contrary, it is a well-established rule of law that, where partial payments are made on an interest-bearing obligation, the payment must be first applied to the liquidation of the interest accrued to the date of such payment, and the balance, if any, applied upon the principal. "The rule for casting interest,"

says Chancellor KENT, in *State v. Jackson*, 1 Johns. Ch. 13, "when partial payments have been made, is to apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due; if the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance, as aforesaid." This rule is generally adopted by modern authority, and in some states of the Union has been confirmed by statute. See 3 Rand. Com. Paper, § 1497; *Story v. Livingston*, 13 Pet. 359; *Backus v. Minor*, 3 Cal. 231; *Estate of Den*, 35 Cal. 692. There may be exceptions to this rule involved by special terms of the contract, or by the parties adopting a different method in their transactions. *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Backus v. Minor*, supra. The general rule, as to the application of partial payments upon interest-bearing obligations, above set forth, apparently is not questioned by counsel for appellants, but he insists that the terms of the note in question indicate that, in case the same was not paid at maturity, the defendants had the right after maturity to apply their partial payments upon the principal first, and secondly upon the interest. To sustain this theory of construction, counsel refers to the fact that the note provides for "interest at the rate of one and one-half per cent. per month from date till maturity; and, if this note is not paid at maturity, we will pay the same rate of interest upon said principal sum until the same is fully paid and satisfied." The counsel for appellants reasons that after maturity the interest and principal become two separate and distinct debts; and the debtor, therefore, had the right to require that his payments be appropriated according to his desire. In our view of this promissory note, we find nothing, in its terms to justify the construction contended for by appellants. Its terms are so plain and definite that they become their own interpreter. As to interest, the makers declare the rate shall be  $1\frac{1}{2}$  per cent. per month from date until maturity, and the same rate from maturity, until payment is finally made. In other words, the note declares that the principal shall bear the given rate of interest before and after maturity from date until payment. We find nothing in the language of this note to indicate that the maker may, by reason of its terms and conditions, require that partial payments thereon should be applied, either in one manner or another.

It is further contended by appellants that at the time of making said note the parties thereto agreed that, in case the debt evidenced thereby was not paid at maturity, the maker might thereafter apply his payments—*First*, upon the principal; and, *secondly*, upon the interest.



The record shows that defendants introduced evidence on the trial in support of such an alleged agreement, and the plaintiff also introduced evidence in rebuttal thereof. The court found that the partial payments were made on the interest and principal of said note, and allowed said partial payments to be first devoted to the liquidation of accrued interest; and such finding is assigned as error. We fail to discover any error in the action of the court on this point, unless it be in allowing the defendant to introduce any evidence as to such an alleged agreement. The law will not permit a contemporaneous parol agreement to be set up to contradict or vary the terms of an agreement reduced to writing, except under certain circumstances, not involved here. Section 628, Code Civ. Proc.; *Fisher v. Briscoe*, ante, 30. It may be further observed in this connection that this court has repeatedly decided that, where the evidence is conflicting, the finding of the court, or verdict of the jury, will not be disturbed, unless some other grounds are shown therefor.

The further and last assignment of error to be determined relates to a controversy as to the date of the last two payments on said note. The parties agree as to the date of the first payment. The plaintiff alleges the last two payments to have been made respectively on the 13th of April, 1885, and the 29th day of September, 1886. The defendants' answer says: "They deny that they made any payment on said note on the 13th of April, 1885, but they admit and aver that they did pay the plaintiff \$250 on the 11th day of April, 1885;" and further, "they deny that they paid plaintiff the sum of \$673.36 on said note on the 29th of September, 1886, but they aver and admit that they did make the plaintiff a payment of \$673.36 on the 8th of September, 1886." Counsel for appellants contends that, inasmuch as the plaintiff in his replication made no reference to said denials and admissions as to the date of said payments, the allegations of the answer as to such dates are to be taken as admitted to be true. We find in these denials of one date, and the averment of another, no matter which demands a further denial by plaintiff. In substance, the plaintiff alleged the dates of said payments. The true dates of payment are material in reference to casting interest. In substance, the defendants denied that the dates stated by plaintiff were the true dates of payment, and alleged, incidentally to such denials, dates which the defendants claimed were the true dates of payment. By these allegations and denials an issue was formed, which could not be made more certain by the plaintiff denying the dates named by defendants, or reasserting the dates which he had before alleged as the true dates of payment. Upon this issue, evidence was necessary to ascertain the correct dates of said payments. The evidence, as disclosed by the record, is meager and obscure as to the disputed dates of payment. The record shows that the defendants introduced no evidence on this point, except that W. L. Perkins, one of the defendants, testified

that he remembered "the circumstances of the payment of \$250 as stated in the complaint on the 13th of April, 1885." On this point Anderson, the plaintiff, testifies that "the memoranda upon the note, 'Paid April 13, 1885, \$250, on interest,' was made on that day. The memoranda of September 29, 1886, was made on that day, and is in my handwriting." There is no other evidence on that point. The import of it all seems to be in favor of the allegations of the complaint, and there is no evidence to the contrary. The court found that the allegations of the complaint are true, and, being supported by all the evidence introduced on the point under discussion, we do not think the finding as to the dates of payment should be disturbed.

Judgment affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 134)

SULLIVAN V. CITY OF HELENA.

(*Supreme Court of Montana*. Oct. 6, 1890.)

DEFECTIVE STREET—PERSONAL INJURIES—PRACTICE—NEW TRIAL.

1. The city of Helena, which was chartered by the territory of Montana, passed an ordinance expressly assuming for itself "the care and responsibility of streets, avenues, and alleys," and thereafter issued a permit to certain private persons to make an excavation in a street, by the negligent performance whereof, and while Montana was still a territory, plaintiff was injured. *Held*, that the city was liable in damages therefor, since, in 1862, and prior to the passage of such ordinance, the principle of municipal liability in such cases was established by the supreme court of the United States in the case of *Nebraska City v. Campbell*, 2 Black, 590, which arose in the territory of Nebraska, and was therefore binding upon the courts of this territory at the time of the injury.

2. Under Code Civil Proc. Mont. § 298, providing that "the party intending to move for a new trial must, within 10 days after the verdict, \* \* \* file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made," where such notice has been filed within 10 days, an additional notice and affidavit specifying the further ground of newly-discovered evidence cannot be served and filed after the expiration of the 10 days.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

Robert B. Smith, for appellant. Kinsley & Knowles, for respondent.

BLAKE, C. J. The respondent recovered a judgment for damages for personal injuries which he sustained by reason of an excavation in a street within the city of Helena. The motion of the appellant for a new trial was overruled, and this action of the court below must be examined.

A question of practice will be considered before we inquire into the merits of the case. The appellant filed, May 21, 1890, a notice of its intention to move for a new trial, and the motion and statement therefor were filed June 30, 1890. Another notice was served June 25, 1890, upon the respondent stating "that, in addition to the causes specified in the notice of motion for a new trial heretofore given in this cause, said motion will also be based upon the affidavit of newly-discovered evidence

in said cause, and which was and is material to the issue in said cause." Afterwards the court granted the motion of the respondent to strike from the statement the last notice and accompanying affidavits, and refused to consider them. It is shown by the record that the matter constituting this new ground was not known to the appellant at the time when the original motion was prepared. There is a radical difference between the provisions of the criminal practice act and the Code of Civil Procedure, which govern the subject. The application for a new trial in criminal causes, upon the ground of newly-discovered evidence, shall be made upon motion, and written notice thereof "must be filed within thirty days after the discovery of the facts upon which the party relies." Comp St. div. 1, p. 135. The Code of Civil Procedure provides that "the party intending to move for a new trial must, within ten days after the verdict of the jury, \* \* \* file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made." Code Civil Proc. § 298. The application for a new trial in civil cases, for the cause of newly-discovered evidence, must be made upon affidavits, but there is no provision for the filing of the notice thereof after the discovery of the facts. The statutes of the states of California and New York, which are similar to the Code of Civil Procedure of this state, supra, have been construed, by their courts, to prohibit the extension of this period of time, or the allowance of amendments to the motion or notice after its expiration. *Mining Co. v. Boles*, 24 Cal. 354; *Ellsasser v. Hunter*, 26 Cal. 279; *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. Rep. 388; *Lavalle v. Skelly*, 90 N. Y. 546. These authorities conform to the intention of the legislature, and require us to uphold the ruling of the court below in this respect.

The merits of the controversy depend upon one proposition. It is conceded that the place where the respondent received his injuries was within the boundaries of the city of Helena, which has been legally incorporated under the statutes of the territory of Montana. It is also admitted that there is no law which expressly makes municipal corporations of this character responsible in damages to persons who may be injured by defects in their streets. The legislative assembly has conferred upon the city council of Helena the authority "to make all ordinances which shall be necessary and proper for carrying into execution powers specified" in the charter. Page 33. The city council is empowered by the legislature "to lay out, open, change, widen, or extend streets, lanes, alleys, sewers, parks, squares, or other public grounds, and to grade, pave, improve, repair, or discontinue the same, or any part thereof; to establish and open drains, canals, or sewers, or alter, widen, or straighten water-courses; to make, alter, widen, or otherwise keep in repair, vacate, or discontinue, sidewalks or crosswalks; to prevent the incumbering of streets, sidewalks, cross-walks, and alleys, with carriages, carts, wagons, sleighs,

sleds, lumber, fire-wood, or other obstacles or materials; to prevent horse-racing, or immoderate riding or driving, in the streets or public places of the city; to prevent the riding or driving of animals or the drawing of vehicles of any kind on the sidewalks, or the doing of any damage to such sidewalk; to require the owners or occupants of lots or buildings to remove snow, dirt, rubbish, or other obstruction or material from the sidewalks adjacent thereto; and, in default thereof, to authorize the removal thereof, at the expense of such owner or occupant." Amendment approved March 12, 1885, p. 189, § 9. The following ordinances were in force at the time when the respondent received the injuries which are described in the pleadings. "Section 1. That said city of Helena hereby assumes for itself the care and responsibility of streets, avenues, and alleys only of that portion within the corporate limits which was originally entered by the probate judge of Lewis and Clarke county, Montana, as trustee for the occupants, as the Helena town-site, and exclusive of all portions thereof deeded by said probate judge in block to private claimants, and by them platted as additions to Helena." Ordinance No. 21. "Sec. 5. No person or corporation shall dig or excavate within, through, or under, any street, alley, gutter, curb, sidewalk, or public place, in this city, for any purpose, without first obtaining a permit from the committee on building permits. The applicant for such permit shall state the exact location, dimensions, and purposes of such digging or excavation. The committee shall thereupon inspect the locality, and, if they deem proper, issue a permit authorizing such digging or excavation to be done in such successive portions, within such limits of time, and with such safeguards, as they may designate, with a due regard to the public convenience and the public safety." Ordinance No. 46. The tenth and eleventh sections of said ordinance No. 46 are as follows: "Sec. 10. Permits, provided for in this ordinance, shall only be issued upon the application of the owner or authorized agents of the owners of the property, to be built upon, or on account of which the digging or excavation is to be made. Every application shall contain an agreement to save the city harmless from all costs and damages which may accrue by reason of such use, occupation, digging, or excavation, as the case may be. Sec. 11. No person shall by his own hand, or by another under his direction, dig up, remove, or loosen, take or carry away, any stone, plank, brick, lumber, block, earth, sand, gravel, or any other material composing any street, avenue, alley, sidewalk, crossing, or public ground, whether the same be free and loosened, or not, without obtaining a permit from the committee on building permits." It appears that the ordinances of the city of Helena have been complied with, and that the party who caused the excavation complained of to be made, obtained from the committee on building permits the authority to do the work. It is contended on behalf of the appellant that there is no law which allows the respondent to maintain this action. The

authorities relating to the matter are numerous and conflicting, and cannot be critically examined and compared in this opinion. This question has not been passed upon by the supreme court of the territory or state, and we are called upon to lay down the rule which shall control similar controversies in the absence of legislative enactment. We will state, in a general way, the views of the courts in order that the points of difference may be understood. In *Barnes v. District of Columbia*, 91 U. S. 540, Mr. Justice HUNT, for the court, refers to certain cases, which hold that a municipal corporation is not liable to an individual for an injury resulting from negligence in the construction of a work which it had authorized, and says: "The authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them." This declaration is followed by a citation of the English and American cases, which includes the decisions of the highest courts of the states of Alabama, Connecticut, Illinois, Maryland, New York, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. Since the publication of the opinion in *Barnes v. District of Columbia*, supra, the appellate courts of other states have announced the same doctrine. There is, however, authority of eminent respectability in support of the opposite view. *Hill v. Boston*, 122 Mass. 344; *Detroit v. Blackeby*, 21 Mich. 84; *Arkadelphia v. Windham*, 49 Ark. 139, 4 S. W. Rep. 450; *Pray v. Jersey City*, 32 N. J. Law. 394; *Arnold v. City of San José*, 81 Cal. 618, 22 Pac. Rep. 877; *Young v. Charleston*, 20 S. C. 116. These cases contain reviews of great ability, and research of authorities, and maintain that the appellant is not liable in the case at bar.

We have already intimated that we do not intend to enter upon the difficult task of pursuing an independent investigation, and ascertaining the true principle of law, and determining the effect of statutes upon decisions. Our opinion is controlled by an important consideration of another nature. At the December term, 1862, and prior to the organization of the territory of Montana, the supreme court of the United States, in *Nebraska City v. Campbell*, 2 Black, 590, heard a case which arose in the territory of Nebraska. Mr. Justice NELSON in the opinion said: "The law is well settled in respect to public municipal corporations, upon which the duty is imposed to construct and repair, or to keep in repair, streets or bridges, and upon which is also conferred the means of accomplishing such duty, that they are liable for any special damage arising out of neglect in keeping the same in proper condition. The principle was fully considered, at the last term, in the case of *Weightman v. Corporation of Washington*, where all the authorities will be found collected and examined. 1 Black, 39, 51-53." It is also stated in the opinion that "the suit was brought in the court below by Campbell against the city, to recover damages for injuries received by reason of a defective bridge in one of the streets in the city."

The case of *Nebraska City v. Campbell*, supra, was approved in *Barnes v. District of Columbia*, supra, at the October term, 1875. This was an action for damages to the person "in consequence of the defective condition of one of the streets of the city of Washington." In *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. Rep. 990, the plaintiff sustained personal injuries by falling into a hole while he was passing on the sidewalk of a street, in the city of Washington. In the opinion of the court, Mr. Justice HARLAN says: "Without further discussion, we adjudge, upon the authority of *Barnes v. District of Columbia*, that the District is liable for such negligence upon the part of its officers, as is charged in the plaintiff's declaration. That case was determined in 1875, and has never been questioned by any subsequent decision in this court. On the contrary, its authority was recognized in *Railroad Co. v. District of Columbia*, 132 U. S. 7, 10 Sup. Ct. Rep. 19, and in *Brown v. District of Columbia*, 127 U. S. 579, 586, 8 Sup. Ct. Rep. 1314, and the principles announced in it were applied in *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. Rep. 884. If the rule announced in the *Barnes Case* is not satisfactory to congress, it can be abrogated by statute." The city of Helena was incorporated by an act of the legislative assembly of the territory of Montana, which was approved February 22, 1881. The respondent was injured August 29, 1888, and filed, December 22, 1888, his complaint in this action. During these times, the decisions of *Nebraska City v. Campbell*, supra, and *Barnes v. District of Columbia*, supra, were binding upon the courts of the territory. With full knowledge of the legal consequences of the proceedings, it was duly ordained that "said city of Helena hereby assumes for itself the care and responsibility of streets, avenues, and alleys." The liability, which had been accurately defined, has not been restricted by the legislative department, and we can presume that the rule stated by the supreme court of the United States was satisfactory. We think it is our duty, under these conditions, to adhere to the doctrine which has been recognized upwards of 25 years within the confines of Montana, and seems to be upheld by the weight of modern authority. Judge Dillon, in the last edition of his valuable treatise on *Municipal Corporations*, states these deductions: "In reference to this subject, it may be remarked that there is undoubtedly some difficulty in defining the logical ground on which to base the doctrine of the implied liability of municipal corporations proper for defective streets, when such liability is denied as respects counties, and towns, without special charters. There is also some apparent, if not real, difficulty in holding that such a liability exists on the part of municipal corporations in reference to streets, without extending it to other duties which are everywhere couched not to give a private action for their neglect. The courts which hold the doctrine in question also differ as to the reasons on which it rests. Notwithstanding this, it will be found, we think, upon a

Careful examination of the cases referred to in the preceding sections, that they do establish the rule therein laid down as respects municipal corporations proper, and that Mr. Justice HUNT is quite right in saying that, whatever may be the true reason for the rule, 'the law in this country must be deemed to be settled in accordance with them.' It will also be found, we are quite sure, that the doctrine of such a liability on the part of municipal corporations, organized under special charters, or under general incorporation acts, exists in the states very generally, and is not confined to the states of New York and Illinois. The doctrine works well, and is just, since no stimulus to the performance of duty is more effectual than the wholesome fear of the verdict of a jury for damages." Volume 2, (4th Ed.) § 1023. See, also, Cooley, Torts, 625; Bish. Non-Cont. Law, §§ 750, 757; Shear. & R. Neg. (4th Ed.) § 289. The judgment is affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 115)

*In re McCUTCHEON.*

(Supreme Court of Montana. Oct. 1, 1890.)

**HABEAS CORPUS — HEARING AND DETERMINATION.**

Comp. St. Mont. div. 5, § 1182, provides, relative to procedure on *habeas corpus*, that "it shall be the duty of such judge, if the time during which such party may be legally detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or upon any process issued upon such judgment or decree, or in cases of contempt of court." Held that, where it appears by the return to the writ that the petitioner is in custody by virtue of a final judgment of a court having jurisdiction of the charge and the person, the proceedings at the trial whereby such final judgment was reached cannot be reviewed.

***Habeas corpus.***

*H. G. McIntire*, for petitioner. *H. J. Haskell*, Atty. Gen., for resistant.

HARWOOD, J. The petitioner, in his application for a writ of *habeas corpus*, declares that he is unlawfully confined and restrained of his liberty by Joseph Hamilton, sheriff of the county of Cascade. The illegality of the confinement is alleged to consist in the facts "that the warrant of commitment upon which the petitioner is restrained is based upon a pretended judgment, which is void upon its face, the same having been rendered by one W. H. Race, he having at the time no jurisdiction to render the same, as appears from a transcript of the proceedings had in that behalf, a copy of which is hereto attached, marked Exhibit A, and made a part of this petition." An order for a writ of *habeas corpus* was accordingly granted. The return, as made by Joseph Hamilton, sheriff of said county, contains a large amount of matter which is not properly placed in such return, and which we must treat as surplusage. The return contains what purports to be a narrative of all the incidents of the institution of a criminal prosecution on the charge of "malicious mis-

chief to property," under section 217, Crim. Laws, from the making of the complaint before a justice of the peace to the final determination thereof by the justice assessing a fine of \$20 and costs against the accused, and the issuance of execution to carry the judgment into effect. The return even goes so far as to state what the justice said to the prisoner on his arraignment, and the reply of the prisoner thereto. To this irrelevant matter, the petitioner has made an answer. This practice is clearly improper in a case like this. Our statute provides, (section 1173, Comp. St.): "The party upon whom such writ shall be duly served shall state in his return plainly and unequivocally—*First*. Whether or not he has the party in his custody, or under his power or restraint. *Second*. If he has the party in his custody or power, or under his restraint, he shall also state the authority and cause of such imprisonment or restraint, setting forth the same at large. *Third*. If the party be detained by virtue of any writ, warrant, or any other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited to the judge on the hearing of such return. *Fourth*. It is provided what the return shall show in case the party alleged to be unlawfully detained was in the custody of the party served with the writ at or before the date thereof, but such custody or restraint has since been transferred to another. *Fifth*. It is provided that the return shall be signed, and in some cases verified by oath or affirmation. Among the other matters set forth by the sheriff as "the authority and cause of such imprisonment or restraint" is contained, very properly, a copy of the writ of commitment, in the following terms: "State of Montana, County of Cascade—ss.. In the Justice Court, before W. H. RACE, Justice of the Peace. The State of Montana, Plaintiff, vs. I. D. McCutcheon, Defendant. The state of Montana to the sheriff or any constable of said county: Whereas, I. D. McCutcheon has this day been duly convicted in said court of the crime of tearing down and destroying a building, committed in our said county on or about the 26th day of August, 1890; and whereas, upon such conviction it was considered and adjudged that for said offense the said I. D. McCutcheon be fined in the sum of twenty dollars: These are therefore to command you, the said sheriff, to take and receive the said I. D. McCutcheon into your custody, and imprison him in the jail of our said county until such fine be fully paid. Witness my hand, the 15th day of September, 1890. W. H. RACE, Justice of the Peace." The return further says "that he (the said sheriff) now detains the said petitioner in his custody under and by virtue of the authority conferred upon him by said *mittimus*."

We will now pass directly to the consideration of the ground upon which the petitioner claims that he should be discharged from custody. That ground is, in brief, the fact that the docket entries of the justice of the peace, in respect to said trial, do not show that the prisoner waived the right of trial by jury before the justice

proceeded to the trial of the charge against the prisoner; that the justice's docket is silent on that point, and therefore the petitioner demands his release under this writ. At the threshold of this consideration we are confronted by the provisions of section 1182, div. 5, Comp. St., as follows: "It shall be the duty of such judge, if the time during which such party may be legally detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or upon any process issued upon such judgment or decree, or in cases of contempt of court." What then are we directed by statute to consider in this case? We are to consider whether it appears by the proper return that the prisoner is detained in custody by virtue of the final judgment of a court of competent criminal jurisdiction, or upon any process issued upon such judgment. If we find such to be the case, we are commanded by statute to remand the prisoner. The justice court, without doubt, has jurisdiction of the misdemeanor of which the petitioner was convicted, as appears by the return, (section 6, Crim. Prac. Act, and section 217, Crim. Laws, Comp. St.,) namely, the malicious destruction or injury of a building, the property of another. The justice court is clothed with power or jurisdiction to try and determine a criminal charge of that character; and in this case the return shows that the justice of the peace had jurisdiction of the person and the place. In this case we have, then, before us, by the return of the officer upon whom the writ of *habeas corpus* was served, a showing of a final process issued by virtue of the final judgment of a competent court of criminal jurisdiction; on the other hand, the petitioner alleges that his imprisonment is illegal, because the justice had no jurisdiction to render the judgment under which the commitment was issued, as appears from the transcript of the proceedings had in the case, a copy of which transcript petitioner alleges he has attached to his petition. Upon this showing, we are asked by the petitioner to review the proceedings of the justice of the peace in this matter to find whether or not his docket shows that all the rights and privileges which the law guarantees to the prisoner were vouchsafed to him on the trial. The petitioner insists that the docket entries of the justice, in the case wherein he was convicted, do not show, as they should by the requirement of the statute, (section 488, Crim. Prac. Act,) that the prisoner waived the right to a jury trial before the justice proceeded to try the case, and for this cause he contends that he should be discharged. Are we to review and determine the legality of the proceedings had before the justice upon a return under the writ of *habeas corpus*? If so, then that writ in this case would also perform the office of the writ of *certiorari*, and bring up the proceedings had before the justice for review; moreover, in the face of the statute quoted supra, which commands us to remand the prisoner if we find by the return that he is held under a process issued up-

on a final judgment of a competent court of criminal jurisdiction, we would be going back of that process, and reviewing the record of the incidents of the trial, which is not properly before us. This position is clearly against the provisions of the statutes and the authorities. We have carefully read all the authorities cited by petitioner's counsel, as well as others, and we find that in all the cases cited which treat of the waiver of a jury, or the failure to waive a jury, or of the right of the court to try a criminal charge without a jury, the question came up regularly by appeal or writ of error, and not on *habeas corpus*. The writ of *certiorari* is often invoked in aid of *habeas corpus*. Ex parte Yerger, 8 Wall 85; State v. Glenn, 54 Md. 572; State v. Neel, 48 Ark. 283. In such a case, and by that means, the record is looked into to find whether the court has jurisdiction to hold the prisoner in custody. He may be held by virtue of a bench warrant issued on an indictment charging an offense unknown to the law. In such a case, on a view of the indictment, it is developed at once that the court has no jurisdiction to issue the warrant for the detention of the prisoner. In a case like the one at bar, wherein the court had plenary jurisdiction to try the charge and render judgment, after final judgment, we cannot, on *habeas corpus*, review and pass upon the legality or illegality of the proceedings at the trial, because the statute limits and confines our inquiry to the question as to whether the final judgment is rendered, and the writ by virtue thereof is issued, by a court of competent criminal jurisdiction. If that question is determined in the affirmative, we have no legal authority to review, on *habeas corpus*, the proceedings at the trial, whereby the final judgment was reached. Section 1182, div. 5, Comp. St. After final judgment, the proceedings at such trial cannot be brought up by *certiorari* for review in aid of the writ of *habeas corpus*. Under our statute, *certiorari* will not issue to bring up the record of an inferior tribunal for review in cases where there is an appeal, and in the case at bar the petitioner has the right to appeal from the final judgment. Section 510, Crim. Prac. Act. It is not so in cases where *certiorari* is resorted to for the purpose of bringing up the proceedings for review to aid *habeas corpus*, where the petitioner is held by warrant on an indictment, or on a preliminary hearing. In such case, there is no final judgment, nor does the petitioner have an appeal; therefore *certiorari* will issue to review the record. Ex parte Yerger, and other cases cited supra. In a case like the one at bar, where final judgment has been passed on a charge within the jurisdiction of a justice, if we should review the record on *habeas corpus*, and, for the reason that some essential provision of the law pertaining to the trial has been ignored, annul the proceedings, then we would be in fact exercising an appellate jurisdiction directly over the justice of the peace courts, where we have no such jurisdiction, except when the cases come to us by appeal, first to the district court, and then to this court. The writ of *habeas corpus* cannot

perform the office of a writ of error. *Ex parte Lehnkuhl*, 72 Cal. 53, 13 Pac. Rep. 148; *Sennott's Case*, 146 Mass. 489, 16 N. E. Rep. 418. The petition must therefore be dismissed, and the prisoner remanded. It is so ordered.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 223)

*In re BAUM.*

(*Supreme Court of Montana*. Nov. 17, 1890.)

DISBARMENT OF ATTORNEY—PLEADING—RES ADJUDICATA.

1. In proceedings to disbar an attorney, it appeared that he was admitted to practice law in Montana upon his petition stating that he was a regularly licensed and practicing attorney of New York, and had been such for 23 years, and upon his original certificate of admission thereto, together with a certificate of Justice Hardin of the fourth judicial department of the New York supreme court that he had practiced in the highest courts of the state, and was then in good standing in his profession in that department. The complaint charged that respondent had been disbarred in New York, and exhibited certified copies of charges preferred against him in the second department of the supreme court, the testimony taken, and the referee's report thereon, and it further appeared that it was decided by a divided court to disbar him, and that before judgment proceedings were stayed pending an appeal, but no appeal was ever perfected or other steps taken. *Held*, that respondent had not been disbarred in New York.

2. The court will not examine the evidence taken in the New York proceeding to determine whether respondent should be disbarred upon the case there presented.

3. It was further specified that, after the disbarment alleged, respondent had gone to a distant part of the state, and procured the certificate from Justice Hardin by fraud, and had fraudulently presented it to this court. The answer specifically denied these allegations, gave a history of respondent's practice in New York, and stated that Justice Hardin was well acquainted with him from boyhood, and was thoroughly conversant with his whole career at the bar in New York. There was no evidence on this issue. *Held*, that fraud could not be presumed, and that the denial met all the charges.

Application is made to revoke the license granted to Peter M. Baum at the July term, 1890, of this court. On July 18, 1890, Mr. Baum filed his petition for admission to practice in the courts of this state, and in that petition, among other matters required by the rules of this court, stated that he was until the 1st of April, 1890, a regularly licensed and practicing attorney and counselor at law of the state of New York, and was such for 22 years next preceding that date. He gives the places and times where and when he had practiced in New York. He states in his petition that he presents, and he did present, his original certificate of admission in New York, and the certificate of Hon. George A. Hardin, presiding justice of the fourth judicial department of the supreme court of the state of New York, in which Justice Hardin certifies "that Peter M. Baum, late of the city of Syracuse, in said state, and now of the city of Great Falls in the state of Montana, has practiced law in the highest courts of said state [New York] for the past 22 years, and last at said city of Syracuse, in said fourth judicial

department, and that he was in good standing in his profession in the said fourth judicial department at the time he practiced there as aforesaid. Dated July 9, 1890." Upon this petition and certificate, and upon the other papers required by the rules of the court, Mr. Baum was admitted to practice in all the courts of this state, at the July term, 1890. The charge in the complaint for disbarment rests upon two specifications: (1) That, when the applicant made his petition to this court, he had been disbarred in the state of New York, and not reinstated. (2) That, being so disbarred, he went to a part of the state of New York remote from the place where he had been disbarred, and by fraud obtained the certificate of Justice Hardin, above referred to, and presented the same to this court with intent to defraud and deceive this court. With the complaint are filed certified copies of the charges preferred against Mr. Baum in the second judicial department of the supreme court of New York, the testimony in the proceeding, the finding of the referee, and all proceedings, except the final order of disbarment, which, it is alleged in the complaint, is in the possession of one Monchausen in the state of New York, who has not entered the same of record in the New York supreme court, and will not allow the complainant to have a copy of the same. The complaint further alleges that said order is held by Monchausen upon an agreement between him and Baum that it should not be entered, if Baum would leave the state of New York and not return. Defendant files a verified answer. As to the first specification, he denies that he was disbarred in New York, and sets forth the following as the facts: That proceedings were commenced against him in the second department in the city of Poughkeepsie, a referee appointed, and proof taken, report and supplemental report made and submitted to the general term of the supreme court at Brooklyn; that in February, 1890, that court, by a divided bench, confirmed the report; that defendant's counsel, in that proceeding obtained a stay of proceedings pending an appeal to the court of appeals of New York; that this appeal is not perfected, and said stay is still in force; that it was understood with the prosecution that no further proceedings should be had, and the prosecution was abandoned before defendant applied for admission to practice in this court. Defendant denies that there was any agreement to forbear prosecution of the New York case, if defendant would leave that state. It is proper to suggest here that the allegation of the answer that the report of the New York referee was confirmed is ambiguous, for an inspection of that report shows that the referee reported only evidence and facts found by him, and no conclusions drawn from the facts, so there was nothing for the general term in Brooklyn to confirm. But the true situation appears from a letter of Hon. J. F. Barnard, presiding justice of the general term referred to, which letter counsel in this proceeding seem to each concede may be considered as evidence in the case. Justice Barnard says: "An ap-

plication was made to remove P. M. Baum as an attorney; proof was taken; it was decided to grant the motion. On application of Mr. Baum's counsel, stayed proceedings pending an appeal to the court of appeals. I understand that no order has been entered on the decision to remove the attorney Baum." To the specification that defendant obtained the certificate from Justice Hardin by fraud, and presented the same to this court fraudulently, he makes answer, and denies that he practiced any fraud upon Justice Hardin; denies that he went to a remote part of the state to obtain that certificate. He gives the history of his practice in New York, and states that Justice Hardin was well acquainted with him from boyhood, and was thoroughly conversant with his whole career as a practicing attorney in the courts of New York. Defendant also denies that any order disbarring him in New York was withheld from record upon the condition of his leaving that state. No replication was filed by counsel for the bar association. No reference was asked by either party, but the cause was submitted on the pleadings, counsel for the association remarking that he submitted it as he would a motion for judgment on the pleadings in a civil case; in other words, that the confessions of the answer were sufficient to entitle the complainant to an order disbarring the defendant.

*McCutcheon & McIntire*, for the bar association. *N. W. McConnell*, for respondent.

DE WITT, J.; (after stating the facts as above.) This case is not an appeal. It is one which this court meets originally. It must be determined upon the pleadings and the evidence. The evidence is the record of the New York proceeding and Justice Barnard's letter, which counsel agree to treat as competent evidence. We are of opinion that the second specification demands but little attention. Fraud in obtaining Justice Hardin's certificate is directly charged. It is as directly denied. And the answer further states that Justice Hardin was fully acquainted with defendant's whole professional career in New York, and therefore necessarily with the Poughkeepsie disbarment proceedings. Fraud against this court in presenting that certificate is alleged, and also denied. Fraud must be proved, and cannot be presumed. The denial is broader than the allegation. There is no evidence. This specification, taken by itself simply as a fraud upon Justice Hardin, of New York, and upon this court, must fail. We will advert to it, however, in considering the other specification; that is, that when defendant made his application to practice, he was disbarred in the state of New York. Here, again, the case must be determined upon the pleadings and evidence. At the outset, we are prepared to say that if it appeared to this court that an applicant for admission to the most honorable of all the professions had been excluded from that high office by the judgment of another competent court, the protection of the purity of our own bar, and the comity due to the

court of a sister state, would demand extraordinary circumstances to impel us to reinstate such person to the honorable fellowship from which he had been expelled. It appears that the supreme court of New York, by a divided bench, decided to disbar the defendant; that thereupon proceedings were stayed, and no order of disbarment made, pending an appeal to the court of appeals; that thereafter the prosecution was abandoned. It certainly appears that the defendant was not disbarred in New York. But counsel for the bar association urge that the referee's report in the New York proceedings shows a sufficient cause for disbarment, (whether it does we do not say,) and that this court should act upon such report, regardless of what the New York court has, or has not, done. To make this original inquiry into acts alleged to have been committed in another and remote jurisdiction, in the face of the certificate of a presiding justice of the supreme court of New York, that defendant was in good standing, we believe is beyond our duty. In consideration of the circumstance that the New York court has properly taken jurisdiction of those matters; and one of two things must be true,—either the case is undetermined by final judgment in New York, or the prosecution in that state has been abandoned. If the latter be the fact, we must conclude, under these pleadings, that the abandonment was for sufficient grounds, and favorable to the defendant. If the former be the situation, it will be time enough for us to consider the New York case when the order of the supreme court of that state has been made against defendant, and an appeal from that order either abandoned, or such order affirmed by the appellate court of that state. Courtesy to the New York courts suggest that we examine their final conclusions, when made, and not ordinarily the grounds therefor, and especially not the grounds before the conclusion is reached. We do not lay down the rule that unprofessional conduct of lawyers of this court, committed without the limits of this state, may not be inquired into, but only hold that the circumstances of this case do not seem to warrant such inquiry. The charges against the defendant are dismissed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 166)

" *PEOPLE ex rel. KERN v. MCINTYRE.*

(*Supreme Court of Montana.* Oct. 16, 1890.)

QUO WARRANTO—TITLE TO OFFICE—PLEADING—DEMURRER.

1. A complaint for usurpation of office which avers that relator was duly elected county surveyor by the qualified electors of the county, took the oath of office, gave his official bond, which was approved, accepted, and filed; and that on a day stated, defendant, without right, did usurp and intrude into said office, and has wrongfully and unlawfully since that time been exercising the functions thereof; and praying that he be excluded therefrom, and that relator be adjudged entitled thereto, and installed therein,—is good on demurrer, and states a good cause of action, under Code Civil Proc. Mont. 1881, § 399, allowing dual prayers.



2. A demurrer that the suit was not brought "under the proper caption or style, nor in the proper name, to-wit, in the name of the people of the state of Montana, instead of being brought in the name of the state of Montana," was insufficient. It should have been on the ground "that plaintiff has no legal capacity to sue," as required by Code Civil Proc. Mont. 1881, § 85.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

This is an action for the usurpation of office, brought under the provisions of sections 410-417, Code Civil Proc. The complaint substantially alleges the holding of an election, under the provisions of the laws, October 1, 1889; that at said election, the relator, W. E. Kern, was regularly and duly elected by the qualified voters of Cascade county to the office of county surveyor of said county, for the term of three years from January 1, 1890; that relator made and subscribed his oath of office, and executed his official bond, which was approved, accepted, and filed, as required by law, in the office of the county recorder; that, on the 28th day of January, 1890, the defendant, H. L. McIntyre, without right, did usurp and intrude into said office of county surveyor, and has wrongfully and unlawfully since that time been holding and exercising the functions of that office; that relator made complaint to the county attorney, and requested that he institute this action, which he refused to do. The prayer of the complaint is that defendant be excluded from holding and exercising the duties of the office, and that relator be adjudged to be entitled to hold the same, and be installed therein. Defendant filed a demurrer on the following grounds: "First, this court has no jurisdiction of the case; second, that the complaint does not state facts sufficient to constitute a cause of action against the defendant; third, that said action is not brought under the proper caption or style, nor in the proper name, to-wit, in the name of the people of the state of Montana, instead of being brought in the name of the state of Montana." The demurrer was overruled. Defendant elected to stand upon the demurrer, and declined to answer. Judgment was thereupon entered for relator, as prayed for, from which the defendant appeals to this court.

Thos. E. Brady, for appellant. Leslie & Baum, for respondent.

DE WITT, J., (after stating the facts as above.) The contention of the parties herein is upon the action of the court in overruling the demurrer.

The first point in the demurrer is abandoned upon the argument, and we shall not discuss it.

As to the second point. The prayer of the complaint is dual, as allowed by the statute, (section 399, c. 5, tit. 10, Code Civil Proc.) that is, (1) that defendant be excluded from the office; and (2) that relator be adjudged to be entitled thereto. The prayer is based upon the statement of two facts in the complaint: (1) Relator's right to the office; and (2) defendant's usurpation of the office. The demurrer is a unit, and therefore, if any cause of action is set forth in the complaint, that

pleading is good. If the usurpation by the defendant is sufficiently stated, the complaint must stand, whether the rights of the relator are well pleaded or not. That this complaint is good upon demurrer is abundantly sustained in *People v. Woodbury*, 14 Cal. 43; *Flynn v. Abbott*, 16 Cal. 359; *People v. Holden*, 28 Cal. 124; *State v. Messmore*, 14 Wis. 125; *State v. Price*, 50 Ala. 563; *People v. Ryder*, 12 N. Y. 433, 16 Barb. 370; *Territory v. Rodgers*, 1 Mont. 252; 2 *Estee*, Pl. & Pr. (3d Ed.) §§ 2902-2918, cases cited; 8 *Deer. Ann. Codes Cal.* § 802 et seq., cases cited. Appellant has not cited us to any authorities, nor do we find any, holding a contrary view.

What may or may not be the valid objections to the style or title of the case we cannot inquire, under the third point of the demurrer as set forth. There is no demurrer "that plaintiff has no legal capacity to sue." Section 85, Code Civil Proc. 1881. The ground of demurrer, as stated by defendant, is not known to the statute. The judgment is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 222)

*In re HALDORN et al.*<sup>1</sup>

(Supreme Court of Montana. Nov. 15, 1890.)

ATTORNEYS—PROCEEDINGS TO DISBAR.

When, in a proceeding to disbar an attorney, the court is satisfied, after a thorough examination of the evidence, as taken before a referee, that the charges against him are groundless, the proceeding will be dismissed.

Application for disbarment.

Chas. O. Donnell, for petitioner. McCutcheon & McIntire and B. Platt Carpenter, for respondents. Mr. Haldorn, pro se.

BLAKE, C. J. This is a proceeding, under the laws of the state, to cause the names of George Haldorn and F. T. McBride to be stricken from the roll of attorneys and counselors at law. After the complaint and separate answers of the parties had been filed in this court, a referee was appointed to take the testimony and report the same. This work has been done, and a voluminous record with many exhibits is before us. We have examined the evidence, and listened to the exhaustive arguments of the counsel, and declare, with out any hesitation, that the charges which have been exhibited against the respondents are groundless. No good purpose can be subserved by a review of the testimony to establish this conclusion, and we will not make a statement of the grievances which have been alleged. The conduct of some of the witnesses before the referee in the use of profanity cannot be passed over in silence, and can be punished by us as a contempt of this court. The persons of whom these remarks are uttered do not appear to have comprehended this matter, but their ignorance is no excuse, and a repetition of the offense will be followed by a speedy prosecution in this tribunal. We are also compelled to censure the counsel upon both sides for many acts of discourtesy towards each other in the hearing before the referee. They should have known and remembered at

<sup>1</sup>For motion to retax costs, see post, 435.



all times that they were in the eyes of the law in the presence of this court, and conducted themselves accordingly. It is therefore ordered and adjudged that the charges against the said George Haldorn and Francis T. McBride be dismissed.

HARWOOD, J., concurs.

(10 Mont. 186)

VAUGHN V. SCHMAISLE *et al.*

(*Supreme Court of Montana*. Oct. 23, 1890.)

UNRECORDED MORTGAGES — PRIORITY OVER JUDGMENT — DESCRIPTION.

1. Under Code Civil Proc. Mont. § 807, declaring that a judgment shall become a lien on the real property owned by the judgment debtor from the time it is docketed, and section 260, Comp. St. div. 5, providing that every conveyance of real estate not recorded shall be deemed void as against subsequent purchasers in good faith and for valuable consideration, an unrecorded mortgage declared by chapter 20, § 258, *Id.*, to be valid as between the parties without recording, has priority of an after-docketed judgment.

2. The description of mortgaged premises as "sixteen feet of the north end of lots (1) one and (2) two in block forty-four (44)" in a given town, county, and state, is not so uncertain as to render the mortgage void.

Appeal from district court, Custer county; GEORGE R. MILBURN, Judge.

M. J. Liddell and W. A. Burleigh, for appellants. Strevell & Porter, for respondents.

HARWOOD, J. In this appeal two questions of law are to be determined: *First*. A question of priority and relative legal effect of a judgment lien on real estate, and title acquired at execution sale thereunder, as against a mortgage executed and delivered prior to docketing of the judgment, but not recorded until after the judgment was docketed and levy made under execution. *Second*. A question as to the sufficiency of description of a portion of the real estate mentioned in the mortgage. These questions will be considered in the order stated.

This appeal is from the judgment of the trial court, and we find in the judgment roll an exception to the conclusions of law found by the court, on the ground that the same are not supported by the facts, as found by the court. The facts bearing upon the first point of controversy, as found by the court, are as follows: March 1, 1886, plaintiff loaned to J. F. Schmalsle \$700, payable 12 months after date, with interest at the rate of 24 per cent. per annum, for which said J. F. Schmalsle made and delivered to plaintiff a promissory note and a mortgage, to secure the same, principal and interest, and \$25 attorney's fees, on certain described lots of land situate in Miles City, county of Custer, which mortgage was filed for record in the office of the county clerk and recorder of said county, April 5, 1886. On the 11th day of March, 1886, judgment was rendered and docketed against said mortgagor, in the district court in and for said county, for the recovery of the sum of \$1,500 in favor of William F. Schmalsle, one of the defendants in this action; that execution was duly issued on said judgment on

March 19, 1886, under which execution the sheriff levied on the same real estate mentioned in said mortgage, and thereafter, on the 9th day of April, 1886, sold said real estate under said levy to William F. Schmalsle, for \$1,100; that when such purchase was made the purchaser, William F. Schmalsle, had actual notice of the existence of the plaintiff's mortgage as well as constructive notice by the record thereof; that on the 9th day of October, 1886, the sheriff executed to William F. Schmalsle a deed conveying to him said property as sold under said execution, which deed was filed for record October 20, 1886. Upon this state of facts the court found as a conclusion of law that the judgment lien was paramount to the mortgage, and that the mortgage could not be "enforced against said property so levied upon to the exclusion of the said judgment or in priority thereto." So holding, the court denied the plaintiff a decree of foreclosure of her mortgage on said premises, and rendered judgment against her in favor of defendants William F. Schmalsle and Nelson A. Miles, from which judgment plaintiff appealed.

The question involved herein as to the relative force of a judgment lien, and a mortgage made and delivered prior to docketing of the judgment, but not recorded until after such docketing and levy of execution, must be solved by a consideration of the statute relating to the judgment lien and execution, and the statute providing for the conveyance of real estate or interest therein, and the effect of recording such conveyances or withholding the same from record. The statute fixing the judgment lien is found in section 307, Code Civil Proc., which provides: "Immediately after filing a judgment roll the clerk shall make proper entries of the judgment, under appropriate heads, or in the docket kept by him; and from the time the judgment is docketed it shall become a lien upon the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until said lien expires. The lien shall continue for six years unless the judgment be previously satisfied." The judgment lien here established by statute takes effect upon "the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time," or thereafter acquired. So, in section 313, Code Civil Proc., where the execution is provided for, the sheriff is required first to satisfy the judgment out of the personal property of the debtor, or, "if sufficient personal property cannot be found, then out of his real property; or, if the judgment be a lien upon real property, then out of the real property belonging to him, on the day when judgment was docketed or at any time thereafter." In *Rodgers v. Bonner*, 45 N. Y. 379, the court says: "A judgment is not a specific lien on any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens." See, also, *School-District v.*

Werner, 43 Iowa, 643. In the case of *Conard v. Insurance Co.*, 1 Pet. 442, Mr. Justice STORY, announcing the decision of the court, says: "Now it is not understood that a general lien by judgment on land constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interest, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances." In *Brown v. Pierce*, 7 Wall. 205, Mr. Justice CLIFFORD, speaking for the court, declares the extent and effect of a judgment lien as follows: "Judgments were not liens at common law. \* \* \* Different regulations, however, prevailed in different states, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or mesne process, created any preference in favor of the creditor, until the execution was issued and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself. \* \* \* Express decision of this court is that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is that a general rule is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof. Specific liens stand on a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. Correct statement of the rule is that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. Guided by these considerations, the court of chancery will protect the equitable right of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered." In *re Howe*, 1 Paige, 125; *Ells v. Tousley*, 1d. 280; *Keirsted v. Avery*, 4 Paige, 15; *Lounsbury v. Purdy*, 11 Barb. 490; *Averill v. Loucks*, 6 Barb. 20. These eminent authorities are cited and quoted from as forcibly expressing the legal effect of a judgment lien generally. The correctness of the views expressed is not questioned, so far as we are aware, throughout the whole range of authorities on this subject.

Notwithstanding these doctrines, if there is any provision in our statutes which changes the relative force of the judgment lien in the case at bar, as against the

prior acquired mortgage, then the latter must be postponed to the former, as held by the trial court. It is insisted by counsel for respondent that a mortgage executed upon land in this state should not be regarded as a conveyance in the sense that applied to a mortgage at common law; that a mortgage on land, as known to our statute, is a mere lien to secure the payment of money, and not a conveyance, as known to the common law. In support of this position, section 371 of the Code of Civil Procedure is cited, which provides as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale." It is urged that this provision radically changes the character of a mortgage in this state from that incidental to a mortgage at common law, making the mortgage here simply a lien on land to secure the payment of money or the fulfillment of an obligation, which lien attaches at the time of the filing of the mortgage for record, and not before. It is true that this provision of statute modifies the conditions of a mortgage in this jurisdiction to the extent of withholding from the mortgagee the right of possession of the mortgaged premises, upon the breach of the conditions of the mortgage, without first a foreclosure and sale. Nevertheless, a mortgage by our statute is declared to be a conveyance. Chapter 20, div. 5, of our statutes, provides the manner by which "conveyances of land or any estate or interest therein, may be made by deed signed by the persons from whom the estate or interest is intended to pass;" and section 270 of that chapter provides: "The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, alienated, mortgaged, or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands." The mortgage in the case at bar is shown to have been executed in the manner provided in said chapter, for the execution of "conveyances of land, or any interest therein," and this mortgage is to be deemed a conveyance in the meaning of that term, as used in that chapter. By section 258 of said chapter, this conveyance is declared to be valid and binding, as between the parties thereto, without recording. Now, if that was a valid and binding conveyance of an equitable interest in said land, as between the plaintiff and her mortgagor, the mortgage interest had been effectually conveyed away prior to the attaching of the judgment lien on said land. In view of the doctrine held by the authorities cited, *supra*, the lien of the judgment, docketed subsequent to the conveyance of the mortgage interest, must have been subject to it. This would be so, not only in consequence of general principles of law, but strictly by the provisions of statute. The statute establishing the judgment lien, as before noticed, fixes the lien on the real estate owned by the judgment debtor in the county at the time of

docketing the judgment or afterwards acquired. Hence, if a valid and binding conveyance of an interest has been made by the debtor prior to the docketing of the judgment, then he did not own the interest so conveyed at the time of docketing the judgment, and the lien thereof could not attach to that which the judgment debtor did not own. It cannot be maintained that the failure to record a mortgage defeats it, or postpones it to the lien of a judgment creditor, unless such failure continues until after sale under execution and purchase by one in good faith without notice. By section 259 of the chapter cited, *supra*, it is provided that the filing of the instrument of conveyance "shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." And, again, in section 260 of the same chapter, it is provided that "every conveyance of real estate within this state, which shall not be recorded, as provided for in this chapter, shall be deemed void as against any subsequent purchasers in good faith, and for a valuable consideration of the same real estate or any portion thereof, where his own conveyance shall be first duly recorded." Neither these provisions nor any others found in the statute include judgment creditors so as to make the unrecorded mortgage void as against a judgment lien. This proposition is supported by numerous authorities where the statutory provisions are similar to those existing in this state. *Wilcoxson v. Miller*, 49 Cal. 193; *Hunter v. Watson*, 12 Cal. 363; *Packard v. Johnson*, 51 Cal. 545; *Galland v. Jackman*, 26 Cal. 80; *Pixley v. Huggins*, 15 Cal. 128; *Thomas v. Vanlieu*, 28 Cal. 617; *Davis v. Owenby*, 14 Mo. 170; *Valentine v. Havener*, 20 Mo. 133; *Holden v. Garrett*, 23 Kan. 98; *Knell v. Association*, 34 Md. 67; *Ells v. Tousley*, *supra*; *Hackett v. Callender*, 32 Vt. 97; *Hart v. Bank*, 33 Vt. 252; *Norton v. Williams*, 9 Iowa, 528. Contrary to the authorities cited *supra*, our attention is called to an observation of Mr. Freeman in his work on Judgments (3d Ed., § 366) to the following effect: "In some states the registry laws so modify the effect of conveyances, and other instruments concerning real estate, as to give a judgment lien precedence over an unrecorded instrument of which the judgment creditor had no knowledge at the date of the attaching of the lien of his judgment." Also, note 1 to this observation, in which the author says: "The tendency of recent statutes, and the decisions interpreting them, is to give a judgment lien precedence over a prior unregistered conveyance or incumbrance, especially if the plaintiff had no notice of it when his judgment was docketed or registered or the levy of the writ made." In this connection respondent cites cases decided in the courts of last resort, in the states of Texas, Virginia, West Virginia, and Georgia. To these citations might have been added cases decided in Massachusetts, Ohio, Illinois, Pennsylvania, and, perhaps, other states. But, on examination of these decisions, and the statutes under which the same were made, we find

provisions differing radically from those of our own state. In the states mentioned, the courts were confronted by statutory provisions which gave precedence to a judgment lien, as remarked by Mr. Freeman, either expressly or by fair implication, and the courts where these decisions are found were interpreting such statutes. The weight of these citations rather tends to confirm us in the opinion that, under our statute, we could not fairly construe a judgment creditor's lien to be paramount to a *bona fide* mortgage, although not recorded at the time the judgment was docketed. It requires the force of statute to make a valid and binding unrecorded mortgage void as to the judgment creditor's lien in like manner as it requires statutory provisions to make an unrecorded deed or mortgage void as to subsequent purchasers or mortgagees. It has been held in *Chumasere v. Vial*, 3 Mont. 376, that the purchaser at execution sale is governed by the rule *caveat emptor*, and that if the judgment debtor was holding the legal title to real estate in trust for another, and such property was sold under execution against the trustee, in that case the purchaser acquired no title. In *McAdow v. Black*, 4 Mont. 475, it is held that "an execution creditor takes the property subject to any lien or equity that might be enforced against the judgment debtor." Is it not an irresistible logical conclusion from these principles that a judgment lien attaches to the real estate of the judgment debtor subject to any equities which might be enforced against the judgment debtor, and also against the purchaser under the execution sale with notice of such equities? We are of opinion that the court erred in concluding that the mortgage of appellant in the case at bar was inferior and subject to the judgment lien of respondent, or the title of respondent to said real estate, acquired by purchase at execution sale under said judgment, after having actual as well as constructive notice of respondent's mortgage on said premises.

We now come to the consideration of the second question involved in this appeal,—namely, whether or not the trial court erred in the conclusion of law that the fractional portion of lots 1 and 2 of block 44 mentioned in the mortgage was not sufficiently described; and, for that further reason, the mortgage should have no effect upon said portion of said lots as against the judgment lien of respondent. The complaint pleads the mortgage by setting it forth in its own terms. The descriptive portion in question is set forth in the mortgage as follows: "And sixteen feet of the north end of lots (1) one and (2) two in block forty-four (44) in said town of Miles City, according to the plat thereof filed for record," etc. The town, county, and state wherein the said lots are situate are fully set forth. The answer does not deny that the plaintiff's mortgage included some portion of lots 1 and 2 of block 44. The answer alleges that the sheriff sold the property described in the mortgage at public sale, and that "said premises and the whole thereof was sold to defendant."

The answer further alleges that said Jacob F. Schmalse was, at the time of docketing said judgment, the owner of the property in said mortgage set out and described, and the whole thereof. Among other findings of fact, the record shows that the court found "that at the time of the mortgage, and since, the defendant Jacob F. Schmalse never owned any other property in said block 44 than the fractional parts of lots one and two in said block, and as described in the mortgage." It is contended by the appellant that, as to said lots 1 and 2 of block 44, the descriptive language of the mortgage means 16 feet in depth severed from the north end of said lots; or, in other words, that the partition line severing plaintiff's portion of said lots under said mortgage, would cross said lots 16 feet from the north end thereof. On the other hand, respondent's counsel contends that the terms of the mortgage "sixteen feet of the north end" may mean 16 square feet. The pleadings do not call upon the court to correct any mistake or imperfection of the conveyance or to make it conform to the intentions of the parties thereto. If such an issue was involved under the present state of the pleadings and facts found we should have no difficulty in drawing a conclusion as to the meaning of said descriptive terms, being guided by the provisions of sections 628-633, inclusive, of the Code of Civil Procedure. The plaintiff is apparently satisfied with the description as it stands in the mortgage. We think the court erred in concluding that the mortgage was void, in so far as it related to lots 1 and 2 of block 44, for uncertainty of description. The plaintiff is entitled in that respect to a foreclosure of her mortgage according to the description therein contained. It is therefore ordered that the judgment of the court be reversed, and that judgment and decree of foreclosure of plaintiff's mortgage be entered in favor of plaintiff, on the facts found, to the effect that her mortgage lien stand precedent to respondent's claims upon said premises set up in this action, and to all other intents in the manner provided by law, and the practice in such cases.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 228)

*In re DAVIS' ESTATE.*

(Supreme Court of Montana. Nov. 24, 1890.)

APPOINTMENT OF ADMINISTRATOR—QUALIFICATIONS—EVIDENCE.

1. Under Prob. Prac. Act Mont. § 55, prescribing the order in which letters of administration "must be granted," and section 59, providing that "no person is competent to serve" who is "adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity," an applicant who takes precedence in the order prescribed in section 55 is not disqualified by reason of drunkenness because he is in the habit of using liquor to some extent, and at times to a considerable extent, when it also appears that he attends to important business, and has done so for many years, and that he is not considered incompetent by any of the wit-

nesses, many of whom testify that his use of liquor is temperate.

2. Nor is such applicant disqualified by reason of "improvidence" because, at the advanced age of 61, he is not possessed of property of any considerable value, and for five years has not supported his wife and minor children, when it appears that he has been separated from his wife during that time, and that, though he has not much property, yet he has carried on a large business for himself, and transacted important affairs for others involving the custody and expenditure of large sums of money, in none of which matters is it proved that he was lacking in diligence, care, and foresight.

3. Such applicant is not disqualified by reason of want of integrity, because that three years before he made application for letters of administration, he excused himself under oath from grand-jury duty on the ground that he was a citizen of another state, but that, upon the trial of his application for letters, he swore that he had resided in the state for five years, thus bringing himself within the statute forbidding the appointment of a non-resident, (Prob. Prac. Act Mont. § 55,) as these facts do not show that applicant has committed perjury, but simply that he made a distinction between "citizenship," which renders one eligible for grand jury service, and "residence" requisite as the qualification of an administrator.

4. In order to prove want of integrity on the part of applicant, the contestants attempted to show that he had entered into a conspiracy with his brother and son to defraud the rest of the heirs of their rightful shares. One of the heirs testified that, on learning that decedent could not live long, she remarked to applicant that the old aunts would be surprised to find how much they had, and that applicant said that they need know nothing of it unless their nieces and nephews told them, and that they would be satisfied with very little. Applicant denied saying this. It was also shown that, at a meeting of the heirs after the funeral of decedent, in Massachusetts, applicant's brother stated to those assembled that it would take from 5 to 10 years to settle the estate, if there was any, in Montana, and that applicant confirmed the truth of this statement. Applicant's brother then requested the heirs to give him power of attorney to represent their interests in Montana, but this they refused to do. It did not appear that applicant had conferred with his brother prior to the meeting, and it was shown that they had seen each other but once in 30 years. It was shown that applicant's son claimed a number of shares of stock, as a gift from decedent, and was inimical to the rest of the heirs. There was much correspondence between applicant's son and his brother, but it was not shown that applicant had any knowledge of it, nor that he knew of statements made by his brother which indicated that he (the brother) entertained sinister designs upon the estate. Many witnesses testified that applicant's reputation for integrity was good in the community in which he lived. *Held*, that no conspiracy was shown, nor was it proved that applicant lacked integrity. BLAKE, C. J., dissenting.

5. The existence of the alleged conspiracy on the part of applicant, his son, and his brother not having been shown, telegrams that passed between applicant's son and his brother relative to the estate, just prior to decedent's death, are inadmissible in evidence against applicant, who is not shown to have had any knowledge of them.

6. Evidence of conversations between applicant's brother and third persons, in which the brother intimated an intention to defraud the other heirs, is inadmissible in the absence of proof of a conspiracy between applicant and his brother, or of proof that the brother's remarks were made in applicant's presence.

Appeal from district court, Silver Bow county; JOHN J. MCHATTON, Judge.

Nathaniel Myers, Wade, Tuole & Wal-

lace, Frank E. Corbett, Stephen De Wolfe, and McConnell & Clayberg, for appellant. Forbis & Forbis, M. Kirkpatrick, and J. M. Woolworth, for respondent.

HARWOOD, J. This is an appeal on behalf of Henry A. Root, an applicant for letters of administration on the estate of Andrew J. Davis, deceased. On the 11th day of March, 1890, as appears by the record, Andrew J. Davis, then a resident of Butte City, Silver Bow county, this state, died at that place, leaving an estate of the estimated value of four and one-half or five millions dollars. Among others, John A. Davis, a brother, and one Henry A. Root, a nephew, of deceased, petitioned the district court, exercising its probate jurisdiction under the constitution, for letters of administration on said estate; and each of said applicants also filed objections to the appointment of the other. Section 64, Prob. Prac. Act. These petitions and contests were heard and determined by the court making an order overruling all objections to the appointment of John A. Davis, and granting to him letters of administration upon said estate. Appellant, Henry A. Root, thereupon made a motion for new trial in said matter upon the following grounds: *First*, Insufficiency of the evidence to justify the judgment, decision, and order of the court, and that the same is against law. *Second*, Errors of law occurring at the trial and excepted to by the party making this application. Sections 323-327, Prob. Prac. Act; sections 295-301, Code Civil Proc. Motion for new trial was made upon a statement of the case, and, being heard by the court, was overruled, and this appeal was taken, both from the order overruling motion for new trial, and from the judgment and order of court granting letters of administration to John A. Davis.

Our statute (section 55, Prob. Prac. Act) provides the order of precedence in which letters of administration must be granted as follows: "Letters of administration on the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, who are respectively entitled thereto in the following order: *First*, the surviving husband or wife or some competent person whom he or she may request to have appointed; *second*, the children; *third*, the father and mother; *fourth*, the brothers; *fifth*, the sisters; *sixth*, the grandchildren; *seventh*, the next of kin entitled to share in distribution of the estate; *eighth*, the public administrator; *ninth*, the creditors; *tenth*, any person legally competent." The persons, however, entitled to letters of administration, as prescribed in the foregoing section, are subject to a provision of the same section, to the effect that "no person who is not a resident of this state shall be appointed administrator;" and also to the provisions of section 59, as follows: "No person is competent to serve as administrator or administratrix who, when appointed, is, —*First*, under age of majority; *second*, convicted of an infamous crime; *third*, adjudged by the court to be incompetent to execute the duties of the trust, by reason

of drunkenness, improvidence, or want of understanding or integrity." In section 64, Prob. Prac. Act, it is provided that "any person interested may contest the petition by filing written opposition thereto on the grounds of incompetency of the applicant." Under the provisions of those statutes it is clear that letters of administration "must be granted" to applicants in the order prescribed by statute, to the exclusion of others, unless the applicant is disqualified by reason of being a non-resident of this state, or a minor, or having been convicted of an infamous crime, or adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. Respondent, John A. Davis, occupies a place precedent to appellant, Henry A. Root, in right to letters of administration upon this estate, by the provisions of statute, and, unless respondent be disqualified by reason of some disability mentioned in the statute, his appointment was properly made by the court and must stand. *McGregor v. McGregor*, 33 How. Pr. 456. The objections set up by appellant against the appointment of John A. Davis are, —*First*, that he is a non-resident of this state; *second*, that he is incompetent to execute the duties of the trust by reason of drunkenness, improvidence, want of understanding and integrity. Evidence was introduced in support of these allegations on the part of Henry A. Root, as well as evidence as to the qualification of John A. Davis, and in his defense against the objections to his appointment. The assignments of error contained in the record relate, — *First*, to the alleged insufficiency of the evidence to justify the findings of the court against the alleged causes of incompetency; and, *secondly*, to errors of law alleged to have occurred at the trial, and been excepted to by appellant. These matters will now be considered in the order set forth in the record.

The first ground of error assigned, is, in effect, that the evidence is insufficient to support the finding of the court that respondent was not disqualified, and should not be adjudged incompetent, by reason of drunkenness. Upon a careful review of all the evidence introduced, we find no error in the conclusion reached by the court below upon this question. This question does not turn upon the fact that the applicant is shown to be in the habit of using intoxicating liquor to some extent. However reprehensible that habit may be as regarded from a moral point of view, it is not within the province of the court to deny letters of administration to an applicant on the ground of mere use of intoxicants. The drunkenness contemplated by this statute, undoubtedly, is that excessive, inveterate, and continued use of intoxicants, to such an extent as to render the subject of the habit an unsafe agent to intrust with the care of property or the transaction of business. It is a matter of common knowledge that the appetite for intoxicating liquor takes such strong hold upon some individuals as to become a controlling influence. The appetite strengthens by each successive indulgence. The will force be-

comes too feeble to resist the craving of the appetite, indulgence is unrestricted, constant, and excessive. A person so controlled by such an appetite may be said to be abandoned to the habit of drunkenness. The unfortunate effect of this habit is to render the subject of it, not only physically and mentally incompetent to transact business of importance, and preserve property with due care, but usually the subject of this habit becomes indifferent to the most sacred duties, and careless of the demands of the highest moment. Such a person may well be adjudged incompetent to execute the duties of the trust involved in the administration of an estate. It is undoubtedly easier to prove the fact, and the disqualifying effect, of drunkenness, than to define the degree of intemperance necessary to produce incompetency. The vital question in the investigation of this objection is whether, or not, the applicant for letters is incompetent by reason of the inveterate use of intoxicants, and not whether he may, or may not, have used the same to some extent. In the case at bar it is admitted by appellant's counsel that the evidence introduced to establish the incapacity of John A. Davis, by reason of drunkenness, is meager. Witnesses introduced in support of that charge testified that John A. Davis drank intoxicating liquor, and some testified that he used the same to considerable extent at times, yet none of these witnesses would undertake to say that John A. Davis was incompetent to transact important business; nor did they testify to other facts from which the court could reasonably draw that conclusion. In defense against this allegation, it was proved, by a number of witnesses on behalf of John A. Davis, that, during his residence in Butte City since the fall of 1885, up to the fall of 1888, he was engaged in the wholesale grocery business at that place, as the senior member of the firm of Davis & Co.; that he was attentive to that business, and conducted it with such care and foresight that he acquired the reputation of being a conservative, successful, and clear-headed business man; and that other business men of that city sought his counsel in reference to business transactions. The testimony introduced on behalf of John A. Davis shows that, since the fall of 1888, when he retired from said wholesale grocery business, he has been engaged in attending to important business matters for the First National Bank of Butte, and also for the deceased, Andrew J. Davis, such as looking after claims owing to said bank, rebuilding the said bank after its destruction in the fall of 1889, and attending to important litigation in Iowa for deceased. The testimony of these witnesses, as to the respondent's habit of using intoxicating liquor, is to the effect that his use of the same was temperate. We think the court properly found upon the proof that the applicant was not incompetent by reason of alleged drunkenness. See *Kechele's Case*, 1 Tuck. 52.

Improvvidence was set up as ground of disqualification of John A. Davis, and it is urged that the court erred in finding that the same was not established by the evi-

dence. In support of this ground of disqualification, our attention is called to two facts shown by the evidence: *First*, that respondent, at the advanced age of 61 years, is not possessed of property of any considerable value; *secondly*, that since 1885 he has not supported his wife and minor children. As to the latter fact, the evidence shows that a separation took place between respondent and his wife in 1885, and that he has not supported his wife and two minor children since that time. These facts do not tend to prove, either the providence or improvidence of respondent. He may have attended all his transactions in reference to the management of property with the best of foresight, and "hoarded his gain with a miser's care," and yet not supported his wife and children. Nor does the fact that respondent has no estate, standing alone, sustain the charge of improvidence. *Emerson v. Bowers*, 14 N. Y. 449. "Improvvidence" is defined to be a want of care and foresight in the management of property. *Coope v. Lowerre*, 1 Barb. Ch. 45; *Webst. Dict.*; 10 Amer. & Eng. Enc. Law, 321. The symptoms of an improvident temperament would, evidently, be carelessness, indifference, prodigality, wastefulness, or negligence in reference to the care, management, and preservation of property in charge. It is said in *Coope v. Lowerre*, supra: "The improvidence which the framers of the Revised Statutes had in contemplation, as a ground of exclusion, is that want of care and foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person." We do not find in the record any evidence to show that respondent possesses, or has exhibited, in reference to property, the characteristics which constitute improvidence. On the contrary, there is evidence showing that he has been engaged extensively in mercantile business; that he has been intrusted with the custody, care, and expenditure of large sums of money, and the superintendence of undertakings of importance, involving large expense; and in none of these matters is it shown that respondent was wanting in foresight, care, and diligence in the management and preservation of the property committed to his charge. The court appears to be fully sustained by evidence in its finding that respondent is not disqualified by reason of improvidence. *Coope v. Lowerre*, supra; *Emerson v. Bowers*, supra; *McMahon v. Harrison*, 6 N. Y. 443; *Coggeshall v. Green*, 9 Hun, 471.

Want of understanding was alleged as a ground of disqualification of respondent, and the finding of the court against the existence of that fact is assigned as error, on the ground that such finding is not supported by the evidence. This proposition is not supported by any evidence found in the record. The tenor of all the evidence is to the contrary, and, moreover, the charge is incompatible with another charge and theory wrought out of the evidence, to be further considered,

namely, an alleged design on the part of respondent to defraud certain heirs of their rightful shares of said estate, and an alleged conspiracy entered into by respondent with others to carry out that fraudulent purpose. Not only the tenor of the evidence, as we view it, but the construction put upon the evidence, by appellant's counsel, contradicts the allegation that respondent is wanting in understanding.

The further and last ground of disqualification urged by appellant against the issuance of letters of administration to respondent is "want of integrity." The finding of the court against that alleged disqualification is assigned as error for the alleged reason that such finding was not supported by the evidence. In passing upon this question it will be necessary also, to consider and determine the alleged errors of law, assigned in reference to the exclusion of certain testimony offered at the trial, on behalf of appellant. In addition to the fact that "conviction of an infamous crime" absolutely disqualifies an applicant for letters of administration, the question of the integrity of the applicant may be raised and be made the subject of judicial investigation and judgment. If judgment be pronounced, to the effect that the applicant is incompetent to execute the duties of the trust by reason of want of integrity, letters shall not issue to him. Section 59, Prob. Prac. Act. Just what degree of moral delinquency would justify the court in proceeding to that judgment is not clear. Undoubtedly, the accusations upon which a court should base this judgment ought to be certain and grave in their nature, and be established by proof which would, at least, approach the certainty required for conviction in criminal prosecutions. An abandoned person may be guilty of many dishonest transactions not punishable by our Criminal Code as an "infamous crime," which, nevertheless, would indicate such moral turpitude, such baseness of character, such want of integrity and conscientious honesty of purpose, as to render him unworthy of the trust involved in the administration of an estate. Under this statute proof may be made of such depraved conduct as would impeach an applicant's integrity, and justify the court in adjudging him incompetent by reason of want of integrity. The testimony, which appellant insists indicates a want of integrity on the part of John A. Davis, will now be examined. It appears, by the testimony of respondent, that about three years ago, on an occasion when he was summoned as a grand juror for Silver Bow county, on his examination under oath as to his qualifications to act as such, he excused himself from such service by saying he was a citizen of Chicago. This fact, coupled with the further fact that respondent testified in the trial of this case that he had resided in Silver Bow county since the fall of 1895, is construed by appellant's counsel as showing that John A. Davis has falsely testified, either in one case or the other. We think it is a self-evident proposition that one who deliberately and knowingly violates the sanctity

of his oath is wanting in integrity. One of appellant's counsel asserts in his brief that John A. Davis "being examined under oath, in order to escape jury duty as a citizen, falsely testified that he then resided in Chicago, and that he did not reside at Butte, and so escaped jury service." This is a grave charge, but the evidence does not support it. Respondent Davis, testifying in this respect, said he had resided in Butte ever since the fall of 1885. He was residing there when summoned to serve on the grand jury, and, as to that matter, he says in his testimony: "I excused myself on account of citizenship, about three years ago. I think, in that conversation, I told the judge, probably, that I was not a citizen here. I think that was as much as two years ago. I know the judge asked me at the time if I intended to become a citizen here. I told him I had not decided. I told him I was a citizen of Chicago." In viewing this evidence, it appears very plainly that the respondent made a distinction between residence and citizenship. There is no other evidence on this matter than the testimony of respondent. It is simply the evidence of respondent as to his intention respecting his citizenship, and the expression thereof before the court two or three years ago. It is not uncommon for a man to dwell or reside in one country, and at the same time claim his citizenship in another. We find nothing in this evidence to justify the inference drawn therefrom by appellant's counsel.

Appellant further undertakes to impeach the integrity of John A. Davis by attributing to him a design to defraud certain heirs of said estate of their rightful shares thereof, and, in furtherance of such design, a conspiracy entered into by respondent, John A., and his brother Erwin, to carry such purpose into effect. To establish this fraudulent design and conspiracy, appellant's counsel point, first, to the testimony of Mrs. Ellen Cornue, a sister of appellant, Henry A. Root. It appears by the record that, during the last illness of Andrew J. Davis, deceased, she was summoned from New York state by telegram to visit her uncle Andrew. In her testimony on behalf of Henry A. Root, the appellant, she relates that soon after her arrival in Butte City, she learned from the attending physician that her uncle could not survive many days. That, upon learning this, she said to her uncle John, the respondent, "What a surprise it would be to those aunts down there when they realize how much they will have." That he replied, saying: "If their nieces and nephews do not put anything into their heads, they will be satisfied with very little. Diana should have the place where she is living. We will give a deed to her and a few hundred dollars, and she will be all right." That she then remarked to her uncle John that he would not find those old aunts such fools as he thought they were, to which John A. replied: "Well, if they do too much talking, I will go in with Jeff and take every dollar. I can go into Iowa and prove anything, and it won't take very much money to do it either." It appears by the record that the person referred to



as "Jeff" is an alleged illegitimate son of deceased. After Ellen Cornue related that conversation as aforesaid, John A. Davis testified as to the same conversation. His version of it contradicts Ellen Cornue's evidence in that respect, except that they both agree that she commenced said conversation. It does not appear that, on any occasion, John A. introduced such subject, nor any subject kindred to the one mentioned in said conversation, although he was in company with his niece, Ellen Cornue, frequently at Butte City, and they traveled together thereafter from Butte, Mont., to Springfield, Mass.; nor does it appear that John A. sought to persuade this niece, or any one who had knowledge of the vast estate left by deceased, to join him in suppressing that knowledge from other heirs, or in defrauding or misinforming them as to the estate. On one occasion alone this niece introduced a conversation as to the surprise that awaited the other heirs, and, according to her narrative, John A. intimated that he harbored improper intentions towards other heirs. This he emphatically denies, and gives a different version of said conversation. The most that can be said of this evidence is that it is conflicting, and the court, having the witnesses before it, decided between the conflicting statements. The well-established rule, often announced by this court, is that in such a case the decision will not be disturbed. We pass to another incident connected with this branch of the case, upon which counsel for the appellant lay great stress, as bearing upon the alleged evil designs of John A. Davis, against certain other heirs. It appears by the testimony that immediately after the death of Andrew J. Davis, the remains of the deceased were conveyed to the family burying-place, near Springfield, Mass., for interment. After the funeral, on the evening of the same day, a number of the relations and heirs of the deceased being present at the Massasoit house, in Springfield, they met together, to consider what action was proper on their part in reference to the estate of deceased. There was present at this meeting, respondent, John A. Davis, his brother Erwin, and several of his sisters, also appellant, Henry A. Root, and some other heirs of deceased. Erwin Davis first made some remarks there, in which he said, in effect, that deceased may have left a will; that there was a will made by deceased at one time. He also said that the estate was not as large as had been reported, and suggested the probability of large debts existing against the estate, and mentioned the fact that it was reported that deceased had an illegitimate son in Iowa, whose claims may be set up, and litigation involved thereby, and suggested something about the advisability of attempting to settle with said son to avoid scandal; that he thought the estate could be settled in 5 years if there was a will, but that it would take 10 years if there was no will. As to this last remark in reference to the time required to settle the estate, he turned to John A. and asked him if he thought the statement about the time was correct, and John A. assented to

the correctness of that statement. Erwin further suggested that some one should be appointed by the heirs to represent their interests in Montana, and said he supposed they would think him a proper person to represent them and look after their interests. This he said he would do if they so desired and empowered him so to do, and he suggested that they sign a paper giving him such power. The remarks of Erwin Davis at said meeting are repeated with considerable variation in important features, by some seven witnesses who were present, and who testified on this hearing, on the part of the appellant, Root. For instance, it is observed that some of these witnesses report Erwin as making the remark, when he referred to said estate, "If there is any estate," while Henry A. Root, the appellant, a lawyer by profession, Mr. Herbert P. Cummings, a business man, and Mrs. Elizabeth Ladd, a niece of deceased, who were called as witnesses against John A. Davis and related the remarks of Erwin Davis at said meeting, do not report him as making such a remark. Mr. Cummings testifies that Erwin, in the course of his remarks at said meeting, said: "If there was any estate for us, it would be obtained after a great deal of litigation." In the same connection, according to this witness, Erwin spoke of the "supposed illegitimate child and said there would be either eleven heirs or one, and that in an emergency some person should be given authority to act in regard to him if anything came up." After Erwin Davis finished his remarks, appellant, Root, made some remarks to those assembled, in which he, in effect, contradicted or modified the statements made by Erwin, and advised the heirs not to sign any power of attorney or other paper as suggested by Erwin, at least until they had advised with counsel. This appears to have ended the meeting. It is shown that, after said meeting, Erwin and John A. still advised their sisters to sign the paper authorizing Erwin to represent them concerning their interests in Montana, but in what respect, and to what extent, this paper authorized him does not appear. It is intimated by appellant's counsel that said paper may have been a document of different purport from that represented by Erwin. That document, however, does not appear in evidence, nor does any witness state anything as to its contents, nor does it appear that Erwin sought to conceal its contents. No evidence is found in the record to show that there was anything in said paper contrary to what Erwin represented, nor that Mr. Root, a lawyer present and disputing the propriety of the heirs signing it, could not have freely examined its contents if he desired.

After the conversation between Mrs. Cornue and respondent had been related by her, and the incidents of said meeting at the Massasoit House had been narrated by many witnesses on the part of appellant, John A. Davis was recalled for further cross-examination by appellants' counsel, and testified to the following effect: That, prior to the said meeting at the Massasoit House, he had not seen his



brother Erwin but once during a period of more than 30 years, and that the one occasion was 10 years ago, when they met and were together about two hours; that before reaching the Massasoit House on the occasion mentioned, he had no communication whatever with his brother Erwin; that he did not know what correspondence passed between his son Andrew and his brother Erwin. He related the incidents of meeting his brother Erwin and his aged sisters, when he arrived at Springfield, Mass., in charge of his deceased brother's body, and narrated what little conversation he had with Erwin prior to the funeral, and on his return therefrom, up to the time of said meeting of the heirs, which meeting occurred after dinner, on the day of the funeral. He positively denies any secret meeting or conversation with Erwin, and denies that he entered into, or thought of entering into, any combination with Erwin. After the aforementioned testimony was introduced on the part of appellant, his counsel offered to prove by him the following facts in opposition to John A. Davis for letters of administration on said estate, to-wit: "That shortly prior to the visit of Mr. Root to Montana, in the early part of March, this year, his uncle Erwin stated to him that there was no doubt his brother Andrew would shortly die; that Andrew could not live much longer; that his estate would have to be taken charge of and administered upon; that the proper persons to control the administration were himself, [Erwin,] Mr. Root, and Mrs. Cornue; that they could select some one to take charge of it; that there were very few of the heirs who needed anything; that there was no reason why many of them should receive anything; that the interests of most of them could be acquired, if he [Erwin] controlled the administration, for very little; that the possession of money would be an injury to most of them; that if he could get control of the administration he could do pretty much what he pleased towards acquiring the interests of the others; that something, of course, would have to be done for Andy in Butte, [meaning Andrew J. Davis, Jr., a nephew of deceased;] that he [Henry A. Root] should have all he was entitled to; that brother John would have to have his share; that the only one of the others that could give him [Erwin] any trouble would be Smith of California, and that, if he resisted, he would law with him until he got sick of it; that, if there was a will that they wanted to have stand, they could have it stand, if they were on the inside; that, if there was a will that they did not want to have stand, they could overthrow it, if they were on the outside; that it would be necessary to go to Montana to carry out the arrangement, get charge of the estate, and put it into the hands of some one representing them; that, as for Diana, he could get her, if he had control of the administration, to accept a deed to the house she occupied and a few hundred dollars a year; and that the house was not worth over \$1,000." This proffered evidence was rejected by the court upon objection on the part of re-

spondent, as being incompetent and immaterial, to which ruling appellant excepted, and the same is assigned as error. At the same time appellant further offered to prove "that, on the conclusion of the meeting at the Massasoit House, Erwin Davis said to Mr. Cornue, 'What is the matter with Henry? [meaning Henry A. Root.] I thought he understood the arrangement between us; he was to be in; that speech of his has cost me some millions.'" In making this offer appellant by counsel said: "I offer to prove that he made these remarks last mentioned to Mr. Cornue, and separately to Mrs. Cornue, but I have no right to say, and do not say, that it was within the hearing of John A. Davis." Upon objection, by respondent's counsel, to the introduction of that testimony, on the ground that it was incompetent and immaterial, the court refused to allow the same to be proved, to which action appellant excepted, and assigns the same as error. Mr. Cornue testified to this same matter, on his examination as a witness on the part of appellant, in which testimony he said "the conversation in the hall between Erwin and me, just referred to by me, was somewhat of a whispered conversation between Erwin and me." On motion that part of Mr. Cornue's testimony, wherein he related said conversation, was stricken out by the court, which action of the court is excepted to and is assigned as error. The manager of the Western Union telegraph office at Butte, in obedience to a subpoena *duces tecum*, brought into court a number of telegrams, which, he said, had passed since the 14th of February, 1890. These telegrams were offered to be read in evidence, on the part of the appellant. The court examined said telegrams, and, on finding that the same had passed between Erwin Davis and his nephew, Andrew J. Davis, Jr., said the court would exclude them on the objection made by counsel for respondent, on the ground that John A. Davis was not shown to have any knowledge of said telegrams, and accordingly said telegrams were excluded. This action of the court was excepted to, and is assigned as error. The only theory upon which said evidence, which was stricken out or excluded, could be admissible against John A. Davis, is that the existence of a conspiracy, between him and his brother Erwin to defraud other heirs had already been established by competent proof. Had that conspiracy been established? By proof of what transaction, incident, or act, are we to find that John A. Davis had conspired with his brother Erwin to defraud other heirs of their rightful shares of said estate? These brothers had not met for more than 30 years, except for the brief space of two hours some 10 years ago, until they met on that solemn occasion, at the Massasoit House, on the morning of their brother Andrew's funeral. It was in evidence that no communications had recently passed between them. Indeed, it does not appear that they had communicated with one another for a period of 10 years.

Up to this time the evidence shows no fact which gives the slightest color of credence to the allegation of such conspiracy.

Even if we take Mrs. Cornue's version of her conversation with her uncle John as absolutely true, there was no reference in it to the fact that John and Erwin proposed to co-operate together. On the arrival of John at the Massasoit House, in charge of his deceased brother's body, he found awaiting him several aged sisters, his brother Erwin, and a number of other relatives of deceased. John tells in his testimony, on cross-examination, what occurred, both prior to the funeral and after that event, up to the time of said meeting of the heirs. It amounts to nothing more than a narrative of a hasty greeting between these brothers and sisters, who had scarcely met between youth and old age; the preparation for the funeral; the journey of 10 miles to the burial place; the obsequies; the return to the Massasoit House; the partaking of a late dinner together with all these heirs present,—after which the meeting occurred. No delay was made to give convenient time and opportunity for these alleged conspirators to meet in consultation. John is questioned on cross-examination as to whether he had a private or secret interview with his brother Erwin on the day of the funeral, prior to said meeting of heirs, and positively negatives all such questions. None of the seven witnesses who were there, and testified to the circumstances, intimate that such an interview occurred. So that up to the time of the meeting we have no evidence to show that any such an alleged conspiracy had been formed. Neither is there any evidence to show that John had any knowledge of Erwin's fraudulent designs if they existed. At the meeting John coincided with one remark of Erwin, as to the time it would take to settle the estate in Montana. This may have been an honest belief. If he was mistaken, we cannot say that it was not an honest mistake. He advised his sisters to sign the paper authorizing Erwin to represent their interests in Montana. There could no vice in this, as far as shown, because it does appear that it might not under certain circumstances be expedient, provided the person delegated was a trustworthy agent. There is nothing to show that John did not honestly and firmly believe in his brother Erwin's integrity when he advised signing such a paper. Mr. Root also expressed the idea that it would be proper for these heirs to be represented in Montana, for he said to them at said meeting that he was going to represent himself and sister, and if any of them wanted him to look after their interests, he would do so with pleasure. If John A. Davis was conspiring with his brother Erwin to carry out the alleged fraudulent purpose, it is a strange circumstance that John sat in said meeting, and heard Mr. Root contradict Erwin, both as to facts and as to the propriety of his advice to the heirs, and yet John offered no remarks calculated to put Mr. Root in a false light, or discredit his statements. Is it not unnatural for a man desperate to conspire for the consummation of such a nefarious scheme, inspired by the same hope, bent on achieving the same result, to calmly and quietly

sit by, and hear a co-conspirator contradicted as to his statements, and challenged as to the expediency of his advice? Especially at the critical moment when the silent conspirator might exert a strong influence in turning the current of action in favor of the common purpose. It is said that John should have risen up and contradicted Erwin at said meeting. The record shows two good reasons why he did not do this: *First*. John says in his testimony that he said nothing to the heirs assembled there; that he had no chance to do so. *Secondly*. If there was any necessity for contradicting Erwin's remarks at said meeting, Mr. Root did so immediately after Erwin spoke. When it is considered, in this connection, that the record discloses that Erwin's remark at said meeting, as to the existence of a will, was founded on information received directly from deceased, according to Mr. Root's testimony; that his statement as to newspaper reports greatly overestimating the value of the estate was true; that his statement as to the report that there was a person in Iowa who claimed to be a son of deceased was well founded; that his remarks about the probability that litigation would arise, and that it might be found that deceased owed debts, and as to the time required to settle the estate, were mere suggestions, there was little to call for a contradiction from any one. In our view the court committed no error in striking out and excluding the evidence mentioned, on the ground that no conspiracy had been established. Even if that evidence had been admitted, we fail to see how it could have strengthened appellant's theory in respect to the alleged conspiracy, or how it would have involved John A. Davis therein. In the whispered conversation between Mr. Cornue and Erwin Davis, in the hall of the Massasoit House, offered in evidence, Erwin is reported as saying "What is the matter with Henry?" [meaning Henry A. Root.] I thought he understood the arrangement between us. He was to be in, and you were to be in." No reference is made to John A., and it is admitted that this remark was not within his hearing. Had this evidence been admitted, there was nothing in it for John A. to defend against, or explain, unless it was to deny that he had any knowledge of the arrangement which Erwin mentioned as being understood between himself and Mr. Root. In the evidence offered to be proved by Mr. Root on his own behalf, Erwin is reported as having sought out Mr. Root, and not only made a confidant of him, but named him a party to Erwin's alleged fraudulent scheme. Erwin is reported as having laid before Mr. Root the details of his alleged fraudulent scheme. He is reported by Mr. Root as having introduced this subject by saying, "Andrew would shortly die. He could not live much longer; that the estate would have to be taken charge of and administered upon; that the proper persons to control the administration were himself, Erwin, Mr. Root, and Mrs. Cornue." Then he is alleged to have gone on and unbosomed his fraudulent plans and purposes to Mr. Root. This occurred in New

York. John A. was several thousand miles away at the time. In the course of this interview Erwin said "that it would be necessary to go to Montana and carry out the arrangement, get charge of the estate, and put it in the hands of some one representing them." John A. was living in Montana, the trusted brother and companion of Andrew, whose estate was the subject of this alleged plot. Why the necessity of going to Montana "and carry out the arrangement, get charge of the estate," etc., if John A. had joined, or was relied upon to join, the others in consummating this alleged fraud?

It is in evidence that Mr. Root had been educated by his uncle Erwin, until he arrived at the age of about 18 years. It also appears by the evidence that, at the time of said interview, and for some time prior thereto, Mr. Root was the attorney for his uncle Erwin, attending to most of his law business, which was considerable. According to Mr. Root's own testimony, shortly after said alleged interview, he came to Montana, arriving the 2d or 3d of March. He found his Uncle Andrew sick and unconscious, and was informed by the attending physicians that his Uncle Andrew could not recover. He then interviewed two attorneys and counselors of his uncle Andrew, in respect to Andrew's affairs, and as to whether he had made a will. Having learned what he could from them, he sought and obtained an interview with his uncle John, the respondent, in which Mr. Root proposed himself as a proper party to take part in the administration of his uncle Andrew's estate. Mr. Root stayed in Butte about one day, then returned to Helena, consulted lawyers and found it was necessary to be a resident of this state to be qualified for appointment as administrator. Thereupon he declared to some parties his intention to become a resident of this state, hired desk room in his lawyer's office, left direction to have his name proposed for membership of a club, and on the 6th day of March left here on his return to New York. Five days later his uncle Andrew died. Mr. Root says he had quite a long talk with his uncle John while in Butte, on the occasion mentioned, but there nowhere appears an utterance throughout the whole range of evidence to show that Mr. Root mentioned to his uncle John the alleged fraudulent intentions and propositions of Erwin Davis, which had been made to Mr. Root, according to his proffered proof, shortly before he left New York to come to Montana. So far as the evidence discloses he kept the alleged fraudulent plans and arrangement of Erwin a profound secret, until he offered to swear to the same at the trial. It does not even appear that he warned his aunts, or even his aunt Diana, whom he says was named by Erwin as an intended victim of the alleged fraud. So that, as far as can be gathered from the evidence, John went to the meeting at the Massasoit House without the slightest warning to arouse his suspicions against his brother Erwin. Even there, when Mr. Root made remarks, he failed to inform the heirs of Erwin's alleged designs. It is further asserted by appellant that John

A. Davis harbored a design to join with Jefferson Davis, the alleged illegitimate son of deceased, and attempt to take the whole estate by virtue of the alleged son's heirship. This accusation is based upon certain remarks which John is alleged to have made. Mary E. Cummings testified that, on the forenoon of the next day after said meeting of the heirs at the Massasoit House, she had a conversation with her uncles John and Erwin, in the parlor of said house, in the presence of her mother, her sister, Mrs. Cummings, and her aunt Diana. The witness testifies that at first they were engaged in social talk, and afterwards the conversation turned on the question of the heirs signing said paper for Erwin; that her mother then stated that she had decided not to sign said paper, for the reason that her children were not willing that she should do so; that Erwin then said he should not ask her again to sign the paper, nor allow her to do so; that he would go to Montana and represent himself. Then John remarked, as this witness testifies, "in a threatening manner," that he would go out and represent himself, and added, by way of a threat, "I can go in with the boy and take the whole." The witness says she then turned to her uncle Erwin and said, "If he can do that, a smart lawyer certainly can," and that Erwin replied saying, "No, no, he does not mean that." We have carefully considered this testimony, not only as to the substance, but also in relation to the circumstances which surrounded the parties speaking, and the other testimony recorded in the case. In itself this testimony shows that what is quoted by the witness must have been a mere fragment of some conversation, of which the context is not given. This is apparent from the sentence quoted,—"I can go in with the boy and take the whole." The witness does not relate that anything had been said about any boy during that conversation. We are left to infer that "the boy" referred to was some person who had been spoken of in the conversation. It is no doubt a fair inference that the person who had been mentioned was the alleged illegitimate son of deceased, and that, when John said "the boy," he referred to that person. If the conversation, of which the remark quoted is evidently a fragment, was laid before the court, it would probably show whether an evil or an innocent intention was the motive of that remark. One of the persons whom this witness named as present at said conversation was a witness before the court, and testified on behalf of appellant, but she gave no testimony as to the substance of the conversation just referred to. If John A. Davis made such remarks, and "in a threatening manner," or "by way of a threat," it is strange that the sister, Mrs. Ada Cummings, who was present and who testified in court on behalf of Mr. Root, says nothing about an occurrence of such importance, and so calculated to harrow the feelings of these expectant heirs. We only have such a fragmentary and disconnected report of it as to require inference or supposition to connect it with the party referred to, but we

have evidence of the same witness to the effect that, when she spoke to her uncle Erwin about said remark made by John, placing a certain meaning upon it, Erwin corrected her, saying John did not mean that. It should also be observed in this connection that, if John A. Davis entertained thoughts of joining with said alleged son to attempt to claim the whole estate through his relationship to deceased, as appellant insists, this brings to light another conspiracy at least contemplated or threatened by John, while at the Massasoit House. According to this theory, John is placed in the attitude of conspiring at one moment with Erwin, to get charge of the estate and defraud certain heirs of their inheritance, and at the next moment, in the presence of Erwin and other heirs, seriously threatening to go in with a person whose claims, if established, would defeat Erwin and all the heirs who met at the Massasoit House, including John himself, of all hope of succeeding as heirs to this vast estate. The record shows that at the Massasoit House much was said, by some of the heirs assembled there about said illegitimate son in Iowa. Erwin suggested that some one be authorized to settle with that individual, to avoid litigation and scandal; and it appears that John favored that plan. It is apparent that a person, in discussing this matter with the fairest motives, may have said, "I can go in with the boy and take the whole," if, in using that expression, it was only meant to urge the importance of arranging a settlement or authorizing some person to attempt it. The context would be the best guide to show what the motive of the speaker was. John testifies that, when he mentioned the said alleged son, in conversation with Mrs. Cornue, he used expressions somewhat similar in import. He testifies that he said: "The big danger is this boy in Iowa that is making the claim. There is danger and trouble, I said. Anybody can take that boy, and can prove anything down in Iowa. I said I could take the boy and prove anything." It appears by the testimony of John that, after the meeting at the Massasoit House, the other heirs having failed to concur in any arrangement to settle with said Iowa claimant, Erwin, on his own responsibility, authorized John to pay said claimant \$25,000 to quiet his claims and avoid scandal, and that Erwin said he would furnish that sum, and take his chances on the other heirs bearing their proportion of such outlay. John testifies that such settlement, if made, was to inure to the benefit of all other heirs; that, upon the suggestion, John went to Iowa on his way west, but was unable to see said claimant. John further said in his testimony: "Erwin and several of us have combined in a common defense against the Iowa boy. There is no agreement with me that is inimical to the interests of the other heirs of this estate. If Erwin has any such design, I know nothing of it."

The record shows that, on the day following Andrew's death, John A. Davis caused to be made, and he verified, a petition for his appointment as administrator

of the estate, in which he estimated the value thereof at four and one-half millions, and named all the living brothers and sisters of deceased, and the issue of deceased brothers or sisters, as the heirs of said Andrew J. Davis, deceased. In this petition, John made no mention of said alleged Iowa claimant. This petition John caused to be filed in court on the 28th day of March, before he returned from the east. There is no proof that John A. Davis has done any act in favor of said alleged son of deceased, or in violation of the rights of others who claim to be heirs to said estate. The attack upon the integrity of John A. Davis is not made by way of allegation and proof of any dishonest act or default committed by him during a long life; but the attack on his integrity is made by construing certain expressions or suggestions, by way of advice, to mean that since the death of Andrew, he has developed into a monster of depravity, and is disqualified to take the office of administrator, by reason of want of integrity. In drawing the proper conclusion from testimony of the character under consideration, it may be necessary for the court to weigh the testimony of divers witnesses, by considering their appearance and manner of conduct on the witness stand, and all the elements which add to, or detract from, the weight which should be given to testimony. From such legitimate reasons, the court before whom the witnesses testified, may have disregarded or given very little credence to certain testimony which is made the basis of appellants' charges against John A. Davis. It is not the province of this court to pass upon the credibility of witnesses, or to decide delicate questions as to the weight of the utterances of divers witnesses, whose testimony is brought here in the record. That province must be left to the judges and jurors before whom the witnesses appear and speak. At the trial, Andrew J. Davis, Jr., was called as a witness, on the part of his father, John A. Davis. This witness testified that he was the confidential agent and business manager of his uncle Andrew, for a long time prior to Andrew's death, and knew about the effects of deceased. The witness testified generally as to the character and value of the assets belonging to the estate. On cross-examination it was developed that this witness claimed to own certain shares of stock in the First National Bank of Butte, formerly belonging to deceased, by virtue of a gift, and actual delivery thereof to him by his uncle Andrew, at the time the latter was preparing to go to Tacoma, a few months prior to his death. The details of this alleged gift were inquired into, and the witness related them. Another witness was called and testified to the same effect. Respondent, John A. Davis, was questioned regarding the same matter on cross-examination, and said he did not know that he had heard it said that his brother Andrew, shortly before the latter's death, had given said bank-stock to Andrew J. Davis, Jr. The witness further said he did not recollect of ever having asked his son Andrew whether or not that rumor was true. It is urged that this

fact that respondent's son has a claim adverse to the interests of the heirs of said estate ought to disqualify respondent to take the office of administrator, on the theory that the respondent would be likely to favor his son's claim. This fact has no bearing upon the question of John A. Davis' integrity, nor upon any other ground of disqualification alleged against respondent. A man of the most upright character, and of the strictest integrity, and free from all disqualifying conditions prescribed in the statute, may have a son who claims interests adverse to other claimants of an estate. It would be clearly unlawful to set aside the father's right to letters of administration on such a pretense as that. If a dispute arise between Andrew J. Davis, Jr., and other claimants of said bank-stock, the law has ample facilities and methods to bring such dispute to trial and determination, independent of the desires of the administrator. The said claim of Andrew J. Davis, Jr., is against the interests of his father John A. Davis. The legal presumption is that a man acts in favor of his own interests. *Higman v. Stewart*, 38 Mich. 518. If we are to understand that appellant contends that John A. Davis would presumably act fraudulently in aid of his son's claim, it must be answered that no such presumption arises from the mere relationship of father and son. The legal presumption is that a man acts honestly and without fraud. Fraud is never presumed. *Hatch v. Bayley*, 12 Cush. 27; *Oaks v. Harrison*, 24 Iowa, 179. The legal maxim is, *odiosa et inhonesta non sunt in lege præsumenda*. So it is said by Lord Coke: "In an act which partaketh both of good and bad, the presumption is in favor of what is good, because odious and dishonest things are not to be presumed." Co. Litt. 78b; *Jackson v. Miller*, 6 Wend. 228; *Habersham v. Hopkins*, 53 Amer. Dec. 676; *Stewart v. Preston*, 1 Fla. 10. In this connection, the testimony of John A. Davis, to the effect that he had no knowledge of the claim of his son to said bank-stock, is criticised, as evidently untrue. There is no evidence, in the record to show that this is untrue, but the argument is made from inferences of relationship. The presumption is that a witness speaks the truth. Section 619, Code Civil Proc. Moreover, if John A. Davis is a man who would testify falsely, and desired to aid his son Andrew in support of the claim to said bank-stock, how easily and plausibly could John have given evidence in support of his son's claim, considering that John was the constant companion of his brother Andrew for a long time prior to the death of Andrew. In defense against the attack made upon his integrity by appellant, respondent, John A. Davis, called a number of witnesses, who testified to the effect that they had known respondent a long time, and knew his reputation, as to integrity, in the community in which he lived, and that his reputation was good. The reception of this evidence is assigned as error. We have no hesitation in pronouncing the action of the court correct, in receiving said testimony as to respondent's general reputation for integrity, where one of the ques-

tions at issue was his want of integrity. Appellant specifies that the court erred in considering the request of sundry heirs for the appointment of John A. Davis. We find nothing in the record showing that the court considered such a document, nor that the consideration thereof was objected to, or an exception saved upon such question. This court will not consider an assignment of error under such conditions.

Upon the views hereinbefore expressed, we are of the opinion that the order of the court below, in overruling the objections to the appointment of John A. Davis, (also the motion for a new trial,) and granting to him letters of administration on said estate, ought to be affirmed, and it is so ordered, with costs.

DE WITT, J., concurs.

BLAKE, C. J., (*dissenting*.) I regret to announce that, for the first time since the organization of the government of this state, a judgment will be pronounced herein by a divided court. I think that the principles which control the issues of drunkenness, improbvidence, or want of understanding in these proceedings have been laid down with legal precision. I concur in the opinion of the majority in upholding the implied findings of the court below that John A. Davis should not be adjudged incompetent to be appointed the administrator of the estate of Andrew J. Davis, deceased, by reason of these objections which have been alleged, heard, and tried. There is a substantial conflict in the evidence upon the cause of drunkenness, and upon this ground alone the ruling under review can be sustained. The testimony of the respondent with reference to his excuse, which he submitted under oath to the district court, and by which he secured exemption from service upon the jury in the case of *Territory v. Clayton*, 8 Mont. 8, 19 Pac. Rep. 293, is contradictory and unsatisfactory. He uses the words "citizen" and "resident" regardless of their exact meaning. In one answer he testifies: "I have excused myself \* \* \* by saying that I was a resident of Chicago. I excused myself on account of citizenship about three years ago." His statements are consistent with both theories of guilt and innocence, and I am willing to give him the benefit of the doubt and dismiss the charge of perjury. I have not been able to find in the authorities a satisfactory definition of the term "integrity," which is found in the statutes relating to the competency of an administrator. Its meaning should not be restricted to what is generally understood by the word "honesty," although the last is properly deemed by lexicographers a synonym. The administrator holds a trust of the highest character, and should act with strict impartiality in the collection of the property of the estate of the deceased, and the payment of the assets to the heirs. When the duties of the position are considered, it is evident that the want of integrity which renders a person incompetent to receive this appointment should be defined. The following definition by Webster is apposite: "Freedom from every

biasing or corrupt influence or motive." The court below was called upon to determine judicially, from all the evidence, not merely whether John A. Davis was an honest or a dishonest man in the ordinary signification of words, but whether he was free from all bias, influence, or motive, which would interfere with the exercise of his functions as an administrator of the estate of his deceased brother. In arriving at a correct decision of this issue, it will be necessary to observe the conflicting interests of the heirs, and the relationship of the parties who are asserting demands which are hostile to the estate, and the conduct of John A. Davis concerning these matters. Andrew J. Davis died March 11, 1890, and was buried on the 18th day of the month in the town of Somers, state of Connecticut. John A. Davis subscribed and verified, two days after the death of his brother, a petition for letters of administration upon the estate, and afterwards accompanied the remains of the deceased to the family burying-ground. The petition, which alleges that the value of the real and personal property of the decedent is about four and a half millions of dollars, was not filed until March 28, 1890.

We will notice other facts about which there is no controversy. The capital stock of the First National bank of Butte, in this state, is \$100,000, and the undivided profits amount to the sum of \$600,000; 950 of the 1,000 shares of this bank stand upon the books thereof in the name of the deceased, A. J. Davis. A. J. Davis, Jr., is a son of John A. Davis, and was called twice to the witness stand in his behalf, and testified, upon cross-examination, that the certificates representing these shares were given to him in December, 1889, by his uncle; that they were not indorsed; that his brother, John E. Davis, voted the stock in the following January at a meeting of the stockholders, under a proxy given by the said A. J. Davis; and that he claimed them as a gift. James A. Talbot, who testified for John A. Davis, corroborated A. J. Davis, Jr., respecting the conversation between the parties in December, 1889, about the disposition of the stock certificates. The members of this bar, who appear for John A. Davis in these proceedings, stated in this court that they are the attorneys for A. J. Davis, Jr., in maintaining his right of ownership in these shares of bank-stock. I do not wish to express an opinion which will convey an intimation of my views of this contention, but I do insist that it is the duty of the administrator of the estate of the deceased to resist in every court this claim of A. J. Davis, Jr., and obtain by a resort to legal remedies, if necessary, the possession of this property. Upon this subject, which involves the sum of \$665,000, John A. Davis testified: "I don't know that I ever heard it said that my brother Andrew, shortly before his death, gave his stock in the First National Bank of Butte to my son Andrew. I do not recollect of ever having asked my son whether or not that rumor was true." A. J. Davis, Jr., testified that his father, during the past two or three years, "has been representing my uncle Andrew, the deceased, in different capacities. My uncle

told me, after father left the grocery business, that he did not want him to pin himself down to any active business; that between his Iowa affairs and the bank he could keep him occupied. He told me there were some old papers in the bank that needed looking after, and that my father was a very good hand at that and could take charge of those matters, and he told me to pay him liberally for his services." When this testimony is weighed, showing the knowledge of John A. Davis of the affairs of the bank and the deceased, his ignorance and neglect to inform himself upon business of such vital importance to the estate, as well as to his son, are inexplicable. This, however, is a digression. It is a presumption upon which we can act, when the contrary is not shown by the record, that John A. Davis will be governed by bias and the influence of parental love in favor of his son in this matter, and that he will not therein protect vigilantly the interests of the estate. It is the policy of the law to exclude men from such a trial, and the authorities bearing upon this proposition will be examined hereafter. But assuming that this state of facts is insufficient to justify the probate court in refusing to appoint John A. Davis the administrator of the estate, it should compel a rigid scrutiny of the evidence with reference to his qualifications. I am unable to reconcile his conduct with honesty or integrity in the treatment of the heirs of the deceased. After the funeral, a meeting of some of the relatives was held at the Massasoit House in Springfield, state of Massachusetts. Among those present were two sisters, Miss Diana Davis, aged 76 years, and Mrs. Sarah M. Cummings, aged 69 years, two brothers, John A. Davis and Erwin Davis, and a number of nephews and nieces. Erwin Davis made some remarks upon this occasion, and the transcript contains the testimony thereof by Miss Cummings, Mr. Cummings, Mrs. Cummings, Mr. Ladd, Mrs. Ladd, Mr. Cornue, Mrs. Cornue, and Mr. Root. In ordinary cases, the general effect of the proof may be stated, but when the court is divided and vast interests are involved, prolixity is unavoidable, and I will quote the language of each witness.

Mrs. Cornue testified: "If there is a will, an estate can be settled within five years. Yet at the end of five years there might not be a dollar for any of us. If there is no will, it will take ten years, and at the end of ten years there probably might not be a dollar for us, as there will necessarily be great litigation. He spoke of there being debts very likely, and he said it was reported that there was an illegitimate child, and that if there was, that there would not be a dollar left for any of us. \* \* \* And then he turned to Uncle John and said, 'You have lived in Montana, and know the laws of Montana. Am I not right about the time it takes to settle an estate?' And Uncle John said, 'Yes, it takes from five to ten years to settle an estate in Montana. \* \* \* He [Uncle Erwin] mentioned five years as the shortest time in which the heirs could receive anything, and then only if there was a

will. \* \* \* And if there was not a will, ten years was the shortest time in which they could get anything." Miss Cummings testified: "He [Erwin Davis] also stated that if there was a will it was possible that the estate could be settled in five years, and if there was no will it would take ten years or more before a distribution of the estate could take place. \* \* \* He spoke several times in this way: 'If there be an estate.' \* \* \* I think those were his words. Near the close of his remarks he turned to his brother John and asked him if he was correct about the laws of Montana, as he [John] had lived there, and John replied that he was; that it took about ten years to settle an estate in Montana. Uncle Erwin said that, if there was no will, everything might be used up in litigation. He said he knew there would be large debts. I am sure he used the word 'large' in speaking of the debts." Mr. Cummings testified: "He [Erwin Davis] went on to state that if there was a will it would take five years to settle the estate in Montana; if not a will, from five to ten years; and, if there was any estate for us, it would be obtained after a great deal of litigation. He spoke of the difficulty of settling an estate in a new territory, and, after speaking of that, he turned to Uncle John and asked him if he was not right. And Uncle John said he was, that it would take from five to ten years to settle the estate." Mrs. Cummings testified: "Erwin Davis said at that meeting that, if there was no will, that would be the worst possible complication of the affair, and that in that case it would take from five to ten years to settle up the estate, if there was any estate, which remarks he made several times, 'if there was any estate.' He said there would probably be large debts. \* \* \* At the close of the statement he asked Uncle John if he was right about its taking so long to settle up an estate in Montana, and Uncle John said he was, and that it would take from five to ten years." Mrs. Ladd testified: "He [Erwin Davis] said it was to be hoped there was a will, because in that case if there was anything coming to us we might get it in five years, and if there was no will it would be ten years, and perhaps we would never get anything. \* \* \* If the public administrator got it, it would be used up in litigation, and there would probably be very little, if anything, left. He said there was one that claimed to be an illegitimate child, and that if there proved to be such a child, he would claim all, and there would be nothing left for us. At the close of the remarks he turned to Uncle John and asked him if he was right about settling an estate, as he had lived in Montana and knew the laws of Montana, and Uncle John said, 'Yes, it would probably take from five to ten years to settle an estate.'" Mr. Ladd testified: "He [Erwin Davis] further said that it was to be hoped that there was a will, in which case the property might be settled so that the heirs would receive what they were entitled to within five years; that, if there was no will, considerable litigation would necessarily follow, which would probably take so much time that it would be ten

years before any division of the estate could be made, even if there was any of it to be divided. \* \* \* There was a son who claimed to be an illegitimate son, and if he came forward to claim the estate, he could claim it and there would be nothing left for anybody else. \* \* \* He said there were probably large debts against the estate. Those were his words, as near as I can remember them. \* \* \* He thought the estate would be settled in five years if there was a will, but that it would take ten years if there was no will. He then turned to his brother John and asked him, 'Is that not so, John? You have lived in Montana, and know the laws out there.' And John Davis replied, 'Yes, you are right; it would take from five to ten years to settle an estate in Montana.'" Mr. Cornue testified: "He [Erwin Davis] said if there was a will it would take five years to settle the estate, and if there was no will it would take ten years. He said there were debts against the estate. \* \* \* At the close of his remarks Erwin turned to his brother John and said to him, 'You have lived in Montana and know the laws there, what do you say?' And Uncle John said 'Yes, that is right; it takes from five to ten years to settle an estate there.'" Mr. Root testified: "He [Erwin Davis] said that a will had been made a considerable period before that, and with codicils, and that it was to be hoped that there was still such a will; and that in case there was a will, whoever was entitled under it would receive what was given to him in five years; and if it should turn out that there was no will, the estate could not be settled for ten years, and perhaps not then, as necessarily there would be a great deal of litigation; and then he added that, will or no will, we must take care of the indigent members of the family. \* \* \* That it was reported that there was an illegitimate son; that if it should turn out that there was such a son, that son would inherit everything and there would be nothing for us; that instead of the estate being divided into elevenths there would be but one portion, and that that son would get it. \* \* \* He said something about there being debts, though I cannot remember just what, but the impression left upon my mind was that he said that it would be found that Uncle Andrew had large debts. \* \* \* He turned to his brother John and said: 'Brother John, am I right about the length of time it takes to settle an estate in Montana? You live there and you know.' And Uncle John said, 'Oh, yes, about five or ten years to settle an estate in Montana.'"

The effect of these statements of Erwin Davis, and of the apparent concurrence of John A. Davis in their accuracy, upon the heirs who composed his audience can be readily seen. They were addressed to persons who lived thousands of miles from Montana and had no knowledge of the financial condition of the deceased, or the laws of this state which regulate the distribution of estates. The youngest of the brothers and sisters of the decedent was then 63 years old, and confidence would be naturally reposed in John A. Davis.



He had been, according to the evidence, the trusted agent of his deceased brother, and possessed the information which the relatives at that time needed. He then knew that the deceased owed small sums, if anything, that the value of this estate exceeded \$7,000,000, and that the settlement of estates in Montana did not require five or ten years, or any similar period of time. It was the duty of John A. Davis, under these peculiar circumstances, to have told the whole truth, but he deliberately refused to afford his kinsmen any light, and said nothing about his petition for letters of administration, which had been prepared before his departure from this state in the same month. The respondent is silent in his testimony concerning these remarks of Erwin Davis and all that he says upon the point is embraced in the following brief sentences: "There was a meeting of the heirs at Springfield, Mass., after the funeral. I said nothing to the heirs assembled there. I had no chance to do so. I might have talked to the individual members of the family, but not to them when assembled." The absurdity of this excuse is evident when the record is looked into. All the foregoing witnesses, Mr. and Mrs. Cornue, Mr. and Mrs. Ladd, Mr. and Mrs. Cummings and Miss Cummings, testify that there was a pause at the conclusion of the speech of Erwin Davis, and Mr. Root, in substance, observed: "If no one else had anything to say, he had." At this gathering of an informal nature, there was nothing which could prevent John A. Davis from having a "chance" to talk. Another part of the evidence should be commented on in this connection wherein John A. Davis says: "Erwin is here in the city and has been for ten days. I have seen him every day of that time." If any of these witnesses had erred in stating the remarks of Erwin Davis, it was within his power to correct them, but he did not vindicate this privilege by going upon the stand. The court below in my opinion did not give to this evidence, which is not controverted, its proper weight. In another particular, I think that John A. Davis is proved to be wanting in integrity. Erwin Davis requested the heirs at this meeting to sign an instrument of some character, which conferred upon him some authority to represent them in the settlement of the estate. Root, the appellant, opposed this action and advised every one of them to consult an attorney before he signed any paper so that he could realize fully the consequences. Mr. Cummings testified: "After Mr. Root had finished and had gone out, and the rest of the company, Uncle Erwin said to Uncle John, 'What was the matter with Root?' He asked Uncle John if he supposed Root had been drinking and Uncle John said he thought so. Uncle John also then said not to have anything to do with a lawyer; that he had had a good deal of law business, and found it was very expensive, and that there were but few honest men among lawyers." Mrs. Cummings testified: "He [John A. Davis] also said that it was necessary to be united in the affair, and he turned to me and said: 'We don't want

any lawyers to be mixed up in it at all; that there were very few honest men among lawyers;' that if they got mixed up in it, the estate would go in litigation." The listeners would infer from these statements that John A. Davis did not intend to protect his interests in the estate with the aid of attorneys, but the following portions of his testimony show his duplicity. "Between the time my brother Andrew died, and the time I left here with the body, I saw counsel here. My son Andy was with me at the time. I told Andy to see Judge Dixon and have him draw a petition for letters of administration for me. I had not seen Mr. Forbis or his firm prior to signing the petition. It was my son Andy who saw them. I instructed Andy to employ Forbis & Forbis." The same spirit of unfairness or deception upon the part of John A. Davis is shown in his efforts to assist Erwin Davis in procuring the signatures of the heirs to the written instrument which has been referred to. Miss Cummings testified: "The meeting adjourned until one o'clock the next day. On that next day I had a conversation with my uncle John and Uncle Erwin. My mother was present, also my sister, Mrs. Cummings, and Aunt Diana. The conversation was in the forenoon, in the parlor of the Massasolet House. We were engaged in social talk at the first, when Uncle Erwin asked my mother and Aunt Diana if they were ready to sign that little paper. And my Aunt Diana said: 'Oh, oh, no; wait until the rest come. You said I might be the last to sign it.' Uncle John spoke and said: 'If no one makes a beginning, if no one signs first, it will never be done,' and he related a little story to illustrate his meaning. He said his wife was sick at one time, and he went to engage a nurse, and she would not go without a hired girl; and he went to get a hired girl, and the hired girl would not go without a nurse. After Uncle John had told that story my mother told Uncle Erwin that she had decided not to sign any paper. Erwin told her, 'Very well. Then I shall do nothing for you. I shan't ask you to sign again. Indeed I shan't allow you to sign if you wish to. I shall go out to Montana and do for myself.' And my Uncle John spoke up and said: 'So shall I go out and do for myself.' Both Erwin and Uncle John spoke in a threatening manner; both of them. And Uncle John added, by way of threat, 'I can go in with the boy and take the whole.' That was in Uncle Erwin's presence, and in my mother's presence, and in Diana's presence. I then turned to Uncle Erwin and said, 'If he can do that, a smart lawyer certainly can.' And Erwin said, 'No, no, he does not mean that.' Uncle John said to my Uncle Erwin that it was ignorance on our part that made my mother refuse to sign the paper. He said that impatiently. I said in answer to that, 'I don't blame you for calling us ignorant, for we are ignorant, and we wish to know what we are doing.'" Mrs. Cummings testified about the same interview: "Mr. Erwin Davis asked Diana Davis if she was ready to sign the paper, and she did not want



to sign. She wished to wait until the other sisters came, and not to sign first. Mr. John Davis said that it was necessary for some one to sign first; that if they all put it off they would never make a beginning." John A. Davis testified: "I do not remember of a power of attorney being procured by brother Erwin to be signed by some of the elderly sisters. I do not remember of any endeavor by brother Erwin to get such signatures to a power of attorney in his favor. I myself did not make any endeavor to get any of the parties to sign for Erwin." I have already observed that Erwin Davis was not called as a witness, although he was in the city of Butte during the hearing. The topics upon which John A. Davis swears that he talked are mentioned in his own words: "As to the character of the conversation during that time, I had not seen my old sisters for about thirty years, nor my nephews or nieces. It was a sort of pleasant sad meeting. \* \* \* He [Erwin Davis] asked about my health, and I asked about his, and I joked my old sisters a little; told them they looked younger than I expected to find. They told me I looked young. That was the general character of the conversation." This was a clear admission from the lips of John A. Davis that he never communicated to his relatives a single fact regarding the estate of the deceased. The occasion demanded of him candor, but everything within his knowledge was studiously concealed. It is proved by the testimony that Erwin Davis is indebted to this estate in the sum of \$536,000, which is evidenced by five promissory notes that were kept in the vaults of the First National Bank of Butte. It is also shown that the deceased in his life-time conversed thereon with A. J. Davis, Jr., Mr. Coram, Mr. Root, and Mrs. Cornue. A portion of this indebtedness has been due since the 1st day of January last past, and there are good reasons for thinking that Erwin Davis does not intend to pay the same, and that the entire amount may not be recovered for the benefit of the estate. There seems to have been some mysterious purpose in the acts and declarations of Erwin and John A. Davis to mislead the heirs. Twenty-nine telegrams, which passed between Erwin Davis and A. J. Davis, Jr., were offered in evidence, and inspected by the court and excluded upon the sole "ground that the applicant, John A. Davis, was not shown to have any knowledge" of them. These persons seem to have had intimate relations respecting this estate, which could not be settled in the ordinary course of correspondence. The testimony of John A. Davis is another remarkable instance of want of knowledge, if not integrity, by one who was paid liberally for his fidelity to the business of the deceased. "I have never heard that my brother Erwin owed him anything." A question of veracity arises between John A. Davis and Mrs. Cornue, which I will not notice for the view of the court upon this conflict cannot be disturbed. John A. Davis visited the so-called illegitimate son in the state of Iowa before his return to Butte, and prior to

the filing of his petition for letters of administration, and testifies: "Erwin and I and several of us have combined in a common defense against the Iowa boy." When all the evidence is compared, I am forced to draw the following conclusions: A. J. Davis, Jr., asserts a claim to personal property which, *prima facie*, belongs to this estate, and is of the value of \$665,000, and he and the attorneys who have been retained to litigate his rights in the first place are also employed by John A. Davis in these proceedings. Erwin Davis is indebted to the estate in the sum of \$536,000, and is striving to evade the payment thereof, and, by his attorney, advocates the appointment of John A. Davis as the administrator. But these parties, whose attitude is that of open war against the heirs of this vast estate, are united in supporting John A. Davis for the administration, and in opposing the application of Henry A. Root for the trust. The objections to Mr. Root rest upon the ground of his non-residence, and do not affect in any degree his ability or integrity. The "Iowa boy" did not offer any testimony in the court below and is not represented in this hearing, and the combination of Erwin and John A. Davis against him appears to have been entered into without a just cause. The pretensions of this child, and the law applicable to him, have been misrepresented by Erwin and John A. Davis, to weaken the confidence of the heirs in their inheritance and induce them to sacrifice their rights. None of the facts affecting this estate which were within the breasts of Erwin and John A. Davis have been revealed to the relatives. A conspiracy has been formed by A. J. Davis, Jr., Erwin Davis, and John A. Davis, to defraud the heirs, and the court below erred in excluding the testimony showing all their acts and declarations in furtherance of its objects. The appointment of the respondent as the administrator will enable A. J. Davis, Jr., and Erwin Davis to gain their ends respectively by collusion in the waiver of the proof of material facts, or the confession of allegations having no other foundation than perjury. On the other hand, the selection of Mr. Root would be the most efficient mode of defeating the schemes of A. J. Davis, Jr., and Erwin Davis for the spoliation of this estate. The argument of counsel for the respondent that the administrator will give a good bond conditioned according to law, does not remove the danger which has been pointed out.

In *Stearns v. Fiske*, 18 Pick. 24, Mr. Justice WILDE, as the organ of the court, said: "It appears that the appellant was very much under the influence of Barker, a debtor to the estate to a large amount, and who is charged with combining with the intestate, in his life-time, to defraud his creditors. The appellant's application for administration was made at his request, and not to protect or subserve her own interest. This influence might, and probably would, be exerted to the prejudice of the creditors, had the appellant been appointed administratrix, and if they might have a remedy against her on her bond, it would increase the expense of liti-

gation, for the recovery of which the creditors could have no legal, adequate remedy. And, besides, an administrator, if so disposed, may prejudice the interests of those for whose benefit the estate is administered, without being exposed to any action." In *Drake v. Green*, 10 Allen, 124, Mr. Justice HOAR, in the opinion, says: "Thus, for example, a person who applies for administration may have interests conflicting with those of the estate. The probability that these would prove an embarrassment in the proper performance of his duty might be a sufficient reason for a refusal of the judge of probate to intrust him with the administration." In *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. Rep. 370, the court say: "An executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty." In *State v. Bidlingmayer*, 26 Mo. 483, the court, by Mr. Justice SCOTT, say: "So, in effect, Adolph Kehr, as administrator of one estate, is prosecuting a suit against Adolph Kehr, as administrator of another estate. How is the defendant's estate to be protected? It is not for Kehr, with the bias on his mind, to determine whether it is indebted or not. That estate should be defended by one who has not an interest that it should go undefended." In *Moody v. Moody*, 29 Ga. 519, there was a "contest between two brothers for administration on the estate of their father," and the court, in speaking of one of them, said: "And so of the other fact, that he was claiming for himself a large part of the estate left by his father. If this were true, his interest was hostile to the interest of the estate, and estates, like everything else in life, are generally better off in the hands of their friends than in the hands of their enemies." In *Pickering v. Pendexter*, 46 N. H. 69, the court discussed the fitness of Pickering to serve as an administrator, and said: "It would seem that he asserts a claim to a considerable portion of the land in the occupation of the deceased at his death, and that this claim is contested by the heirs; and it may be the duty of the administrator to contest this claim, or at least to investigate it thoroughly, and determine fairly, whether it ought, or ought not, to be contested; and that for neither of the duties would he be a suitable person. It is argued by his counsel that he must give bond for the faithful discharge of all his duties; and that is true; and yet we think it would not be a sound exercise of discretion to appoint a person whose interest is clearly opposed to that of the persons for whom he acts." In *Ellmaker's Estate*, 4 Watts, 34, the court say: "But again, there is reason to believe that the appellant has attempted to overreach the heirs, by trumping up a false account against the estate. The least taint of fraud is a conclusive objection. It works a legal incompetency to perform the duties of the office; an office of such trust and confidence as should under no circumstances be committed to a person wanting in good faith, and in whom confidence cannot be reposed." In *Bleber's Appeal*, 11 Pa. St. 157, the court say: "The able opin-

ion of Mr. Justice ROGERS, in *Ellmaker's Estate*, 4 Watts, 38, is directly in point. \* \* \* It was further held, in that case, that the right of one Swartswelder was properly rejected on the ground of expediency. The objection is insurmountable when he stands as a litigant party in opposition to the other heirs. Courts have constantly declined putting in persons as administrators so situated. This is a strong case. Here Isaac was already in possession of more than half the estate. It is said he claimed it as a gift from his mother. This position rendered him an incompetent person to perform the duties of the office of administrator, which is one of trust and confidence, and ought to be committed to a person who has no interest in opposition to the other heirs of the estate." Mr. Gary, in his work on Probate Law, writes: "A person is not suitable merely because he is ready to give a bond with sufficient sureties, because parties damaged by official misconduct may be subjected to expense of litigation for which they can have no adequate remedy, and an administrator may prejudice the interests of parties interested, without being exposed to an action on his bond. When there is good reason to suspect that the purpose is to promote some interest adverse to that of the heirs or creditors of the estate, it would seem that the person would be unsuitable." Section 267. In *Thayer v. Homer*, 11 Metc. (Mass.) 104, the court say: "But unsuitableness implies no want of capacity or mental infirmity, but an unfitness arising out of the situation of the person in connection with the estate of which he is administrator, either by reason of his being indebted to it, or having claims upon it, or in the interest he has under a will, or his situation as an heir at law." While the application of some of these cases may be limited by the statutes under which they were made, the legal doctrines which are announced are undoubtedly correct, and would prevent the appointment of the respondent as the administrator of this estate. I maintain this proposition, when the testimony is weighed. But the relations of the parties have been radically changed by a fact which has been brought to the attention of this court by the attorneys for John A. Davis. They have caused to be filed with the record in the case, the photographic copy of a will of the said Andrew J. Davis, deceased, which, in effect, gives to John A. Davis the entire estate, subject to "a life-time maintenance" for three persons, who are not the lawful heirs. The executors who are nominated in this instrument have departed this life, and John A. Davis filed, July 25, 1890, in the court below, a petition duly verified, which concludes with the following prayer: "Wherefore, your petitioner prays, that the order, hereinbefore mentioned, made by this court, on the 28th of April, 1890, appointing him administrator of the said estate, be vacated and set aside; that the said will, a copy whereof is hereto annexed, be admitted to probate in this court, and established by the judgment thereof; that the usual order be made, fixing the day for the hear-

ing of this petition, and due notice thereof be given to the heirs at law, and devisees under said will of said deceased, and that letters of administration, with the said will annexed thereto, be issued to your petitioner." This new matter should be treated like the suggestion to this court of the death or disability of a party, or the transfer of his interest in an action or its settlement pending an appeal. The respondent, who has voluntarily produced this supplemental record, must abide by the consequences of his conduct. It is conceded by counsel that the appellant has filed objections to the probate of this will on the ground of its invalidity, while Erwin Davis and A. J. Davis, Jr., support the petition of John A. Davis, and admit that the document is genuine and legal. The harmonious combination of these three members of the family continues unbroken, although the instrument will "cut off" Erwin Davis without any share of the estate. The unfavorable conclusions which have been already stated are strengthened, if possible, by these strange and seemingly inconsistent acts of the parties. They remove any doubt which may have been entertained concerning the state of hostility between John A. Davis and some of the heirs of this estate, and demonstrate that his appointment is in conflict with the authorities and one "not fit to be made."

(10 Mont. 168)

**BULLARD v. NORTHERN PAC. R. CO.**

(*Supreme Court of Montana.* Oct. 21, 1890.)

**CARRIERS—INTERSTATE COMMERCE ACT—EFFECT ON PRIOR CONTRACTS.**

A contract entered into prior to the passage of the interstate commerce law (Act Cong. Feb. 4, 1887) for the carriage of freight by a railway company at rates contrary to the provisions of that law cannot be enforced after its passage, and the shipper cannot recover any rebates stipulated for in such contract.

Appeal from district court, Custer county; GEORGE R. MILBURN, Judge.

*Cullen, Sanders & Shelton*, for appellant.  
*Chas. R. Middleton*, for respondent.

**BLAKE, C. J.** This is an appeal from a judgment which was entered on the pleadings. The amended complaint was filed January 25, 1890, and alleges that the "defendant, the Northern Pacific Railroad Company, is a corporation duly organized, created, and acting under the laws of the United States;" that the following contract in writing was entered into November 15, 1885: "This indenture, made and entered into this 15th day of November, A. D. 1885, by and between the Northern Pacific Railroad Company, party of the first part, and W. H. Bullard and Thomas H. Irvine, copartners, under the firm name of Bullard & Irvine, of Miles City, Montana territory, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the covenants hereinafter mentioned, made, and to be performed by the said parties of the second part, hereby promises and agrees to and with the said parties of the second part to carry and transport over its line of railroad from

St. Paul, Minnesota, to Miles City, Montana territory, all the casks, cases, kegs, and barrels of beer, which the said parties of the second part may deliver in car-load lots to the said parties of the first part, at said St. Paul, between the dates hereof and the first day of November, A. D. 1887, for the sum of seventy-five cents for each and every one hundred (100) pounds of said casks, cases, kegs, and barrels of beer delivered, as aforesaid, in car-load lots. And the party of the first part further agrees to carry and transport over its said line of railroad from said Miles City, Montana territory, to said St. Paul, Minnesota, all empty beer casks, cases, and kegs, and barrels, which the said parties of the second part may deliver in car-load lots to the said party of the first part at said Miles City, between the date hereof and the first day of November, A. D. 1887, for the sum of fifty cents for each and every one hundred (100) pounds of said empty beer casks, cases, kegs, and barrels, delivered, as aforesaid, in car-load lots. And the said party of the first part further agrees that if between the date hereof and said first day of November, A. D. 1887, its regular schedule of freight rates on casks, cases, kegs, and barrels of beer, in car-load lots, from said St. Paul to said Miles City, and on empty beer casks, cases, and kegs, and barrels, in car-load lots, from said Miles City to said St. Paul, should be reduced to a sum less than the rates herein provided, the said party of the first part will thereupon permit the said parties of the second part to ship under, and have the benefit of, such lower regular schedule rates. In consideration of the premises, the said parties of the second part do hereby covenant and agree, jointly and severally, that they will well and truly pay, or cause to be paid, to the said party of the first part, all sums which may become due under this contract for transportation, as aforesaid. And said parties of the second part further covenant and agree that they will not brew or manufacture any beer or other malt liquors at or within the corporate limits of said Miles City, Montana territory, between the date hereof and said first day of November, A. D. 1887. It is further agreed by and between the parties hereto that in case any casks, cases, kegs, or barrels of beer, or any empty beer casks, cases, kegs, or barrels, belonging to, or shipped by, said parties of the second part, are injured or damaged in any manner whatsoever while in transit over or on the railroad of the said party of the first part, the said party of the first part shall not be liable therefor, unless such injury or damages shall be caused by the negligence of the servants or employees of the said party of the first part. In testimony whereof, the said party of the first part has caused these presents to be signed by its general freight agent this 15th day of November, A. D. 1885, and the said parties of the second part have hereunto set their hands and seals this 15th day of November, A. D. 1885. J. H. HANNAFORD, General Freight Agent. W. H. BULLARD. [Seal.] THOS. H. IRVINE. [Seal.]" It is further alleged "that, subsequent to the making of the contract aforesaid, it was agreed

and understood by and between the said parties that the freight on all the casks, cases, kegs, and barrels of beer, which the said defendant might deliver, pursuant to the terms of the said contract, should be paid for by the said Bullard & Irvine at the regular schedule of freight rates on car-load lots charged by said defendant, and, in case such schedule freight rates should be in excess of seventy-five cents per hundred pounds, that the overcharges should be rebated, settled, and paid by said defendant to the said Bullard & Irvine, by vouchers upon any and all such freight bills being forwarded by the said Bullard & Irvine to the said defendant; \* \* \* that thereafter, and before the 1st day of January, 1887, and while said contract was still operative and in force, the said defendant, delivered to the said Bullard & Irvine, at Miles City, Montana territory, eleven (11) car-loads of beer in barrels, the weight of which, in the aggregate, amounted to 235,710 pounds; \* \* \* upon the said eleven car-loads of beer, the way-bills were made out by the said defendant's company, and the said Bullard & Irvine were required by said company and did pay freight thereon, amounting, in the aggregate, to the sum of \$2,358.77; \* \* \* that subsequent to the delivery of each of said car-loads of beer, and pursuant to the agreement aforesaid, the said Bullard & Irvine forwarded the way-bills therefor to the general freight office of the said defendant's company at St. Paul, Minnesota, accompanied by vouchers for the overcharges thereon, over and above the price specified in said contract, and demanded payment of the rebate thereon; \* \* \* that the said defendant has failed, refused, and neglected to pay to said Bullard & Irvine, or to this plaintiff, the said overcharges on the said eleven car-loads of beer, or any part thereof, although often duly demanded; \* \* \* that the said overcharges on said eleven car-loads of beer so paid by the said Bullard & Irvine, over and above the contract price therefor, and which said defendant agreed to pay to said Bullard & Irvine, amounts to the sum of \$590.95." It is also alleged that the said contract, and all rights, claims, and demands under it, were transferred and sold, December 12, 1888, to Bullard. The prayer is for judgment against the defendant for the sum of \$590.95. The answer was filed May 9, 1890, and is as follows. "The defendant for answer to the amended complaint of plaintiff in this cause alleges that, on 4th day of February, 1887, there was passed by the congress of the United States, and approved by the president, an act entitled 'An act to regulate commerce;' that, up to, and including, the 4th day of April, 1887, this defendant had duly performed all the conditions on its part of the contract in the said amended complaint set out and alleged, and has, up to, and including, the 4th day of April, 1887, paid to the said Bullard & Irvine, and the said Bullard individually, all rebates and overcharges of every kind and nature whatsoever, due them by the terms of said contract, for all property shipped by the said Bullard & Irvine over the defendant's

road, up to and including that date, and that all the claims made in plaintiff's complaint have arisen, if at all, since the 4th day of April, 1887; that defendant did, in the month of March, 1887, by its duly-authorized agent for that purpose, J. M. Hannaford, duly notify the said Bullard & Irvine, and the said Bullard, individually, that by reason of the law hereinbefore named, and in obedience to the command and requirements thereof, all special and contract rates quoted to, and entered into by, this defendant company with the said Bullard & Irvine would be canceled, and declared null and void on the 31st day of March, 1887; that the said Bullard & Irvine, and the said plaintiff Bullard, individually, received the said notice from this defendant; that on and after the 5th day of April, 1887, by reason of the said law, and in compliance with the provisions thereof, this defendant charged the said Bullard & Irvine, for property shipped by its road, whether in car-load lots, or otherwise, regular schedule rates for freight, and the same rates charged by it to any and all other persons for like contemporaneous service, and no more nor less; that by reason of the said law, and the provisions thereof, and not otherwise, this defendant has refused, and does now refuse, to pay the said plaintiff any rebate or drawback for goods shipped by defendant's road since the 5th day of April, 1887. Defendant denies that there is due the said plaintiff from this defendant, by reason of the said contract, or by reason of any consideration whatever, \* \* \* any sum." Thereafter, on motion, the court rendered judgment in favor of Bullard for the amount prayed for in said complaint.

We assume for the purposes of this inquiry that the contract between the parties, which is set forth in the pleadings, was legal at the time of its execution. The act of congress, "to regulate commerce," which is mentioned in the answer, was approved February 4, 1887, but the provisions which we must examine took effect sixty days thereafter. Contracts similar to that before us are not excepted from the operation of this law, and became invalid under the second section, which is as follows: "That if any common carrier, subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like or contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited, and declared to be unlawful." What then is the liability of the appellant to the respondent under the contract? We confess that we are surprised to be unable to find any case in which this important question has been considered and determined by the

courts of last resort. In *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 84 Am. & Eng. R. Cas. 630, Mr. COOLEY, the learned chairman of the interstate commerce commission, delivered the opinion, and said: "But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with state laws, as well as with federal. There probably was never an act passed in restraint of the sale of intoxicating drinks that did not affect some contracts, and render their literal enforcement impossible. The same may be said of the federal revenue laws. Nothing is more likely than that a considerable change in customs regulations and customs duties, or in the provisions made for enforcement of excise laws, will deprive some party of a right he supposed he had secured by contract. But the incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable." The order of the interstate commerce commission in this case was reversed by the United States circuit court for the district of Kentucky, upon grounds which, however, do not conflict with these views. 37 Fed. Rep. 567. Mr. Justice JACKSON, in discussing the power of congress over the subject, says: "No court has attempted to define the extent, limit, or scope of the power conferred by the constitution upon congress to regulate commerce among the states. The power is undoubtedly sovereign and exclusive. Prior to the passage of the interstate commerce act, this power and exclusive authority over the subject was only exercised—with the exception of regulations for the protection of passengers upon navigable waters, and the transportation of live-stock by railroads—through the judicial department of the general government in the way of restraining or annulling state legislation or action which undertook to interfere with, obstruct, or impose burdens or restrictions upon, interstate commerce." After citing the leading case of *Gibbons v. Ogden*, 9 Wheat. 1, he concludes: "Possessing such sovereign and exclusive power over the subject of commerce among the states, it is difficult to understand why congress may not legislate in respect thereto to the same extent, both as to rates and all other matters of regulation, as the states may in respect to purely local or internal commerce." Chief Justice MARSHALL in *Gibbons v. Ogden*, supra, says: "We are now arrived at the inquiry, what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is com-

plete in itself; may be exercised to its utmost extent; and acknowledges no limitations other than are prescribed in the constitution. \* \* \* If, as has always been understood, the sovereignty of congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." The doctrine of *Gibbons v. Ogden*, supra, has been reiterated in many cases, and we have no hesitation in asserting that the act of congress relating to the matter under consideration is in accord with the authorities and the constitution. *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *New Orleans Gas-Light Co. v. Louisiana, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Walling v. People*, 116 U. S. 448, 6 Sup. Ct. Rep. 454; *Morgan's, etc., Co. v. Board, etc.*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114; *Railway Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4; *Robbins v. District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681.

It is not necessary to determine whether congress can pass a law which impairs the obligation of a contract, but it is a sound proposition that its power to legislate on this matter is at the least equal to that possessed by the legislatures of the states. The rules which have been applied to local legislation of this nature should be safe guides for us to follow in the adjustment of this contention. The supreme court of the United States has uniformly upheld statutes which have been enacted in many states to regulate the compensation of railroad companies within their jurisdiction for the carriage of goods. In the construction of the general corporation law of the state of Iowa, Chief Justice WATTS in *Railroad Co. v. Iowa*, 94 U. S. 155, says: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are therefore engaged in a public employment affecting the public interest; and, under the decision in *Munn v. Illinois*, 94 U. S. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters. \* \* \* But when the legislature steps in, and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. \* \* \* Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent." The condition of the parties in *Railroad Co. v. Ackley*, 94 U. S. 179, when compared with that of the litigants in the case at bar, is reversed. The railroad company

brought an action to recover a reasonable compensation for its services in the transportation of goods, which exceeded the maximum prescribed by the legislature of the state of Wisconsin, and Chief Justice WAITE said, in the opinion: "As between the company and a freighter, there is a statutory limitation of the charge for transportation actually performed; \* \* \* but for goods actually carried, the limit of the recovery is that prescribed by the statute." It should be remembered in the treatment of these questions that the appellant has been incorporated by an act of congress. In referring to the Union Pacific Railroad Company, Chief Justice WAITE says, in *Sinking Fund Cases*, 99 U. S. 700: "This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is therefore subject to legislative control so far as its business affects the public interests." In *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191, Chief Justice WAITE, reaffirms this principle, and observes: "It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." See, also, *Munn v. Illinois*, 94 U. S. 113; *Peik v. Railroad Co.*, Id. 164; *Railroad Co. v. Blake*, Id. 180; *Stone v. Wisconsin*, Id. 181; *Ruggles v. State*, 108 U. S. 526, 2 Sup. Ct. Rep. 832; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. Rep. 1028. Inasmuch as dissenting opinions may be found in some of the cases which have been cited, it may not be deemed improper to quote from a recent decision of that eminent tribunal, which reconciles the differences referred to, and maintains the same doctrine. In *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. Rep. 47, Mr. Justice FIELD delivered the opinion, and said: "The incorporation of the company, by which numerous parties are permitted to act as a single body for the purpose of its creation, or, as Chief Justice MARSHALL expresses it, by which 'the character and properties of individuality' are bestowed 'on a collective and changing body of men,' (*Bank v. Billings*, 4 Pet. 514, 562;) the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the state's right of eminent domain that it may appropriate needed property,—a right which can be exercised only for public purposes; and the obligation assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates,—affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains; and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the pub-

lic, but also to prevent extortion by unreasonable charges, and favoritism by unjust discriminations. This is not a new doctrine, but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in *Munn v. Illinois*, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that, when such use exists, the business becomes subject to legislative control in all respects necessary to protect the public against damage, injustice, and oppression. In almost every case which has been before this court, where the power of the state to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed has not been the original power of the state over the subject, but whether that power had not been, by stipulations of the charter, or other legislation, amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion."

The liberal quotations from these opinions show clearly the grounds upon which legislation similar to the provisions of the act of congress under examination are based, and also the limitations which have been sometimes placed upon the law-making power in this regard. Counsel in their briefs have not pointed out, and we have been unable to find, any case in which a contract like that in the complaint has been protected from the operation of a statute which fixed penalties for an unfair discrimination by railroad companies in their tariffs for carrying freight. We think that the significance of this fact can be easily understood, when we inquire into the authority for this species of legislation by the states. The act of congress derives its force from the grant of power by the constitution "to regulate commerce with foreign nations, and among the several states." Const. art. 1, § 8. The local statutes, which have been reviewed by the foregoing authorities, are founded upon the police power of the states. No court has attempted to define this power with precision, although the general principles applicable thereto have been established firmly in jurisprudence. Says the great Chief Justice SHAW, in *Com. v. Alger*, 7 Cush. 53: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. \* \* \* Rights of property, like all other social and conventional

rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. \* \* \* The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." In *Thorpe v. Railroad Co.*, 27 Vt. 140, Chief Justice REDFIELD said, in the opinion: "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free states. \* \* \* The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *sic utere tuo ut alienum non laedas*, which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power, which resides primarily and ultimately in the legislature, is twofold." See, also, *Pierce, R. R.* 460; 2 Redf. *R. R.* (4th Ed.) p. 232; *State v. Railroad Co.*, 19 Minn. 434, (Gil. 377,) affirmed 94 U. S. 180, *supra*; *Watertown v. Mayo*, 109 Mass. 315; *Com. v. Liquors*, 115 Mass. 153, affirmed 97 U. S. 25; *Fertilizing Co. v. Hyde Park, Id.* 659; *New Orleans Gas-Light Co. v. Louisiana, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Rodemacher v. Railroad Co.*, 41 Iowa, 297. In discussing this legislation, *Pierce on Railroads*, *supra*, says: "Such laws may incidentally impair the value of franchises, or of rights held under contracts, but they are enacted *diverso intuitu*, and are not within the constitutional inhibition." In *Com. v. Liquors*, *supra*, Mr. Justice ENNICOTT, as the organ of the court, said: "Every such law limits, restrains, impairs, and, in some cases, destroys the uses, which were previously enjoyed of, the property so made the subject of legislation, but the extent to which it may do so does not affect the validity of such laws, or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury, in the proper and legal sense of these terms." In *New Orleans Gas-Light Co. v. Louisiana, etc., Co.*, *supra*, the court says: "The constitutional prohibition upon state laws, impairing the obligation of contracts, does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the oth-

er may be involved in the execution of such contracts." Another view of the controversy conducts us to the same conclusion. If the contract mentioned in the complaint had been fulfilled, it is plain that, after the act of congress became effective, and, during the period specified in the pleadings, there would have been a discrimination in favor of the respondent by the appellant in the sum of \$590.95, on account of the transportation of his goods. In other words, the patrons of the Northern Pacific Railroad Company, who had no special agreement, would pay this amount for the same service in excess of what would be demanded of the respondent. It has been adjudged in many cases that, when these circumstances arise, the contract, which was entered into by the parties in this action, is contrary to public policy, and cannot be enforced. *Messenger v. Railroad Co.*, 36 N. J. Law, 407, affirmed 37 N. J. Law, 531; *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. Rep. 907; *Christie v. Railway Co.*, 84 Mo. 453, 7 S. W. Rep. 567; *Railroad Co. v. People*, 67 Ill. 11; *Railroad Co. v. Ervin*, 118 Ill. 250, 8 N. E. Rep. 862.

There is an old rule of law which can be invoked and applied to the case at bar. In *Atkinson v. Ritchie*, 10 East, 530, Lord ELLENBOROUGH, C. J., said, in the opinion: "That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt." Professor Pomeroy writes: "An illegal contract is, as a rule, void, not merely voidable, and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the agreement is illegal in its inception, or whether, being valid when made, the illegality has been created by a subsequent statute." *Cont.* § 280; *Brown v. London*, 9 C. B. (N. S.) 726, affirmed 13 C. B. (N. S.) 828; 2 Pars. *Cont.* (5th Ed.) 674; *Mouncey v. Drake*, 10 Johns. 27; *Jones v. Judd*, 4 N. Y. 411. The principles which have been stated are applicable to the act of congress "to regulate commerce," and the contract which has been described. The respondent is not entitled to recover a judgment for any amount. The contract cannot serve as the foundation of any action by the parties thereto. It is therefore ordered that the judgment be reversed, with costs, and that the cause be remanded, with directions to dismiss the action.

HARWOOD and DE WITT, JJ., concur.

(86 Cal. 617)

HARMON v. SAN FRANCISCO & S. R. CO.  
(No. 12,017.)

(Supreme Court of California. Dec. 8, 1890.)

APPEAL—CONSOLIDATION OF ACTIONS—MECHANICS' LIENS—STATEMENTS OF CLAIM—EVIDENCE.

1. Where two cases are consolidated in the trial court, and the plaintiffs, being both defeated, move separately, upon different grounds, for new trials, take separate appeals, and file separate bills of exceptions, the reviewing court must decide each case on its own record, and cannot



consider the evidence in the record of the other.

2. The mere fact that the lienor claims for more lumber than was actually used, or places too high a value on it, does not, in the absence of fraud, defeat his right to recover the value of what was used.

3. Under Code Civil Proc. § 1187, requiring a lienor's claim to state "the name of the person \* \* \* to whom he furnished the materials," one who furnishes materials to a railroad contractor, and afterwards to his assignee, need not state what portion he furnished to each, since there is but one contract, and the company has to settle only with the assignee.

In bank. For former reports, see 22 Pac. Rep. 407, and 23 Pac. Rep. 1024.

J. H. Boalt and H. A. Powell, for appellant. E. S. Lippitt, Chas. F. Hanlon, and Lloyd & Wood, (O. P. Evans, of counsel,) for respondent.

PATERSON, J. This cause was heard in bank, and the judgment and order were reversed, and the cause remanded for a new trial in May last. We are satisfied with the conclusion then reached herein. The evidence shows that "the work on the contract was completed on June 2, 1884." We are asked to consider the evidence in the record on appeal in the case of Gordon Hardware Co. v. San Francisco & S. R. Co., *infra*, (No. 12,030.) because that case and the one at bar were consolidated by order of the court below upon consent of counsel for the respective parties; but this we cannot do. The plaintiff in each case was defeated in the court below, and each one moved separately for a new trial, the grounds of which were peculiar to the respective cases; separate bills of exceptions were prepared and filed, separate appeals were taken, and each case was presented in this court on its own record. Respondent claims that the claim filed by plaintiff, and upon which this action is based, must have included material for which no lien could be maintained, because the plaintiff testified that of the lumber he furnished "there was used \$1,159.13 worth in the building of temporary houses," and \$577 paid on the lumber for freight and cartage. It does not clearly appear whether there was extra material included in the claim of lien, or an erroneous statement as to the value; and, as the claim filed contained no articles except such as are the subject of lien, we cannot see that a lien for so much lumber, etc., as was actually used in the construction of the road should be defeated by reason of this testimony. The bare fact that the plaintiff had filed for too much lumber, or set too high a price on it, would not, in the absence of fraud, defeat his right to recover. Whatever may be the rule in ordinary cases, where the material-man furnishes materials to several independent contractors, we do not think it was necessary for the plaintiff to segregate the amounts in the claim which he filed. Hawley was the only person with whom the company had to settle. The latter was liable only for the balance of the contract price held by it. It was in no way interested in the question how much had been furnished McDonald before the assignment. Hawley had simply stepped into McDonald's shoes, with the knowl-

edge and consent of the company, and had assumed all liabilities. There was but one contract on the part of the defendant. On final settlement McDonald was entitled to nothing, and we are unable to see how the company could be prejudiced by the failure to designate the amount furnished to each. No question of priority is involved herein. Where a statute required a claimant to state from whom the debt was due, it was held that a mistake in the name of the contractor would not defeat the lien, if it appeared that the owner was not harmed by the error. *Putnam v. Ross*, 46 Mo. 337. In the case at bar, the proof segregates the amount furnished to Hawley from that which was furnished to McDonald, so that no injury could possibly result. We think that the court erred in rejecting the notice of lien. Other points made by the respondent need not be specially noticed. If the facts shown by the evidence of the plaintiff are true, he is entitled to have his lien declared good to an amount not exceeding the amount of the contract price in the hands of the company at the time the notice of lien was filed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

(86 Cal. 620)

GORDON HARDWARE CO. v. SAN FRANCISCO & S. R. CO. (No. 12,030.)

(*Supreme Court of California*. Dec. 8, 1890.)

MECHANICS' LIENS—TIME OF FILING—LIENABLE ARTICLES—DIFFERENT CONTRACTORS.

1. In determining whether a mechanic's lien against railroad property was filed within 30 days from the completion of the work, it is proper to count as part of the work two weeks spent by direction of the chief engineer in removing materials wrongfully placed upon the lands of another by the contractor, when the latter's obligations to the company did not terminate until such removal was completed.

2. Where the lien filed by a material-man against a railroad is in part for picks, shovels, and similar articles, for which no lien can be asserted, he may segregate the non-liable articles by proof, and is entitled to have a lien declared for the remainder.

In bank. For former reports, see 22 Pac. Rep. 406, and 23 Pac. Rep. 1025.

Hepburn Wilkins and H. A. Powell, for appellant. Lloyd & Wood, E. S. Lippitt, and Chas. F. Hanlon, (O. P. Evans, of counsel,) for respondents.

PER CURIAM. Upon further consideration of this case we are satisfied that the conclusion we reached on the former hearing—viz., that the claim of lien was not filed within 30 days after the completion of the work—was based upon a misapprehension as to the evidence. The claim was filed June 18, 1884. While it is true the work done after May 17th was work not contemplated by the contract, it nevertheless appears that it was done under the direction of the chief engineer, and that the obligations of the contractor to the company were not extinguished until the *débris* which he had placed upon Mr. Porter's lot was removed therefrom. The testimony of Mr. Walsh on this subject con-



sists largely of conclusions, but it went in without objection on that ground, and, as against a motion for nonsuit, must be considered as sufficient to establish appellant's contention that the work was not completed until June 2d. He testified as follows: "The work on the railroad under the contract was completed June 2, 1884. The last two weeks of the work was occupied in moving rock which had been dumped at the end of the tunnel in section No. 1, on Mr. Porter's ground, contrary to the terms of the contract. The rock was moved back to the right of way to make it comply with the contract. I was instructed by Mr. Zook, chief engineer, to do this work, May 17, 1884. The last day we were at work was June 2, 1884." We have carefully examined the record in the case of *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. Rep. 772, and think it sustains appellant's contention that, although the claim of lien was in part for articles (picks and shovels) not the subject of lien, the court should permit the plaintiff, by proof, to make the necessary segregation, throw out the value of such articles, and declare a lien for the balance. In the case referred to, the claim of lien included an item of deer and bear meat, but the lien was held to be good to the amount of the lienable articles; and the rule seems to be that, unless there is something to show a willful attempt to claim a lien for the non-lienable articles, the lien is not lost. *Whitford v. Newell*, 2 Allen, 427; *Phil. Mech. Liens*, § 355. Upon the same principle it was held in *Barber v. Reynolds* that, notwithstanding the fact that the claim filed was for too much, it would still be valid unless it should appear it was a "willfully false claim," within the meaning and intent of the statute. 44 Cal. 533. It was not necessary for the plaintiff to designate what portion of the materials was furnished to each of the contractors, as Hawley was the only person with whom the company had to settle, and the latter was liable only for the balance of the contract price held by it at the time the notice of lien was filed. *Harmon v. Railroad Co.*, ante, 124, (this day filed.) Judgment and order reversed, and cause remanded for a new trial.

(86 Cal. 584)

**TRENOUTH v. GILBERT et al.** (No. 12,507.)  
(*Supreme Court of California*. Dec. 3, 1890.)

ADVERSE POSSESSION.

The repudiation of the claim of the purchaser of an undivided one-fifth interest in a Mexican grant by the persons in possession of the land under a patent from the United States, claiming the whole title, and their continuous, exclusive, and adverse possession of the land for more than five years thereafter, is a bar to the title of the purchaser of such one-fifth interest.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

This action by Trenouth against Gilbert and others was in the supreme court once before, and the following statement of facts is taken from the opinion in that case, (63 Cal. 405:) "By the deeds of Maria Louisa and Juan B. Buelna, plaintiff acquired whatever right or interest they had

in the rancho San Gregorio, at the date of said deeds. They never had more than an undivided fifth interest in said rancho, and previously to their conveyance to the plaintiff they had conveyed all their interest in 4,000 acres of said rancho to one Hamilton, so that the interest conveyed to the plaintiff is not more than an undivided one-fifth of the residue of said rancho. In 1839, said rancho was granted by the Mexican government to Antonio Buelna, who, in 1842, made a will by which he devised the entire rancho to his wife, Maria Concepcion Valencia, Juan Bautista Buelna, and three others, share and share alike,—that is, to each an undivided one-fifth. In 1842, said Antonio died, leaving said will and all of said devisees surviving him. In 1846, said Juan Bautista died intestate, leaving him surviving, as his only heirs at law, the said Maria Louisa and Juan B. Buelna. After the death of her husband, said Maria Concepcion made a conveyance of one league of said rancho to one Castro; and, in 1852, said Castro and said Maria Concepcion presented a petition to the board of land commissioners to have the claim of said Castro to one league, and the claim of said Maria Concepcion to the other three leagues, confirmed, and their said respective claims were accordingly confirmed and patented to them in 1861. That they held the legal title to an undivided interest in said rancho in trust for the said Maria Louisa and Juan B. Buelna is too clear to admit of any doubt. The court found that 'the defendants, and those from and under whom they hold and claim the possession, have been in the open, notorious, and exclusive possession of the premises described in the complaint, holding separately, as stated in their several answers, claiming to own the same, and to have the whole title thereto for more than five years next before the commencement of this action. The defendants, and those from and under whom they respectively hold and claim, more than five years before the commencement of this action,—to-wit, in the year 1857,—being in possession respectively as aforesaid, acquired by purchase all the right, title, and interest of the patentees, and all of the legatees, under the said will of Antonio Buelna, except said Juan B. Buelna, to their respective portions of said land, and still hold and own the same. The plaintiff's cause of action arose and accrued to him more than four years before the commencement of this action; and the defendants and each of them had held all the land described in said complaint, claiming to own the title to the same, and in open and notorious hostility to the plaintiff's claim, and to any trust or equitable interest claimed by him for more than five years before the commencement of this action.' The evidence sustains the finding that the defendants and those under whom they claim were in possession of the premises in 1857, and that while so in possession 'they acquired by purchase all the right, title, and interest of the patentees, and of all the legatees, under the will of Antonio Buelna, except said Juan B. Buelna, to their respective portions of said land, and

still hold and own the same." On the first appeal, a judgment in defendants' favor was reversed. On a retrial of the case, defendants again had judgment, and plaintiff appeals.

*York & Whitworth and E. J. & J. H. Moore*, for appellant. *John Reynolds, M. G. Cobb, Cope & Boyd, Arthur Rodgers, and Pillsbury & Blanding*, for respondents.

FOOTE, C. This case has been here before. 63 Cal. 405. It is an action to establish a trust by one claiming to be co-tenant with others of a tract of land in San Mateo county, and for other relief in connection therewith. The question determined on the former appeal seems to have been that the findings of fact to the effect that the defendants held an adverse possession of the lands in dispute for a time sufficient to bar the plaintiff's right of action were not sustained by the evidence. That finding was, in substance, that the plaintiff's cause of action accrued more than four years before the commencement of the action, and that there had been a continuous adverse possession by the defendants for more than five years prior thereto. It was then said that the only evidence to sustain the finding was that of one witness,—Mr. Teague. Upon the trial of the case now on appeal, which seems to have been tried with a view to obviate the objection sustained on the former appeal, there was other evidence which tended at least to show that all of the contesting defendants held adverse possession for more than five years after plaintiff's right of action accrued before suit brought. First there was a deposition of Mr. Teague read, taken since the former trial. He testified "that the defendants answering in the suit were all in the occupancy, cultivation, inclosure, and pasturage of the entire four leagues; some claiming to own 1,000 acres, and others a less quantity, and claiming to own separately. They claimed all the legal title to the land in their possession, dating back as far as 1858, through themselves and their grantors." They claimed the whole legal title." As to the equitable title, he says that he knew of their having notice of the equitable title (bought by the plaintiff on 20th day of April, 1866,) as early as 1867, and previous, running back to 1864; conversed with them individually and separately about this equitable title, purporting to arise under the will of one Buelna. They all refused to recognize it, except Mr. Bell, who is not a party to this action, he having bought the plaintiffs title to his (Bell's) tract of land. He also said that in 1867, or 1866, Trenouth requested him to speak to these defendants in possession, and propose to them a compromise. He did so, and reported progress, but the defendants all repudiated Trenouth's claim. He states that he is confident that it was in 1866 that he first told Trenouth that the chances for a compromise with the defendants seemed bad; that the defendants said they had all the legal title; that they had improved the land; that they had bought up one bogus claim purporting to have arisen under this will, (that of Buelna, the

Mexican grantee of the land,) and did not propose to buy off any more. Moses Davis, who testified that he was interested with the plaintiff in his purchase of this equitable interest from Juan B. Buelna and Maria Louisa Buelna, made on the 20th of April, 1866, states that he had been employed by all the settlers on this rancho to work up the evidence in another case pending against them,—that of Wilson et al. vs. Castro,—and that in order to do that they had to show that the Mexican grantee (Buelna) had made a will, and that in working up the evidence he discovered this fifth interest that Trenouth bought, and on which this suit is predicated, had never been conveyed. He endeavored to get "our people" to purchase, but they would not, and he then arranged for the plaintiff to purchase it. Mr. Raynor testified that he, and other parties holding under the same title that he claimed, by genuine patent title from the United States government, through Wilkins & Hepburn, had possession of the whole ranch from 1858 to 1872; that he had a conversation with the plaintiff just after he bought his claim, (April 20, 1866,) and told the plaintiff he was sorry that plaintiff had got himself into such a speculation; that the title he (plaintiff) was trying to get was of no value whatever, and Moses Davis had just led him into it for the purpose of making money out of him. He always told Trenouth there was nothing in it for him; he could get nothing out of it; that Trenouth wanted him to talk to the other settlers and see what compromise could be made. Mr. Gordon testified that he and most of the defendants had been in possession since 1863. While he was acting for the settlers to resist Trenouth's claim, as well as that in Wilson et al. vs. Castro, some time in the summer of 1866, not more than three or four months after Trenouth's purchase, he had a conversation with Trenouth, in which the latter was trying to induce him to help have a settlement made with the other settlers, and held out certain inducements to him. He replied that "he did not consider there was anything in it." That the settlers and himself did not consider his (Trenouth's) title worth anything. That he told Teague and Trenouth that he had already advised the settlers to resist Trenouth's claim. That he had been employed in this matter by all the settlers but Bell and Seale. That this was in 1866, not more than three or four months after Trenouth's deed went on record. Mr. Seale testified that he purchased his ranch from Lloyd Tevis on the 4th of August, 1863. He had used the land for his own purposes. It had been under fence all the time he had used it. Had a dairy for several years, and for the last 13 or 14 years had rented it. It had been under fence all this time. He claimed under the title obtained from Lloyd Tevis, which was the title of the original heirs of the Buelna title under the patent. He had talked with Tevis about Trenouth's title, and to Bell and Gordon, when he bought, but to none others. He had resisted Trenouth's claim when suit was brought by him against Dall and others in 1868. That

all this time he claimed under his deed from Tevis, and received all his rents and profits, without accounting to any one.

Taking the whole testimony in this case, it presents this aspect: Trenouth bought the equity he claims on a speculation, after the settlers had refused to have anything to do with it, in April, 1866. He was not certain, according to his own evidence on his cross-examination, whether he had title or not. He waited to see the result of the Wilson vs. Castro suit. The settlers, defendants here, who had bought the patent title, which was the legal title, when informed of Trenouth's purchase, would not acknowledge, but repudiated, his title, according to the evidence of witnesses called for them, and whose evidence we have quoted. Then, after his efforts to induce them to compromise with him and pay him for his alleged title had failed, and he had hesitated a long time, to await the result of other litigation, uncertain as to his title, he brings suit on March 13, 1872, a little less than six years from the date of his purchase, and about five years and a half from the time when these defendants, in possession by themselves or their agents, when approached by him to settle with him, repudiated his claim and refused to settle, having always claimed, since their purchase, to hold under that patent the whole legal title. As it seems to us, the findings as to adverse possession for the statutory period sufficient to bar the plaintiff's right of entry are, at the most, based upon conflicting evidence, and should not be disturbed. We therefore advise that the judgment and order be affirmed.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

I concur in the judgment. BEATTY, C. J.

Fox, J., took no part in the decision of the above case.

(86 Cal. 615)

McDOWELL v. BELL, Judges. (No. 13,855.)

(Supreme Court of California. Dec. 8, 1890.)

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—  
JURISDICTION—PROHIBITION.

A judgment was recovered and proceedings supplementary to execution were instituted against debtor's wife, alleging that she held lands which belonged to him. On the same day she conveyed to another. The court adjudged that the land belonged to her husband, ordered execution to issue in the original case, and appointed a receiver to take possession and subject the land to the satisfaction of the debt. *Held*, that these proceedings were beyond the court's jurisdiction, and will be restrained by prohibition, since Code Civil Proc. Cal. § 720, simply provides that in supplementary proceedings the court may make an order authorizing the judgment creditor to institute an action against any person who holds property of the debtor and claims an adverse interest therein.

In bank.

Code Civil Proc. Cal. § 720, provides that "if it appears that a person or corporation alleged to have property of the judg-

ment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt, and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

H. S. Brown, for petitioner. T. B. Dozier, for respondent.

PER CURIAM. Application for writ of prohibition. In September, 1889, one Primm commenced an action in the superior court of Shasta county against one Edson. In the action such proceedings were had as that judgment was duly given and made in favor of the plaintiff, and against the defendant, October 4, 1889. Execution was issued to the sheriff of Shasta county, and returned unsatisfied. Upon proceedings supplemental to execution, Bertha Edson was examined touching certain property held by her, to-wit, a house and lot in the town of Sisson, Siskiyou county, claimed by the judgment creditor to be the property of the judgment debtor. On the same day that the affidavit was filed for the institution of these proceedings supplementary to execution, Bertha Edson conveyed the property to one Wright, who subsequently conveyed the same to this petitioner. Upon the hearing upon such supplementary proceedings, it was found and adjudged by the respondent that the lot in question was the property of the judgment debtor, and that neither Bertha Edson nor Wright ever had any interest therein, and ordered that execution issue in the case of Primm vs. Edson, (in which case all the proceedings were conducted,) and the property be subjected to the satisfaction of said judgment; and further ordered that a receiver be appointed to take possession of the property, and subject the same to the satisfaction of said judgment. In this the respondent exceeded his jurisdiction, and the jurisdiction of his court. His only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court, against the parties claiming the property, for the recovery of the property, and the subjection of the same to the satisfaction of the debt, and forbidding a transfer of the property until such action could be commenced and prosecuted to judgment. Code Civil Proc. § 720; Hartman v. Olvera, 51 Cal. 501. Let the writ issue and be made perpetual commanding the said respondent, Aaron Bell, judge of the superior court of the county of Shasta, in the state of California, to forever desist and refrain from proceeding further under, or in enforcing, the judgment and order made and given by him in the case of E. P. Primm, plaintiff, against H. J. Edson, defendant, dated January 11, 1890; and let the petitioner herein have judgment for his costs of this proceeding.

(96 Cal. 633)

GOING v. DINWIDDIE. (No. 13,694.)

(Supreme Court of California. Dec. 6, 1890.)

## FALSE IMPRISONMENT—PLEADING.

A complaint which alleges that defendant, a justice of the peace, imprisoned plaintiff, "unlawfully and with force and without probable cause," on a pretended charge of contempt of court for the disobedience of a writ of restitution "wrongfully and unlawfully" issued by him, is insufficient, because it does not state facts showing that the acts complained of were without, or in excess of, defendant's jurisdiction as justice; and the use of the words "unlawfully" and "wrongfully" does not supply the omitted facts.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

*James L. Copeland and Hunsaker, Britt & Goodrich*, for appellant. *W. H. Fuller and H. L. Titus*, for appellee.

McFARLAND, J. This is an action for alleged false imprisonment. Defendant demurred to the complaint. His demurrer was overruled, and, upon his refusal to answer, judgment was rendered against him. He appeals from the judgment, and relies for reversal upon the insufficiency of the complaint. In the complaint it is first averred that, on a certain day, defendant "imprisoned plaintiff, and caused her to be imprisoned and deprived of her liberty for a period of five days, unlawfully and with force and without probable cause, on a pretended charge of contempt of court." The "circumstances attending and immediately surrounding and preceding the said false imprisonment" are then averred, and are substantially these: That a short time prior to said alleged imprisonment, the defendant, "acting as a justice of the peace for Bear Valley township, in said county," did "wrongfully and unlawfully" issue a writ of restitution requiring plaintiff to quit and surrender a certain house and premises; that the writ was given to a certain constable, who, with a posse, attempted to serve the same; that an "altercation and affray ensued," in which, among other immaterial things mentioned, "the plaintiff was then and there roughly used and handled by said constable and his posse;" "that said writ was never served on plaintiff;" that defendant "wrongfully caused her to be arrested as for a contempt for the disobedience of said writ of restitution, and imprisoned the plaintiff for a period of five days, as above set forth;" and that, "by reason of the said false and wrongful imprisonment," the plaintiff was damaged, etc. The above are all the material averments. We think that the complaint is fatally defective, and that the demurrer should have been sustained. It is clear that the acts complained of were done by the defendant in his official capacity as a judicial officer, and there is no averment, in terms, that said acts were without, or in excess of, his jurisdiction, nor are any facts averred from which such want of jurisdiction appears. And that a judicial officer is not liable for acts done in his official capacity, and within his jurisdiction, is as thoroughly established as any other principle of law. One of the best expositions of that principle is found in

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the opinion of SHAW, C. J., in *Pratt v. Gardner*, 2 Cush. 68. This court has also had frequent occasions to state the principle. *Downer v. Lent*, 6 Cal. 94; *Turpen v. Booth*, 56 Cal. 68. The question here is not one of evidence or burden of proof; it is a question of pleading. A complaint, to be sufficient, must contain a statement of facts which, without the aid of other conjectured facts not stated, shows a complete cause of action. As said by this court in *Gates v. Lane*, 44 Cal. 397: "The pleadings but poorly subserve the purpose intended, if the court, before declaring the law upon the points presented by the parties, is compelled, as in this case, to surmise many of the essential facts on which the points turn." In the case at bar, we are left to assume, to imagine, to "surmise," that the defendant, as justice of the peace, for some unrevealed and unknown reason, had no jurisdiction to do the acts complained of. A plaintiff, attempting to state a cause of action in his complaint, has no right to presume that a justice of the peace acted outside of his jurisdiction. Where the burden of proof is when a party relies on the validity of a justice's judgment is an entirely different question. The only plausible answer to the above stated objection to the complaint rests upon the averment that defendant "wrongfully" caused plaintiff to be arrested, and "unlawfully" did certain other things. There may be some relations where "wrongfully" and "unlawfully" and similar adverbs have some significance, but the ordinary rule is that for purposes of pleading they are utterly valueless. In *Miles v. McDermott*, 31 Cal. 274, the court say: "Such words as 'duly,' 'wrongfully,' and 'unlawfully,' so frequently used in pleadings, might better be omitted. They tender no issue." In *Triscony v. Orr*, 49 Cal. 617, which was an action in the nature of trover for the conversion of certain sheep, the complaint merely alleged that the defendants took the property "unlawfully, fraudulently, willfully, and maliciously." A demurrer to the complaint had been sustained in the trial court, and, on appeal to this court, the judgment was affirmed. This court, among other things, say: "Whether the defendants took the sheep is a question of law, and not the statement of an issuable fact. If they took them 'fraudulently,' the facts constituting the fraud should have been averred; otherwise, no issuable fact is stated." In *Reardon v. City and County of San Francisco*, 66 Cal. 496, 6 Pac. Rep. 317, the court say: "If the defendant was empowered by law to do the work counted on in Army street, the averment in the complaint that such work was unlawful and wrongful would amount to nothing. Such epithets in a pleading are, in general, meaningless. They may be and are generally inserted with no valuable purpose, but only to round off or swell out a sentence. Unless the matters averred show the acts complained of to be unlawful or wrongful, such words are mere superfluous verbiage." And in *Pratt v. Gardner*, supra, which was an action against a justice of the peace, and very similar to the case at bar, the complaint

was, as Judge SHAW says, "thickly sprinkled" with such epithets as "unlawful," "wrongful," "illegally," "groundless," "false," "willfully," "maliciously," etc.; but judgment for the defendant on the demurrer was sustained, and the court said that such epithets "cannot change or qualify the material facts." Our conclusion is that the complaint is insufficient, because it does not show that the acts of defendant complained of were without, or in excess of, his jurisdiction as justice of the peace; and that the use of the words "wrongfully" and "unlawfully" does not supply the omitted facts; and that therefore the demurrer to the complaint should have been sustained. The judgment is reversed, with directions to the superior court to sustain defendant's demurrer to the complaint.

We concur: SHARPSTEIN, J.; THORNTON, J.

(86 Cal. 631)

*Ex parte PALMER.* (No. 20,765.)

(*Supreme Court of California.* Dec. 9, 1890.)

**EMBEZZLEMENT—VENUE.**

The superintendent of a ranch in Yolo county kept books there of his receipts and expenditures, making monthly reports to his principal in San Francisco. He shipped horses to Sacramento, and there received the proceeds of their sale, but made no book-entry or report thereof. *Held*, sufficient evidence that the embezzlement was committed in Sacramento county to justify the magistrate in holding him for trial there.

In bank. *Habeas corpus.*

A. L. Hart, for petitioner.

BEATTY, C. J. The petitioner was held to answer by a justice of the peace of Sacramento on a charge of embezzlement alleged to have been committed in that county. He asks to be discharged from custody upon the ground that he was committed without reasonable or probable cause, (Pen. Code, § 1487,) claiming that there was no evidence that he was guilty of the crime charged, or of any crime, and especially that there was a total failure of evidence that he had committed any offense in Sacramento county. We think, however, that the evidence is sufficient to make out a *prima facie* case, and to justify the holding of the petitioner to answer before the superior court of Sacramento. It appears that he was superintendent of a ranch in Yolo county; that the owner of the ranch resided in San Francisco; that monthly reports of receipts and disbursements on the ranch were made by the petitioner to the owner, and books were kept on the ranch by a book-keeper, under the direction of the petitioner, in which it was his duty to preserve an accurate account of all receipts and disbursements. This being the case, petitioner, about a year before his arrest, sent some horses from the ranch (the property of his principal) to a dealer in Sacramento, who sold them, and paid over the net proceeds (\$385) to the petitioner in Sacramento. No account was ever rendered of this sum, and no entry of it was made in the books. This, in the absence

of any satisfactory explanation of his failure to account, was sufficient to justify the committing magistrate in holding petitioner to answer in Sacramento county. He received the money in Sacramento county, and there is no evidence that he ever took it out of Sacramento county. If he did appropriate it to his own use, as the evidence seems to indicate, it is reasonable to assume that he did so in the county where he is last shown to have had it in his possession. Writ discharged, and prisoner remanded.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

(86 Cal. 639)

TOOMEY v. DUNPHY. (No. 12,904.)

(*Supreme Court of California.* Dec. 10, 1890.)

**STATUTE OF FRAUDS—REAL-ESTATE BROKER—ADMISSIBILITY OF EVIDENCE.**

1. Under the statute of frauds, (Civil Code Cal. § 1624,) which includes "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission," a writing, which states that plaintiff "can arrange for the sale of my ranch in Nevada as per within memorandum," is sufficient without stating that he is to have a commission therefor.

2. Since section 1614 declares that "a written instrument is presumptive evidence of a consideration," the agent is entitled to show, by parol evidence, the reasonable value of his services in effecting a sale under the authority of the memorandum.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

C. V. Gray and J. E. McElrath, (George W. Chamberlain, of counsel,) for appellant. H. I. Thornton and Lloyd & Lloyd, for respondent.

GIBSON, C. Plaintiff brought this action to recover of the defendant \$18,750, as the reasonable value of his services rendered in procuring a purchaser for defendant's ranch in the state of Nevada, with the livestock and farming implements thereon, at the fixed price of \$750,000, payable in three several installments under a writing signed by the defendant, the material part of which is as follows: "Henry Toomey can arrange for the sale of my ranch in Nevada as per within memorandum."

\* \* \* On the trial the plaintiff, to sustain the issues upon his part, after proving that he was a real-estate broker and agent, and the execution and delivery of the memorandum, above referred to, offered it in evidence, and upon the objection of the defendant that it was incompetent, etc., because it neither specified that the employment of plaintiff was for compensation or a commission, nor the amount of any compensation or commission for his services, it was excluded. The plaintiff next offered to prove that he found a purchaser, able, ready, and willing to purchase, who was acceptable to the defendant, and that his (plaintiff's) services were reasonably worth the amount demanded. The evidence so offered was excluded on defendant's objection, on the ground that there was no evidence tending

to show that the plaintiff had been employed by a contract, in writing, as broker or agent to sell the property for compensation or a commission. Then, after other evidence of the same character as the last was offered and excluded, the plaintiff rested his case. The defendant, without offering any evidence, did likewise; and thereupon the judgment, from which plaintiff appeals, was rendered against him. The exclusion of the memorandum presents the gist of the controversy. The appellant contends that all that a writing employing a broker or agent to purchase or sell real estate for compensation or a commission need show is the fact of employment; and that it is not required to express that such employment is for compensation or a commission; while, on the other hand, the respondent contends that, to be valid, it must disclose that the employment is for compensation or a commission.

By section 1624 of the Civil Code, it is provided: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent. . . . (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission." This section was applied in the following cases: *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. Rep. 523; *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. Rep. 642. In each of those cases it was held that no recovery by a broker or agent for effecting a sale of real estate could be had, unless he was employed by an agreement in writing for that purpose. But none of them involved the precise point in question here. The sixth clause was added to the above section of the Code in 1878. Prior to which time, it seems that the absence of an express contract might have been supplied by proof of usage regulating transactions like the one here. *McCarthy v. Loupe*, supra. The change thus made was to prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which could be done with facility under the former rule. Thus we perceive that the clause is remedial in its object, and if its meaning is doubtful as suggested by this controversy, its words will have to be construed so as to suppress the mischief adverted to, and advance the remedy. The agreement referred to in the clause, it is true, is one defining the right of the agent to effect a purchase or sale of realty, and the liability of the principal to recompense him for his services. But it is to be observed that the chief element in it is the employment. This must necessarily be so, because as appears by the cases above cited, without proof in writing of the employment, no recovery can be had. If, then, no recovery can be had without such proof of the employment, it seems to us that the object of the clause will be fully subserved by holding that, in an agreement like the one in question, the expressing of the fact of employment, without stating that it is for compensation, will suffice. If there were any doubt of this it would be resolved by reading in connec-

tion with the above clause section 1614 of the same Code, which bears upon the same subject-matter, and which is as follows: "A written instrument is presumptive evidence of a consideration." This provision is general, and applies to all contracts where a different rule is not expressly prescribed. And we think that had the legislature intended that contracts, like the one in question, should state a consideration for the services to be rendered by the broker or agent, it would have expressly said so. From this it follows that the memorandum of agreement offered in evidence by the appellant was erroneously excluded; also the evidence tending to prove that he had rendered services under the contract of employment. *Waterman v. Bollinghouse*, 82 Cal. 659, 23 Pac. Rep. 195; *Zeimer v. Antisell*, supra. And as the written contract of employment raised a presumption that the defendant, as principal, had agreed to pay the plaintiff, as his agent, a consideration for services rendered under that contract, and as no certain amount appeared to have been stipulated for, the evidence tending to show the reasonable value of such services should have been admitted. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

(3 Cal. Unrep. 311)

BLUMENTHAL v. GOODALL. (No. 12,638.)  
(Supreme Court of California. Dec. 6, 1890.)

#### AGENCY—REVOCATION.

A person authorized by the owner of land to sell it gave a contract to a third person for the price named, but "subject to perfect record title. Thirty days allowed for examination of title." The owner of the land let such third person take the abstract to examine, but told him he could not have 30 days. Held that, as the agent had not produced a purchaser ready and willing to take the property on the terms embraced in the authority, the owner might, before such unconditional acceptance, revoke the authority of the agent. *WORKS and THORNTON, JJ.*, dissenting.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

*H. C. Firebaugh*, for appellant. *Geo. E. Towle*, for respondent.

*Fox, J.* Action for the recovery of commissions claimed to have been earned by a real estate agent, in the sale of certain lands belonging to defendant. Judgment for defendant; motion for new trial denied, and appeal from both judgment and order. The record contains no bill of exceptions, or statement of the case. Consequently, there is nothing upon which we can review the order of the court refusing to grant a new trial. The only examination we can make is of the judgment roll, and the only inquiry is whether the findings support the judgment. The court found that the defendant, being the owner of the land in question, on the 13th

<sup>1</sup> Reversed in banc. See 26 Pac 906, 89 Cal. 251.

day of July, 1887, gave to L. Oestreicher, a real estate agent, an authorization in writing, of which the following is a copy: "I hereby authorize Mr. L. Oestreicher to sell blocks 899, 900, 901, 903, outside lands, for the sum of fifteen hundred dollars (\$1,500) each; will allow him one hundred dollars (\$100) as commissions for his services on each block. This contract to be in force for ten days from date hereof." Which paper was duly dated and signed by defendant. The court further finds that on the same day Oestreicher agreed with one Fulda, orally, for the sale of the blocks at the price named, but, Fulda failing to put his agreement in writing, Oestreicher afterwards, and on the same day, executed with O. F. Von Rhein & Co. the following agreement in writing: "Received of O. F. Von Rhein & Co. the sum of three hundred dollars (\$300) on account of purchase of outside land, blocks 899, 900, 901, and 903; price agreed upon, six thousand dollars, (\$6,000;) subject to perfect record title. Thirty days allowed for examination of title. If title does not prove perfect, deposit to be returned." On the same day Oestreicher notified the defendant in writing of what he had done with Von Rhein; that on the 14th, Von Rhein applied to defendant, told him of his agreement to purchase, and asked for the abstract of title. Defendant told him that he would not allow 30 days to examine title. Von Rhein replied that he would make the examination earlier if possible, and received and receipted for the abstract, the same to be returned to the defendant, but no time for its return specified. Later in the same day defendant received from Fulda a letter, notifying him that he (Fulda) had agreed with Oestreicher for the purchase of the blocks, and that he was prepared to examine the title, and complete the purchase if the title proved satisfactory, demanding of defendant to complete the sale, and offering to deposit \$500 on account thereof; that on the next day defendant served written notice upon both Oestreicher and Von Rhein & Co., reciting that Oestreicher had procured the authorization given to him, upon his representation that he had an eastern party who was about to depart, to whom he could sell those blocks, if he had authority to act at once, but he had not time to hunt up other blocks for him before his departure; that, instead of selling them as he said he could, he had negotiated a sale of them to two different resident purchasers, and, in view of these complications and misstatements, he revoked the authority of Oestreicher, and declined to proceed further in the consummation of the sale of the property through him; that on the 19th day of July, Von Rhein completed his examination of the title, and offered to complete the purchase, but the defendant refused to accept the money, or make the deed; that demand of the commission had been made and refused, and the claim therefor had been duly assigned to plaintiff. It was also found that the authorization from defendant had not been secured through any fraud or misrepresentation on the part of Oestreicher. On these facts the court

found, as conclusion of law, that the plaintiff was not entitled to the relief demanded, and judgment was entered for defendant.

Although the rule may in some cases be a harsh one, the conclusion of the court was correct. Goodall had the right to revoke the authority given to Oestreicher, at any time before complete performance on his part. Civil Code, § 2356; *Masten v. Griffing*, 33 Cal. 114; *Brown v. Pfiorr*, 38 Cal. 553; *Jenin v. Browne*, 59 Cal. 47; *Flanagan v. Brown*, 70 Cal. 254, 11 Pac. Rep. 706. Up to the time of the revocation in this case, there had been no performance on the part of Oestreicher. Performance on his part, to entitle him to his commissions, would have been the production of a purchaser, then ready and willing to make the purchase upon the terms embraced in the authority. No such purchaser had been found and produced when the authority was revoked. Neither of those who are claimed to have been such had up to that time signified their willingness to take the property unconditionally, upon the terms proposed. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.

We dissent: WORKS, J.; THORNTON, J.

(86 Cal. 596)

BUCKLEY v. HOWE. (No. 12,711.)

(*Supreme Court of California*. Dec. 6, 1890.)

PUBLIC LANDS—PATENT HELD IN TRUST—AMENDMENT OF PLEADINGS.

1. In a suit to procure a decree that defendant held the title to certain lands, for which he obtained patent as a pre-emptor, in trust for plaintiff, on the ground that plaintiff had a better right thereto, and that defendant procured the patent by fraud and through mistake and misconception of the law, by officers of the land department, plaintiff as the basis of her right to attack defendant's patent averred that certain persons, each being entitled to an additional homestead entry, made applications at the land-office to locate portions of said lands, that said applications were rejected, that the applications were made for plaintiff's benefit, and that plaintiff had become owner of all the title and interest of said applicants. There was no appeal from the order rejecting their applications, and they did not contest defendant's right to pre-empt said land. *Held* that, the proceedings of the land-office having been acquiesced in, plaintiff had no ground for attacking defendant's patent.

2. The privilege of amending after the sustaining of a demurrer is, under Code Civil Proc. Cal. § 472, one not of right, but rests in the discretion of the trial court, and it is too late to raise the point for the first time on appeal that it was error to sustain the demurrer without leave to amend.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

*Gray & Haven*, for appellant. *George Pearce*, for respondent.

Fox, J. This is a bill in equity to procure a decree that the defendant holds the title to certain lands in Marin county, for which he procured patent as a pre-emptor, in trust for plaintiff, on the ground that plaintiff had a better right thereto, and that defendant procured the patent by fraud, and through mistake and mis-



conception of the law on the part of the officers of the land department of the government. That a patent may be attacked in this way, and such relief be had in a proper case, has been held in very many cases. *Bludworth v. Lake*, 33 Cal. 256; *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. Rep. 641; *Hosmer v. Wallace*, 47 Cal. 461; *Rutledge v. Murphy*, 51 Cal. 388; *Plummer v. Brown*, 70 Cal. 544, 12 Pac. Rep. 464; *Sanford v. Sanford*, 13 Pac. Rep. 602; *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Smelting Co. v. Kemp*, 104 U. S. 636. And such a ruling is in accord with section 2224 of the Civil Code. But in such a case it is not enough to show that the defendant was not entitled to have received the patent. Plaintiff must also show that she herself occupies such a *status* towards the property as entitles her to control the legal title. *Plummer v. Brown*, *supra*. If she claims priority of right to become the purchaser, and to receive the patent, it is not enough to allege that she had or has such right, for that is a mere conclusion of law; but she must show the state of facts which gave her the right, and also the facts showing that she took the legal steps to avail herself of such right. *Aurrecoechea v. Sinclair*, 60 Cal. 532. The allegations of the complaint tending to show that the defendant was not entitled to pre-empt the land; that the same was not at the time subject to pre-emption; and that he was not entitled to have or receive the patent,—are, in our judgment, sufficient to constitute a cause of action in that behalf, and to put the defendant to his defense, so far as that branch of the case is concerned, but they show the legal title to be vested in the defendant, and before he can be called upon to defend that title against the plaintiff's allegations of fraud, or be adjudged to hold it in trust for plaintiff, she must show a better right to have received the patent. She cannot recover on the weakness of defendant's right alone, but must do so on the strength of her own. On this branch of the case, the complaint sets out a series of facts tending to show that, at the time of the filing of the township plat, the plaintiff had a priority of right to purchase the lands in question, under the act of July 23, 1866, to settle land-titles in California, on the ground that she was a *bona fide* purchaser, and in possession under a Mexican grant from which her lands had been excluded under the final survey; but the complaint failed to show the subsequent acts on her part necessary to preserve her right, and on the hearing she abandons all claim of right on that ground.

But as the basis of her right to attack the defendant's patent, upon which she now relies, plaintiff avers that on the 8th of October, 1878, one Laney and one Parks were each entitled to an additional homestead entry, under the laws of the United States, and each made application to the register of the proper land-office to locate portions of the land in question, accompanying their said applications with proofs that the lands were non-mineral, and paying to the register the fees and charges required by law for the entry,

which applications were refused by the commissioner of the general land-office; that afterwards, and on the 5th of April, 1879, they respectively renewed their applications, and were again refused; that afterwards, and on the 27th of August, 1880, Laney again renewed his application as to a part of the lands, and again was refused; that on the 8th of September, 1880, one Holly was entitled to an additional homestead entry, and applied to the register of the land-office to locate a portion of the lands, accompanying his application with proof that the land was non-mineral, and paying the fees of office for such entry, but his application was refused. The complaint avers that at the time of each of said applications there was no valid adverse claim to the land. The complaint fails to state upon what ground the original applications of Laney and Parks were rejected, but there is no difficulty in determining, from the facts alleged, the ground upon which such rejection was based. The township plat of the lands had then just been returned by the surveyor general to the district land-office, but it had not been finally approved by the land department; and shortly after such application was withdrawn, and was not finally filed, and did not become an authenticated public record, until the 5th of February, 1879, four months after the making of such application. The lands were not, therefore, at the time of such application, open to entry, or to selection under the additional homestead law. Meantime the lands were not in possession of the applicants. They never attempted to take possession of them; but, as shown by the complaint, they were in part within the exterior boundaries of inclosures of plaintiff, and in part within the exterior boundaries of inclosures of one Brackett, and when the plat was finally approved and filed, they were a part of the public domain, inclosed, as aforesaid, in common with other lands held by the owners of the respective inclosures. It does not appear that either of the persons so having the lands inclosed ever filed a petition in the land-office, or any paper, claiming a right of priority of entry or purchase, under the act of 1866, or put the government upon any notice that they were in possession, or claimed to be purchasers under a Mexican grant from the final survey of which they had been excluded. The applications of Laney and Parks, made April 5, 1879, are not shown, as in all the other cases, to have been accompanied by any of the proofs required by law as to the character of the land, and presumptively were not so accompanied. It is probably for this cause that they were then rejected, the complaint failing to state what, if any, reason was given for this rejection. All the applications made by Laney, Parks, and Holly, in 1880, the complaint shows, were rejected because the defendant had acquired the right of pre-emption of the lands; and it further appears from the complaint that defendant had filed his declaratory statement as a pre-emptor as early as April 18, 1879, and was then in possession of a portion of the demanded and pre-

empted premises, which had before that time been included within the inclosures of Brackett. It does not appear that Brackett ever objected to defendant's entry or possession. Neither does it appear that the applicants for homestead entry, or either of them, ever appealed to the commissioner of the general land-office from the order of the register and receiver, rejecting their applications, or took any proceedings whatever to secure the approval of their applications, or contest the right of the defendant. On the contrary, the rejection seems to have been accepted as final, and they and their successor in interest remained silent and passive until the defendant had proved up, paid for his land, and secured his patent. Plaintiff further alleges that these several applications to make additional homestead entries were made for her benefit, with her assent, and by her procurement, and that for a valuable consideration she has become the owner of all the right, title, and interest of the said applicants, and of the said Brackett, in the lands described in the complaint. Concede all this to be true, the complaint fails to show that they, or either of them, ever had any right, title, or interest in the lands to convey. Neither naked possession of the public domain, nor a rejected application for leave to enter it, under whatever law it may be made, if acquiesced in, as was done in this case, so far as appears from the complaint, will give any such right or title as will enable the party successfully to attack a patent issued by the government to another. Assuming that these additional soldiers' homestead entries might, under the law, be made in the name of the soldier, at the instigation and for the benefit of a third party, (a matter, however, upon which we do not pass,) and having been made and approved might thereafter be alienated before patent, as was held in *Rose v. Lumber Co.*, 73 Cal. 385. 15 Pac. Rep. 19, cited by appellant, it does not help the plaintiff in this case at all, for here the entry was not made, and no right was acquired by a mere application, abandoned at the first adverse decision. From these views, it appears that the plaintiff has failed to show any right in the premises which entitles her to attack the defendant's patent, and therefore has failed to state in her complaint facts sufficient to constitute a cause of action. The demurrer to her complaint was properly sustained.

The complaint in this case had already been once amended. The demurrer was sustained without leave to amend. At the conclusion of the oral argument upon the hearing here in bank, it was suggested that this was error, and that the court below should have given the plaintiff leave again to amend. The privilege of amending, after trial of the issue of law raised by demurrer, is not one of right, but one resting in the discretion of the trial court. Code Civil Proc. § 472. If the plaintiff desired again to amend, she should have applied to the court below, and, if refused, exception should have been taken. It is too late to make the point for the first time in this court, when nothing appears

on the record to show an abuse of discretion. Judgment affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

(86 Cal. 643)

BUCKLEY V. ALTHOFF. (No. 13,824.)  
(Supreme Court of California. Dec. 10, 1890.)

STATEMENT ON APPEAL—DISMISSAL.

1. Code Civil Proc. Cal. § 661, provides that, when a motion for a new trial is made on the minutes of the court, the judgment roll, and a statement to be subsequently prepared, shall constitute the record on appeal. Section 659, subd. 4, declares that the notice of a motion for a new trial on the minutes must specify the particulars wherein the evidence is claimed to have been insufficient, and the errors of law relied on. *Held* that, where the notice of the motion contained no such specifications, a statement, on appeal, afterwards prepared, was unauthorized, and could not be considered by the appellate court.

2. A statement on appeal which is not served until five days after the expiration of an additional period allowed by the court for its preparation cannot be considered by the appellate court.

3. When there is no "statement on appeal" or bill of exceptions which can be considered, or transcript filed within the time limited, the appeal must be dismissed.

In bank. On rehearing. For former report, see 24 Pac. Rep. 635.

*Hassett & Tevlin*, for appellant. *Chas. J. Heggerty*, (*Gunnison & Booth*, of counsel,) for respondent.

PER CURIAM. On the 28th of July, 1890, an order was made and entered in this cause dismissing the appeal, and, under the rule of the court, *remittitur* was issued forthwith. Subsequently, upon an *ex parte* showing, which seemed to be sufficient, the *remittitur* was recalled, and the appellant moved the court to vacate or modify the order dismissing the appeal, on the ground that the same had been imprudently made, through a misconception of the facts and the records in the cause. The reasons for making the order were not then fully stated in the opinion, nor was it entirely correct in its statement of the rule of practice under the Codes. The reasons then given will therefore be stricken out, but the motion to vacate the order dismissing the appeal, or to modify the same, must be denied.

The action was for forcible entry and detainer. Judgment for plaintiff, March 5, 1890. On the 8th of March, notice of intention to move for a new trial, to be heard on the minutes of the court, was given. The motion came on regularly to be heard on the 11th of March, and was then overruled. On the same day, notice of appeal was given, and undertaking on appeal filed March 13th. On the 21st of March, appellant procured from the judge of the court below an order granting to defendant "twenty days" further time from date hereof in which to prepare and serve his proposed statement on appeal herein." On the 10th day of April, he procured from the judge another order giving him "five days from the date hereof in which to prepare and serve his proposed statement on appeal herein." This time expired April 15th. In law and in fact he

was not entitled to have settled in the case any "statement on appeal." His motion for new trial having been submitted on the minutes of the court, he could only bring to this court, on appeal, matters other than those appearing in the judgment roll by bill of exceptions, or a "statement of the case subsequently prepared." Code Civil Proc. § 661. And he was entitled to such a statement only upon having made a motion on the minutes of the court, upon notice duly given as provided in subdivision 4, § 659, Code Civil Proc. That subdivision provides that a notice of motion to be heard on the minutes of the court must specify the particulars wherein the evidence is claimed to have been insufficient, and the errors of law relied upon. It does not appear that any such specification was given, or assignment made, in the notice given in this case. Even when the notice is so given, the "statement of the case subsequently made" must be confined to the errors and particulars specified in the notice. As none were so specified, no subsequent statement of the case was required or authorized. The extensions of time were therefore secured to do something which the law did not authorize to be done, or which could not be used on appeal if done, whether that something was to prepare and serve "proposed statement on appeal," or "statement of the case subsequently made." The extended time expired on April 15th. The proposed statement was not served until the 21st day of April, six days after the expiration of the time allowed by law, and by all extensions given, so that, on this ground also, the statement was one which the court was not called upon to settle, and which could not be used upon the appeal. No transcript was filed within 40 days after the perfection of the appeal, and there was no statement or bill of exceptions to be used, or which could be used, upon the appeal, settled, or pending to be settled. The transcript was not therefore filed in time, and the order dismissing the appeal was properly made. No sufficient cause is shown why said order should be vacated, and the motion to vacate the same is denied. Let *remittitur* herein issue forthwith.

(56 Cal. 623)

SAN FRANCISCO WATER CO. v. PATTEE *et al.* (Nos. 11,326, 11,823, 11,912.)

(Supreme Court of California. Dec. 9, 1890.)

CORPORATIONS—PURCHASE OF PROPERTY BY OFFICERS.

1. Under Civil Code Cal. § 2228, which requires the highest good faith from a trustee towards his beneficiary, and under section 2230, which prohibits the trustee from taking part in any transaction adverse to the beneficiary, the secretary of a corporation, who is also its general manager, and to whom all its affairs are committed, is guilty of a fraud against the corporation in secretly purchasing its property in his own name at execution and tax sales.

2. To redeem from such purchases of the secretary, the corporation need repay him only his expenditures incurred in that behalf, and not his claim for salary, as the payment of such claim would be giving him an advantage over the other creditors of the corporation, in violation of Civil Code, § 2228, which prohibits a trustee from ob-

taining any advantage to himself in dealing with the trust property.

3. The title to the corporation's property acquired from the secretary by one who himself occupied fiduciary relations to the corporation, and who had full knowledge of the manner in which the secretary acquired his title, must stand or fall with that of his grantor.

In bank. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Action by the San Francisco Water Company against Solon Pattee, and others. Both parties appeal. Civil Code Cal. §§ 2228, 2230, 2233, 2234, are as follows: "Sec. 2228. In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." "Sec. 2230. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary." "Sec. 2233. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed. Sec. 2234. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

Wm. M. Pierson, for appellant. Mesick, Maxwell & Phelan, for respondent.

Fox, J. The pleadings and findings in this case are somewhat voluminous, and we do not deem it necessary to recite them with any considerable detail. The case and its facts, briefly stated, are as follows: The plaintiff was incorporated in July, 1867, for the purpose of acquiring and supplying water to the inhabitants of the city and county of San Francisco. Its by-laws provided for the appointment of a secretary, and very fully defined his duties. Under them, the defendant Pattee was appointed secretary in 1867. There is a dispute as to when he ceased to be such,—he claiming that he resigned in August, 1878, and the plaintiff insisting that he continued to be secretary, and to act as such, until January 4, 1881. Some time prior to the 26th of February, 1878, the plaintiff had become the owner and possessed of certain lands in San Mateo county, taken up as government lands, the title to a part of which was not perfected until some time afterwards. No assessment was ever levied upon the stock of the corporation. Whenever money was needed to pay expenses or liabilities, the secretary went to the president, or others of the directors, and got the money required, or in default thereof the liabilities remained unpaid. The enterprise was unsuccessful; and it would seem that as early as 1872 the hope of bringing it to a successful issue was abandoned, for in October of that year the board of directors passed a resolution allowing the secretary the sum of \$1,000 as compensation for his services up to that time, and authorizing the same to be placed to his credit on the books, to bear interest at the rate of 1 per cent. per

month, to be compounded semi-annually until paid, and the president assured him that when they made a sale of their lands and water-rights, as they hoped to do, he should be well compensated for his further services. This anticipated sale, however, was never effected, and in May, 1878, the company was in debt, with no funds to meet its obligations. A meeting of the directors was holden, and the secretary reported these facts to the board, calling attention, among others, to a debt due one Rosenblum. The board refused to levy any assessment, and the stockholders refused to advance further funds, but the board passed a resolution authorizing the president and secretary to make a loan of \$2,000 to meet the outstanding liabilities, and to secure the same by a mortgage upon the company's property. The secretary undertook to negotiate this loan, but was unsuccessful. In August or September, 1878, the secretary told the president that he had been unable to make a loan, and that he was so annoyed by the bills that he would not longer act as secretary. About the same time, he told the defendant Boyd, who was the attorney and one of the directors of the company, the same thing, in substance, and in October, 1878, he made a pencil entry in one of the books of the company: "Resignation of secretary filed." It does not appear, however, that any resignation was ever in fact filed, and Pattee kept and retained all the books and papers of the corporation until January, 1881. No meeting of the directors was held after that of May, 1878, until January 4, 1881. In August, 1878, Rosenblum commenced an action against the company for the amount of his claim before a justice of the peace in Santa Clara county. When the officer attempted to serve the summons upon the secretary, he refused to accept the service, and told the officer that he was not the secretary; thereupon service was made upon the president. The papers were turned over to Boyd, who was the attorney, and a director of the company, and he employed the defendant Travers to appear specially in the case, and move to dismiss for want of jurisdiction. This Travers did, but his motion was denied, and judgment entered against the company. Travers reported the facts to Boyd, who paid him for his service, and dismissed him from further service in the case. In November of that year, execution was issued upon this judgment, the property sold, and at the sale Travers appeared and bid in the property in his own name, but with money furnished by Pattee, and at Pattee's request. In due time, the sheriff's deed was regularly issued under this sale, and the title thus acquired was transferred to and became vested in Pattee. During all former years it had been Pattee's custom to collect the necessary funds from some of the stockholders, and pay the taxes upon the company's property, but in 1877 he did not do so, and in February, 1878, the property was sold for delinquent taxes of the year 1877-78. Pattee procured an assignment of the certificate of sale, and ultimately the tax-title under sheriff's deed also became vested in him. In the fall of 1879, having secured

the title under these two sales, Pattee entered into possession of the land by securing attornment from the tenants to him, he having theretofore had the general charge of the leasing of the land, collection of the rents, and of other matters connected with its management. None of the officers or stockholders of the corporation, except the defendant Boyd, to whom Pattee conveyed a half interest in the property so acquired, in consideration of the payment to him of one-half the cost thereof, had any knowledge of these transactions, by which Pattee and Boyd had come into the title and possession, until very shortly before the 4th of January, 1881. At the meeting held on that date, Pattee was asked about the matter, and then openly, and for the first time, so far as notice to the company was concerned, declared that he had acquired and held the property in his own right, and in hostility to the company; a claim which the company by its directors there and then repudiated. In 1878 and 1879, it ought to be stated, Pattee had been inquired of in regard to the delinquent taxes, and replied that it was all right, that he had bid in or redeemed the property; but he did not say that he had bought it in for his own benefit. In April, 1884, the president of the company, by authority of the board of directors, offered to reimburse Pattee and Travers all moneys they had paid out in securing their said titles, as well as certain moneys which Pattee had expended in procuring patent from the United States for a part of the land, together with interest thereon, and demanded that they respectively reconvey to the company; but they each refused to accept such reimbursement, or to make such conveyance. Shortly afterwards, this action was brought. Meantime, and in 1882, the defendant Pattee had executed to the defendant Low a quit claim deed of his half of the property, which the court finds was given as security for present and future loans made by the Anglo-California Bank, Limited, of which Low was one of the managers, and that such conveyance was so accepted without notice of any equities of the plaintiff, and for valuable consideration.

The action is to declare a trust, and to compel reconveyance of the property, upon repayment of all the moneys expended in securing those adverse titles, and procuring the patent, with interest thereon; the plaintiff claiming that because of the fiduciary relations of the defendants, Pattee, Boyd, and Travers, neither of them could acquire and hold these titles, as against the corporation, without first giving the corporation notice of their intention in the premises, and also claiming that Low was not a *bona fide* purchaser without notice and for value. The court found in favor of the plaintiff upon all the questions as to the fiduciary relations of the defendants, Pattee, Boyd, and Travers, (the latter of whom, however, seems to have been a mere agent of the other two,) and found in favor of the defendant Low, and the bank,—that the conveyance to Low was made without notice, and for valuable consideration,—and judgment was entered accordingly. Motion for new

trial made and denied, and the plaintiff appeals from that part of the judgment in favor of Low and the bank; defendant Pattee appeals from that part of the judgment against him, and from the order denying his motion for new trial, and the defendant Boyd takes a like appeal as to that part affecting himself.

The defendant Pattee appeals on the ground of errors of law, insufficiency of evidence to justify the decision, and that the decision is against law. We have carefully examined the record on his appeal, and find no prejudicial errors of law in the matters covered by his assignments of error. The evidence also seems to sustain the findings, and the findings support the judgment. The issue upon which it is claimed that there was no finding—that of the value of the property—is an immaterial one. In his argument, counsel for this appellant claims that the court should have found in favor of this defendant under his plea of laches, and the statute of limitations. We think that in that regard the finding supports the judgment, and is supported by the evidence, but, if it was not so, there is nothing in this defendant's assignments of error, or specifications of insufficiency, upon which to base the argument.

It is also claimed for this defendant that his relations to the company were not of a fiduciary character, and that even if they were, he was not for that reason forbidden by law to buy in the property for his own benefit at a forced sale not made by himself, or at his instigation. The terms of the by-laws make him in large degree the general agent and manager of the corporation. The supervision of nearly all its affairs was committed to him, and the evidence shows very conclusively that during many years, while the corporation was in a state of inactivity, he was its head and front; it had no knowledge of its own affairs except as he gave it, and met or moved only as and when he suggested. He was therefore bound to act towards the corporation in the highest good faith, and was not at liberty to obtain any advantage over the corporation by concealment from its directors of the true condition of its affairs. Civil Code, § 2228. Under section 2230 of the same Code, he had no right to take part in any transaction concerning the property of the corporation, all of which was practically in his keeping, adverse to the interests of the company, without the consent of its directors, given upon full knowledge of the facts. If he did so it was a fraud against the company, (section 2234;) and if by doing so he acquired any interest adverse to the interest of the company, it was his duty to give immediate information thereof, (section 2233.) See, also, *Baker v. Whiting*, 3 Sum. 475.

It is also claimed that he ought not to be decreed to make restitution, except upon payment not only of his expenditures in that behalf with interest, but also of all other indebtedness of the corporation to him. For all claims except such as it is provided in the decree that he shall be reimbursed, he was, in common with others, a simple creditor of the corporation.

Without resort to, or waiting for, the

sales under which he acquired the titles in question, he could at any time have subjected the property of the corporation to the satisfaction of his claim, and if insufficient, or whether insufficient or not, he had also his remedy against the stockholders. We know of no law, and have been cited to none, which would justify him in secretly procuring an adverse title to the company's property, and then compelling the company to give him a preference over all other creditors before it could be redeemed. When redeemed, he and other creditors will stand upon a common level, as they did before. If the doctrine thus contended for were sustained, he would have gained an advantage by his forbidden act, in direct violation of the provisions of the Code which we have cited.

The defendant Boyd appeals upon the ground that the evidence was insufficient to justify the decision, that the decision was against law, and of errors of law. His specification of grounds of insufficiency and of errors is much more elaborate than on Pattee's Appeal, but much to the same effect; and on the argument it was conceded that, as to most, if not all the points made, the judgment must necessarily follow that rendered on Pattee's Appeal. But in Boyd's Case it was expressly found that no demand had been made upon him for conveyance, and no refusal to convey, before suit brought. If Boyd held by a title independent of that acquired by Pattee, this fact might raise a question for serious consideration; but as he holds under Pattee, and took with a full knowledge of Pattee's relations to the company, and of the manner in which Pattee's title was acquired, himself also occupying fiduciary relations to the company, his title must stand or fall with that of his grantor.

The plaintiff appeals from the judgment on an exception taken to the 17th finding, in favor of the defendant Low, and that portion of the judgment which is based thereon. In the bill of exceptions, all the evidence upon which said finding is based is set out, and we think it fully supports the finding. It in turn supports the judgment.

On each of said appeals, the judgment and order is affirmed.

WE CONCUR: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON J.

(86 Cal. 605)

GRIFFITH v. HAPERSBERGER. (No. 12,644.)<sup>1</sup>  
(Supreme Court of California. Dec. 7, 1890.)

#### BUILDING CONTRACT—PERFORMANCE.

1. Plaintiff contracted to construct for defendant the foundation of a public monument, payment to be made when the work was completed and accepted by the architects, and after plaintiff should satisfy the architects that the work and material furnished by plaintiff had "been fully paid, so that no lien can be filed against" it. Plaintiff through his subcontractor constructed one foundation which was rejected, and then built another which was accepted. Plaintiff paid his subcontractor for the first foundation but not for the second, but it did not appear that plaintiff was under any greater or other

<sup>1</sup> Modified on rehearing, post, 487.

obligation to pay his subcontractor for both than defendant was to pay plaintiff for both. Besides, it was not found that any lien had been filed or that there were any bills unpaid for which a lien could be filed. It was found that there was not a strict performance of the letter of the contract, but it was found that there was a substantial compliance, and that the work was accepted and approved by the architects of the monument association. It was found that the work was not accepted by defendant's architects, and that plaintiff did not satisfy them in regard to liens, but it was also found that defendant had, prior to the completion of the work, discharged such architects and had not thereafter employed any. *Held*, that plaintiff was entitled to judgment.

2. It is no defense to such action that plaintiff's subcontractor in an action against defendant, to which plaintiff was not a party, obtained judgment against defendant for work and material furnished in the construction of said foundation.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

*Edward P. Cole*, for appellant. *A. N. Drown*, for respondent.

*Fox, J.* Appeal from the judgment, and the case comes up on the judgment roll alone, appellant claiming that the findings of fact are such as entitle him to judgment, and that the court erred in its conclusions of law, and in rendering judgment on the findings for defendant. The complaint is in *indebitatus assumpsit*, for the recovery of \$2,050, for work and labor done, and materials furnished. The answer denies the allegations of the complaint, and then sets up as a further defense that all the work and labor done and materials furnished for or to the defendant by plaintiff were done and furnished under a special agreement in writing, and that plaintiff has not performed the agreement on his part, and is not entitled to any further compensation thereunder. Defendant then, by way of counter-claim and cross-complaint, sets out the substance of the agreement, and alleges divers failures on the part of plaintiff, by reason whereof he claims to have suffered damage in the sum of \$2,000, for which he prays judgment against plaintiff. There was an answer to this cross-complaint, and, upon the issues thus framed, the case was tried before the court without a jury.

The court found that the plaintiff did not perform labor or furnish materials for defendant, and the defendant did not undertake or promise to pay, otherwise than in accordance with the terms of a written contract, dated December 1, 1882, which is set out in the findings in full. From this contract it appears that the defendant was the original contractor for the erection of the Garfield monument, in Golden Gate park; that he entered into this subcontract with the plaintiff to do all the work and furnish all the material for the excavation, concrete foundation, and granite base of the monument, ready for the statue. The details of the work which the plaintiff undertook to do are very fully set out, but need not be as fully repeated here. The contract price was \$5,630. The work and material were, among other things, to be according to plans and specifications made by Townsend & Wyneken, architects in the em-

ploy of defendant. One thousand two hundred dollars was to be paid when the corner-stone and the first base course was set, and the balance "when all is cut and set in position and accepted by the architects." By another paragraph, however, it was provided that "before any payment is made under the contract, the party of the second part [plaintiff] shall satisfy the said architects" that all materials furnished, and all the work of mechanics, laborers, and others, employed or hired by the plaintiff "have been fully paid, so that no lien can be filed against said work or such materials, mechanical work, or labor." Also "no payment to be made, without a certificate be obtained and signed by said architect that the said payment is due, and according to the terms of the contract." It is further found that the plaintiff, by and through one M. F. Redmond, "his subcontractor," built a concrete foundation, and, in another finding, that plaintiff paid Redmond for building it, but that this foundation was not in accordance with the contract between plaintiff and defendant, and was rejected; that after such rejection "plaintiff's agent and subcontractor, Redmond," built another concrete foundation beside the first, which was accepted, and upon it the iron, granite, brass, and copper work, and, in short, the monument complete, was subsequently erected.

The court further finds that for this second concrete foundation the plaintiff has not paid Redmond; also that some of the copper clamps and rods used in the other work of plaintiff were not set in lead, as required by the letter of the contract, but were set in sulphur instead; but that the work in this behalf was satisfactory to and was accepted by the monument association, the parties with whom defendant made his original contract, and was a substantial compliance with the terms of plaintiff's contract. There is no finding of any failure to pay for all materials furnished, and all labor done, except the one above mentioned, of the non-payment of Redmond for the building of this second concrete foundation; nor is there a finding that any lien was ever filed against the structure in any form whatever, although, according to another finding, Griffith's work was finished in or before September, 1883, and this action was not commenced until July, 1885. It is found that plaintiff's work was not done to the satisfaction, or under the direction, of said Townsend & Wyneken, and that plaintiff never procured their certificate, as required by the contract; but the court finds further in that behalf on the 15th of May, 1883, defendant dismissed the said Townsend & Wyneken from his service, and in writing released them from all responsibility as his architects of said monument, and that, by reason thereof, the plaintiff was prevented from procuring their approval or certificate. It is further found that from and after May 15, 1883, no architect was employed by defendant in the premises, and none were connected with the construction of the monument, except Wright, Kenitzer & Macy, who were competent and experienced archi-

pects, employed by, acting under, and representing, the monument association; that on September 15, 1883, plaintiff did procure from them a certificate that he had "completed his contract for the excavation, concrete work, granite work, iron and copper work, required in the erection of the Garfield monument in Golden Gate park, city and county of San Francisco, as per contract dated the first day of December, 1882;" that no certificate of any architect was ever furnished that all or any of the work or materials used or furnished for the building of said second concrete foundation had ever been paid for; that in fact the same had not been paid for; and that there was, at the time of the filing of said findings, another action pending in the same court, brought by Redmond against one Weismann, the agent and representative of defendant, for the recovery of the sum of \$948.60, for such materials and labor.

We may remark here that this finding as to the pendency of another suit is not within the issues in this cause. After he had procured the certificate of Wright, Kenitzer & Macy, above mentioned, payments were made to plaintiff to the amount of \$3,700. No other or further sum is found to have been paid to him. The findings are voluminous, but we think we have here given sufficient of the substance of them for the purposes of the consideration of the point made by appellant. The conclusions of law upon these findings were all in favor of the defendant, and judgment was entered accordingly. Even with the assistance of the able counsel for the respondent, we are unable to discover any principle of law upon which these conclusions and judgment can be sustained. For every technical failure to comply with the strict letter of the contract, found by the court, the courts also expressly found the antidote. The first concrete foundation was a failure, but the court finds that plaintiff paid for a concrete foundation, and that "his agent and subcontractor" built a second one, which was approved and accepted. It is said that the plaintiff did not pay for this second one. Both were built by a subcontractor under him, and it does not appear that he was under any other or greater obligation to pay his subcontractor for both than defendant was to pay him for both, and there is no pretense of such an obligation. But it is further said that the court has found another suit pending, brought by that subcontractor against the agent of defendant, to recover for the second foundation, and counsel cites the records of this court (Redmond v. Weismann, 77 Cal. 423, 20 Pac. Rep. 544) to show that judgment has gone against the agent of defendant in that suit. The finding was not within the issues of this cause, and cannot be regarded. The judgment in the case cited was on the findings in that cause, a cause in which this plaintiff was not a party, and in which his rights could not be tried. If through any mistaken theory of that case, or want of proper defense, judgment went against Weismann, when if the real facts had been known it would have gone otherwise, it may be Weismann's misfor-

tune, but it is one by which this plaintiff cannot be estopped, for in it he was not heard, and had no day in court. This case must stand upon its own findings, and they, taken as a whole, will bear no other construction than that the accepted foundation was built by plaintiff, as well as the rejected one.

There is a finding that plaintiff has not paid all the bills, as it is claimed that under the contract he was bound to do. That finding, however, has reference solely to the non-payment of Redmond for this second foundation. Besides, it is not found that he has not so paid the bills as that no liens shall be filed or accrue, and the contract shows that this was the only purpose of that clause in the contract. It was a clause evidently taken from an ordinary builder's contract, and, in this case, was an unnecessary one, for the monument, though built by private contribution, was erected upon and as an adornment of one of the public parks of the municipality, and could not be made subject to lien. It was affixed to the freehold, and thus became a part of the land, the property of the municipality. *Manufacturing Co. v. School-Dist.*, 10 Pac. Rep. 350; *Leonard v. City of Brooklyn*, 71 N. Y. 498. Plaintiff has alleged full performance. The court has found how he performed, and in this regard we think it amounts to a finding of full performance. It is found that there was not a strict performance of the letter of the contract, in the matter of the setting of certain clamps and rods, but it is also found how plaintiff performed in that regard, and it expressly finds that it was a substantial compliance with the terms of the contract, and was accepted and approved. This was all that was required. *Voorman v. Voight*, 46 Cal. 393. It is also found that plaintiff did not procure the approval or certificate of architects Townsend & Wyneken, but in the same connection it is found that defendant by his own act rendered it impossible to do so, and that plaintiff did get the certificate of the architects in charge. This was a sufficient compliance with the contract in that regard. *Reynolds v. Jourdan*, 6 Cal. 111; *Steinbach v. Leese*, 13 Cal. 367; *Wolf v. Marsh*, 54 Cal. 228; *Houghton v. Steele*, 58 Cal. 424; Civil Code, § 1512. Under these findings we are clearly of the opinion that the conclusions of law and the judgment should have been in favor of plaintiff. It was suggested on the argument that, if this conclusion was reached, the judgment should be for the balance unpaid on the contract, less the amount of the judgment, and costs in the case of Redmond v. Weismann. The record in this case furnishes no justification for such an order. The plaintiff has never had an opportunity to be heard as to whether he was liable for any part of the sum for which that judgment was recovered. Judgment reversed, with directions to the court below to enter judgment on the findings in favor of plaintiff, and against defendant, for the sum of \$1,950, that being the unpaid balance of the contract price, with interest thereon from September 15, 1883, the date of the architect's certificates.



We concur: PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; WORKS, J.; THORNTON, J.

ON REHEARING.

(Jan. 7, 1891.)

PER CURIAM. Petition for rehearing is denied, but the judgment is modified to this extent: The superior court will compute interest on the amount awarded to respondent from January 1, 1885, as prayed for in the complaint, instead of September 15, 1883, the date of the architect's certificate.

(20 Or. 78)

DAVIS V. DAVIS *et al.*

(Supreme Court of Oregon. Nov. 17, 1890.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—STATUTE OF LIMITATIONS—RIGHTS OF GRANTEE.

1. A voluntary conveyance by a husband to his wife of all of his property subject to execution is constructively fraudulent as to existing creditors, and an intent to defraud creditors is not necessary.

2. When the title of a grantee is attacked for fraud, he may look behind the judgment, and ascertain whether or not there was an actual indebtedness between the parties upon which the judgment is founded.

3. A grantee whose deed is attacked for fraud by one claiming to be a judgment creditor of his grantor may plead the statute of limitations against the debt before it becomes merged in the judgment; and, before any question can arise in relation to the statute of limitations, the objection must be taken in the proper manner, *i. e.*, by demurrer, if the objection appears on the face of the complaint, otherwise, by answer.

4. Where a debt is barred by the statute of limitations, the debtor may renew it by a new promise in writing, and, where he afterwards makes a voluntary conveyance to his wife, which is attacked because constructively fraudulent, the grantee in such deed cannot say that she was injured by such new promise.

5. Under section 2874, Hill's Code, the expenses of the family are chargeable on the property of both the husband and wife, and where the wife takes a voluntary conveyance from her husband, and pays a sum which had accrued as family expenses before the conveyance to her, she is entitled to have the same, as well as a sum she paid to her husband's vendor as purchase money before the land was conveyed to her, out of the first proceeds of the sale.

(Syllabus by the Court.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

The plaintiff is a judgment creditor of the defendant M. W. Davis, and brings this suit to set aside a voluntary deed made by M. W. Davis to Emily Davis. At the time the deed in question was made, Emily Davis was M. W.'s wife, but a separation occurred soon thereafter, and a divorce was obtained by the wife. The complaint is in the usual form in such case, except that it is not alleged therein that an execution had been issued on the judgment, and a return of *nulla bona* made thereon; but it is alleged that M. W. Davis had no property whatever, other than the land in controversy, out of which the plaintiff's debt could be made, and that at the time M. W. Davis deeded said land to his wife he was, and has ever since continued to be, wholly insolvent. Among other things, the defendant Emily Davis alleged in her answer that the judgment of L. M. against M. W. Davis was taken and procured by the fraudulent conniv-

ance between the plaintiff and defendant therein, and that the same was taken for the sole purpose of enabling the plaintiff, who is the brother of the defendant M. W. Davis, to bring this suit against the defendant Fanny Davis, when in truth and in fact the defendant M. W. Davis is not indebted to the plaintiff in any sum whatever. Some other allegations are made in the answer which will be more fully noticed in the opinion.

J. C. Fullerton and Hamilton & Hamilton, for appellant. Wm. R. Willis and C. A. Sehlbrede, for respondent.

STRAHAN, C. J., (after stating the facts as above.) In the view we take of this case, it is not necessary to particularly notice all of the questions attempted to be raised by counsel for appellant on this appeal. In the first place, it must be conceded that the plaintiff recovered a judgment against the defendant M. W. Davis on a note that bears date prior to the execution of the deed to Emily Davis, and that there was no valuable consideration passed between Emily and M. W. Davis at the time the deed was executed; in other words, that it was purely a voluntary deed. This entitles the plaintiff to the relief which he seeks, that is, to set aside the deed as constructively fraudulent, so far as it hinders or delays the plaintiff in the enforcement of his judgment,—unless the legal effect of these facts is averted by something else apparent in the record. The note upon which the judgment mentioned in the complaint was entered bears date November 20, 1888, and the deed in question, January 19, 1889, so that upon the face of the record the debt existed at the time of the conveyance. But the defendant Fanny Davis insists that she may go behind the judgment, and that if it appears that the debt was fictitious or barred by the statute of limitations in the first case, it would not support the proceeding, and in the other, it could not be revived to her prejudice. These questions will be separately examined. The first is one of fact; the second, one of law.

1. For the purposes of this case, the defendant Emily Davis has the right to inquire behind the note upon which the judgment mentioned in the complaint is founded, and for this purpose we think she may inquire into the consideration of the note, because, if there was not an actual subsisting debt due and owing by M. W. Davis to L. M. Davis at the time the note was executed, the execution of the note could not create one, nor would such transaction constitute the plaintiff a creditor, within the meaning of the statute. It is therefore necessary to look to the evidence on that subject. The only evidence offered is that of the plaintiff. He testifies, in substance, that on the 14th day of October, 1888, M. W. Davis was indebted to him between \$1,600 and \$2,000 for medical attendance, money advanced and furnished, lodging, washing, etc. That, about the 20th day of November of that year, the parties had a settlement, "made a lumping settlement in the sum of \$1,500," for which he took the note upon which the judgment mentioned was rendered, and

that nothing had been paid thereon. On his cross-examination he testified that \$480 of this sum was advanced, he thought, in 1878, and \$40 more the following year; \$75 at another time, and about \$500 was advanced to buy his stock and dental outfit when he came to Roseburg. Thinks this was in 1879 or 1880. He further testified that the items for boarding and nursing accrued in Missouri in 1876 or 1877. He further says he charged \$250 for dental tuition, and \$250 for board, while M. W. lived with him for the purpose of receiving instruction, and that M. W. is a younger brother. No books of account were produced, and there is a degree of vagueness and uncertainty in the evidence which tends to render it somewhat unsatisfactory, but it is not contradicted, nor is the credibility of the witness assailed. This evidence is weak, and somewhat unsatisfactory, growing out of the delay in asserting the claim against M. W., and all the attending circumstances; yet we do not think it can be rejected. Unless rebutted or overthrown in some way, it is *prima facie* sufficient to prove that the note sued on was founded upon a sufficient consideration.

2. The appellant next insists that, it appearing that more than six years elapsed after the demands of the plaintiff accrued, and became due and payable, they are barred by the statute of limitations, and that as against her they could not be revived or made the foundation of a claim upon which a judgment could be entered, and made the basis for an attack on her title. If this contention was tenable in a proper case, and we think it was, it cannot avail this defendant for two reasons: (1) She did not plead the statute of limitations; and (2) so far as the facts are disclosed by the evidence, the new promise was made before the deed to the defendant Fanny Davis was executed. The rule of law must be taken as settled in this state that if a claim be set up against a party which is barred by the statute of limitations, and the fact appears upon the face of the proceedings, the objection must be taken by a demurrer; otherwise it must be taken by answer. And, if not taken either in one form or the other, according to the fact, it is to be deemed waived. In this case, the objection did not appear on the face of the complaint. It was necessary, therefore, to take it by answer, or else it was waived. The objection as to the new promise we think equally unavailing. If Fanny Davis had relied upon the statute of limitations in her answer, and the new promise had been made after the execution of the deed of M. W. Davis to her, we think that no new promise that M. W. might have made could have affected her. But, so far as the evidence discloses the facts, the new promise is older than her deed. It is true her counsel have argued with great tact and ingenuity that this is a mere device resorted to by these brothers to overreach her, and to enable the plaintiff to attack her title. The fact may be so, but it rests on conjecture merely, and not on the evidence. If this new promise were made before the deed to the defendant Fanny Davis, no reason is perceived why it should be held

invalid as against her. At that time she had no interest in this land. M. W. Davis owned it, and could have mortgaged it to secure an outlawed debt if he had thought proper to have done so. He might have been sued on this old outlawed account, which his brother held against him, and refused to demur to the complaint on the ground that the debt sued on was barred; and the plaintiff could have taken a judgment against him, and subjected this same land to its payment before it was conveyed to his wife, and no one could have interposed any objection. For the reasons indicated, the statute of limitations is not in this case, and cannot influence its determination.

3. There is one other question that seems to require some attention. Hill's Code, § 2874, makes the expenses of the family chargeable upon the property of both husband and wife. Whatever family expenses were incurred while either of the parties owned this property were a charge upon it, and if, after Fanny Davis received the title, she paid any such expenses, her equity for the amount paid is superior to the plaintiff's, and must be first satisfied. The evidence tends to show the amount was \$300. So, as to the claim of Aaron Rose for the balance of the purchase money. Whether Rose had a lien for it or not she paid it, and the same must be returned to her before the plaintiff is paid anything. The decree of the court below will therefore in all things be affirmed, except that Fanny Davis will be first paid, out of the proceeds of the sale of the property, \$300, with interest at 8 per cent. per annum from the date of payment, which the court below is directed to ascertain, and the further sum of \$145, paid by Fanny Davis to Aaron Rose, with interest thereon at the rate of 8 per cent. per annum, which the court below is also directed to ascertain.

(19 Or. 186)

#### KYLE v. RIPPY et al.

(Supreme Court of Oregon. May 1, 1890.)

#### TRIAL BY COURT—FINDINGS OF FACT.

When a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed as a verdict, and the duty of this court is to ascertain whether the legal conclusions drawn therefrom are such as the law pronounces.

#### (Syllabus by the Court.)

Appeal from circuit court, Jackson county.

A. S. Hammond, for appellant. C. W. Kahler, for respondents.

LORD, J. This was an action to recover the sum of \$250 as commissions for the sale of land by the plaintiff as a real-estate broker. The action was tried by the court without a jury, by consent of the parties. After hearing the evidence, the court found, as facts, that the defendants agreed to pay the plaintiff the sum of \$250 if plaintiff would sell for the defendants certain lands described, but that he had failed to sell the same, or to procure a purchaser who entered into a binding contract for the purchase; and, as a matter of law, that the plaintiff was not entitled to recover anything in the action, but that the defendants were entitled to recover

er their costs and disbursements, and judgment was rendered accordingly. The bill of exceptions contains all the evidence, and the error mainly assigned is error in the court in finding the facts as above stated. But this court cannot look into the bill of exceptions to ascertain the facts, as the findings of the court are conclusive upon us. In *Hallock v. City of Portland*, 8 Or. 29, it was held that when a case is tried before the court without the intervention of a jury, the findings of the court upon the facts shall be deemed as a verdict, and must be accepted as correct until set aside in that court. We have nothing to do with the facts as found, except to ascertain whether the legal conclusions drawn therefrom are such as the law pronounces. But, to enable the court to determine the correctness of the legal conclusions drawn from the findings of fact, it may be important that counsel should be vigilant to have the findings of fact stated with fullness and particularity to avail themselves of the legal objection which they desire to raise and to have determined. In the case at bar, the contention of the plaintiff is not that the legal conclusions drawn from the facts found are incorrect and erroneous, but that the uncontradicted evidence does not warrant the findings of fact as found by the court. His assignment of error is that the court erred in finding that the plaintiff had failed to sell the land, or to procure a purchaser to enter into a binding contract, and his argument is devoted to showing that the undisputed evidence is otherwise. In a word, he claims that a proper finding of facts would warrant the legal conclusion that the plaintiff was entitled to recover his commissions. If the legal consequences would result upon such a finding of facts as he claims that the uncontradicted evidence authorizes, and the court ought to have found, there is no doubt that the judgment works him an injury and wrong which it is the aim of the law to avoid. But, to my mind, it is not clear that the mode that the plaintiff has pursued to have the error of which he complains reviewed is the proper one, and can be availed of here, but, that injustice may be avoided, it is thought by the court, under the circumstances presented by this record, that it is safer and better to remand the cause to the trial court to make a full finding of the facts, and the legal conclusions to be deduced therefrom. And for this purpose the judgment is reversed; and it is so ordered, and that the costs and disbursements abide the result.

(19 Or. 504)

**FENSTERMACHER et al. v. STATE.**

(*Supreme Court of Oregon.* Oct. 27, 1890.)

**ACTION—PETITION—REVIEW ON APPEAL.**

1. The phrase "civil actions" includes actions at law or suits in equity, and all other judicial controversies in which rights of property are involved, and is used in contradiction to "criminal action."

2. A "petition" in common phrase is a request in writing, and in legal language describes an application to a court in writing, in contradiction to a "motion," which may be made  *viva voce*.

3. When a finding is wholly unsupported by evidence, and that fact is made to appear by a bill of exceptions purporting to contain all the ev-

idence upon this point, this court would disregard it.

(*Syllabus by the Court.*)

**Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.**

The facts in substance are that on the 7th day of May, 1887, one John Fenstermacher died, in Multnomah county, intestate, leaving certain real and personal property described herein; that thereafter, on the 20th day of June, 1887, J. K. Wait was duly appointed administrator of the estate of the said intestate by the county court, and the said estate was duly administered upon and finally settled up by him, and he discharged on the 20th day of May, 1888, as such administrator. No legal heirs entitled to said estate having appeared thereafter, such proceedings were instituted as by law required before the circuit court of Multnomah county as resulted in a judgment declaring all the property belonging to said estate of the said John Fenstermacher, deceased, escheated to the state of Oregon, and, in accordance with the judgment or decree rendered therein, the property belonging to said estate was duly sold in accordance with law, and the proceeds thereof, after deducting the necessary expenses, were paid over to the treasurer of the state; that on the 25th day of May, 1889, the above-named petitioners filed their complaint in the circuit court of Multnomah county, claiming to be the heirs at law of the said John Fenstermacher, deceased, and asking for a judgment of said court that they be declared to be the rightful owners to all of said property, etc.; that the cause was tried before the court without the intervention of a jury, and that the court found that the said petitioners were not the heirs of the said John Fenstermacher, deceased, and that neither of them was entitled to any of the property belonging to the estate of the said John Fenstermacher, deceased, which had heretofore escheated to the state of Oregon, and that said state do have and recover its costs, etc., from which this appeal is taken.

*W. S. Beebe and John M. Gearin, for petitioners. Thos. A. Stevens, Dist. Atty., and W. W. Page, for the State.*

**LORD, J., (after stating the facts as above.)** The first inquiry suggested is whether the proceeding authorized by Hill's Code, § 3141 is a suit in equity or an action at law. For the state, it was argued that the words "in civil actions" used in the section cited, *supra*, indicated that the action was at law, for the reason that if it had been intended to be an equity proceeding the word "suit" would have been used, and not "action;" but this construction is not tenable. A civil action is instituted for the purpose of enforcing a private or civil right, or to redress a private wrong, as distinguished from actions instituted to punish crimes, which are known as "criminal actions." Referring to the act of congress of July 2, 1864, which declares "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or inter-

ested in the issue to be tried," Mr. Justice MILLER said: "The phrase 'civil actions' includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime." *U. S. v. Cigars*, 1 Woolw. 125; *Green v. U. S.*, 9 Wall. 655; *Rison v. Cribbs*, 1 Dill. 184. The phrase, then, "civil actions," as used in the section supra, may mean either a suit in equity or an action at law taken alone, but it is suggested in aid of that argument that the use of the word "petition," and the words "and the court thereupon must try the issue," have a tendency to indicate that the proceeding is in equity. "A 'petition' in common phrase is a request in writing; and in legal language describes an application to a court in writing, in contradistinction to a 'motion,' which may be made *viva voce*." *FOLGER, J., in Shaft v. Insurance Co.*, 67 N. Y. 547. It is ordinarily used for interlocutory purposes. "As a general rule," said VAN FLEET, V. C., "a petition cannot be presented in a cause until a bill has been filed;" and, while he admitted that there are cases in which a proceeding might be instituted by petition, he thought it must be limited to those instances in which the legislature has expressly authorized its use, or where it has the sanction of long-established practice. *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 451. Under some of the Codes it is the first pleading filed, like one complaint by the plaintiff, where-in he states the facts of his case. The word "petition," therefore, lends but little aid to uphold this contention. Nor do we think the other words, "and thereupon the court must try the issue," any more decisive of the matter. It is true, suits in equity are tried by the court, but so are actions at law, without the intervention of a jury, and by the court when the parties so consent and stipulate as required or provided in section 218, Code Or. But what to our mind is more decisive of the matter is the nature of the subject-matter to be tried. Its object is to identify the petitioners as the heirs of the intestate, and entitle them to recover the money escheated to the state, indicating a legal inquiry for which the proceeding was instituted, and which courts of law are competent to try. We are of the opinion, therefore, that the proceeding is one at law, and must be so regarded in the present case.

Another question raised is whether this court will interfere if there is no evidence to support a finding. In *Kyle v. Rippy*, 19 Or. —, ante, 141, which was tried without the intervention of a jury, and the finding excepted to, and the evidence included in a bill of exceptions, this court declined to review the evidence on the ground suggested, but remanded the cause for a fuller finding of the facts; but that was more in consequence of a want of particularity in the findings. In *Hicklin v. McClear*, 18 Or. 138, 22 Pac. Rep. 1057, the court said, by THAYER, C. J.: "If the findings of the circuit court are wholly unsupported by the evidence, and that fact is made to appear by a bill of exceptions

purporting to contain all the evidence upon the point, this court would disregard the findings." So that in *Bartel v. Mathias*, 19 Or. —, 24 Pac. Rep. 918, where the question was raised that a certain finding of vital importance in the case was not supported by the evidence, and the evidence upon that point was set out in the bill of exceptions, this court examined it; but, finding that there was some evidence having a tendency to support it, held that the finding of a referee is conclusive as to the facts found, if there was any evidence before them having a tendency to establish such facts. In the case in hand, the record discloses, after the evidence was all in, that the counsel for the petitioners asked the court to find "that the petitioners were the heirs of the said John Fenstermacher, and entitled to the money described in their petition," which finding the court declined to make, to which refusal an exception was taken and reserved, and thereafter the court found that the petitioners were not the heirs of the said John Fenstermacher, and were not entitled to the money mentioned in their petition, to which finding counsel excepted, and the court allowed. The evidence is in a bill of exceptions. As this court said, in *Hicklin v. McClear*, supra, "whether or not that court was justified by the weight of evidence to make the finding, this court cannot consider." The weight of evidence is for that court, and not for us, to determine, however much we might feel disposed to differ from it. Testing the evidence by these principles, we cannot do otherwise than affirm the judgment.

(19 Or. 550)

## TAYLOR v. MILES.

(Supreme Court of Oregon. Nov. 3, 1890.)

## RESULTING TRUST—PAROL EVIDENCE—PRESUMPTION OF PAYMENT—FRAUDULENT CONVEYANCES.

1. When land is conveyed to one person, and another pays the consideration, a resulting trust will be presumed in favor of the one paying the consideration. It rests on the equitable principle that the property belongs to him who advances the money to pay for it.

2. As the trust results from the payment of the consideration, if the party claiming to be the beneficial owner has made no payments, he cannot show, by parol evidence, that the purchase was made for his benefit, for that may not involve anything more than a breach of a parol agreement to purchase and hold in trust for another.

3. It is not essential that the payment of the consideration be in money, but it may be made in anything of value.

4. The presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no moral or legal obligation resting on the purchaser to pay the consideration for another.

5. When a purchaser takes conveyances in the name of his wife, the rule is reversed, and equity raises the presumption that the purchase and conveyance was intended as an advancement or gift.

6. If a purchaser takes a deed in the name of his wife for the purpose of hindering and delaying his creditors, and not for the purpose of making an advancement, a trust will result to the purchaser, and the land be liable for his debt.

7. The law enforces a careful regard for the rights of creditors against conveyances without consideration made by a party largely indebted, and unless he makes provision for the payment of his debts, or retains other property of suffi-

cient value for that purpose, they are of no validity as to such creditors.

8. Whether a party largely indebted can put his property in the hands of another to hold until he can pay his debts, and, when the debts are paid, the transaction will be relieved of its fraud, not decided.

9. Where a party, in order to secure his property against the claims of his creditors, conveyed it to another to hold until he could pay his debts, and, after such debts were paid, directed it to be conveyed to his wife, and subsequently joined with her in a deed in exchanging said property for other property with C., held, that no trust resulted to him in such property.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. H. STEARNS, Judge.

This is a suit in equity, brought by the plaintiff, to quiet title, and to have a trust declared in certain lands described and lying in East Portland, standing in the name of his wife, Elizabeth Taylor, now deceased. The plaintiff alleges that now, and since the 16th day of December, 1869, he has been the owner and in possession of the said property, describing it; that on that day he purchased and paid for said described property, and had the legal title to the same conveyed to his wife, Elizabeth Taylor, in trust for himself; that she received such title in trust for him, and agreed to hold it subject to plaintiff's directions and control, and to convey the title to him, when demanded, and that, in case of her decease before the property was otherwise disposed of, she would leave a will devising the legal title to the plaintiff; that, on the 30th day of April, 1882, the said Elizabeth Taylor made her will devising said property to the plaintiff, and died on that day; and that the defendant claims an estate or interest in said property adverse to the plaintiff, etc. The defendant by his answer, after denying the facts, as alleged, sets up, affirmatively, (1) that the said Elizabeth Taylor was seised in fee-simple of said lands, and that she died intestate, leaving no heirs at law, except three daughters, naming them, each of whom inherited an undivided one-third of said property, etc., and that the defendant, by a regular chain of conveyances, has succeeded to the interest of two of such heirs; and (2) that the plaintiff ought not to be permitted to maintain his suit on account of facts alleged to create an estoppel, etc. Upon issue being joined the evidence was taken and submitted to the court, which, being duly advised by argument, after mature deliberation, found that plaintiff had no right or title to the described lands, except by estate by curtesy, and that the said Elizabeth Taylor did not hold the same in trust for plaintiff, nor subject to his direction and control; that she did not make a will devising the said property to the plaintiff, but that she was the owner thereof in fee-simple, and that the defendant had succeeded to her right in an undivided two-thirds thereof, subject to the curtesy of the plaintiff; and thereupon decreed that the plaintiff had no right, title, or interest therein, except an estate by curtesy for his own life; and that the defendant is the owner in fee-simple of an undivided two-thirds of said land, subject to said es-

tate by curtesy, etc. From this decree the present appeal is brought.

A. L. Frazer and E. B. Williams, for plaintiff. B. Killen and W. E. Thomas, for defendant.

LORD, J., (after stating the facts as above.) The question raised by this record is whether, upon the facts, the wife of the plaintiff held the property in dispute in trust for him, or in her own right as the intended beneficiary of it. Where one purchases an estate, and pays for it, and takes the title in the name of another, or where one purchases land with the money of another, and takes the title to himself, there arises, by operation of law, a resulting trust in favor of him whose money paid for it. Parker v. Newitt, 18 Or. 274, 23 Pac. Rep. 246. It rests on the equitable principle that the property belongs to him who advances the money to pay for it, or that the beneficial ownership follows the consideration. If the party claiming to be the beneficial owner has made no payments, he cannot show, by parol evidence, that the purchase was made for his benefit, for that might involve no more than a breach of a parol contract to purchase and hold in trust for him. Nor is it essential that the payment of the consideration be in money, but it may be made in anything of value. "It is sufficient," said WELLS, J., "if that, in fact, which formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf, or on her credit. The trust results from the purchase and payment of the consideration by or for one party, and the conveyance of the land to another. The receipt of a deed founded on such a transaction raises a presumption that it was taken for the benefit of the party supplying the consideration." Blodgett v. Hildreth, 103 Mass. 487. As a consequence, it follows that a trust must arise, if at all, at the time of the conveyance, and that the money, or other consideration for the deed, which is the foundation of the trust, must then be paid or secured to be paid. White v. Carpenter, 2 Paige, 238. The resulting trust must arise at the time of the purchase, and cannot be created afterwards. But the presumption that the party paying for the property intended it for his own benefit applies only when the transaction is between strangers, where there is no natural or legal obligation resting on the purchaser to pay the consideration for another. When the purchaser takes the conveyance in the name of his wife, the sale is reversed, and equity raises the presumption that the purchase and conveyance was intended to be an advancement or gift. "Whenever," says Mr. Pomeroy, "the real purchaser—the one who pays the price—is under a legal or even a moral obligation to maintain the person in whose name the purchase is made equity raises the presumption that the purchase is intended as an advancement or gift, and no trust results." 2 Pom. Eq. Jur. § 1039. But if a husband purchases an estate, and pays the consideration thereof, and procures the title to be conveyed to his wife, with the understanding that she shall convey the same to him

when demanded, she has no such beneficial interest in the property that will, in the event of her death while holding the title as against the husband, descend to her heirs. It is the payment of the purchase money by the husband that creates the trust, and the agreement to so hold and convey when demanded may be shown in evidence to rebut the presumption that the property was conveyed to the wife as an advancement. *Cotton v. Wood*, 25 Iowa, 46.

Again, if the purchaser takes the deed in the name of his wife or child, for the purpose of defrauding or delaying his creditors, and not for the purpose of making a settlement, or advancement, a trust will result to the purchaser, and the land be liable to his debts. *Guthrie v. Gardner*, 19 Wend. 414; *Belford v. Crane*, 16 N. J. Eq. 265.

When, however, a party holding real estate in his own right, in order to secure it against the claims of his creditors, makes a conveyance of it to another, without any valuable consideration, who accepts the conveyance upon a secret trust for such party's use, it is void as to existing creditors, and the land is liable for their debts. Nor can a party largely indebted give or convey away his property in disregard of the claims of his creditors, and escape the suspicion that the transaction originated in fraud. The fact may be that no fraud was intended, but if they operated to the prejudice of his creditors, and delay and hinder them, such conveyance will not be upheld, or allowed to defeat the payment of their claims. The law enforces a careful regard for the rights of creditors against conveyances without consideration, made by a party largely indebted; and unless he makes provision for the payment of his debts, or retains other property of sufficient value for that purpose, they are of no value as to them, and may be set aside, and appropriated to the payment of their claims. These principles are elementary, and the justice of them so obvious that no citations are necessary to sustain them.

Turning now to the evidence it only remains to apply these principles to it, and declare the result. For convenience, it may be best, first, to briefly trace the line of conveyance to the property in dispute. The plaintiff was the owner of a tract of land upon Suavie Island, the greater part of which, he and his wife conveyed to one Nelson Hoyt; that shortly after, by direction of the plaintiff, Hoyt conveyed the same to the wife of the plaintiff; and that in the year ensuing the plaintiff and his wife exchanged this land for the land in dispute. Taking these transactions separately, the testimony shows that in the month of January, 1868, the plaintiff, being in debt, and fearing that his creditors would subject his property to its payment, conveyed to one Nelson Hoyt 120 or 160 acres of land that he owned on Suavie Island, and that the said Hoyt accepted the conveyance upon a secret trust for the plaintiff's use. This trust, the testimony of the plaintiff shows, was to hold it for him until he could raise the money to pay his debts. Shortly thereafter, he directed Hoyt to convey this land to his wife, Eliz-

abeth Taylor, not, however, as the plaintiff claims, until he had fully paid his creditors. But the only proof of such payment is the declaration of the plaintiff. Hoyt says that when he conveyed, at the plaintiff's request, the property to his wife, "the plaintiff said he had paid up his debts." No receipts or vouchers or other evidence of payment were offered to establish this important fact, nor was any creditor called to show that he had received payment for his debt. But, on the other hand, there was the testimony of one of the creditors, produced by the defense, tending to show that his debt was not paid at the time Hoyt conveyed this property to Elizabeth Taylor. If that were true, the original transaction was not purged of its fraud, and Elizabeth Taylor took the property subject to the debts of the plaintiff's creditors. It may be true that the motive that induced the transfer of the property to Hoyt was not fraudulently intended, but it is not questioned that it did not operate to the prejudice of the creditors of the plaintiff, only that, when the same property was conveyed by Hoyt to his wife, the debts of his creditors had been paid. The law is plain that a person indebted cannot convey his property to another without consideration, unless some provision is made for the payment of his creditors, without the transaction being regarded as fraudulent.

As between the plaintiff and his creditors, the conveyance from him to Hoyt was void; and, as between plaintiff and Hoyt, equity would have refused its aid to the plaintiff to reclaim his property from him. And the argument of counsel concedes that, if the debts were not paid when Hoyt, at his request, conveyed the property to his wife, the original transaction was not purged of its fraud, and the land went into her hands with that fraud still clinging to it, and liable for her husband's debts. Whether a party largely indebted can put his property in the hands of another, to put it out of the reach of his creditors, and to hold until he can pay such debts, and then, if he is fortunate enough to succeed in paying them, that the transaction is purged of its fraud, we do not, nor is it necessary for us to, decide. But, for the purposes of this case, we may assume the correctness of the argument that the debts were paid when Hoyt conveyed to Mrs. Taylor, and the original transaction is purged of its fraud, so that, when she took the deed for it, the property stood free from all fraudulent impediments. What then? As the case now stands, Hoyt was merely an intervening trustee for the plaintiff to convey his property to his wife. In effect, the transaction was the same as if the deed had been made directly from the plaintiff to his wife. Here, no consideration was paid to Hoyt, who conveyed to the wife. The plaintiff conveyed by deed to Hoyt, and Hoyt conveyed by deed to plaintiff's wife; no money or other valuable consideration passed. The plaintiff was not a purchaser, nor Hoyt a seller. It was the plaintiff's conveyance through Hoyt to his wife. There is no evidence, nor is it alleged or claimed, that there was any understanding that Mrs. Taylor was to hold this property

subject to the control of her husband. The testimony of Hoyt is explicit that nothing was said at the time of that conveyance, except that the plaintiff requested him to deed the property to his wife. It is difficult to understand how the equitable principle that when land is conveyed to one person and another pays the consideration a resulting trust will be presumed in favor of the one paying the consideration upon such facts. The trust is based upon the fact of the payment of the purchase money by the husband for the property, and, as we have already shown, no consideration was paid to Hoyt, who conveyed to the wife, nor was the plaintiff a purchaser, nor Hoyt a seller. The plaintiff simply conveyed his property through Hoyt to his wife. It was his conveyance through Hoyt. The equitable principle that a resulting trust will be presumed in favor of the one paying the consideration is not applicable to such facts. This is not a transaction of that kind. Nor can it apply for another reason, namely that the presumption of a resulting trust in favor of him who supplies the consideration only applies between strangers, and has no application where a family relation exists, and there is no moral or legal obligation for the purchaser to pay the consideration. When the purchaser takes the conveyance in the name of his wife, for whom he is under a legal obligation to provide, the rule is reversed in its application, and, between such parties, the presumption is that the payment by the husband was intended as an advancement or gift.

A man cannot give away his property to-day and take it back to-morrow, and, if he makes his wife the owner, the same result follows, and he must abide by her ownership. As we have shown, the authorities to this point speak without a dissentient voice. It results then that the conveyance of the Suavie Island property to the wife made her the owner of it, and the plaintiff must abide by that ownership. Yet the plaintiff claims that when he and his wife joined in a deed of this property, containing 120 acres, and 40 acres belonging to him, to one Clark, in exchange for the East Portland property, (the property in dispute,) which Clark deeded to his wife, he purchased and paid for the property in dispute, and that, at the time of such conveyance to his wife, she agreed to hold it subject to his direction and control, and that, in the event she should die before him, she was to will it to him, and that, in accordance with such agreement, just before her death, she made a will of it to him, although it was void, by reason of an omission to name any of the children in the will. This proceeds upon the theory that the plaintiff paid the consideration money, or that it was his property that constituted the consideration for the property in dispute at the time of its conveyance to his wife, when the fact is that the great part of the consideration was composed of her property, and only a small part (40 acres) was composed of his property. Of what value these 40 acres were there is no evidence, but presumably they were of very little value, as

they were not regarded of sufficient consequence to be included in the conveyance of Hoyt to protect them against the claims of his creditors, so that the *pro rata* part of the consideration to be paid for the property in dispute is not ascertainable. That there is some testimony tending to show that his wife recognized the property in dispute as belonging to him may be admitted, although there is some other evidence in contradiction of it. Hoyt says that once, when Mrs. Taylor was at his house, she remarked that if she died before the plaintiff she intended to will the property to him; that she wanted him to have it. This referred to the property in dispute, but there is nothing in this inconsistent with the ownership. So too McNulty says that in 1879, after she had had the property in dispute about 10 years, in a conversation in which she claimed the property, and her husband disputed it, she afterwards said she was only joking. It is hardly necessary to consider this in the view we take of the facts. A trust arising by operation of law must arise at the time of the transaction, and cannot be created afterwards. As Chancellor KENT said: The trust must have been "coeval with the deeds, or it cannot exist at all." *Botsford v. Burr*, 2 Johns. Ch. 405. It must result from the original transaction at the time it takes place, and cannot be mingled and confounded with any subsequent dealings. A trust must have been impressed on the Suavie Island property at the time it was conveyed by Hoyt to Mrs. Taylor, by operation of law, to affect the property in controversy. If no trust was created at that time, but she took the property as her own, that ownership remains until she legally transfers or disposes of it. We have shown that in any view the transaction must be regarded as a conveyance to the wife, conferring upon her the ownership of that property; that no trust attached to it by implication of law at the time Hoyt transferred it to her. Now, as that property—the property belonging to Mrs. Taylor—constituted the main consideration for the property in dispute, and the deed was taken in her name, no trust could result, and the property became her own. The whole foundation of a resulting trust is the payment of the purchase money, which must be clearly and satisfactorily established. As this was not paid by the plaintiff, but by his wife, no trust could result to him, and the bill should have been dismissed. This view renders it unnecessary to consider some other aspects of the case, or to express any opinion concerning the same. The bill is dismissed, and it is so ordered.

(20 Or. 69)

#### FARQUAR V. FARQUAR.

(*Supreme Court of Oregon.* Nov. 17, 1890.)

#### RES ADJUDICATA—EFFEKT.

A former decree between the same parties for the same cause is a bar to a re-examination of the same facts in this case; but, when new facts have occurred since the former decree, entitling the plaintiff to relief, she may have a decree founded on those facts.

(*Syllabus by the Court.*)



Appeal from Douglas county; R. S. BEAN, Judge.

This is a suit for divorce. The charges are, briefly, cruelty and personal indignities rendering life burdensome. These are denied by the answer, and, by way of a further defense, the answer pleads the rendition of a decree by the circuit court of Douglas county, Or., between the same parties in which the same facts were relied upon as in this suit. The reply denied the new matter. The plaintiff had a decree in her favor, from which this appeal is taken.

W. R. Willis and C. A. Schldrede, for appellants. J. C. Fullerton and Geo. W. Colvig, for respondent.

PER CURIAM. It is manifest, from an examination of this record, that very much of the plaintiff's case is covered by the former decree between the same parties, and therefore cannot be considered again in this case. But there is enough which has occurred since that time to entitle her to a decree. The alienation between these parties seems to be permanent and irreconcilable. The feelings of both are deeply moved, one against the other. The defendant is engaged in the saloon business at Roseburg, and has been for many years, and appears to have entertained much suspicion concerning the fidelity and chastity of his wife. From his own testimony in the case, the "green-eyed monster" seems to be ever before him, and his frequent insinuations and statements concerning his wife's chastity show conclusively the state of his mind on the subject. It is unnecessary to recapitulate them, or make a permanent record of them here. So far as this record discloses, these charges are without foundation. The plaintiff appears to have been industrious, and to have manifested at all times a becoming solicitude for the welfare of her children. We do not find any error in this decree appealed from, and it is affirmed.

(20 Or. 60)

THOMAS & HOUSTON ELECTRIC CO. v. SIMON

(Supreme Court of Oregon. Nov. 17, 1890.)

COMMON CARRIERS—STREET RAILWAYS—RIGHT OF EMINENT DOMAIN.

1. Common carriers are classified as carriers of goods and carriers of passengers, because their employment is *quasi* public, and the public have an interest in the faithful performance of their duties.

2. The provisions of the statute for the condemnation of a right of way have little or no reference to corporations operated as street railways propelled by electricity or horse-power for local convenience, and the transportation of passengers, and do not authorize such to condemn private property for a right of way.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

Dolph, Bellinger, Mallory & Simon, for appellant. Stott, Boise & Stott, for respondent.

LORD, J. This is an action to condemn a right of way for a street and suburban railway operated for the carrying of passengers. A demurrer was filed to the com-

plaint, which was sustained by the court below, and the plaintiff refusing to proceed, judgment was rendered therein from which this appeal is taken. The contention of the plaintiff is that our statute authorizing the condemnation of land for a right of way contemplates the exercise of such power as much by street and suburban railways propelled by horse-power or electricity as railroads where cars are propelled by steam. The argument is that section 3239, Hill's Code, which provides that a corporation organized for the construction of "any railway" may appropriate land for a right of way, by the use of the phrase "any railway," *ex vi termini*, includes street and suburban railway corporations, organized to transport passengers only, and propelled by horse-power or electricity, as well as railroads authorized to transport passengers and freight, and propelled by steam; that the terms of the statute, viewed as a whole, indicates and imports that it was intended to authorize railway corporations to condemn lands for the use of their road, whether they were organized to carry passengers or freight, or both, or whether they were propelled by steam, or other power. To strengthen the construction that it is not necessary that the railway corporation, however propelled, should be formed to carry passengers and freight to entitle it to exercise the power of eminent domain, and condemn lands for its use, the language of section 3236 is relied upon as showing that this distinction is not observed with reference to navigation corporations authorized to construct portage railways, wherein it reads: "For the purpose of transporting freight or passengers across any portage on the line of such navigation in like manner and with like effect as if such corporation had been formed for such purpose." To this it is answered that every railway corporation for the construction of a railroad under the statute for the condemnation of lands is a common carrier, and that such a statute, being in derogation of common right, is not to be extended by implication. Section 3254 of the statute, authorizing the condemnation of land for a right of way, provides: "Every corporation formed under this chapter for the construction of a railway as to such road shall be deemed common carriers, and shall be entitled to collect and receive a just compensation for transportation of persons or property over such road." The argument is that as a common carrier of goods for hire, and while a common carrier, it may carry passengers and combine the two employments of carrying goods and passengers, as is almost universally done by railroads, yet, as a corporation for the construction of a railway, it cannot be deemed a common carrier unless it is formed to carry goods and passengers; that the legislature in delegating the right of eminent domain intended only that such railroads should be entitled to exercise it as were common carriers of freight and passengers. Hence a corporation could not exercise the right of eminent domain in the construction of a railway organized to transport passengers only, and

not freight. Much of this argument is based on the technical definition of a common carrier as one who undertakes for hire to transport the goods of such as choose to employ him from place to place, so that before a corporation can be deemed a common carrier it must of necessity include in its business the transportation of goods or freight from place to place. There are usually in a railway act some sections which have the effect of putting the railway company on the footing of common carriers, (2 Rob. Pr. 524;) but, whether made so by general statute, or by their charters, railroad companies are held to be common carriers, (2 Amer. & Eng. Enc. Law, 781.) And it is said when they are made so by the express provision of a statute, such provision will be merely declaratory of the law as it already existed. Hutch. Carr. § 67. A common carrier is such because his duties partake of a public character. "To bring a person," says Judge Story, "within the description of a common carrier, he must exercise it as a public employment. He must undertake to carry goods for persons generally, and must hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation *pro hac vice*." Story, Bailm. § 495. To constitute one, then, a common carrier it is necessary that he should hold himself out as such. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a public employment, and is a public or common carrier of passengers. "A common carrier of passengers," says Judge Thompson, "is one who undertakes, for hire, to carry all persons indifferently who may apply for passage. Railroad companies, the owners of ships, ferries, omnibuses, street-cars, and stage-coaches are usually common carriers of passengers." Thomp. Carr. 26, note 1. It is true that carriers of passengers are not common carriers as to the persons of those whom they carry. But common carriers are classified as carriers of goods and as carriers of passengers. The reason is their employment is *quasi* public, and the public have an interest in the faithful discharge of their duties. "Every common carrier," said MCLKEY, J., "has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligation to carry passengers, and *vice versa*. So, if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will, nevertheless, be a common carrier." Wiggins Ferry Co. v. East St. Louis W. Ry. Co., 107 Ill. 451. A common carrier, then, may be either a carrier of passengers or freight, or both. The argument, then, that the plaintiff is not the kind of corporation authorized to exercise the power of eminent domain because it is only a carrier of passengers, and not of freight, would not deprive the plaintiff of its character as a common carrier, and, as such, to be deemed within the statute. This would result in giving to the statute

a construction which would include both classes of carriers, but not necessarily that such carriers should combine both employments. It might be engaged in carrying passengers or freight, or both, and still be deemed a common carrier.

But it is apprehended that the safer way to determine whether the word "railway" or "common carrier" as used in the statute is to be confined to railroads operated by steam or railroads operated by other power, such as street railways, is to look at the context and intent, and in that way ascertain whether the plaintiff is such corporation organized for the construction of a railway as is contemplated by the statute to be invested with the power to condemn lands for the use of its road. While it is true that the word "railway" may include railroads operated by steam as well as those whose cars are propelled by some other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street railways for local convenience. The plaintiff is an electric company and as such we know belongs to the class of corporations operated as street railways for the benefit of the local public. It was so understood at the argument, and the action is described as one to condemn "a right of way for a street and suburban railway for the carrying of passengers." I take it, then, that we are to consider the plaintiff as belonging to this class in determining whether it is such a corporation for the construction of a railway as is intended by the statute to be invested with the power to exercise the right to eminent domain. The statute provides (section 3239) that "a corporation organized for the construction of any railway," etc., (Id. § 3240,) "may appropriate so much of said land as may be necessary for the line of such road, not exceeding sixty feet in width, besides a sufficient quantity for workshops," etc., "and in case of a railway a sufficient quantity of such land in addition to that before specified in this section for necessary side tracks, depots, water-stations, cuttings, embankments," etc., "and such railway company shall have the right to cut down any standing timber in danger of falling upon its road," etc., "may cross, intersect, join, and unite with any other railway," etc., "and may make the necessary turnouts, sidings, and switches, and other conveniences," etc., (Id. § 3246,) "and all streams and other waters on the line of such road shall be safely and securely bridged except," etc., and (Id. § 3254,) "every corporation formed under this act for the construction of a railroad as to such road shall be deemed a common carrier," etc. Few, if any, of these provisions have any reference to the class of corporations to which the plaintiff belongs, and was scarcely intended to apply to them. They contemplate and authorize a railway to be constructed where none was built before, through the country, requiring bridges, cuttings, fillings, and embankments, and sometimes tunnels, through hills and mountains, and, also, the building of depots and stations for the accommodation of freight and passengers, of an-

gine-houses, repair-shops, switches, and turnouts to enable the corporation to properly conduct its business. A railroad corporation, which must avail itself of the benefit of such a law to enable it to do these manifold things to build its railway and put it in operation, may well be considered, from the public nature of its employment, and the interest the public has in the proper conduct of its business, as a "common carrier," without a legislative declaration that it shall be deemed such. But it is plain that the provisions of such a law can have little or no reference to corporations organized and operated as street railways, propelled by electricity or horse-power, and intended to accommodate local convenience for the transportation of passengers. They contemplate a track laid upon an established street or highway, and are usually restricted to the bounds of the city, its vicinity, or adjacent towns, and generally derive their authority to lay their tracks upon such streets or highways from the municipality or county, and their construction is regarded by many adjudications as a legitimate use of such streets and highways, and an exercise of the right of public travel. This distinction as to the uses and purposes of each of such class of corporations is thus stated in *Railway Co. v. City Ry. Co.*, 2 Dav. 178, by ROBERTSON, J.: "A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight; a street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad." It is not enough that a railway is for a public use to authorize the taking of private property, but the taking must be for a public use within the scope of its undertaking, and the object which it is to subserve. To authorize railroads operated for such purposes to take the private property of the citizen, and appropriate it to its use without his consent, the statutory authority for it must be plainly given; otherwise, the right does not exist. In view of these considerations, we do not think the provisions of the statute for the condemnation of a right of way apply to the plaintiff, so as to authorize it to take private property without the consent of the owner for its own use as a right of way. It follows that the judgment must be affirmed.

## ON REHEARING.

(Dec. 1, 1890.)

LORD, J. Further consideration of our statute for the condemnation of a right of way by a railroad strengthens the conviction that it does not extend to or contemplate the business class of railways to which the plaintiff belongs. Few, if any, of its provisions have any reference or application to it as such. Nor has any authority been cited, or argument suggested, other than that the word "railroad" may include railways operated by steam or other power, to give it a different construction. In preference to construing the statute by this method, we thought the safer

way to ascertain what the legislature intended was, as SHAW, C. J., said in *Cleveland v. Norton*, 6 Cush. 380, "to take the entire provisions of the act and ascertain, if possible, what the legislature intended." From that point of view, we thought it contemplated a railroad in the larger sense, and such as is considered a highway for travel and traffic, with its necessary adjuncts, and that it was to such railroads that the provisions had reference, and come within the design of the legislative grant, conferring on such the right of eminent domain for the various things specified as indispensable to effect the purposes of its organization, and essential to carry on its business. Nor do we find that the authorities differ with us in this regard. Referring to some of the things which must be regarded as among the acknowledged necessities for operating such a railroad, LE ALLEN, J., said in *Re Railroad Co. v. Kip*, 46 N. Y. 552: "But passenger depots, convenient and proper places for storing and keeping cars and locomotives when not in use, proper, secure, and convenient places having reference to the public interests to be subserved for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating the railroad, to the proper prosecution of the business in the interests of the public. This may be regarded as indispensable to the accomplishment of the general purposes of the corporation, and the design of the legislative grant." In *State v. Railroad Com'rs*, 56 Conn. 312, 313, 15 Atl. Rep. 756, CARPENTER, J., said: "Depots for passengers and freight are essential parts of a railroad," and that "a railroad is incomplete without them." In speaking of the constitutional power of the legislature to authorize the taking of lands for the construction and operation of railroads, under the statutes of that state, LIBBEX, J., said: "It rests upon the proposition, now well established, that railroads are public highways, the great thoroughfares for public travel and commerce." *Spofford v. Railroad Co.*, 66 Me. 39. In a note in 29 Amer. & Eng. R. Cas. p. 52, referring to Mr. Justice HARTAN's summing up of the legal status of railroads as public highways for travel and traffic, etc., the writer says: "Whence it may be concluded, and these conclusions are sustained by authority, that (1) railways are *quasi* public corporations, created for the purpose of conducting the business of common carriers of passengers and property upon their lines of railway, and for no other purpose; (2) as such they are engaged in a public service." From the point of view that railroads are highways for public travel and commerce, it is indispensable to the accomplishment of the purposes of their organization that they should have depots for passengers and freight and all the adjuncts necessary and essential to carry on their business. By looking at the entire provisions of our statute, we find all these matters provided for, and within the de-

sign of the legislative grant, whence we conclude that our statute contemplated a railway in this larger or comprehensive sense, and intended to confer the power of eminent domain on such as are highways for the carriage of passengers and freight, and not on the class of railways engaged in the business to which the plaintiff belongs. Our conclusion then is that the motion must be denied.

(19 Or. 560)

**KING et al. v. BRIGHAM et al.**

(Supreme Court of Oregon. Nov. 8, 1890.)

**BOUNDARIES—MONUMENTS—EVIDENCE OF LOCATION.**

1. The actual location of lines and monuments on the ground will control over courses and distances, and, if such monuments can be found, the courses and distances must give way. Approving *Lewis v. Lewis*, 4 Or. 178.

2. Where it is claimed lines and monuments do not agree with courses and distances, the evidence of their actual location must be so clear and satisfactory as to establish that fact to the entire satisfaction of the court or jury, and to place beyond question the actual location of the lines or monuments.

(Syllabus by the Court.)

Appeal from circuit court Multnomah county; E. D. SHATTUCK, Judge.

This is a suit brought, under the statute of 1887, (Hill's Code, §§ 506-510,) by the respondents against J. R. Brigham, A. D. Tufts, Henry Fleickenstein, S. Julien Mayer, David Cole, D. Cavanaugh, Peter Esser, Mary Soderstrand, and the city of Portland, to settle a disputed boundary between the King and the Lownsdale donation land claim in Multnomah county, Or. The complaint is in the usual form, averring, "that the said boundary lines between the lands aforesaid is as follows, to-wit: Commencing at a point in the east boundary line of the Amos N. King donation land claim, which point is the north-west corner of the W. W. Chapman donation land claim, and also the south-west corner of the D. H. Lownsdale donation land claim, (this corner is marked by a stone monument;) thence northerly, along the east boundary line of the Amos N. King donation land claim, to a point which is ninety-three (93) feet easterly, measured along the south boundary line of B street, in said city, from a point where the south boundary line of said B street is intersected by the west boundary line of Fourteenth street, in said city, as extended by the common council of said city of Portland, county of Multnomah, and state of Oregon, said line being the easterly boundary line of the said plaintiffs' land, and the westerly boundary line of the defendants' land." The separate answers of each of the defendants, except the city of Portland, are substantially the same, and "deny that the boundary line commences on the east boundary line of the Amos N. King D. L. C. other than as hereinafter set forth, or that said point is the north-west corner of the W. W. Chapman and D. H. Lownsdale donation land claims, or that said line runs thence northerly, along the east boundary line of the Amos N. King donation claim, to a point which is 93 feet easterly, measured along the south

boundary line of B street, from a point where said B street is intersected by the west boundary line of Fourteenth street, as alleged by plaintiff, or that said line is the easterly boundary line of plaintiffs' lands, or the westerly boundary line of the lands belonging to these defendants. These defendants, further answering, allege that the true and correct east boundary line of the A. N. King D. L. C., as established by the proper officers of the United States to said King, commences at a point on the baseline which is three chains east of the south-west corner of the south-west quarter of section 33, T. 1 N., of R. 1 E. of Willamette meridian, and running thence north, 20 degrees 15 min. east, 20.60 chains to a point near and intersecting the south line of B street, as now laid out and existing in said city of Portland, county of Multnomah, and state of Oregon; and that the south-west corner of the D. L. C. of said D. H. Lownsdale and Nancy Lownsdale, as established by the officers of the government of the United States, and patented to them, commences at a point on said line last described, north, 20 deg. 15 min. east, and 6.15 chains distant from the said commencement point of said King's D. L. C.; thence running north, 20 degrees 15 min. east, 14.45 chains, intersecting and near the south boundary of said B street, and distant in a westerly direction from the west line of Fourteenth street, as originally laid out, 77 feet, more or less, to the said east line of King's D. L. C., and the west boundary line of said Lownsdale D. L. C., as herein set forth. And for a further answer these defendants plead adverse possession for more than ten years." The reply denies the new matter set up in the answer, including the adverse possession of the defendants. The answer of the city of Portland, after denying and alleging substantially the same facts concerning the true boundary as in the answer of the other defendants, alleges that there is a public street through the lands of defendants Brigham and Tufts. This cause was referred to a referee to report the testimony and conclusions of fact and law, and, on the coming in of his report, the court below modified the same and found "that the eastern boundary line of the donation land claim of Amos N. King, and the western boundary line of the donation land claim of Daniel H. and Nancy Lownsdale, as originally run, is a line commencing at the stone monument at the N. W. corner of the donation land claim of W. W. Chapman, which is also the S. W. corner of the donation land claim of Daniel H. and Nancy Lownsdale; and thence running northerly on a line north, — degrees east, to a point in the south line of the John H. Couch donation land claim, which is seventy (70) feet from the west line of Fourteenth street, in the city of Portland, Oregon, sometimes called 'Old Fourteenth Street.'" The court also found that, "by reason of adverse possession of the plaintiff Amos N. King, as found by the referee, he (said Amos N. King) is the owner in fee-simple of all the lands described in the complaint which lie north of the south line of Morrison street, if ex-

tended westerly, and west of a line running north, 20 deg. 15 min. east, from the stone monument at the N. W. corner of the W. W. Chapman claim, to the south line of the John H. Couch donation land claim, where there is an iron post set by C. W. Burrage." A decree was entered against the city of Portland adjudging that Morrison street does not extend further west than the west line of Fourteenth street. A decree was then entered establishing the line between plaintiffs and defendants Cole, Cavanaugh, Soderstrand, and Esser as one running from the stone monument at the south-west corner of the Lownsdale claim to a point in the south line of the Couch claim, which is 70 feet west of the west line of Old Fourteenth street, and between plaintiffs and defendants Brigham and Tufts, as a line running from the stone monument at the north-west corner of the Chapman claim north, 30 deg. 15 min. east, to the iron post set by C. W. Burrage in the south line of the Couch claim. From this decree the defendants Brigham and Tufts and Cole appeal. The facts sufficiently appear in the opinion.

*R. & E. B. Williams and Mr. Carey, for appellants. Killen, Starr & Thomas and Moreland & Masters, for respondents.*

BEAN, J., (*after stating the facts as above.*) The matter sought to be established in this suit is the true location of the boundary line between the donation land claims of A. N. King and Daniel H. Lownsdale in Multnomah county, Or. In March, 1852, King, Lownsdale, and W. W. Chapman filed upon adjoining donation claims, on what was then unsurveyed public lands. The initial point of the King and Chapman claims, as stated in the notifications of the respective parties, is the same, being 3 chains east of the S. E. corner of the S. W.  $\frac{1}{4}$  of section 33, township 1 N., range 1 E. According to the calls of the notification, certificates, field-notes, and patent of the King claim this boundary line runs from the initial point north 20 deg. 15 min. east, 20.60 chains; this line being the one in dispute in this case. The Chapman claim, from the initial point, according to the notification, runs north, 20 deg. 15 min. east, 6.15 chains. But the initial point, as mentioned in the field-notes of the survey and in the certificate of the Chapman claim, is .04 chains further east than as stated in the notification, and the course as given in the field-notes and certificate is north, 20 deg. 45 min. east, in place of north, 20 deg. 15 min. east, as given in the notification. The Lownsdale claim is what is known as a legal subdivision claim. The original plat map of the survey of the claims of King, Chapman, and Lownsdale, as approved by the surveyor general, shows the eastern boundary line of the King claim, and western boundary line of the Chapman and Lownsdale claims, to be a common line, and the south-east corner of the King claim to be the south-west corner of the Chapman claim, and the north-west corner of the Chapman claim to be the south-west corner of the Lownsdale claim. But the

field-notes of the survey of these claims, as made by the United States deputy surveyor, does not mention or refer to any point or monument as common to the respective claims, or as common to any two of them. There are stone monuments at the south-east corner of the King claim, and the north-west corner of the Chapman claim, which are conceded, in this case, to have been located at the place designated by the government surveyor as the original corner of these claims. There is no dispute in this case as to the correct location of the original initial point of the King claim on the base line. It is also conceded by plaintiffs that a line projected from the initial point of the King claim, and running thence north, 20 deg. 15 min. east, 20.60 chains, the course and distance according to the calls in the notification, certificate, field-notes, and patent of the claim, will intersect the southern boundary line of the Couch claim about 75 feet westerly from the western boundary line of Fourteenth street, sometimes called "Old Fourteenth Street." This is the line defendants claim to be the true boundary line between the King and Lownsdale claims, and, therefore, it will be observed that plaintiffs admit, at the outset of this case, that the line defendants are contending for is the correct line, as called for by the course and distance given in the notification, certificate, field-notes, and patent of the King claim; but they seek to avoid the force of this fact by claiming: (1) That, since the King, Chapman, and Lownsdale claims are, or were intended to be, adjoining claims, to have a common division line, the true boundary line between them should be extended from the south-east corner of the King claim through the north-west corner of the Chapman claim, to the intersection with the Couch claim at the point on B street where there is an iron rod, set by C. W. Burrage; (2) that the location of the original north-east corner of the King claim, by the deputy United States surveyor, has been established by the evidence, and should control over courses and distances, this corner being, as plaintiffs claim, at the point in B street where the iron rod is located; and (3) that a line extended east from the located corner of the King claim, and, in this case, known as the corner under Judge Stearn's house, according to the course and distance given in the field-notes of the King claim, will establish the south-east corner of the claim at the point in B street where the iron rod, before referred to, is located. These claims we will notice in the order claimed.

1. The south-east corner of the King claim is the last corner established by the government surveyor in running the exterior lines of the claim. The field-notes show the claim was surveyed by commencing at the initial point, in the base line, and running thence north, 20 deg. 15 min. east, 20.60 chains, and so on around the claim to the south-east corner, and thence a certain course and distance to the place of beginning. There is no reason shown in this case why this corner is any more nearly correct than any other known

corner of the claim, and certainly no sufficient reason was suggested by counsel why it should prevail over the known initial point of the survey, and we have been unable to find any. The claim that the north-west corner of the Chapman donation should govern in the location of the line in dispute may be disposed of by saying that such corner is nowhere mentioned or referred to in the courses or distances given in the field-notes, notifications, certificate, or patent of the King claim, nor mentioned as one of the calls in the description of such claim; and, besides, the field-notes of the Chapman claim show that the initial point of the claim is four links east of the initial point of the King claim, and the course is 30 min. east of the corner of the King survey, so that, according to the field-notes of the two claims, the north-west corner of the Chapman donation must necessarily be east of the line of the King claim in dispute in this case, and any line extended from or through this corner cannot be the true east boundary line of the King claim.

The law is well settled in this state that the actual location of the lines and monuments on the ground will control over courses and distances, and, if such monuments can be ascertained, the courses and distances must give way. *Raymond v. Coffey*, 5 Or. 132; *Goodman v. Myrick*, Id. 65; *Lewis v. Lewis*, 4 Or. 178. The initial point of the King claim being undisputed, if the monument at the north-east corner of the claim, as actually located, can be ascertained, the boundary line in dispute will be a straight line from the initial point to such corner. Mr. King, one of the plaintiffs, is the only witness who undertakes to testify, of his own knowledge, concerning the actual location of this corner. He says that he saw Leland, the deputy United States surveyor, who surveyed his claim, set a post at the north-east corner thereof in 1859 or 1860, but that he cannot tell what became of the post, or how long it remained, but thinks at least two years; that afterwards he fenced in a small field, the east line of which was on the line as surveyed by Leland, but he would not be positive whether he built the fence while the stake was there, or not, but the witness tree was there. Too long ago; cannot tell when he fenced it, but the fence stood over 20 years, and until New Fourteenth street bridge was built. The fence was 30 or 40 feet from the post, and a little east of it; and the north end of the fence was 30 or 40 feet from the east end of the bridge. Thinks the fence did not run quite up to the post. There was a pretty steep bank there,—a kind of cove. It might be 10 or 15 feet from the post to the end of the fence. The fence ran southerly something over two blocks, a block and a half. "I would not be positive in this." Mr. E. J. Jeffreys testifies that King pointed out the stake to him some 21 or 22 years ago. "My memory is that it was a wooden stake; nothing peculiar about it that I can remember. B street has since been filled. This street has been filled over sixteen years I think. Saw old fence supposed to be on the line. This fence was built in

1868 or 1869, and remained until New 14th street bridge was built, in 1883. The stake pointed out to me by King was nearly thirty feet east of New 14th street bridge. The fence ran nearly parallel with the fence then and now standing west of the property claimed by Cavanaugh, Soderstrand, and Brigham and Tufts. Don't understand the post I mentioned as a post to designate a corner of the King claim, with reference to the compromise line with Couch. All I know about it being the N. E. corner in B street is what Mr. King told me." J. E. Oliver, another witness for plaintiffs, says that, "prior to the building of the New 14th street bridge, there was an old fence that ran along to the best of my recollection. It started off the hill at this side of the gulch, about the end of the bridge in the south side, run north, and would intersect B street about thirty feet east of Fourteenth Street bridge. This is as near as I can come to it, to the best of my recollection; everything has changed so. In some respects things have changed so in that neighborhood during the last fifteen years that my memory is very indistinct in regard to location, in others, it is not. Don't know where the King east line is, other than what Mr. King told me." This is substantially all the testimony of plaintiffs as to the actual location of the north-east corner of the King claim. On the part of defendants, W. S. Chapman testifies that while he was city surveyor from July, 1872, to July, 1874, he ran the east line of the King claim, commencing at the initial point, and running on the course and for the distance called for in the original field-notes of the survey, and that the line so run would bring the corner about 15 or 20 feet north of the south line of B street, and between 70 and 80 feet west of the west line of Old Fourteenth street, and he thinks about 15 or 20 feet west of the east line of New Fourteenth street. Being asked if he discovered any post or witness tree in what is now New Fourteenth street, in the north line of the King claim, and south line of the Couch claim, he says: "I started from King's initial point, and ran the course and distance, which brought me to what ought to be his north-east corner. I then looked about for the witness tree called for in the notes. This I found, it having been blown over, falling northward, about one-half of the large roots on the main side of the tree being in the ground, and still connected with the trunk of the tree, about thirty feet of which was still intact, the balance of the tree having been cut up and hauled away. On this tree, on the under side thereof, and a quarter of the way from the under side, from the middle of the under side to the middle of the west side of the tree, I discovered the letters 'C 51.' I should now think that that tree was fully 36 inches in diameter at the time I speak of. I made allowance by careful measurements, so as to get the position of the bearing tree when it was standing erect. Then I laid off the course and measured the distance stated in the field-notes, and at such distance set a post for the true north-east corner of the A. N. King D. L. claim. I then ran the west line

of Old 14th street, and took the distance from the west line of Old 14th street to this corner as set by me, which distance I found to be 70 feet." This corner claimed to have been found by Chapman corresponds with the description of this line as found in the field-notes of the King survey. It appears from the testimony that, soon after the Chapman survey, the old fence referred to by King, Jeffreys, and Oliver was torn down, and has never been replaced, and that parties owning property south of where the old fence stood moved their fences onto the line as surveyed by Chapman, and have maintained them there ever since, and, as far as the evidence in this case shows, without objection from King; and, further, the testimony of Tufts and Mayer, who were desirous of purchasing property along what is now the disputed line, tends to show that Mr. King did not claim that his line extended east of the line as run by Chapman; and, while the rule of law is, as heretofore stated, that actual location of the lines and monuments on the ground will control over courses and distances, we think that, where it is claimed that such lines and monuments do not agree with the courses and distances, the evidence of their actual location should be so clear and satisfactory as to establish the fact to the entire satisfaction of the court, and to place beyond question the actual location of the line or monument. In this case, after a careful examination of the evidence, we are not satisfied that the actual location of the corner, as claimed by King, has been proven by that clear and satisfactory testimony the imperative requirements of the law demand. The stake only stood for about two years; no effort was made to preserve it; and the fence by which it is sought to establish the location of the corner was not built until 1863 or 1869, some six or seven years after it is admitted the stake disappeared. Mr. King himself could not have been very positive about the matter, else he would not have permitted the fence to be torn down after the Chapman survey, and especially he would not have permitted parties owning property along this line to have inclosed and occupied up to the Chapman line from 1874 to the commencement of this suit, without objection on his part, so that, if there was no other evidence as to the location of the corner, but that offered by plaintiffs, we would be compelled to hold it unsatisfactory; but, when taken in connection with Chapman's testimony, we are irresistibly led to the conclusion that Mr. King must be mistaken as to the location of the stake set by Leland. It is true Mr. King attempts to account for the witness tree found by Chapman by saying that it must have been a witness tree for the stake set by the surveyor who surveyed his claim in 1850, and that afterwards Chapman, Lonsdale, and himself, by mutual agreement, changed the line in question by making the corner further east. If such agreement was ever made, it must have been before King filed on his claim, for there is no evidence in this case of any changes in his original filing, and the field-notes of the survey

made by Leland, some seven or eight years afterwards, corresponds with the courses and distances given in the original notification. The court below found the true north-east corner of King's claim to be according to the Chapman line, but held the true east boundary line of the claim to be a line from the north-west corner of the Chapman claim to this corner. By commencing at the north-west corner of the Chapman claim to extend the line, for the reasons already stated, we think the learned judge was in error.

3. What has already been said about the uncertainty of the south-east corner of the King claim as a proper monument from which to extend the east line of the claim applies to the corner at the south-west corner of the Couch claim, with this additional suggestion: That the evidence shows that this corner was established by a surveyor who surveyed the Couch claim, and as a corner of that claim, and not of the King claim. The court below, while finding the north-east corner of the King claim to be as claimed by defendants, nevertheless held that the plaintiffs had acquired title by adverse possession up to the line as claimed by them, as against appellants Brigham and Tufts. In this we think there was error. The evidence shows that Mr. King held this possession, if at all, under mistake or ignorance as to his true line, and with no intention to claim beyond the true line when discovered. Such a possession is not adverse, and cannot ripen into a title as against the real owner. *Caufield v. Clark*, 17 Or. 473, 21 Pac. Rep. 443. It follows therefore as to these appellants, the decree below must be reversed, and between them and plaintiffs the boundary line established was a line run as follows: Commencing at the point on the base line 3 chains east of the S. E. corner of the S. W.  $\frac{1}{4}$  of section 33, township 1 N., range 1 E., in Multnomah county, Or., running thence north, 20 deg. 15 min., east, 20.60 chains to a point near and intersecting the south line of B street, in the city of Portland; and that this suit be remanded to the court below, with directions to appoint commissioners, as by law provided, to locate and mark out the line as by this court determined.

(87 Cal. 34)

SAUER v. MEYER. (No. 13,699.)

(Supreme Court of California. Dec. 12, 1890.)

FORFEITURE OF LEASE—RE-ENTRY—RIGHTS OF SUBTENANT.

A lease provided that the rent should be payable on the 1st of each month in advance. It also gave the lessee the right to sublet, and provided "that, if any rent shall be due and unpaid for \* \* \* ten days after the same should have been paid under the conditions hereof, \* \* \* then it shall be lawful for the said party of the first part to re-enter," etc. The rent for three months being due and unpaid, the lessor agreed that it should stand until the 1st of the next month. Held, in ejectment by the lessor against a sublessee of half the property, that, forfeiture having been waived for those months, the action could not be maintained until demand for the rent had been made on or after the 10th of the next month.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.



*J. M. Wilcoxon and Graves, Turner & Graves, for appellant.*

**BEICHER, C. C.** This is an action of ejectment. The court below gave judgment for the defendant, and the plaintiff appeals on the judgment roll. The facts of the case, as found by the court, are, in substance, as follows: In November, 1883, the plaintiff leased the demanded premises for the term of ten years and one month from the 1st day of December following, the rental during the last five years of the term to be "forty dollars per month, payable in gold coin on the first of each and every month in advance." The lease provided that at the expiration, or sooner determination thereof, the lessees should have the right to remove from the premises all improvements placed thereon by them, and to sublet the premises or any part thereof, and "that if any rent shall be due and unpaid for the period of ten days after the same should have been paid under the conditions hereof, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom, in the manner prescribed by law." During the year 1889, the defendant was in possession, as sublessee, of one-half of the leased premises. On the 1st day of October of that year the whole rent, \$120, for the months of August, September, and October was then due and unpaid, and on that day the plaintiff agreed orally with the defendant's lessor, who was one of the original lessees, that the same should stand unpaid until the 1st day of November following. On the 1st day of November the plaintiff demanded of the defendant the payment of all rents then due, and the defendant denied that he owed plaintiff, and refused to pay anything. On the 4th day of the last-named month this action was commenced, and on that day, before defendant knew of its commencement, he offered to pay the amount due plaintiff for rent under the lease, and asked the amount due, and told her he was ready to give her a check for the same on a local bank, in which he had money sufficient to pay the sum due. The plaintiff refused to tell defendant the amount due, but made no objection to the offer of payment by check. On the 26th day of November, and before defendant filed his answer herein, he offered, in writing, to pay to the plaintiff the sum of \$160, in gold coin, the same being the amount due for rent under the lease up to and including that month, and the plaintiff refused to accept the same, but specified no objection thereto. The case was tried in December, and on the trial thereof, and before its submission, the defendant brought into court, and delivered to the clerk of the court, for the use of the plaintiff, the sum of \$220, the said amount being more than enough to pay all the rent then due and the costs of the suit. The value of the improvements placed on the premises by the lessees is \$5,000. Upon these facts, we think the defendant was entitled to have judgment entered in his favor.

To maintain an action of ejectment, the plaintiff must show that he was entitled to the possession of the demanded premises at the time he commenced his action. *Hestres v. Brennan*, 37 Cal. 385; *Bank v. Hynes*, 50 Cal. 195. The appellant here claims that she had a right to recover, because there had been a forfeiture of the lease for non-payment of rent. Forfeitures are not favored, and our Civil Code contains this provision: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Section 1442. To give a landlord a right of re-entry for non-payment of rent, a demand of the rent, upon or after the last day which the lessee has to pay, is essential to complete the forfeiture and enable him to maintain an action. *Tayl. Landl. & Ten.* (8th Ed.) § 297; *Wood, Landl. & Ten.* (2d Ed.) § 514. It does not appear here that any demand for the payment of the rent due in August and September was made during those months, and the agreement of October 1st that the rents for August, September, and October should stand unpaid until November 1st, was a clear waiver of any forfeiture, if demand had been made. The plaintiff demanded on November 1st that the defendant pay all the rents then due, and, conceding that this demand was sufficient, and that the rents should then have been paid by defendant, notwithstanding he was only a subtenant of half the leased property, still no forfeiture then occurred, or could occur, until the expiration of 10 days thereafter, for the reason that the lease only provided that the lessor should have the right of re-entry in case "any rent shall be due and unpaid for the period of 10 days after the same should have been paid." As the action was commenced four days after the demand, it was evidently prematurely brought. Other grounds are urged for the affirmance of the judgment, but they need not be considered. We advise that the judgment be affirmed.

We concur: **FOOTE, C.; HAYNE, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 38)

**URTON v. WOOLSEY.** (No. 13,699.)

(*Supreme Court of California.* Dec. 12, 1890.)

**VENUE—ACTIONS TO FORECLOSE VENDOR'S LIENS.**

The complaint averred plaintiff's right to enforce and foreclose a vendor's lien on lands in another county. After the complaint was filed, the prayer was amended so as to expressly ask for foreclosure of the lien. *Held*, that under the provisions of Const. Cal. art. 6, § 5, that "all actions for \* \* \* the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, \* \* \* is situated," the court had no jurisdiction over the case, and no authority to enter judgment of foreclosure.

Department 2. Appeal from superior court, Fresno county; **J. B. CAMPBELL**, Judge.

*Jud C. Brusie, S. R. Hart, and Taylor &*

*Hall*, for appellant. *Graham & Monson*, for respondent.

McFARLAND, J. Judgment was given for plaintiff. Defendant appeals from the judgment; also from an order refusing a change of venue; also from an order refusing to set aside a default, and vacate the judgment because taken against him through surprise, excusable neglect, etc. The motion for change of venue was on the ground that defendant resided in a county other than the one in which the action was commenced; and perhaps the denial of the motion may be sustained on the very technical ground that the notice and demand state that "defendant is a resident of" and "resides in" the other county, instead of stating, in the language of the Code, that he so resided "at the commencement of the action." It is possible also that, on the record before us, the ruling of the court denying the motion to open the default cannot be reached, although that denial seems to have been somewhat harsh, because while the defendant resided in Amador county, and his attorneys in Sacramento, (the cause pending in Fresno,) the motion for change of venue and a demurrer to the complaint were denied and overruled on September 20th, in the absence of defendant and his attorneys. No leave to answer was given. Default was entered the next day, and final judgment was entered on the 23d. It is not necessary, however, to thoroughly examine these questions, because, in our opinion, judgment itself should be reversed for want of jurisdiction.

The action was commenced in the superior court of Fresno county. The complaint sets forth a written contract between plaintiff as vendor, and defendant as vendee, for the sale and purchase of certain lands situated in the county of Tulare, and avers facts showing plaintiff's right to enforce and foreclose a lien upon said lands for the purchase money. The prayer of the complaint, as originally filed, did not ask in terms for a foreclosure of the lien; but a short time afterwards, and while an amendment could be made as a matter of right, the plaintiff amended the prayer of the complaint so as to make it ask expressly for a foreclosure of the lien, and the judgment forecloses said lien, and decrees the sale of said lands. The action, therefore, is an action to enforce a lien upon real property; and the constitution provides that "all actions for . . . the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." The superior court of Fresno had, therefore, no jurisdiction over the case, and no authority to enter the judgment. We do not just now recall any case where this point has been directly decided by this court, although in *Gurnee v. Superior Court*, 58 Cal. 88, the law is clearly assumed to be as above stated; but we are fully satisfied, upon principle, that no court has jurisdiction to entertain an action like the one at bar unless it has been commenced in the county where the land is situated. The judgment is reversed, with

directions to the superior court to dismiss the action.

We concur: THORNTON, J.; SHARPSTEIN, J.

(3 Cal. Unrep. 314)

OHM v. CITY AND COUNTY OF SAN FRANCISCO *et al.* (No. 13,689.)<sup>1</sup>

(*Supreme Court of California*. Dec. 9, 1890.)

MEXICAN GRANTS—VALIDITY—LIMITATIONS—PLEADING.

1. A Mexican grant of 800 *varas* square, "as a place called Rincon, embraced within the limitation of Yerba Buena," is so vague and uncertain that nothing passes by force of the grant alone, nor will it be helped out by possession taken under it by the grantee, as the Mexican law, then in force, required possession to be given "by judicial authority, with the citation of all those bounded upon him."

2. Such grant is also fatally defective, where the original application, to which is attached each successive paper or certificate up to and including the final grant, fails to show on its face that the grant was made with the approval of the pueblo, of the governor, and of the departmental assembly, and that a record of such fact was made in the public archives, as required by the laws of Mexico then in force.

3. Under Code Civil Proc. Cal. § 1875, subd. 3, which permits courts to take judicial notice of the acts of the judicial department of the state, the supreme court will judicially notice the vacation of a decree confirming a Mexican grant.

4. One who alleges that he has a perfect title to land under a Mexican grant, not barred by the statute of limitations, may maintain a legal action for the possession, and there is no necessity for the interference of a court of equity to enable him to assert his rights.

5. Since the passage of St. Cal. 1863, p. 327, which gives five years "from the date of its passage" in which one claiming title to land under a Spanish or Mexican grant may commence an action for its enforcement, the want of confirmation, patent, or survey of such a grant by the United States government has not operated to interrupt the running of the statute.

6. Where a pleader, in his complaint, alleges a fact, and then sets out the written evidence on which he relies for proof of the fact, the complaint will be held good for only what the evidence proves.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

A. Everett Ball and J. M. Kinney, for appellant. Pillsbury & Blanding and Geo. Flournoy, Jr., City Atty., for respondents.

Fox, J. This is an action in equity for a decree declaring the appellant to be the owner of certain premises situate in the city and county of San Francisco, commonly called, in early times, the "Sherrebeck Claim," and adjudging that the defendants hold the legal title in trust for plaintiff; and also for rents and profits up to the time of the filing of the complaint, in the sum of \$1,500,000, and at the rate of \$250,000 per month from that date (August 1, 1885) to the date of judgment. Defendants demurred to the complaint on several grounds, and, among others, that it failed to state facts sufficient to constitute a cause of action; that plaintiff's claim was stale; also that it was barred by the provisions of sections 318, 319, 322, and 343 of the Code of Civil Procedure. The demurrer was sustained, and defend-

<sup>1</sup> Rehearing granted.

ants had judgment, from which plaintiff appeals.

In his complaint, plaintiff claims as successor in interest of Peter T. Sherrebeck, the alleged grantee of a Mexican grant of a tract of land 800 *varas* square, within the pueblo of San Francisco. He does not content himself with alleging the ultimate fact of grant and title, but sets out with great particularity all the proceedings had in applying for, and in the making and delivery of, the alleged grant. He shows that a pueblo was already established; that the land was within the pueblo; that the applicant applied to the prefect of the district for a grant; that the prefect, as the law required he should do, referred the application to the alcalde of the pueblo, who reported the land vacant, and the applicant as possessing the requisite qualifications; but that, in his opinion, only land upon which to build a house and corral, and to plant, can be granted to him, which means that only a house lot of 50 *varas* square, and a planting lot of 200 *varas* square, could be granted to him. Whereupon the prefect, according to the allegations of the complaint, made a grant to the applicant of 800 *varas* square, "at a place called 'Rincon,' embraced within the limitation of Yerba Buena," which grant is set out in the complaint, and from which the quotation just made is copied. It contained no description or boundaries whatever, other than that so quoted. It did not require that juridical possession be given, and the complaint does not show that any ever was given. It, however, alleges that under it the grantee took possession of 800 *varas* square, claimed to be the property now sought to be recovered. The complaint fails to show a valid grant. The description given in the paper grant was so vague and uncertain that nothing would pass by force of this paper alone, nor would it be helped out by possession taken under it, by the grantee. Under the law, juridical possession by the public authorities was required to be given. "No person," reads the law, "though his grant be older than others, can take possession for himself, or set limits to his landed property, unless it be done by judicial authority, with the citation of all those bounded upon him, (*colindantes*,) for whatever is done contrary to this will be null and of no validity or effect." "As the grantee could not locate his land by his own survey, it would seem a necessary conclusion that he could not do so by mere occupation, and the assertion of a claim to any particular place." *Waterman v. Smith*, 13 Cal. 411. This survey or juridical possession made or given was requisite, in order to attach the grant, if it was one having any force whatever, to any specific tract of land, and must have been made by competent authority. *Steinbach v. Moore*, 30 Cal. 508, affirmed in *More v. Steinbach*, 127 U. S. 79, 8 Sup. Ct. Rep. 1067; *Leese v. Clark*, 18 Cal. 536.

This grant was also fatally defective in other particulars. It is a matter of common knowledge, as well as of law, that the initial paper, in all these cases of Mexican grants, was the petition, or application for a grant. Each successive paper

or certificate, to and including the final grant, and the certificate of juridical possession, was indorsed upon or attached to this petition, so that when the last step was taken which perfected the title, the grantee had in his possession all the original papers in the case constituting one instrument, records of the different parts thereof having been made in the public archives as the proceedings progressed, and this instrument constituted his muniment of title. In this case the plaintiff has alleged that the grant was made with the approval of the pueblo, the governor of the territory, and of the republic of Mexico. The law required that it should be so made, and that a record of the fact should be made in the public archives. The plaintiff has made his paper title a part of his complaint, by setting it out *in hæc verba*. By so doing, he has proved that the averments of his complaint above referred to are not true. The grant was not made with the approval of the pueblo, but against the objection of the chief executive officer, who spoke for the pueblo, as shown upon the face of the paper pleaded. The paper fails to show that it was with the approval of the governor of the territory, or of the republic of Mexico. Without such approval, attested by the signature of the governor, and the order of the departmental assembly, it was without authority of law. Such was the rule, even where the lands were not municipal. *Luco v. U. S.*, 23 How. 515, 543. Being municipal lands, the fact of the grant must be registered in the public archives of the municipality. *S. F. Land Titles*, p. 144, art. 17; *Dwinelle's Colonial History of San Francisco*, *addenda*, p. 11; *Plan of Pictic*, § 17; *Donner v. Palmer*, 31 Cal. 508. The paper fails to show registration anywhere, either in the archives of the nation, the department, or the municipality. The complaint alleges that it was recorded by the prefect in the archives and registers of his prefecture; but the paper fails to show even such recording, and there was no law making the archives of the prefect, if he kept any, public archives for the registration of land-titles. It may be said that since there is an allegation of the recording, whether it was recorded or not becomes a matter of proof, and cannot be questioned on demurrer. The answer to this is that the fact is one which ought to appear upon the paper itself according to the laws and usages of the country; that these laws, usages, and customs of the country are matters of which the court will take judicial notice, as well as of the principal fact that they are not so recorded. *Fremont v. U. S.*, 17 How. 567; *Romero v. U. S.*, 1 Wall. 721. The complaint is to be taken most strongly against the pleader. When he alleges a fact, and then acts out the written evidence upon which he relies for proof of the fact, the complaint will be held good for only what the evidence proves.

There are other points of objection taken to the validity of this grant, but they do not need to be considered here. To obviate these defects the complaint alleges decree of confirmation of this grant, on the 5th day of December, 1859, and sets out the

decree. This decree is equally indefinite with the grant in the matter of description, and on its face requires a survey and location. More than 25 years had passed after this alleged decree before the filing of this complaint, and there is no allegation of survey whatever. But more than this; the pleading of this decree was unwarranted in law, and almost without precedent in the history of jurisprudence. The decree itself was vacated and set aside within six months afterwards, and there is no decree of confirmation of the grant. This fact does not appear upon the face of the complaint, but it is a matter of common history and knowledge of the country, and is an act of the judicial department of the government of the United States, of which this court will take judicial notice, under subdivision 3, § 1875, Code Civil Proc. *Sharon v. Sharon*, 79 Cal. 697, 22 Pac. Rep. 26, 131; *Romero v. U. S.*, 1 Wall. 742.

Plaintiff's cause of action, if any he ever had, is both stale and barred by the statute of limitations. There is no pretense in the complaint that the plaintiff or his grantor have been in possession of this property since the date of the treaty of peace, in 1848,—42 years since. It is alleged that the pueblo became a municipal corporation, by the name of the "City of San Francisco," (the predecessor of the present municipal defendant,) in April, 1850; that it applied for confirmation of its title to four square leagues, including said 800 *varas* square, in 1852; that, pending the proceedings thereunder, it disputed the title of said Sherrebeck, and the location of the same. According to the rules of construction of pleadings, it must be held that this is an admission that the title was disputed by the defendant as early as the institution of such proceedings,—July 1, 1852. Plaintiff's grantor had been then at least four years out of possession. If, as plaintiff claims, he had a perfect title under the Mexican government, or under the pueblo, his cause of action then at once arose, and he could at once, and if his title be, as claimed, a perfect one, and not barred, he can still maintain his action at law, for the recovery of the possession of said property. That such an action could be maintained upon such a title as he claims this to be was held by this court as early as *Reynolds v. West*, 1 Cal. 323; affirmed in *Cohas v. Ralsin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 616; *Payne v. Treadwell*, 16 Cal. 231; and has never been overruled. According to his own theory of the case, there has therefore never been a necessity for a resort to a court of equity to assert his right. He had ample remedy at law, and a court of equity will not interfere.

But he has slept so long upon his rights, if he ever had any, that he cannot now recover at law, and the same rule that forbids his recovery at law forbids it in equity. His right of action accrued, and the statute of limitations commenced to run against him, at the latest, July 1, 1852. Before the expiration of five years, however, the statute of limitations was amended, so that the action could be maintained if commenced within five years from the

time of final confirmation of the title by the government of the United States, or its legally constituted authorities, if the title was one derived from the Spanish or Mexican government. St. 1855, p. 109. In 1863, the statute was again amended, giving five years from the date of the passage of that act in which to commence the action, where title was claimed under the Spanish or Mexican government, unless five years had already run since the date of confirmation. St. 1863, p. 327. Since the passage of that act, there has been no disability on account of want of confirmation, patent, or survey, against the running of the statute of limitations. A careful reading of that act can leave no doubt that the statute of limitations commenced to run in favor of the city and county of San Francisco, and its grantees, for the lands embraced in the grant to the pueblo of which it or they were in possession at the date of that act, (April 18, 1863,) no matter whether it be held that the confirmation of the grant was the act of congress of July 1, 1864, conveying the title to the land embraced within the Van Ness Ordinance, (of which the Sherrebeck claim was a part;) the act of March 8, 1866, granting and relinquishing to the city the four leagues confirmed by the decree of the circuit court of May 18, 1865; the date of the final survey of the four leagues, or of the patent to the city. There can be no doubt that five years, without reference to date of confirmation, is the limitation under the Codes, and to our minds it is equally clear that such is the limitation under the act of 1863, when section 6, as there amended, is carefully analyzed, as it needs to be, for it is not clearly constructed, and at first reading is somewhat difficult of comprehension. This court, however, seems to have reached the same conclusion, as to its proper construction and effect, as long ago as *San Jose v. Trimble*, 41 Cal. 536. Judgment affirmed.

We concur: SHARPSTEIN, J.; WORKS, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment on the first point discussed; but what is said about the statute of limitations is very important, and may lead to serious consequences in other cases. It is the general understanding that the statute does not begin to run until after a patent. Does not this opinion overturn that doctrine?

(87 Cal. 1)

*In re OSBORN'S ESTATE.* (No. 13,372.)

(*Supreme Court of California.* Dec. 10, 1890.)

EXECUTORS—LIABILITY FOR ACTS OF CO-EXECUTOR.

1. An executor being about to leave the state temporarily, turned over to his co-executor the funds in his hands. Thereafter he took no part in the management of the estate, but his co-executor attended to the business. The executors filed a joint account four years after the time prescribed by the statute. At this time said executor knew that there was a shortage which he personally made up, without reporting it. He never made any effort to have a final settlement of such account. *Held*, that his co-executor having thereafter used the funds on hand at the time of such report, and having become insolvent, said executor was liable therefor.

2. The fact that the money and sole management of the estate was turned over to said co-executor, with the concurrence of one having a power of attorney to collect moneys due non-resident beneficiaries of the estate, in no way relieves said executor from responsibility.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

*Cope, Boyd & Fifield*, for appellant. *Selden S. Wright and Wright & Wright*, for respondent.

PATERSON, J. Edmond Saul and the appellant, William E. Straut, were appointed executors of the will of William G. Osborn, and entered upon the discharge of their duties October 28, 1867. The value of the estate for which they accounted was \$32,667.20. Claims were presented amounting in all to only \$1,560.74. Nearly all of the heirs and devisees were non-residents, and constituted Hon. Seth M. Richmond, of New York, their attorney in fact with authority "to collect, receive, sue for, demand, and give acquittances for all legacies, moneys, and property due and payable from the executors and trustees of the estate, and to make and execute full and ample receipts therefor." In February, 1868, Mr. Richmond came to this state, and it was determined by the executors, with his concurrence, to sell beach and water-lot No. 588. It was sold for the sum of \$23,500, \$10,000 cash, and the remainder on mortgage. The mortgage was assigned to Mr. Richmond, and there was paid to him the sum of \$1,500, leaving \$8,500 of the purchase money received in the hands of the executors. Each executor deposited one-half of that sum (\$4,250) to his credit in the Hibernia Savings Bank, receiving a pass-book therefor. Appellant, having been called east on business, delivered his pass-book, containing his account with the Hibernia Bank to his co-executor, and transferred the account to him. Saul drew out the moneys deposited in Straut's name prior to September 1, 1868, and thereafter had the deposit entered in his own book. Richmond was aware of Straut's intention to leave the money and business of the estate in the care of Saul, and made no objection thereto. No account was filed until September 3, 1872, and no proceedings were ever taken for its settlement by the executors. No other account or exhibit was filed in the probate or superior courts until 1886, when the executors were, under a citation directed to them, ordered to file a final account of their administration. Straut only was served, Saul being absent from the state. Appellant filed an account on the 27th day of October, 1886, showing that the only moneys of the estate received by him was said sum of \$4,250, deposited in the Hibernia Bank, and subsequently turned over to his co-executor, and the further sum of \$650, received by appellant in March, and immediately remitted to the attorney for the heirs. From the time of the issuance of letters to the executors until the sale of beach lot 588, appellant had taken no active part in the management of the estate—had not received or disbursed any of its property. All collections made sub-

sequent to the sale of that lot were made by Saul. Straut was absent from the state from March to October, 1868. During all that time Saul was in business for himself, in good standing and credit in the community. At the time the account was filed in 1872, appellant knew that there was a shortage in the account of his co-executor, and contributed about \$2,500 to make it up, believing himself to be liable for one-half of the shortage. When the account of 1872 was rendered, there was in Saul's hands, belonging to the estate, the sum of \$3,714.43, of which \$3,060 was collected subsequent to January 1, 1869. Appellant took no part in the management of the estate after his return from the east in 1868. Saul became insolvent, but the precise time of his insolvency is not shown by the evidence. Appellant states in his testimony that he does not know what was the financial condition of Saul at the time the account of 1872 was filed, but he thinks he was then in business for himself; that Saul left this state about seven or eight years ago, and when last heard from was living in Mexico. The court below held that the appellant was indebted to the estate, as executor, in the sum of \$3,716.70, less the sum of \$1,000 allowed him as commissions. In view of the fact that there was no intentional wrong on the part of Mr. Straut, the court did not allow interest on the principal sum found to be due the estate.

An executor, who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is generally liable for any misapplication of it by the latter. There are exceptions to this general rule; but to avoid liability in such cases it must appear that good reasons existed for turning over the money to the co-executor, and that in allowing him to keep, control and disburse it, he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion. In the *Sanderson Case*, 74 Cal. 213, 15 Pac. Rep. 753, the court said: "It has sometimes been broadly stated that, if an executor turn over assets which he has received to his co-executor, he becomes responsible for the due application and administration of those assets by his co-executor." There are cases which go to that extent. *Crosse v. Smith*, 7 East, 246; *Douglass v. Satterlee*, 11 Johns. 16; *Edmonds v. Crenshaw*, 14 Pet. 166. But this is not a universal rule. There may be circumstances which would render it, not only appropriate, but necessary to make such a transfer of the assets of an estate by an executor to his co-executor in good circumstances and credit—such as inability to act by reason of sickness or imprisonment. *Sterrett's Appeal*, 2 Pen. & W. 419. The liability of the executor who has thus intrusted to his co-executor the fund for which he was himself primarily responsible, depends upon the circumstances of each case. Good faith alone will not save him from liability, nor will bad faith on the part of his co-executor subject him to it. If good reason existed for turning over the money to his co-executor, and if, in allowing him to

keep, control, and disburse it, he acted in good faith, and with reasonable care and prudence, so that it cannot be said those who are entitled to receive it have lost it through his fault or negligence, he will not be held responsible. A wrongful act or omitted duty lies at the foundation of his liability. He has the right to assume in all cases that his co-executor is an honest man. The testator by his appointment recommended him as such, and the fact that he is insolvent should create no suspicion upon which to base a want of confidence. An honest executor who is poor is as worthy of confidence and trust as an honest executor who is rich. *McKim v. Aulbach*, 130 Mass. 484; *Wilson's Appeal*, 115 Pa. St. 101, 9 Atl. Rep. 473; *Peter v. Beverly*, 10 Pet. 534; *Oriniston v. Olcott*, 84 N. Y. 346; *Langford v. Gascoyne*, 11 Ves. 333. But, where the estate or part of it has been lost through the failure of the executors to perform some duty required of them by the trust, such as to collect debts before the statute of limitations has barred action thereon, to preserve the estate, to prevent waste, etc., they are liable jointly and severally. In the *Sanderson Case*, supra, the court said: "The obligations of co-executors arise from their contract, and are several. Although one may in some cases make himself liable by placing the other in a position to do wrong, or by aiding him in his acts of misfeasance, the liability is still the several liability of each. And this is so, even if it be conceded the devisees or legatees may under some circumstances claim both to be liable. \* \* \* If an executor stands by and sees a breach of trust committed, or about to be committed, by a co-executor, and does nothing to protect the estate, or to call the defaulting executor to account, he is liable. \* \* \* When an executor is guilty of neglect with reference to assets in the possession of his co-executor, he is not made liable upon the theory that the assets are in the possession of both, which, in fact, they are not, but upon his neglect in delivering them to his co-executor without good cause, or in not seeing to it that they were taken out of the possession of the co-executor, or were not by him misapplied or lost." This decision is in line with current authority, and with the provisions of the Code. Section 2239, Civil Code, provides that "a trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enable the latter to commit, but for no others." See, also, *Story, Eq. Jur.* § 1284, note; *Croft v. Williams*, 88 N. Y. 384; *Lincoln v. Wright*, 4 Beav. 427; *Welgand's Appeal*, 28 Pa. St. 471. Applying these principles to the case at bar, we find no way to escape the conclusion that appellant was properly charged with the balance found by the court to be due from the executors on March 17, 1871, less commissions.

There is no doubt that Mr. Straut acted in the utmost good faith in all matters connected with the estate, and that he is a man of high character and excellent repute. There has been no intentional neglect of duty, and it is a matter of regret that his inadvertence, over confidence, and

good nature have brought upon him this loss; but we are not authorized by the hardship of this particular case to depart from well-settled principles, and establish a precedent which would open an avenue of waste, fraud, and speculation in the management of estates, and for which the guilty parties could not be held accountable. We cannot say that Mr. Straut was wrong or negligent in placing the money in the hands of his co-executor. He was about to leave the state for an indefinite period. The journey had to be made by sea and land, and was a perilous one. There was nothing to create a suspicion that Saul might misapply the money left with him. There were few claims against the estate, which was one that could have been and ought to have been speedily administered and distributed. Nor was there anything wrong in allowing Saul to manage the estate. Straut had the right to act alone, or not at all, as he chose. He could have renounced the trust entirely,—it is unfortunate for him that he did not do so; but in acting with Saul he made the latter's acts his own, and is bound by them. The delay in the filing of accounts and settlement of the estate was a direct violation of a statutory duty. The executors were required to file an exhibit under oath, showing the amount of money received and expended by them, the amount of all claims presented, names of the claimants, and all other matters necessary to show the condition of the estate, and to render full account within 30 days after the expiration of the time mentioned in the notice to creditors. Instead of filing an account, showing the amount of money received by him, and what had become of it, as he had a right to do to protect himself, and as required by law, Mr. Straut chose to allow four years to elapse without any showing by himself or his co-executor, and then joined in an account with his co-executor, which he adopted as his own, and prayed for its settlement. There is nothing upon the face of the report to show that he had received only the amount of money referred to, (\$4,250,) or that he had turned it over to his co-executor. If the facts had been made to appear in that account, the devisees would have had something to put them upon their guard. Appellant's neglect through a period of nearly 20 years to report to the court his own transactions with respect to the property of the estate was itself negligence, and, taken in connection with the report made by himself and his co-executor, wherein it was made to appear that they had received all the moneys therein accounted for jointly, is sufficient, we think, to render him liable. The court below evidently believed that the loss would not have been sustained if the appellant had exercised reasonable diligence and care in the performance of his duty as executor, and for that reason held him chargeable with the deficiency; and we cannot say that the court erred. In *Adair v. Brimmer*, 74 N. Y. 566, the court held that where an executor through his negligence suffered his co-executor to receive and waste the estate, when he had the means of preventing it by proper care, he

was liable to the beneficiaries for the waste. In *Thompson v. Finch*, 22 Beav. 316, an executor was held liable for failure to see that money was properly invested, although he had been informed by his co-executor that it had been properly invested. The executor in that case allowed a period of 10 years to pass without ascertaining what the co-executor had done with the funds, and for such negligence was held liable, although no improper motive was attributed to him. It has been held in a great many cases that it is the duty of executors to account within reasonable or statutory time, and a neglect to account which results in waste renders the executor liable the same as in case of failure to collect debts, before the statute of limitation has run against them. *Styles v. Guy*, 1 Macn. & G. 434; *Sutherland v. Brush*, 7 Johns. Ch. 17. By joining his co-executor in the account of 1872, appellant admitted the joint liability of the executors for the balance then in their hands. If the account had been settled by the court, as prayed for by them therein, the order of the court would have been an adjudication of their joint liability. *Ducommun's Appeal*, 17 Pa. St. 268; *Haage's Appeal*, Id. 190; *Hengst's Appeal*, 24 Pa. St. 420.

The fact that the money and the sole management of the estate were given into the hands of Saul with the concurrence of Mr. Richmond is immaterial. *Edmonds v. Crenshaw*, supra. Mr. Richmond's power of attorney authorized him only to collect moneys due non-resident beneficiaries, and gave him no authority to direct the management of the estate, or to waive any of the rights of those whom he represented. The court found that the sum of \$3,060 of the balance due from the executors was collected by Saul subsequent to January 1, 1869. From this finding it is apparent that only \$654.43 could have been money which appellant turned over to Saul, and as he is entitled to a credit of \$1,000, commissions as executor, he claims that the judgment should have been in his favor. It is true said amount of \$3,060 of the money turned over by him to Saul was actually and regularly disbursed by the latter in payment of claims and legacies, and if appellant had reported correctly and within reasonable time his transactions, so as to show the court and beneficiaries the limit of his responsibility, he would have been protected. Instead of doing this, however, under a mistaken idea as to his liability, and through fear "that if the matter were exposed in the courts it might seriously affect his credit, and the credit of his firm," he failed to disclose the fact that "he, Saul, was not doing right," and that "there was a shortage," borrowed \$2,250, which was one-half of the amount then due the legatees, and sent it to Mr. Richmond in satisfaction, as he believed, of all claims against him on account of the default of his co-executor. Subsequently, Saul prepared an account showing a balance due to the estate of \$3,622.79. Appellant examined the account, and it was signed and filed as the joint account of the two executors. Upon its face it appeared that the executors had

acted jointly in the receipt and disbursement of all the property of the estate, and retained a balance of \$3,622.79, including commissions. Here is where appellant made his greatest mistake. The law required prompt reports from both. Instead of reporting his own transactions, and permitting or requiring his co-executor to do likewise, which would have put all concerned upon notice of the several liabilities of each executor, he joined in an account which represented him to be jointly responsible with Saul, although he knew that Saul "was not doing right," and allowed it to slumber on the records for over 16 years, without any effort to correct it, or have it settled. In the meantime his co-executor became insolvent, and left the country, and is now, together with his property, if he has any, beyond this jurisdiction. When appellant discovered that there was a shortage, that his co-executor was not doing right, and was in failing circumstances, it was his duty to the beneficiaries and to himself to report the facts to the court, and prosecute a settlement of the account; this would have determined the liability of each, and put all concerned upon their guard. The exact time when Saul became insolvent is not shown, but appellant testifies that he was in business some time after the account was filed, but that "his reputation was not as good after that time as it was before." It is an unfortunate case; but upon all the authorities, and upon principle, we must hold the executor responsible when it is so apparent that only his own negligence and mistaken idea as to his liability have occasioned the loss. It would never do to permit an executor to appear to be acting and sharing in the responsibility with his co-executor, join in reports of what they have done jointly, and many years afterwards, when the co-executor is bankrupt, and out of the jurisdiction of the court, allow him to contradict the reports rendered, and avoid responsibility by showing that as a matter of fact he has done none, or only a part, of the things reported. There is but one safe course for one named as executor to pursue, either renounce the nomination and refuse to qualify, or make prompt and correct reports and accounts of his transactions as executor, and have them settled. The order affirmed.

We concur: BEATTY, C. J.; FOX, J.; MO-FARLAND, J.; WORKS, J.; SHARPSTEIN, J.

(37 Cal. 610)

HOYT V. SAN FRANCISCO & N. P. R. CO.  
(No. 14,066.)<sup>1</sup>

(Supreme Court of California. Dec. 11, 1890.)

APPEAL—DISMISSAL.

Under Sup. Ct. Cal. Rule 3, providing that, if the transcript is on file when the notice of motion to dismiss appeal because the transcript was not filed in time is given, that shall be a sufficient answer to the motion, it is not sufficient that the transcript was filed on the same day that the notice was given, but later in the day.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

<sup>1</sup> Affirmed on rehearing, post, 1066.



*E. S. Lippitt and Charles F. Hanlon, for appellant. T. J. Crowley, for respondent.*

**PER CURIAM.** This is a motion to dismiss appeal because the transcript was not filed in time. The judgment was rendered May 26, and appeal taken June 12, 1890. September 16th, 94 days after the taking of the appeal, the clerk of the court below issued his certificate showing that no transcript had been prepared or certified. September 20th, notice of motion to dismiss was given, accompanied with a copy of the clerk's certificate. This was served at 9:30 A. M. At 3:30 P. M. the fee for filing the transcript was paid to the clerk of this court, but the transcript was not then delivered to said clerk. At 8 P. M. of that day, the transcript was served on counsel for respondent, and at 11 P. M. the clerk found the transcript in the letter box at his residence, and marked it filed as of that day. Rule 3 provides that if the transcript is on file when the notice is given, that shall be a sufficient answer to the motion; and counsel now invokes the rule that the court will not take cognizance of fractions of days. We appreciate the force of, and the reason for, the rule so invoked, and have no doubt sometimes applied it on motions of this kind. But where, as in this case, an event had actually occurred, and a fact been established, under which rights had accrued before the happening of another event, which, if it had occurred a few hours before, might have defeated those rights, we think it the duty of the court to take note of the order of those events, even though they may all have happened on the same day. The court has been, and possibly ought to be, liberal in the matter of extending time for the filing of transcripts, or of relieving parties from the effect of failure, where the delay has been brief, and good cause has been shown; but in this case no attempt was made to secure an extension of time, and no cause or excuse is shown for a delay of nearly 60 days in filing a transcript so brief that it could have been, and finally was, in fact, prepared and filed in a single day. If the general rule in regard to fractions of days is inevitably to apply in every such case, rule 3 of this court may as well be repealed, and no limit fixed for the filing of transcripts. Such practice as that adopted in this case is peculiarly adapted to the encouragement of appeals for delay, and ought not to be countenanced by the court. The motion is granted, and the appeal dismissed.

(87 Cal. 15)

LEHMANN v. SCHMIDT. (No. 12,547.)  
(Supreme Court of California. Dec. 11, 1890.)  
FACTOR'S LIEN—CONVERSION—WAIVER—SPLITTING CAUSE OF ACTION—EVIDENCE.

1. Defendant agreed with the owner of some wine to receive and sell it, and under the agreement did receive part of it. He then refused to sell the wine or have anything more to do with the contract, or to return the wine which he had received, or to account for it. When demand was made on defendant, he made no claim of lien. He stated to witness that it was so mixed up with his wine that he could not make any statement of it. *Held*, that the court was justified in finding that there had been a conversion of the

wine, and that defendant had waived his lien for advances and expenses, if any he had. Reversing 22 Pac. Rep. 973, and 24 Pac. Rep. 120.

2. It being stipulated in the agreement that the owner was to receive for the wine 20 cents per gallon "net," defendant was not entitled to any allowance for sediment.

3. Defendant having converted the wine to his own use, the net amount per gallon that the owner was to receive by the terms of the agreement was some evidence of its value at the time it was converted.

4. Under an assignment to plaintiff by the owner of all his interest in a certain number of gallons of wine, "more or less," held by defendant or sold by him for said owner's account, plaintiff could maintain an action for the value of a less number of gallons than therein specified.

On rehearing. For former reports, see 22 Pac. Rep. 973, and 24 Pac. Rep. 120.

*Chapman & Slack, for appellant. A. Heyneman, for respondent.*

**PATERSON, J.** The authorities are clear upon the proposition that, when one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit* for the value thereof. *Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 386; *Berly v. Taylor*, 5 Hill, 577; 2 Greenl. Ev. § 108. But it is contended by appellant that the defendant had a lien on the wine for money paid out and advanced, and that his refusal to comply with the plaintiff's demand did not constitute a conversion. The court found, however, that the defendant advanced on account of said wines under the agreement the sum of \$678.50 and no more, and that he incurred no other liabilities on account of the wine under the agreement; and the answer of the defendant admits that he had received "as the proceeds of the sale of a portion of said wines mentioned in plaintiff's complaint" the sum of \$1,124.16. Thus it appears from the findings, evidence, and admissions of defendant that he had received more than he had advanced and expended. But if this were not so the defendant waived his lien, if any he had, for moneys advanced or expenses incurred on account of the wine by repudiating the contract, refusing to deliver the wine, and by declining to account to Smith for the amount received or expended. It has been held in England that a person having a lien on goods does not waive it by the mere fact of his omission to state that he claims them in that right when they are demanded, but, if a different ground of retention than that of the lien be assumed, the lien ceases to exist. In this country the weight of authority seems to support the contention that if the bailee refuse upon demand to deliver the property without setting up any lien thereon he waives his right to claim a lien after suit brought. *Hanna v. Phelps*, 7 Ind. 24; *Everett v. Saltus*, 15 Wend. 478. In the case at bar it is true the defendant was not merely a bailee for service, he was also a factor to sell; but he not only failed to assert a lien on the wine for advances and expenses at the time a demand was made upon him, but he notified Schmidt "that he would not have anything more to do with the contract," refused to go on with the sale

of the wine or have anything further to do with it, and refused to deliver possession of the wine, or make any accounting in relation thereto. He stated to one of the witnesses that he could not tell anything about the wine, as "it was so mixed up with his own wine that he could not make a statement of it." Upon this evidence the court was justified in finding that there was a conversion of the property, and that defendant waived his lien, if any he had. Section 2910, Civil Code; *McPherson v. Neuffer*, 11 Rich. Law, 267; *Ramsby v. Beezley*, 11 Or. 49, 8 Pac. Rep. 288; *Overt. Lieus*, p. 142, § 115.

We do not think that the defendant is entitled to any allowance for the 230 gallons of sediment, or for the money expended for freight, labor, and materials. He knew when he took the wine that there would be some sediment and waste in curing it, and it was stipulated in the agreement that plaintiff was to receive 20 cents per gallon net. He agreed to furnish the necessary labor and outlay for freight, labor, etc., in shipping and curing the wine. It is admitted that he received the 7,981 gallons of wine with which the court charged him, and, having converted it all to his own use, any expense or loss incurred in getting possession of that quantity or improving its quality must be borne by himself.

The finding of the court as to the value of the wines is supported by the evidence. Mr. Smith testified that if the defendant had sold the wine at once "he could have realized a great deal more than twenty cents per gallon, for wines were very high at that season, but his neglect and delay caused me a great loss." Furthermore, it was stipulated in the contract, as stated above, that plaintiff should receive 20 cents per gallon net; and, under these circumstances, having converted it to his own use, we think the price stipulated in the agreement is some evidence of the value of the property at the time of the conversion.

The point was made that the assignment to the plaintiff did not entitle him to maintain this action, but we think it is sufficient to support an action for the value, although it be for only a portion of the wines referred to in the agreement. The rule against the splitting up of the cause of action (*Zirker v. Hughes*, 77 Cal. 235, 19 Pac. Rep. 423.) is inapplicable to this case.

The findings of the court are supported by the evidence, with the exception of the fourth finding, which states that defendant incurred no other liabilities and made no other advances than the \$678.50 cash, advanced to Smith. The latter testified that he received from the defendant the sum of \$678.50 in cash, and some casks that he had ordered from the defendant. The defendant testified that the casks referred to were furnished at the request of Smith, and were worth the sum of \$39.55, including drayage, which amount was charged to Smith as an advance under the contract. It is clear, therefore, that the defendant should have been allowed that amount as an offset in addition to the \$678.50. The cause is remanded, with directions to the court below to modify the

judgment by inserting therein \$912.95, instead of the words and figures "nine hundred and fifty-two and fifty-hundredths (\$952 50-100) dollars." As so modified the judgment will stand; but the respondent will be taxed with the costs of this appeal.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

(87 Cal. 11)

ROBINSON v. MERRILL *et al.* (No. 12,900.) (Supreme Court of California. Dec. 11, 1890.)

STREET ASSESSMENTS—FORECLOSURE OF LIEN—PARTIES.

In an action to foreclose a street assessment lien upon a lot under St. Cal. 1871-72, p. 816, it being required by the statute that the owners of the lot be sued, the burden of proof that defendants were the owners is upon plaintiff, though the answer alleges that the title was in certain persons, one of whom was not a party defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

J. M. Wood, for appellant. Geo. B. Merrill, for respondents.

BELCHER, C. C. This action was brought to foreclose a street assessment lien upon a lot of land in the city and county of San Francisco. The original complaint was filed in November, 1877, and an amended complaint in March, 1887. The court below gave judgment for the defendants, and the plaintiff appeals from an order denying his motion for a new trial. The complaint alleged, among other things, that the defendants were the owners of the property assessed. The answer denied this averment, and alleged that "at all the times and dates of the proceedings set forth in the complaint, and particularly on the twenty-first day of May, 1877, the defendant J. C. Merrill, and one Moses Ellis, who is not made a party defendant in this action, were the owners in common, each of one-half part undivided, of the land mentioned in said complaint." At the trial the plaintiff offered and read in evidence the original contract, assessment, diagram, and warrant, and affidavit of demand thereto annexed, together with the indorsements thereon, showing the due recording of all the papers, and also a deed of J. C. Merrill, by the sheriff of San Francisco, conveying all the undivided one-half part of the land in question to his co-defendant, the Hibernia Savings & Loan Society, on the 9th day of July, 1881, which was recorded on the 11th day of the same month. The plaintiff then rested his case, and the defendants offered no evidence. The court found that all the allegations of the complaint were true, except as to the ownership of the land, and, as to that, "that the defendants were not the owners of said land, on the 21st day of May, 1877, as alleged in said amended complaint, or at any other time;" and, as a conclusion of law, that the plaintiff was not entitled to a judgment and decree in his favor, but that defendants were entitled to judgment for their costs. To maintain his action, it was

necessary that the plaintiff make all the owners of the property assessed parties defendant. *Hancock v. Bowman*, 49 Cal. 413; *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525; *Harney v. Appelgate*, 57 Cal. 205. Whether the defendants were such owners or not was an issue distinctly raised by the answer, and the only question is, on which side was the burden of proof upon this issue? Counsel for appellant contend that the burden was on the defendants to show that they were not the owners of the property, but that Merrill and Ellis were, as alleged in the answer. In support of their contention, counsel cite section 13 of the act under which the proceedings were taken, (St. 1871-72, p. 816,) declaring what shall constitute a sufficient complaint, and section 17, declaring who are to be regarded and treated as owners, and also the case of *Whiting v. Townsend*, 57 Cal. 515. The portions of the sections cited read as follows: Section 13: "In bringing an action to recover street assessments, the complaint need not show any of the proceedings prior to the issuance of the assessment, diagram, and certificate; but it shall be held legally sufficient if it shows the title of the court in which the action is brought by the parties plaintiff and defendant, the date of the issuance of the assessment, the date of the recording thereof, the book and page where recorded, a general statement of the work done, a description of the lot or lots sought to be charged with the assessments, the amount assessed thereon, that the same remains unpaid, and the proper prayer for relief." Section 17: "The person owning the fee, or the person in the possession of lands, lots, or portions of lots, or buildings, under claim of ownership, or exercising acts of ownership over the same for himself, or as the administrator or guardian of the owner, or the person in whom, on the day the action commenced, appears the legal title to the land by deeds recorded in the recorder's office in the city and county of San Francisco, shall be regarded, treated, and deemed to be the owner, (for the purposes of this law,) according to the intent and meaning of that word as used in this act." In *Whiting v. Townsend* it was held that the complaint was sufficient under the thirteenth section of the statute, but there was no suggestion or intimation that all of the owners need not be joined as defendants. On the contrary, the court, on page 519, said: "The finding of the court below was that the defendants were the owners in fee of the land at the time the assessment was made, and at the date of the commencement of the action. This is a sufficient finding upon the question of ownership. \* \* \* The whole lot was liable for the entire assessment, and no particular part of it was liable for any particular portion of the assessment. The statute requires that the owners of the land, lot, or portion of lot assessed shall be sued," etc. In the sections and case above cited we see nothing to sustain the theory of appellant. His complaint undoubtedly complied with the provisions quoted from section 13, but it does not follow, because this is so, that

the necessary parties were made defendants. In a case of this kind, the owners of the property assessed, or their representatives, on the day when the action is commenced, must be sued, or the action must fail. Whether the defendants were such owners or not was therefore an issuable fact, and the burden of establishing by competent proofs the affirmative of the issue was clearly cast upon the plaintiff. He offered no evidence upon the subject, and his theory seems to have been that the averment in the answer that Merrill and Ellis were the owners was new matter which relieved him of the burden, and cast it upon the defendants. This theory, however, is untenable. The averment referred to was not new matter, but was, in legal effect, merely a denial of the averment of the complaint as to ownership. *Goddard v. Fulton*, 21 Cal. 436. The appellant also says in his brief: "The Hib. S. & L. Society was the owner of one-half, and why not be compelled to pay a half, at any rate?" A full answer to this query is found in the cases above cited. In *Clark v. Porter* and *Diggins v. Reay* it was distinctly held that, in such a case as this, the statute gives no authority for a decree enforcing the lien, in the absence of any of the parties interested. We advise that the order appealed from be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(15 Colo. 129)

YORK v. FORTENBURY et al.

(*Supreme Court of Colorado*. Nov. 19, 1890.)

PLEADING AND PROOF—VARIANCE—APPEAL—REVIEW OF EVIDENCE.

1. An answer alleging a joint loan to both plaintiffs is not sustained by proof of a loan to one of them individually.

2. Where the record on appeal does not contain all the evidence, an objection that the judgment is not sustained by the evidence will not be considered.

Appeal from superior court of Denver.

W. B. Herr and W. W. Cooke, for appellant. *Stuart Bros. & Andrews*, for appellees.

HELM, C. J. Appellees brought suit against appellant for work and labor done at appellant's instance and request. The answer, after putting in issue all the material averments of the complaint, concluded with a counter-claim in the following words: "That defendant lent to the plaintiffs, at their special instance and request, the sum of \$500; that they have not paid any part thereof." The cause was tried to the court, without a jury. Appellant's counter-claim was disallowed, and judgment was rendered in favor of appellees for \$240 and costs. A reversal is asked upon the ground that the judgment is not sustained by the evidence. In the first place, there is not a total absence of proofs to support a matter essential to appellees' recovery. The testimony is in some particulars conflicting, but the judg-

ment is not so inconsistent with the great preponderance thereof as to justify interference by this court. Besides, in view of the fact that the record before us does not purport to contain all the evidence, we would, in any event, decline to consider favorably the present objection.

The principal ground urged, however, in support of a reversal, is the exclusion of appellant's testimony offered to establish her counter-claim. The action was brought by two parties, Fortenbury and Carson, as co-plaintiffs. The answer averred a joint loan to the plaintiffs. The proof rejected showed that the loan in question was made to Fortenbury individually, Carson deriving no benefit therefrom, and not being in any way connected therewith. The allegation of a loan to both plaintiffs is not sustained by proof of an individual loan to one of them. There was, therefore, such a variance between the pleading in question and the proof offered, as justified the court's rejection of the latter. In view of the foregoing conclusion, it is not necessary to discuss the further specific point made in the briefs that the individual debt of a partner cannot be set off against a firm demand in suit by the firm, or the exceptions to this rule, relied on by opposing counsel. The judgment of the court below is affirmed.

(15 Colo. 260)

#### ZIPPAR V. REPPY.

(Supreme Court of Colorado. Nov. 7, 1890.)

#### LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.

Where a lessee for a year, upon the expiration of his term, continues in possession by the consent of the lessor, with no alteration in the agreement between them save an increase in the rent, which is duly paid, he becomes a tenant for another year.

Commissioners' decision. Appeal from district court, Arapahoe county.

*Pence & Pence and Dolloff & Wright*, for appellant.

BISSELL, C. George P. Reppy commenced this action before a justice of the peace to recover the possession of certain properties situated in the city of Denver. He based his right of recovery upon a lease executed upon the 1st day of December, 1886, by one Harriett Ullman, the owner of the property, to him and another. The defense was a lease, resulting, by operation of law, from a holding over by Zippar, after the expiration of a term previously granted. It appeared in evidence that, in August, 1885, the owner of the property, Mrs. Ullman, executed a written lease to the defendant, Zippar, for the period of one year, upon certain terms and conditions, among which was the payment of a monthly rent of \$80. The tenant Zippar occupied the premises until the expiration of the term limited by his original agreement. Within a day or two of the 1st of August, 1886, Mrs. Ullman called for her rent, and when tendered a check for \$80, which had been the agreed price, demanded \$5 per month more, alleging that the neighboring premises were being rented for \$85, and she

should decline to take less for her property. Nothing whatever was said between the parties as to the terms, or conditions, or duration of the ensuing tenancy in case Zippar should accept the proposition of a raise. The next day Mrs. Ullman came back for her rent, and was paid the \$85, which she had insisted upon receiving as the monthly rental. Thereafter, the defendant, Zippar, continued to occupy the premises, and pay the stipulated rent, until the month of December, 1886, at which time he was given notice to quit; refusing to vacate, these proceedings were instituted for the purpose of ejecting him. The proceedings resulted in a judgment of ouster. He contended that since he had been a tenant from year to year, and, upon the expiration of the term limited by the original agreement, had continued in possession by the consent of the landlord, with no change in the contract between them save the alteration which was made in the price, he had a right to occupy and be treated as a lessee for the term of one year. That he was right is too well settled in the law to permit of dispute. After the expiration of a lease for a year, if the tenant holds over with the consent of the landlord, the law treats him as responsible to him as upon a hiring for another year, upon the same terms and conditions as those which controlled the antecedent tenancy. This principle is so well settled that it would be folly to incumber the reports with a statement of the reasons upon which the rule is based. It is enough to declare its existence. *Schuyler v. Smith*, 51 N. Y. 309; *Wolfe v. Wolff*, 69 Ala. 549. As in all other states where the question has arisen, the same doctrine has been declared in Colorado, and in these terms: "If a tenant under a lease for a year holds over after the expiration of his term, in the absence of a new agreement, he holds the premises subject to the covenants and conditions contained in the original lease. The holding over rests not upon the former lease, but upon a new contract which the law implies to be for the same time, and upon the same terms, with the lease under which the premises were held the preceding year." *Sears v. Smith*, 3 Colo. 288; *Reithman v. Brandenburg*, 7 Colo. 481, 4 Pac. Rep. 788. Nothing whatever occurred between the parties at the time of the payment of the rent, in August, 1886, to prevent the application of this well-established rule. Both the landlady and the tenant were silent upon every matter essential to the construction of a new agreement. It is well settled that the rights of the parties were unaffected by the alteration of the rent. *Digby v. Atkinson*, 4 Camp. 275. The existing tenancy must then be held to be one for a year, running from August, 1886, until August, 1887. The judgment should be reversed, and the cause remanded.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed.

(15 Colo. 290)

DENVER, U. & P. RY. CO. v. BARSALOUX  
*et al.*

(Supreme Court of Colorado. Nov. 7, 1890.)

STREET RAILWAY COMPANIES—BROADENING GAUGE  
—INJUNCTION.

1. Where a city, by its ordinance, grants to a railroad company the right of way for its tracks through certain streets, and there is nothing in the ordinance as to the width of the tracks, the company will not be enjoined at the suit of owners of abutting property from changing its track from a narrow to a broad gauge.

2. If an injunction could be granted, a decree prohibiting the broadening of the gauge outside the limits of defendant's property could not stand.

Commissioners' decision. Appeal from district court, Arapahoe county.

A bill was filed in this case by Barsaloux and others by which they sought to restrain the Denver, Utah & Pacific Railroad Company from laying a third rail on a street over which they were, and for several years had been, operating a narrow-gauge road, until compensation should be made for the resulting damage, or the company proceed to condemn under the statute. It appeared that, in 1878, one Joseph L. Collins filed in the recorder's office of Arapahoe county a plat of an addition to the city of Denver. The addition contained some 33 lots, and through it, according to the plat, ran a street which was named Argostreet. This street seemed to be only a division or boundary between the two blocks of lots, for there was no outlet at either end, and it abutted as to its termini upon other properties belonging to other people. Later, Collins conveyed three of the lots to Louis Mabe, who transferred them in August, 1881, to Annie Barsaloux, the wife of David Barsaloux, one of the plaintiffs. These transfers were put in evidence, and whatever of right or title, as to the street, would pass to adjoining lot-owners by virtue of a conveyance from Collins, passed to Mrs. Barsaloux; the other two plaintiffs, Brahoney and Reese, offered no evidence of title save a deed from Brill to Reese, in December, 1881, and a deed from Ryan to Brahoney in March, 1881. Where their grantors got title does not appear; but the matter of title was not the subject of inquiry in the court below, nor is error assigned for failure of proof upon that matter. It is sufficiently manifest however that all these parties were in possession of the respective lots, as they were claimed some time in the year 1881. In the fall of that year the railroad company constructed a narrow-gauge track over its own property which was immediately south of the Collins addition, and thence northward along and throughout the entire length of Argo street. The plaintiffs were in possession of the property described in their bill at the time that the road was constructed. It is probable however that the construction of the houses thereon; and the actual occupancy, commenced about the time the railroad was built. The company's depot lay to the south and west of the plaintiffs' property; but, by an ordinance of the common council of the city of Denver, the corporation was authorized to construct and lay its tracks along and across the various al-

leys and streets lying between the depot and their property which joined the Collins addition on the south. From the time that the railroad company prepared its grade and laid its track along Argo street, in the fall of 1881, it continued its use and operation as a narrow-gauge road down to the time of the injury complained of. In the spring and summer of 1887, the company proceeded to lay, on the ties already in the street, a third rail to accommodate the transfer of broad-gauge cars to their yard and depot from their connections with the broad-gauge roads north of the addition. The laying of the third rail had been finished, at the time of the filing of the bill, to a point beyond the immediate frontage of the plaintiffs' property. It appeared that from time to time afterwards they put in new ties, fixed the grade, and otherwise strengthened the work already done, but that the new ties were all of the same length as the old ones, and apparently occupied no more of the street. The evidence tended to show that the burden of the easement was unchanged by the alteration of the gauge of the road. No evidence of special damage or of any damage at all, except that which might inferentially result from the broadening of the gauge of the road, was offered by the plaintiffs. No sort of objection was ever made by the plaintiffs to the use of the street by the railroad company until they commenced to widen their tracks. The answers of the company setting up their various defenses were interposed in apt season, and a preliminary injunction was issued restraining the corporation from further proceeding with the laying of the third rail; and, on the final hearing, after making the proofs which show the foregoing facts, the court entered the following decree: "And now on this day, this cause again coming on for final decision on the pleadings, evidence, and arguments of counsel heretofore submitted to the court, and the court, now being sufficiently advised in the premises, does find the equity of said cause with the plaintiffs, whereupon it is ordered, adjudged, and decreed by the court that the preliminary injunction heretofore, and on, to-wit, the 13th day of October, A. D. 1887, issued in said cause be, and the same is hereby, made perpetual so far as the same restrained the construction of a third rail beyond the point at which the same is now constructed, and that plaintiffs do have and recover from the defendant their cost herein expended to be taxed, and that they have execution and fee-bill therefor, to which the defendant at the same time excepts."

*Wolcott & Valle*, for appellant. *Brown & Putnam*, for appellees.

BISSELL, C., (after stating the facts as above.) A great many questions are raised and discussed by counsel, but as the case has been practically settled by a decision rendered in this court subsequent to the hearing and judgment in the court below, most of them will be left undetermined. The very full statement of facts which precedes this opinion will show the applicability of that decision to this con-

trovery, and serve to eliminate from the discussion most of the other questions which would naturally be suggested. There is no dispute concerning the extent and character of the antecedent occupation of the street by the railroad company. The road was built and put into practical operation in the fall of 1881, and since that time, down to the laying of the third rail, which is the injury complained of, the street had been occupied by the company, and the road constantly used by them in the operation and maintenance of their system. To this operation and use the plaintiffs offered no objection. During this entire period, as they allege, they were the owners, and in the occupancy, of the lots which they claimed were injured by the laying of the third rail. This rail was to be laid on the old road-bed and ties, and was, if anything, an added burden laid upon the street. At no point in its course did the road cross the property of the complainants, and touch the lots of which they possessed the fee. The case then is clearly within the principles laid down in the case of *Railroad Co. v. Domke*, 11 Colo. 247, 17 Pac. Rep. 777.

It was not open to the complainants to interfere with the operation of the road already constructed. The absence of protest or objection, and the implied assent to that use, properly presumed from their silence, effectually precluded the plaintiffs from seeking any equitable relief against the continued operation of the road as originally constructed. They are equally without right to injunctive relief for the damages resulting from the laying of the third rail, and the extended use of the road-bed for that purpose. The plaintiffs were, if anything, simply abutting lot-owners, with no title to the fee of the street, and therefore without other right to recover than what accrued from the damages which they might sustain by the increased burden put upon the street, and the injury done to their particular estates. But against these wrongs equity does not relieve in this state, unless some special circumstances, bringing the case within some other branch of equitable jurisdiction, be averred. The party injured is not without remedy, but his recovery may only be had in a court of law where the damages may be estimated. Were the foregoing reasons insufficient to warrant a reversal, the decree could not be permitted to stand. It did not undertake to adjudicate the rights of the parties as to the use of Argo street where it abutted upon the plaintiff's property, but conceded the use proved to be consistent with the rights of the owners. By its terms it inhibited the company from continuing the broadening of their gauge beyond the point which it had reached at the time of the institution of the suit. This point was beyond the limits of the complainant's property. About the user and extension of the road in that manner no one under the proofs in this suit had a right to complain. It was not competent for the court to adjudicate as to a matter which was not properly involved in the issues, and which was not embraced by the proofs made. The case should be reversed

and remanded, with instructions to the court below to dismiss the bill at the plaintiffs' costs.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed, and the cause remanded, with directions to dismiss the suit.

(15 Colo. 297)

DENVER, U. & P. R. CO. v. TOOHEY.

(*Supreme Court of Colorado*. Nov. 7, 1890.)

ESTOPPEL BY DEED.

Where an owner of land abutting on a street for a valuable consideration releases a railroad company from all claims for damages by reason of the maintenance of its railroad in such street, he cannot afterwards maintain an action to enjoin the company from changing its track from a narrow to a broad gauge.

Commissioners' decision. Appeal from district court, Arapahoe county.

This case, No. 2215, was consolidated with No. 2214, (*Railway Co. v. Barsaloux*, ante, 165,) which is the preceding case against the company, and the two cases were tried together. The record comes into this court showing that the cases were tried on the same proofs, except in so far as they are modified by the difference in the parties plaintiff, and the lots involved, and a further fact which will be stated. Mrs. Toohey proved title by the production of a conveyance from Collins, who platted the addition. The statement of facts made in the preceding case is applicable to this. It further appeared on the trial that Mrs. Toohey, prior to the institution of her suit, had executed the following instrument: "Know all men by these presents that I, Ann Toohey, of the city of Denver, in the state of Colorado, for and in consideration of the sum of \$200, to me fully paid by the Denver, Utah & Pacific Railroad Company, the receipt whereof is hereby confessed and acknowledged, do hereby release, discharge, and forever quitclaim the said Denver, Utah & Pacific Railroad Company from all and singular every claim and demand whatsoever existing in my favor against the said railroad company, from the beginning of the world to this date, and particularly from all and singular the damages of every name and nature which I have sustained by reason of the construction, maintenance, and operation by the said railroad company of its railroad in front of my premises situate on the strip of land called 'Argo Street' in the city of Denver, which said premises are described as being lot numbered 32 in Collins' addition to the city of Denver. Dated September 22, A. D. 1884. [Signed] ANN TOOHEY." The pertinence of this proof is manifest from the record. Under the evidence it cannot be said that the third rail; or the manner of operating the road after the change, put an added burden on the street, which was a damage to Mrs. Toohey or to her property. The same decree was entered in this case as in the *Barsaloux* Case against the company. From it the same appeal was prayed and taken.

*Wolcott & Vaile*, for appellant. *Browne & Putnam*, for appellee.

BISSELL, C., (after stating the facts as above.) It is unnecessary to repeat what has already been decided in the case of *Railway Co. v. Barsaloux*, ante, 165. For the reasons given in that opinion it is evident that Mrs. Toohey cannot maintain her bill, and is entitled to no relief under the proofs which she has made. But her case need not be put upon those grounds alone. Upon the record this release is an insuperable obstacle to her recovery. If she had suffered any damage from the original construction of the road she had been fully compensated for it; and, for a valuable consideration, had released the company therefrom. No subsequent use of the street for railroad purposes, nor any further operation of the road, could give to Mrs. Toohey any right of action, without sufficient proof by her that a new use, or a new mode of operation, had in some fashion so damaged her as to give rise to a cause of action, based on such new use, or such new mode of operation. This the evidence fails to establish. For this reason, as well as those which are assigned in the preceding opinion, the decree in favor of Mrs. Toohey must be reversed, and her cause remanded, with directions to the court below to dismiss her bill at her own costs.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed, and the cause remanded, with directions to dismiss the suit.

(15 Colo. 281)

BECKETT *et al.* v. CUENIN.

(*Supreme Court of Colorado*. Nov. 7, 1890.)

SERVICE OF WRIT—PUBLICATION—PLEADING.

1. An affidavit for an order for the service of a summons by publication, which merely states that the action is brought to recover on two notes therein described, but not alleging any connection of defendants with the notes, is fatally defective under Code Colo. § 44, requiring such an affidavit to show that a cause of action exists against defendants.

2. A judgment recovered in a court of record will be set aside where no complaint or written statement of the cause of action was filed therein.

Commissioners' decision. Appeal from Gunnison county court.

In July, 1886, the plaintiff, Cuenin, started this case in the county court of Gunnison county, by filing in that court an undertaking and an affidavit for attachment. The summons and writ of attachment were issued. The summons recited substantially that the plaintiff demanded judgment for \$1,000, with interest at 10 per cent. from June 12, 1884, for attorney's fees amounting to 10 per cent. of the note, and for costs of suit. Subsequently, and in September, the plaintiff filed an affidavit in the following words: "Dexter T. Sapp, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled cause. That this action is brought to recover of the defendants the sum of one thousand one hundred

twenty 97-100 dollars upon two promissory notes of \$500 each, dated August 14, 1884, with interest thereon at the rate of ten per cent. per annum from said date, and also ten per cent. attorney's fees, as provided in said notes. That said William D. Beckett and John M. Beckett compose the copartnership of said Beckett Bros. That upon the 17th day of July, A. D. 1886, a writ of attachment was issued in this cause, and placed in the hands of the sheriff of said Gunnison county for service. That on said day a writ of summons was issued in this cause in due form, subscribed, 'Brown & Sapp, Attorneys for Plaintiff,' which summons was placed in the hands of the sheriff of Gunnison county for service upon said defendants. That the defendants William D. Beckett and John M. Beckett now reside at Hastings, in the county of Clay, state of Nebraska, as deponent is informed by Louis Boisot, of Gunnison, Colorado, said Boisot having been the attorney of said Becketts, and as deponent also believes from having received letters from said defendants which were mailed at said Hastings. That at no time since the issuing of summons in this case has either of said defendants been within the state of Colorado. That the sheriff of Gunnison county has returned to this court the summons issued herein and placed in his hands for service as aforesaid, with his indorsement thereon, to the effect that he cannot find the said defendants in his county. That personal service of said summons can be had upon said defendants at said Hastings, in the state of Nebraska, but cannot be had upon either of them in the state of Colorado, as deponent is informed as aforesaid, and as he believes. That the defendants are a necessary and proper party to the action for the reasons (1) that there are no other defendants and no other person or persons liable for the debt sued for; (2) that, by virtue of the writ of attachment issued in this cause, real property owned by one of said defendants, and situate in the county of Mesa, in this state, and debts owing to said defendants, have been attached by garnishment in the said county of Gunnison, and, without some kind of service of summons in this cause, it will be impossible to have the property and debts so attached applied towards the payment of the claim in this cause sued for. Wherefore, affiant asks that an order may be granted that the service of said summons be made by the publication thereof. Subscribed and sworn to before me this 21st day of September, A. D. 1886. EDWARD P. COLBORN, Judge and Acting Clerk." As a matter of fact the affidavit was not signed, although the statement of the verification recites its subscription. The order for publication was made, and publication was had, and in March, 1887, after making proof of the mailing of two copies of the summons to the two defendants, and a showing therein that no appearance had been entered for the defendants, a default was entered by the judge and acting clerk of the court, and afterwards, and on the same day, according to the recital of the judgment, viz.: "Upon application to the judge and acting clerk by Brown & Sapp,



attorneys for said plaintiff, judgment is hereby entered against said defendants, in pursuance of the prayer of said complaint; wherefore, by virtue of the law and by reason of the premises aforesaid, judgment is hereby entered against the defendants, and in favor of the plaintiff, for the sum of fourteen hundred and seventy-three and 20-100 dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, and his costs and disbursements incurred in this action, taxed at the sum of seventeen 55-100 dollars, and that he have execution therefor. Attest: EDWARD F. COLBORN, Judge and Acting Clerk." No complaint was ever filed in court in the case. On the 22d of March, an execution was issued on the judgment, and on the 31st of the same month the defendants served their notice of appeal as provided by the statute.

*Bell, Goudy & Boisot*, for appellants.

**BISSELL, C.** The errors contained in this record leave no basis upon which the judgment can be sustained. The service was made by publication, and the order therefor was entered upon the affidavit which is set forth in the statement. It is an established principle in all courts that the method of acquiring jurisdiction by publication is in derogation of the common law, and that the statutory requirements must be successively and accurately taken in order to confer upon the court jurisdiction over the defendant. This principle has been so often decided and so universally declared that it is wholly unnecessary to cite authorities in support of the proposition. The application of this rule precludes any successful defense of the order of publication which was entered by the county court. To justify the making of the order, the plaintiff was bound under section 44 of the Code to file an affidavit by which it should appear that a cause of action existed against the defendants. No such showing was made in this case, according to any reasonable construction of the section. The affidavit does not state that any cause of action exists in favor of the plaintiff, or against the defendants, nor is this fact otherwise made affirmatively to appear in it. It sets up that the action is brought to recover the sum of \$1,120.97 upon two promissory notes, which are described as to the date of their execution, but it does not state, either that the defendants were the makers of those two notes, or the guarantors thereof against whom a right of action existed in favor of the plaintiff, or that they were the payees and subsequent indorsers, or indorsers thereof and not payees, or that the plaintiffs were the owners and holders of the notes. The affidavit states no cause of action whatsoever against these two defendants, or either of them, upon the two notes as described. Under these circumstances it is wholly impossible to uphold the jurisdiction of the court in the premises. *Ricketson v. Richardson*, 26 Cal. 149; *Yolo Co. v. Knight*, 70 Cal. 432, 11 Pac. Rep. 662; *Slocum v. Slocum*, 17 Wis. 155; *Towsley v. McDonald*, 32 Barb. 604; *Shields v. Miller*, 9 Kan. 390; *Atkins v. Atkins*, 9 Neb. 191-194, 2 N. W.

Rep. 466. It is exceedingly doubtful whether there is any such showing of non-residence as would entitle the plaintiff to proceed to obtain service by publication; but the insufficiency of the affidavit renders it unnecessary to put the decision upon this ground. The failure to file a complaint prior to the rendition of judgment, or at all, is a fatal irregularity. According to the practice, as it existed at that time, it was necessary that the complaint should be filed before the entry of judgment. Section 9 of an act to amend, etc., Sess. Laws 1885, p. 182.

Whether the failure to file the complaint prior to the entry of judgment would of itself have been fatal to the validity of the judgment, or whether upon application for the purpose prior to the appeal the court could have made an order permitting it to be done, it is not necessary to consider. No such application was made, nor was any complaint ever filed. On general principles, regardless of this statute, it must be held that a complaint, or some written statement of the cause of action, is absolutely indispensable to the maintenance of a judgment recovered in a court of record. As it was well put in *Young v. Rosenbaum*, 39 Cal. 654: "It would seem impossible to maintain in any forum a judgment unless it was based upon a complaint, or a statement of the cause of action of the party in whose favor it was rendered." These errors render it impossible to maintain the judgment. Since the cause must be reversed, it is needless to discuss the question whether it should be reversed because it was entered for more than the sum which the plaintiff was entitled to recover according to the action as he instituted it, or whether he should be permitted to remit the excess, and the judgment be upheld for the balance. The judgment should be reversed, and the cause remanded for further proceedings.

**RICHMOND and REED, CC.**, concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment below is reversed.

(15 Colo. 262)

**PERKINS et al. v. MARRS et al.**

(Supreme Court of Colorado. Nov. 7, 1890.)

**TROVER AND CONVERSION — DAMAGES — INSTRUCTIONS — VERDICT — ASSIGNMENT PENDING ACTION.**

1. In an action for the value of personal property taken and converted, damages equal to the legal interest upon the value of the chattels converted may be allowed, and included by the jury in their verdict.

2. Under Code Colo. § 81, providing that any error which does not affect the substantial rights of the parties shall be disregarded, and that no judgment shall be reversed because of such error, a judgment will not be reversed at the instance of the defendant because of error in the form of an instruction, when no definite request was made by defendant upon the subject, and the verdict includes nothing that plaintiffs were not entitled to recover.

3. An objection that the court instructed the jury orally, without the consent of defendant, is unavailable on appeal when the transcript fails to show, either that the court instructed the jury orally, or that defendant objected to the action of the court in that respect.

4. That a verdict includes the value of property not declared for in the complaint is wholly immaterial where plaintiff permits to be taken from the verdict a sum largely in excess of the value of such property.

5. In trover, the right to recover the value of the property converted is not defeated by an assignment of the property by plaintiffs pending the action, where no objection is taken to the continuance of the suit in the name of the original plaintiffs, or motion made for the substitution of the assignee, it being provided by Code Colo. § 15, that, in case of the transfer of interest, the action may be continued in the name of the original party, and shall be neither affected nor abated.

Commissioners' decision. Error to district court, Arapahoe county.

In 1886, Marrs, Middleton & Hunter brought this action against Perkins and Colthrop to recover the value of several horses which had formerly been the property of one John L. Alexander, who had mortgaged them to the firm to secure certain promissory notes payable to the order of Marrs & Middleton. The notes had been transferred to the new firm of Marrs, Middleton & Hunter, who were the owners of them. The ownership of the notes, as set up in the fifth paragraph of the complaint, was not disputed. The plaintiffs declared upon their title as mortgagees, and averred the taking and conversion by the defendants. The complaint set up the conversion of six horses, with the description by name and by color. The defendants admitted the taking of four horses, and controverted the taking of the remainder. On the trial, without objection, proof was made that the defendants had received and disposed of five horses, which were included within the terms of the mortgage as originally executed and set out in the complaint. The value of the five horses, without interest, according to the testimony of the several witnesses, varied from \$545 to \$665. According to the testimony, the defendants had taken one white horse called "Snowflake," whose value was established to be from \$75 to \$100. It appears from the record that there was a difference between the allegations of the complaint and the proof, as offered, with reference to this particular horse. It was not described in the complaint either by name, by color, or by any other description. No testimony was introduced save that offered by the plaintiffs. Upon the conclusion of the testimony, one instruction seems to have been given to the jury which embraced four several propositions of law. An exception was saved to that instruction simply in general terms as to each and every part of it. A request was made by the defendants for an instruction, substantially, that the plaintiffs could not recover the value of any horse not named in the complaint. No instruction was prepared and tendered to the court, nor was any objection made to the court's refusal to give the instruction requested, nor was any exception saved to such refusal. There was a verdict for the plaintiffs for the sum of \$706.15. A motion for a new trial was interposed which attacked the verdict principally upon two grounds: *First*. That the instruction of the court charged the

jury: "If the plaintiffs are entitled to recover, your verdict will be for the value of the horses at the time of their conversion, and interest on such sum from that date to the day of the trial." And, *second*, that the verdict included the value of the horse Snowflake which was not warranted by the allegations of the complaint. On the hearing of the motion, by permission of the court, the plaintiffs remitted from their verdict \$186.15. According to the journal entry of the judgment, this included both the interest and the value of the horse not declared for. The defendants sued out a writ of error to reverse the judgment entered.

*A. D. Bullis and M. B. Carpenter*, for plaintiffs in error. *Reddin, Van Buren & Alphin*, for defendants in error.

*BISSELL, C.*, (after stating the facts as above.) It is evident from the record that no harm has come to the plaintiffs in error from the entry of the judgment against them. The property which they took was covered by the mortgage owned by Marrs, Middleton & Hunter, who were entitled to recover it, or its value. Numerous errors have been assigned and argued by counsel, but there are not many which deserve serious consideration. The error most insisted upon seems to be entirely unavailable to the appellants. The instruction of the court upon the subject of interest may not have accurately expressed the law as applicable to an action of this description. It is quite evident that the jury computed the interest, and included the computation in their verdict. If this were not, under the facts, error without prejudice, it would not be ground for reversal, because it is not included in the judgment as entered. By the permission of the court, the plaintiffs remitted \$186.15 from their verdict, taking judgment only for the balance. The court, in its entry, declares that this sum includes all the interest which was originally expressed in the verdict, as well as the value of the horse Snowflake. This conclusion of the trial court finds support in the record, and the finding would seem to remove that question from the necessary consideration of this court. Counsel have attacked the finding upon this question of fact with so much zeal and acuteness as seemingly to require that the judgment be maintained without the aid of it. In form, the instruction was not justified by the authorities in this state. At the time the case was tried it was pretty generally supposed by the profession that, in actions of trover for the conversion of personal property, the interest upon the money detained could not be computed by the jury, and included by them in the verdict which they might return. This question has been set at rest in this state by a recent decision wherein the whole subject was examined. It is now the established rule in Colorado, that while, as interest, damages may not be recovered for the detention of the money, or the money value of property taken and converted, yet damages equal to the legal interest upon the value of the chattels converted may be allowed, and included in the verdict which

the jury may render. *Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. Rep. 925. Under the law, as established in that case, the plaintiffs were entitled to recover, and have included in the verdict of the jury, a sum of money, as damages for the detention of the property, which would have been the exact equivalent of the interest which the jury computed and included in the verdict, and which the court told them the plaintiffs had a right to recover. In form the charge was undoubtedly erroneous, though in substance it was a correct expression of the law. But, as committed in this case, it is not an error for which the cause will be reversed, and sent back for a new trial. The plaintiffs in error cannot be heard to complain of the form of the instruction, for they took no specific objection to that clause relating to the matter of interest, which was but one of the half dozen legal propositions embraced in it; nor did they specifically request the court to charge the jury according to the law upon that subject. It has been repeatedly adjudged that, upon a general objection to an entire charge, error may not be predicated. Under the very liberal provisions of our Code, (section 81,) which substantially provides that the court shall disregard any error in the proceedings which do not affect the substantial rights of the parties, and that no judgment shall be reversed by reason of such error, this court would not reverse the judgment because of the error in the form of the instruction when no definite request was made by the defendant upon the subject, and when the verdict included nothing but that which the plaintiffs were entitled to recover.

An error is assigned upon the action of the court in instructing the jury orally, without the consent of the defendants or their counsel. In this state the court is without authority to instruct the jury orally when either party specifically objects to this form of instruction. To make the error available, an exception must be saved upon an objection duly taken. There is nothing whatever in the transcript tending to show either that the court instructed the jury orally or that the appellant objected to what the court did in respect of that matter. Wherever parties desire to insist upon and preserve their rights in this particular, it is incumbent upon them to make it apparent by the record that an error has been committed. It is manifest from the verdict of the jury that they found for the plaintiffs as to the five horses which the testimony showed the defendants had appropriated to their own use. There was, therefore, originally included in the verdict the value of the white horse, *Snowflake*, which was not declared for in the complaint, but concerning which there was abundant evidence of conversion. The jury probably proceeded upon the hypothesis that, as the defendants had taken the horse, and his value was established, the plaintiffs had a right to recover for him. It is quite possible that the jury were right in their conclusion, and that their verdict even might have been sustained, since the evidence concerning it was introduced with-

out objection; but it is wholly unnecessary to determine this question. The value of that horse was eliminated from the verdict, and is not included in the judgment, for the amount remitted was largely in excess of his value. It is true that the plaintiffs sought to deduct from the judgment the amount of the interest which the jury may have computed. Whether the plaintiffs succeeded in eliminating from their verdict both the value of the horse and the amount of the interest becomes wholly immaterial. They were entitled to recover the interest as damages, and, if it be conceded that they were not entitled to recover the value of the horse, they have permitted to be taken from their verdict a sum largely in excess of his value. Under these circumstances it is evident that, under the provision of section 78 of our Code, this court would have no right to reverse the judgment upon the error complained of.

The only remaining error which it is important to consider is that which is based upon the proofs contained in the record, showing that the plaintiffs had transferred, at the time of the trial, all their interest in the notes and mortgage, and were therefore personally without right to recover the value of the property converted. The plaintiffs in error contend the law is that, in an action of trover for the conversion of personal property, the plaintiff's right to recover its entire value is dependent upon his possession of the title thereto at the time of the institution of the suit. This doctrine grows out of the principle that, upon the recovery of a judgment, and the satisfaction thereof in an action of this description, the title to the property, for the conversion of which suit was brought, vests in the defendant. It therefore follows that, if the plaintiff, at the time of the institution of his suit, is without title, his recovery must be limited to the nominal damages which result from the taking, since he has no title upon which the law can operate when the defendant satisfies the judgment which has been obtained. That this is the law applicable to cases of this description is well settled. *Cooley, Torts*, 459. It is without application to the case at bar. In the complaint, the title of the plaintiffs at the time of the institution of the suit is distinctly averred in their fifth paragraph, and it is not controverted or put in issue by the defendants in their answer. It therefore follows that it is established by the record herein that the plaintiffs had the right to recover when they commenced their action. It is not so easy to see how a recovery in the suit could be defeated, or this judgment reversed, because of the showing which the record contains of a subsequent transfer of the plaintiffs' title. It must be conceded that, upon the cross-examination of one of the plaintiffs, it transpired that they had parted with their interest; but the testimony showing the transfer also declares the fact that the suit was being prosecuted in the interest of the assignee. No objection to the continuance of the suit in the names of the original plaintiffs was interposed by the defendants, nor did they make any motion

in the court below seeking to have the assignee substituted, in order that, upon the record, his title and his interest might be both affected and concluded. Under these circumstances, the plaintiffs' right to recover is not limited to the nominal damages to which only they would be entitled when the transfer precedes the commencement of the action. The Code (section 15) distinctly provides that, in case of a transfer of interest, the action may be continued in the name of the original party, and that it shall be neither affected nor abated by reason of such transfer of interest. This provision, in effect, prevents the application of the doctrine contended for to the facts in this case. If the defendants desired the record to show the transfer of interest in order that the satisfaction of the judgment might be clearly conclusive against the real party in interest, and operate to transfer the title as against the plaintiff in the record, it was open to them, when the facts were disclosed, to move the court for a substitution of the parties. Had they seen fit to take such action, the record then would have been a perfect defense in case of a subsequent litigation. They are protected, however, against any subsequent action by the assignee of the securities by the fact that the assignment was subsequent to the commencement of the suit. The assignee is bound by the judgment, and will be concluded as to the title in any subsequent suit. The record presents no other question which need be considered or determined. There are no errors apparent which warrant a reversal of the judgment. It should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is affirmed.

(15 Colo. 270)

HILL v. CORCORAN.

(*Supreme Court of Colorado*. Nov. 7, 1890.)

REPLEVIN—GOODS IN CUSTODY OF UNITED STATES MARSHAL—COMPETENCY OF JUROR.

1. Goods in the custody of a United States marshal, under attachment issued from a federal court, may be replevied by suit in a state court, by consent of the federal court. Adhering to *Mitchell v. Smith*, 13 Colo. 170, 21 Pac. Rep. 1026. ELLIOTT, J., dissenting.

2. Where a juror in an action of replevin is shown to be a clerk in the employ of a firm on intimate relations with one of the parties in interest, and which became their bondsmen upon the instrument which secured them in possession of the property in controversy, he is properly excused.

3. The fact that during the trial one of the jurors was accused of a grave crime, and employed one of the counsel for the successful party to defend him, is not ground for a new trial, where it does not appear that the juror was rendered incompetent or failed to give due attention to the testimony and arguments.

4. A judgment will not be reversed because of a remark by the trial judge tending to discredit counsel for taking an exception to the action of the court in excusing a juror for cause, where there is no showing as to the number of jurors in the box who remained there to render the verdict after the remark was made, and the remark it-

self does not tend to indicate any predisposition of the court regarding the controversy.

5. To justify an instruction that inadequacy of price is for the consideration of the jury in determining the fairness of a sale by a failing debtor, there must be proof of the real value of the goods, and this is not supplied by merely comparing the price with the original cost of the goods.

Commissioners' decision. Appeal from superior court of Denver.

This was an action of replevin brought by the appellee Corcoran against Hill to recover the possession of certain property alleged to have been unlawfully taken, with damages for the detention. Hill defended and justified the taking under mesne processes of attachment issued out of the federal court in Colorado in two cases, in one of which Cousins and others were plaintiffs, and Louis Witkowski was defendant, and in the other of which the Bay State Shoe & Leather Company were plaintiffs, and Witkowski was likewise defendant. The defendant not only contested the jurisdiction of the court over him in this suit, but further defended on the ground that the sale between Witkowski and Corcoran, under which Corcoran claimed title, was fraudulent as against creditors, and consequently that the transfer was indefensible. Issue was taken by the plaintiff Corcoran upon the various matters set up in the answer, and he justified his suit, and attempted to sustain the jurisdiction of the court, by setting up leave of the federal court to institute the particular suit by an order duly entered for the purpose. The replication was demurred to, as to so much of it as set up the authority to institute this suit under leave granted, on the theory that the federal court was without jurisdiction to grant the leave, and that under the order, or by reason of it, or under any circumstances, the state court could acquire no jurisdiction because the property had been seized by the marshal. The demurrer was overruled, and the cause tried upon the main issue as to the character of the sale to Corcoran. No evidence of the value of the goods sold to Corcoran was given save that which came out in the history of the sale to him by Witkowski, and the inventory made at the time. Little evidence was given by the defendant which tended to establish the fraudulent character of the sale, nor did the defendant attempt to prove the extent of Witkowski's indebtedness, or Corcoran's knowledge of his situation. Whatever was proved upon that subject was of an inferential character, and derived almost wholly from the general history of the sale. The jury found upon this issue for the plaintiff. The defendant appeals.

Joseph N. Baxter and N. B. Carpenter, for appellant. Patterson & Thomas for appellee.

BISSELL, C., (after stating the facts as above.) Among the many errors urged on behalf of the appellant, that which is most extensively argued is based upon the action of the court in entertaining jurisdiction of the suit. This question was supposed to have been set at rest by the decisions of this court in the cases of

Smith v. Bauer 9 Colo. 380, 12 Pac. Rep. 397; Weil v. Smith, 11 Colo. 310, 18 Pac. Rep. 30; Mitchell v. Smith, 13 Colo. 170, 21 Pac. Rep. 1026; and Smith v. Jensen, 13 Colo. 213, 22 Pac. Rep. 434.

In view of the constant and repeated assaults upon the principle involved in these decisions, and of the later adjudications of the supreme court of the United States, particularly that of *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355, it has been deemed best to further elucidate and explain this court's position on the question. This is ample justification for the labor and space essential to what may be taken as an end of the controversy, until the highest tribunal of the nation shall declare its opinion on the very matter in dispute. The language used by that very distinguished court in the case last referred to, as in all the cases following *Freeman v. Howe*, in 24 How. 450, affords some apparent warrant for the contention of appellant's counsel. When properly understood and explained, however, none of the federal authorities, nor any of the arguments urged against this court's position, compel any modification of the doctrine already announced. It is one of the fundamentals of the law that, to entertain and decide a controversy between parties, it is essential that the court which tries the case shall have jurisdiction of both subject-matter and of parties. The postulate that wherever there is a want of jurisdiction, either as to the person or as to the subject-matter, the judgment which it may render is indefensible, is without exception. It has thus become common to assert that, wherever a matter can be termed "jurisdictional," it is beyond the power of the court to increase or diminish its powers at pleasure concerning that matter. With regard to the subject-matter of this *replevin* suit, the action of the federal court concerning it cannot be said, except in a special and very restricted sense, to be jurisdictional. To permit the res to be seized on the process of another court, organized and exercising its judicial functions under a different sovereignty, may, without doing violence to legal terms or juridical definition, be termed an "invasion" of the jurisdiction of the court which has taken the property. But in the sense, and in the broad inclusion of meaning, in which that word "jurisdiction" is by the courts and lawyers used, understood, and defined, the word is not accurately applied, and has led to much uncertainty and confusion. In the main action in which the *mesne* process issued, the court has jurisdiction, assuming the action to have been rightly brought, of both parties and subject-matter. If, however, B.'s property be taken on the writ issued and executed in C.'s suit against A., the court, as to the essentials of the controversy arising from the seizure, has jurisdiction neither of the person nor of the subject-matter. B. is neither privy, nor party. If his property be taken and sold he is neither bound nor concluded by either process, judgment, or sale. He has not lost his property right, nor is he without remedy. The definite thing may have

disappeared, and he may be restricted in the remedies open to him to enforce his rights and redress his wrongs. But of him, and of the subject-matter of any suit which he may lawfully institute, the court which seized his property has no jurisdiction without the concurrence of other facts to bring the matter within the scope of federal cognizance. This demonstrates the inaccuracy of the application of the word "jurisdiction" as a designation of the primary and fundamental difficulty. It is only the limited possessory element of jurisdiction which is either concerned or involved. The general trouble has arisen from the insurmountable obstacle to absolutely accurate and perfect judicial declaration. Unless the precise question be raised by the record, it is most liable to lie hidden beyond the range of mental vision, and be discoverable only as the land is when the ship has sailed far enough in its direction. The exact question herein has never been presented to the supreme court of the United States, nor has it ever had occasion to declare its position on this phase of it. The position of this court being unassailable, and supported by every consideration of comity, necessity, and convenience, as well as by sound and convincing legal argumentation founded on well understood and recognized rules of judicial definition and interpretation, it may very properly be assumed to be in harmony with the probable future declarations of that court. The whole question is one of the avoidance of a conflict in the exercise of the powers of two courts acting under authority conferred by different sovereignties, but exercised within the same general territorial limits. This is plain to be seen when the subject is considered both with reference to the purposes for which the authority is claimed, and the absence of right on the part of the parties really interested to assert that the control of the federal court is exclusive. The object is not to preserve the property or its fruits to answer the judgment, for neither can ultimately be devoted to any such purpose, if the process has been laid upon property to which the defendant, in the process had no title. This is apparent because the officer may be sued in a state court in trespass for the unlawful taking, or he and his bondsmen may, in like manner, be sued upon his official bond, and made to respond for the unlawful conversion. This is abundantly settled by the same high court which declares that property taken under its process may not be interfered with so long as it is within the scope and power of the writ. *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. Rep. 286; *Buck v. Colbath*, 3 Wall. 334.

The real owner is not precluded from asserting his title as against the marshal in a tribunal of his own selection. It is only that the goods are temporarily and incidentally in the custody of the court, and a stranger may not lay hold of them. Under these circumstances it is not easy to see why the federal court may not by order permit the res, the specific thing, to be pursued. The privilege does not at all belong to the officer, neither is it his right.

He could not justify on any grounds personal to himself. The jurisdiction of the federal court is dependent on citizenship, or on some other statutory consideration. If both be lacking there is no personal right in the officer. When he is permitted to set up the defense he simply asserts the power and authority of the court. It is only because the court's rights and functions are involved that the plea is permitted to him. That it is not a personal privilege is evident from those decisions which permit the damages for the taking to be recovered either of him or his bondsmen. If it were a personal privilege, or his right and privilege as an officer, the defense would always be available, and he could, at all times, and in all courts, insist upon his right to litigate in the federal forum, whether sued in trespass, or on his bond, or in replevin. That he may insist upon it in replevin is solely because the property is in the custody of the federal court. The plaintiff in the action in which process issued is equally without right to demand that the replevin suit be heard in the federal tribunal. He is without any choice in the premises as to the forum in which that controversy shall be settled. The original suit does not enter into the solution of that problem. The jurisdiction of the court over the original subject-matter and controversy is neither assumed nor cast off at its pleasure. It always remains when justly invoked and set into active operation. To say that it may by order release property which has been seized under its process either to answer a judgment which may or may not be recovered, or to satisfy one already rendered, when the particular property is alleged not to be answerable to the judgment, and permit that question to be litigated in a court otherwise of competent jurisdiction, is not to assume a power in the court to refuse or assert a jurisdiction over the subject-matter of a controversy represented by citizens who have a right to be heard in that forum. The officer is without personal right to be heard, for he may elsewhere be made to answer for his illegal taking. The party is without right because he neither has the property nor can he be heard to plead in any suit against the officer. The plea of levy under the process of the federal court is then neither a personal plea nor one incidental to the office of marshal, but the setting up of a fact, to-wit, the antecedent acquisition of possession of the property by another court foreign to the tribunal in which the later action has been instituted. It is the fact of possession solely, which, if at all, permits the jurisdiction to be said to attach. It does not spring from the existence of the main suit, nor grow out of the *personnel* of the officer, but the circumstance that the officer of a particular court under its process has seized the goods by construction brings them within the jurisdiction of that tribunal; and the possession, save by the exercise of a wise and well-directed comity, may not be disturbed. The ultimate judgment in the action wherein the mesne process was issued, and the sale of the property seized under final execution, in no manner affects

the question of title to the property. The *res*, the specific thing, may be lost or transferred, but the owner may still recover of the officer for the taking, and neither the seizure and sale nor the judgment of that court is of any moment in determining the matter of the ownership. When then it is asserted that the question is one of jurisdiction it is only true in a limited and special sense. The property is in the hands of the court, and consequently is accurately said to have passed within its jurisdiction. The question of title to the property seized is never involved in the principal suit nor at all affected by the fact of seizure. A particular remedy for the establishment of that title is unavailable, because it invades the court's possession. All the court surrenders, when it enters an order permitting suit to be instituted against its officer, is that possession, and the right to it. It neither assumes jurisdiction of the subject-matter of any suit, nor does it reject jurisdiction of any controversy which has been initiated in it. The parties to the original suit remain unaffected by the order, for they never had any right to have the question of title to B.'s property investigated in the suit which has been brought by A. against C. The officer has lost nothing, because he might always be sued in the foreign tribunal for his illegal acts. The court has simply said the possession is so far yielded that the matter of ownership may be litigated in the state court. That the power exists to make the order appears unquestionable. It is conceded that there is no statutory grant of such authority, but it is the incidental and inherent right existing in every court to control, direct, and govern its own process, to maintain its authority over property which has been seized under it, or relinquish it, at its pleasure, so long as no right to contest the surrender inures to any suitor or citizen. As said by Mr. Justice MILLER in *Buck v. Colbath*, *supra*: "It is only while the property is in the possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not." The supreme court has undoubtedly declared the law to be that the stranger whose property has been seized may, in their court, assert and defend his title as against the process. No other position would be consistent either with the rights of citizens or the exercise of a proper authority by the court. The position and rule laid down by the supreme court of the United States are not at all in conflict with the principles which this court has declared. Both rules may well be permitted to stand, and the comity and harmony which has always prevailed, and been asserted by both tribunals, will be the better conserved and protected. The court did not err in overruling the demurrer to the replication.

The remaining errors assigned require no extended consideration. Two of them may be grouped, since they grow out of the excusing of one of the jurors from service and the remark made by the court incidentally, when he was let off from service on the panel. It is quite true that, when the court commits an error in excusing a juror who is challenged for cause, that error is the subject of review in this court, and when it is plain to be seen that thereby a party has been prejudiced, the cause will be reversed. This cause however does not seem to be brought very clearly within that rule. The record as it is brought up fails to show at what time, and under what circumstances, the juror Light was excused from service, save that it appears that, during the progress of the examination, counsel for appellee submitted to the court "that it was a question whether the juror under the circumstances ought to be admitted into the panel." No direct challenge was made for cause, nor did the court rule directly upon the proposition of a challenge as made by the challenging party. The judge proceeded to further examine the juror, and upon the conclusion of his questions excused him; and thereto the appellee saved an exception. But for the remark of counsel, no objection to the excuse of the juror could have been taken, and such exercise of the court's discretion would not have been available on error. *Mooney v. People*, 7 Colo. 218, 3 Pac. Rep. 235. Were it necessary, the court would be inclined to hold that there was no sustaining of a challenge for cause upon which error could be based; but it is evident that the juror was so circumstanced in his situation and in his relations that the court properly exercised the discretion reposed in it when it excused him from the panel. He was in the employ of a firm, apparently on the most excellent terms and intimate relations with one of the parties in interest. The firm became their bondsmen upon the instrument which secured them in the possession of the property in the original controversy. It is apparent that one side of the case at least might easily have been the subject of enlarged discussion in the house wherein the juror was a clerk, and that, from the atmosphere, he was liable to imbibe notions and prejudices which would render him, not perhaps an incompetent juror, but one who would not be thoroughly impartial as between the parties. At the time that the juror was excused and the exception was saved, a remark was made by the judge which had a tendency to cast some discredit upon the action of counsel in saving the exception. There is a dispute between the attorneys for the respective parties in this court as to the regularity of the bill of exceptions and the accuracy of its contents. The remark which was excepted to was written in the bill apparently after its preparation by the stenographer, and it has since been crossed out by pencil so as to leave it uncertain whether legitimately it is a part of the record. This court will not assume the task of determining what the fact is, and weighing the evidence furnished by counsel *pro* and *con* upon the subject. If the

appellant desired to predicate error upon that proposition, it was his duty, after the bill of exceptions exhibiting the erasure was filed in this court, to suggest a diminution of the record, and obtain leave to file a supplemental bill showing the action of the court in the premises. It cannot be expected that this court will determine matters which are not properly determinable from the record before it. It is perhaps proper to say, however, that, while the remark is of a slightly unjudicial character, it is not of the sort for which, under the showing made here, a case would be reversed. It is not every slight departure from the strictest judicial propriety which will warrant the setting aside of the finding of a jury. It must be clear, or reasonably so, at least, that the remark would probably tend to the prejudice of the party against whom it was made. That is not clear under the circumstances here, for there is no showing as to the number of jurors in the box who remained there to render the verdict after the remark was made, nor does the remark itself tend to indicate any predisposition of the court regarding the controversy. The instructions which were asked by appellant and refused were rightly denied. It is quite within the province of a *nisi prius* tribunal to reject the instructions in the form asked by counsel, and to express the law upon the subjects covered in their own fashion and in their own phraseology. The practice perhaps is more honored in the breach than in the observance, but wherever it is done, and the subjects embraced within the instructions asked by counsel are included in the court's own admonitions to the jury, there is no cause for complaint. In this case, the instructions, which it would have been error to refuse had they not been covered, were fully included within the court's statement of the law. As to the others, it may be said that the case lacks the evidence upon which they can be properly predicated. It is true that an inadequacy of price is always a matter for the consideration of the jury in determining the fairness of a sale, as between the purchaser and a failing debtor, but, to apply it to any given controversy, it is incumbent upon the contestant to make proof of the real value and the proper price of the goods that were sold. The only way in which that was done in this case was by comparing the price paid by the purchaser with the original cost of the goods. This is not such a determining of value as necessitates the giving of that instruction.

There is but one other error which need be considered, and this grows out of the overruling of a motion for a new trial, based upon an affidavit substantially setting forth that, during the trial, one of the jurors in the panel was accused of a grave crime, and that he employed one of the counsel for the other side to defend him against the charge. There was nothing in the proof offered upon this matter which tended to show that the juror was thereby rendered incompetent, or that he failed to give due and proper attention to the testimony as it was adduced, and to the arguments of counsel. Even under



great strain and pressure of misfortune, or other circumstances, the mental operations may, for collateral purposes, be as clear and precise, and, possibly, more accurate, than when free from pressure. These facts are not of themselves enough to warrant setting aside a verdict which is abundantly sustained by the testimony. There are no other errors assigned which need consideration. The judgment should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is affirmed.

ELLIOTT, J., (*dissenting*.) I cannot concur in the foregoing opinion, for the reasons stated in my dissenting opinion in the case of Mitchell v. Smith, 13 Colo. 172, 21 Pac. Rep. 1026.

(15 Colo. 236)

BRAND v. MERRITT *et al.*

(Supreme Court of Colorado. Nov. 7, 1890.)

REAL-ESTATE BROKERS—ACTION FOR COMMISSIONS.

1. In an action for services rendered by real-estate brokers in procuring a purchaser for defendant's land, where there were no written pleadings in the trial court, and no testimony of any definite contract, evidence of the value of the services, based on the price for which the land sold, was properly admitted, and a judgment entered upon that basis was proper.

2. Where it is claimed in such action that the property had been sold by another agent prior to the negotiation of the sale by plaintiffs, and the evidence upon that point is somewhat conflicting, a finding that no such sale was made will not be disturbed, although upon the evidence the court might have reached a different conclusion, especially as defendant testified that he gave plaintiffs no notice of the pending sale, and permitted them to continue their efforts in his behalf.

Commissioners' decision. Error to superior court of Denver.

L. S. Smith, for plaintiff in error. A. L. Dowd, for defendants in error.

BISSELL, C. Merritt & Grommon brought this suit in 1886 against George Brand, to recover a sum of money which they alleged to be due them for services rendered in the procurement of a purchaser for certain property which Brand had placed in their hands for sale. The case was tried without a jury in the superior court, to which it went on the appeal taken by them, and resulted in a judgment in favor of the plaintiffs for the sum of \$125, to which the defendant excepted, and in regard to which he alleges error. There are not many questions raised and discussed by counsel for plaintiff in error, although everything of importance is considered in his brief. The errors on which he relies may be properly grouped in three divisions.

It is contended that the judgment cannot be maintained because it was rendered upon the basis of the value of the services rendered by the plaintiffs, computed upon the price for which the property was sold. It is said that as plaintiffs sued for a specific sum, and sought to recover upon a definite contract, they were limited to a

recovery upon the contract as they averred it, and were debarred any relief upon the basis of the value of the services rendered. This contention might possibly be true, were it apparent from either the abstract or the record that the plaintiffs had declared upon a specific contract which they had failed to prove, or the evidence established the existence of such a contract. The trouble, however, is that there were no written pleadings in the justice's court, where the case originated, and none were filed in the superior court, where it was subsequently tried. It is therefore impossible to determine whether the suit was brought upon any such hypothesis, or whether the plaintiffs should be held entitled to recover only upon due proof of it. The record itself is equally barren of testimony establishing a contract upon which the plaintiffs could recover, unless they made proof of the value of their services as rendered. Under these circumstances, the evidence as to the value was properly admitted, and judgment upon that basis properly entered by the court.

The plaintiff in error likewise contends, by several errors assigned, that, in a suit by real-estate brokers to recover commissions earned by the procurement of a purchaser to whom the property is not ultimately sold, they are bound to make proof that the customer which they produced was both able and willing to take the property and pay the price put upon it by the owner, and to carry out a contract which, in terms, conforms to the conditions affixed by the owner when he put the property in their hands. The principle contended for is accurately stated by counsel, and it has been universally held to be true that such proof is absolutely indispensable to the broker's recovery of commissions. The accuracy of the statement does not determine its application to the case in hand. The evidence upon this proposition is not as full and satisfactory as it is ordinarily made in cases of this description. This is due perhaps to the suggestions of the court that further evidence upon the subject need not be produced. There was, however, enough testimony given upon this subject to warrant the court in reaching the conclusion at which he arrived. It is probably true that it was not offered in the form usually observed in giving testimony of this description, but no objection was taken to the method of its offer; nor upon the conclusion of the plaintiffs' case was a specific objection taken that they had failed sufficiently to prove this essential fact. In the absence of objections which properly raise a question of this sort, the findings of the court upon such a proposition of fact will not be disturbed.

The only other error which has been urged is that the case shows that the property had been sold by another agent prior to the time of the negotiation of the sale by the plaintiffs. It is contended that this fact debars the plaintiffs' recovery, upon the principle that where property is placed in the hands of several brokers for sale, to the knowledge of them all, any one of the brokers assumes the risk of having his claim to compensation defeated by

a sale made by another broker before he procures a purchaser. It is wholly unnecessary to determine the accuracy of this legal proposition, for the court has found, as a matter of fact, that no such sale was made prior to the time the plaintiffs found a purchaser ready, able, and willing to purchase upon the specified terms, and notified the owner. The evidence upon this proposition is somewhat conflicting, and it is not easy to determine from the evidence produced the exact dates and times of the sales by the contending brokers. Upon the evidence, it would have been possible for the court to reach a different conclusion from that expressed in his judgment. The record, however, justifies the finding which he made. It has support in the equitable circumstances apparent in the case. According to the owner's evidence, the sale which he contends defeats the brokers' right to recover depended solely upon the purchaser's conclusions concerning the title. Notwithstanding this fact, he gave the plaintiffs no notice whatever of the pending sale, and permitted them to continue their efforts in his behalf. They were thus fully justified in believing the agency still to exist, and the owner will be held to the full responsibility of its continuance, unless he be able to demonstrate satisfactorily that the sale, which in law is to be held to terminate it, was in fact consummated before the brokers found a purchaser and earned the commission. Under these circumstances, the finding will not be disturbed. It is an universal rule in this court that the judgment of a *visi prius* tribunal will never be disturbed from any considerations of mere preponderance of testimony, and wherever there is evidence enough in the case to justify the judgment rendered it will be sustained, unless it is so manifestly against the weight of the testimony as to indicate prejudice or gross error. *Ralph v. Weary*, 7 Colo. 217, 3 Pac. Rep. 224; *Smelting Co. v. Pless*, 8 Colo. 87, 5 Pac. Rep. 650; *Jackson v. Allen*, 4 Colo. 263; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901. There being no error manifest in the record, the judgment should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment below is affirmed.

(15 Colo. 212)

COOK *et al.* v. MERRITT.

(Supreme Court of Colorado. Nov. 7, 1890.)

TRIAL—READING PLEADINGS TO JURY—INSTRUCTIONS.

1. Where the issue is clearly defined and thoroughly understood at the trial, a party is not entitled to read to the jury extracts from the pleadings, on the ground that his opponent, by failing to deny, admits a material allegation, which admission affects his credibility as a witness on his own behalf. The construction of such pleadings is for the court.

2. In an action to enforce a personal liability against the directors of a corporation, upon a note made by it, on the ground of their failure to record certificates of the amount of capital stock and the proportion paid in as required by statute, defendants set up an agreement whereby

plaintiff, in consideration of a certain bill of sale, and the assignment of certain leases, released them from personal liability. *Held*, a charge that, unless the jury found that such an agreement was made, defendants were liable, because of their failure to file the certificates, was proper.

Commissioners' decision. Appeal from district court, Arapahoe county.

E. P. Harman, for appellants. Isaac E. Barnum, for appellee.

RICHMOND, C. Elmer W. Merritt, plaintiff below and appellee herein, instituted his action in the county court to recover of the defendants the sum of \$595, alleging in his complaint that John Cook, Jr., W. H. Conley, and B. F. Bush, on the 1st day of January, 1885, became the directors of a corporation organized under the laws of the state of Colorado, known as the "Denver Rink & Land Company," and so remained and continued directors until the 1st day of January, 1886; that on the 7th day of May, 1885, the corporation borrowed the sum of \$1,000 of the plaintiff, for which it executed its promissory note; that on the 9th of November, 1885, the corporation desired to continue the loan aforesaid, increasing the amount to the sum of \$1,300, which was done, and a promissory note executed therefor. A portion of this sum was paid, leaving a balance due to him from the corporation of \$595, which sum he seeks to recover from the defendants, appellants herein, as directors of said company, alleging that the president and directors or trustees of said corporation had not recorded in the office of the secretary of state, or in the office of the recorder of deeds, in the county wherein the business of said company was carried on, any certificate stating the amount of capital of the company fixed and paid in; and, further, that the corporation did not within 60 days from the 1st day of January, 1885, or at any other time before or since, file or record in the office of the recorder of deeds, in said county of Arapahoe, that being the county wherein the business of said company was carried on, any report stating or showing the amount of capital of said company, or the proportion or amount of said capital stock that was paid in. Defendants answered by a general denial of all the allegations in the complaint, and for a third defense allege that, at the time of the giving of the note for the sum of \$1,300, the Denver Rink & Land Company executed to the plaintiff a bill of sale of certain personal property, and that plaintiff at that time entered into a contract with the corporation through its officers to the effect that the company was to assign in writing to the plaintiff certain leases owned by said company, and that, in consideration of the written assignment of the leases by the company to plaintiff, plaintiff obligated himself to the company and the defendants Cook and Conley not to hold defendants or either of them liable as individuals, or in their official capacity as officers, directors, and trustees of the company, and to look only and solely to the company for the payment of the note of \$1,300, and interest, and whatever rents he might have to pay for said company; that, in

accordance with this contract, the company assigned in writing said leases to plaintiff. To this answer, plaintiff replies denying that he entered into any such contract or agreement. It is apparent from the pleadings, as well as from the testimony included in the record filed in this court, that the issue between the parties plaintiff and defendant was whether or not at the time of the execution of the last note plaintiff agreed to relieve defendants Cook and Conley of any responsibility individually, or as directors and officers of the company, for the payment of the sum due him. It is also apparent from the record that the various certificates referred to in the complaint, and required by the statute to be filed, were not filed, and that on account of the failure to file the certificates the defendants, as officers and directors, became under the law responsible to plaintiff, unless the plaintiff had agreed as set up in the third defense. The cause was tried in the county court, resulting in a verdict for the plaintiff, whereupon it was appealed to the district court, and there tried to a jury, resulting in a verdict for plaintiff in the sum of \$523. To reverse this judgment, appellants prosecute this appeal.

In support of their contention, it is claimed that the court erred in refusing defendants' counsel the right to read to the jury defendants' third defense and plaintiff's replication thereto, and that the court erred in its instruction to the jury, and in refusing to give instructions asked for by the defendants. The object, as averred in the argument of appellants' counsel, of reading the pleadings referred to to the jury, was to show that the replication did not deny all the allegations of the third defense; that, as a matter of fact, it admitted a very material allegation, which admission he claims goes to the credit of the plaintiff as a witness. This being the case, he insists the jury should have had the benefit of the admission. Pleadings are presumed to be statements, in legal form, of those facts constituting the charge or defense of the parties by means of which issues between the parties to be tried are defined, and are necessary to inform the court what issues are raised, and which are proper for trial in the case. It is not the province of the jury to construe and determine the effect of the pleadings. In section 260, 1 Thomp. Trials, the author uses the following language: "It should be kept in mind that matters concerning the pleadings are ordinarily addressed to the judge, whose duty it is to state the issues to the jury when he comes to deliver to them his instructions, and that comments on the pleadings to the jury are, in general, out of place, and sometimes unprofessional." In *Tavis v. Hicks*, 41 Cal. 123, it was held that "the question as to what facts are admitted by the pleadings is one for the court, and not for the jury, and the court should not submit such a question to the jury." In *Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.*, 35 Mo. 85, it was held that "an instruction by the court that all allegations and petitions not specifically denied in the answer are to be

taken as true is erroneous. The issues should be specifically stated by the court." 1 Thomp. Trials, § 1027; *Potter v. Wooster*, 10 Iowa, 334.

It is not necessary for us to go so far as to say that under no circumstances may counsel be permitted to discuss or read to the jury the pleadings in a case, or extracts therefrom; but, in the case at bar, the issue was one clearly defined, thoroughly understood by court, counsel, and jury, and counsel sought to bring to the attention of the jury the fact that certain allegations of the defendants were admitted by failure to deny on the part of the plaintiff. That question certainly was not for the jury. It was for the court to determine, and it was the duty of counsel to call the court's attention to his position, and ask instructions. In refusing this permission to counsel, we see no error. The instructions asked for by the defendants and refused by the court, we think, were fully covered by the instruction given to the jury. The court instructed the jury as to the nature of the contract, and particularly enforced upon its attention the fact that if plaintiff had agreed with the defendants, Cook and Conley, by reason of the assignment of the leases, and the execution of the bill of sale, to relieve them of responsibility for the indebtedness of the company as directors and officers of the company, they should find for the defendants; but if, on the contrary, such a contract was not entered into, that, by reason of the failure of defendants as officers and directors of the corporation to file the certificates provided for by law, they became responsible to the plaintiff to the amount of his claim against the company. It is unnecessary for us to set forth the instructions asked and refused. Suffice it to say that a careful examination of the record warrants us in asserting that the issues between the parties plaintiff and defendant were thoroughly understood, and fairly tried. There is evidence to support the verdict, and the instructions of the court were sufficiently full and explicit upon the issues. We see no error, and therefore are of the opinion that the judgment should be affirmed.

BISSELL and REED, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

(15 Colo. 229)

FIRST NAT. BANK OF DENVER v. DEVENISH.

(*Supreme Court of Colorado*. Nov. 7, 1890.)

BANKS AND BANKING—PAYMENT OF CHECK BY MISTAKE.

1. Plaintiff bank in the regular course of its business received checks drawn by C. upon defendant, a private banker, which were forwarded to F., its correspondent, for collection, and paid by draft, payment of which was afterwards stopped by defendant. In an action on the draft, defendant pleaded that it was executed under the mistaken belief that C. had sufficient funds on deposit to meet the checks. On the trial defendant testified that he drew the draft in reliance upon C.'s statement that a certain check left by him with defendant for collection would be paid, and that such check was not paid

*Held*, that the mistake attempted to be proved was not the one relied on in the pleading, and that neither of them was available as a defense.

2. A special defense that, after the execution of the draft, C. deposited large sums of money which defendant, relying upon the promise of F. to return the draft, paid out on other checks, was unavailing in view of defendant's own testimony showing that when the deposits were made he knew that the draft had been protested, and was being retained, and he was not relieved from responsibility thereon.

3. Defendant's agent testified that he gave the checks to F., and explained the circumstances, and that the latter took them, and said that he could not return the draft because it was in the post-office, but that the matter would be all right. In reply to a question by the court, the witness stated that he could not say exactly what F.'s language was, and that he did not think he said in express words, "I will have the draft returned." F. denied that he agreed to return the draft, or accept the checks in payment. *Held*, that no agreement by F. to rescind and return the draft was established.

Commissioners' decision. Appeal from district court, Arapahoe county.

*Wolcott & Vaile*, for appellant. *W. S. Uhren* and *L. B. France*, for appellee.

REED, C. Appellant is a national bank doing business in the city of Denver. In the year 1883, appellee was a private banker doing business at Tin Cup, in the county of Gunnison. Appellant, in the regular course of business, received checks amounting to \$312, drawn by one C. F. Caldwell upon the bank of appellee, which were forwarded to its correspondent, one Freeman, at Tin Cup, for collection, and presented on the afternoon of December 27, 1883, at the bank of Devenish & Co., and paid by draft drawn upon the German National Bank of Denver, of which the following is a copy: "\$312. Cochran & Devenish, Bankers, Tin Cup, Colo., Dec. 27, 1883. Pay to the order of S. N. Wood, cashier, three hundred and twelve dollars. S. G. DEVENISH & Co. To German Nat'l B'k, Denver, Colo." On the afternoon of the next day, (December 28th,) appellee returned the checks which had been paid and canceled on the day previous, to Freeman, and asked a return of the draft, claiming that the checks had been paid through mistake. The draft had been forwarded by Freeman to the appellant at Denver. Appellee, by telegram, stopped the payment of the draft. Appellant did not return the draft, and afterwards instituted this suit to recover the amount, the complaint being in the ordinary form of a bill of exchange.

The defendant in answer put in special pleas admitting the presentation and payment of the checks. "Believing that said Caldwell had on deposit with defendant funds to meet and pay said checks, and in that belief, the defendant made and delivered to said Freeman, agent of the plaintiff, the bill of exchange in the complaint herein described; but defendant avers that such bill of exchange was so executed and delivered as aforesaid, by defendant, under a mistake of fact, and that the said Caldwell did not then have, at the time of the making and delivery of said bill of exchange, in the hands of defendant, funds to pay the check for which said bill of ex-

change was given." That defendant discovered the mistake about 1 o'clock the next day, (December 28th,) when the checks were returned to Freeman, and he was requested to return the draft. That Freeman promised to return the draft, but neglected to do so. It is also pleaded, as a special defense, that on the 20th of January, 1884, Caldwell deposited with appellee large sums of money much in excess of the amount of the draft, but that appellee, relying upon the promise of Freeman to return the draft, failed to protect himself, and paid out such deposits on other checks of Caldwell. These special defenses were fully replied to by the plaintiff. The case was tried to the court, without a jury, and judgment found for the defendant, from which this appeal was taken.

The appellee relies in argument in support of the judgment upon two propositions: *First*. That the payment of the checks was made through such a mistake of fact as legally entitled him to recall it upon discovering the mistake. *Second*. Upon the supposed rescission of the transaction by delivery of the paid and canceled check to Freeman, the correspondent of appellant, and the demand for the return of the draft, and the supposed acceptance of the checks by Freeman and their detention by him. Caldwell was a customer of appellee,—kept his account with them. They were supposed to be informed of his financial standing, and certainly were supposed to know the condition of his account with them at the time of the presentation of the checks for payment. Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If, from negligence or inattention to their own affairs, banks improvidently pay when the account of the customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid. The supposed mistake relied upon in argument is stated in the pleadings as follows: "That such bill of exchange was so executed and delivered as aforesaid, by defendant, under a mistake of fact, and that the said Caldwell did not then have, at the time of the making and delivery of the said bill of exchange, in the hands of the defendant, funds to pay the checks for which said bill of exchange was given, and that defendant discovered said mistake at, to-wit the hour of 1 o'clock on the afternoon of the 28th day of December, 1883." The character of the supposed mistake, as stated in pleading and shown in evidence, was such as to preclude appellee from availing himself of it as a defense. It being the direct result of carelessness and inattention to his own affairs, there can be no relief at law, and, even in equity, courts will seldom if ever relieve a man from the result of a mistake attributable to negligence or want of diligence in his own affairs. *Kerr, Frand & M. 407; Beaufort v. Neeld, 12 Clark & F. 248; Leuty v. Hillas, 2 De Gex & J. 110; Railroad Corp. v. Babcock, 6 Metc.*

(Mass.) 346; Ferson v. Sanger, 1 Woodb. & M. 138; Wood v. Patterson, 4 Md. Ch. 335.

An examination of the evidence shows that it utterly failed to support the allegation in the answer in regard to a mistake. S. G. Devenish, in substance, testified that, at the time of the presentation of the Caldwell checks on December 27th, for which a draft was drawn, Caldwell was a customer of his bank; that he had no money to his credit in the bank; that prior to that date, on December 19th, Caldwell had left with the bank for collection a check on the First National Bank of Leadville for \$150, which he represented would be paid; that, relying upon such assurances as to the check for \$150, he accepted the checks of Caldwell on the 27th for \$312, and drew the draft in controversy; that at 1 o'clock P. M. of the 28th, he found that the representations of Caldwell, in regard to the Leadville check of \$150, were false, and the check unpaid; that he then caused the checks of Caldwell to be returned to Freeman, and requested a return of the draft. It is apparent at once that the supposed mistake attempted to be proved was not the one alleged in the pleading. It is perhaps needless to say that the supposed mistake established by the evidence is not such an one as to be cognizable at law as a ground for the rescission of an executed transaction between the parties to this suit. It was not a mutual mistake to which appellant was a party, or of which he was supposed to have any information. It seems at most, when explained, a case of misplaced confidence of appellee in the statements of a customer on the strength of which money was advanced to the customer and paid to appellant. Such mistakes are not such as are defined as mistakes in the books and remedied in courts.

We do not see how the last special defense, viz., that Caldwell afterwards deposited large sums of money which appellee, relying upon the promise of Freeman to return the draft, paid out on other checks, can aid him. Mr. Devenish testified that on the 2d or 3d day of January, 1884, about mid-day, he informed Freeman of his surprise at having received a notice of protest of the draft in question. Consequently he knew at that time that the draft was being retained by the appellant, and he held for its payment on refusal of the German National Bank to accept it; and, on the 20th day of January, he knew it had not been returned, nor he relieved from his responsibility on his outstanding draft. Why did he not protect himself when he had an opportunity and full knowledge of the facts? If appellee considered the transaction rescinded, and the checks of Caldwell unpaid by the draft, good faith required that he should have paid them from the deposited funds, knowing them to be outstanding and unpaid. His failure to protect himself when opportunity offered cannot well prevail as a defense in the action. The defense made is not tenable on the ground of mistake, and, if allowed to prevail, could only succeed upon full proof of the agency of Freeman, and his authority to bind appellant

by an agreement to rescind, and proof that he did make the contract and promised to return the draft. The testimony fails to establish any such agency. It shows him to have been a merchant to whom appellant sent checks on the bank of appellee for collection, which he collected, and remitted the proceeds, generally in drafts drawn upon its correspondent, the German National Bank. Appellee did not attempt to prove anything further in regard to the scope of Freeman's agency. Freeman testified that that was the only agency or connection he had with appellant.

The testimony also fails to establish any agreement of Freeman to rescind and return the draft. The interview with Freeman was not by Devenish, as he was indisposed, but between Mr. Uhren, representing Devenish, with Mr. Freeman. Mr. Uhren testified as follows: "I took the checks, with that mark on the upper left-hand corner in pencil, and the signature had been canceled; that is, by drawing a line across it with a pen. Took them over to Mr. Freeman, and explained the circumstances to him, very shortly, as I was very busy. He took the checks. He said he could not give me the draft, because it was in the post-office, but that the matter would be all right. I left the store and went home, and heard no more about it until it was protested; and afterwards the suit was brought." "The Court. Did he say to you that he would make the matter all right? Answer. I understood the draft would be returned. He could not give it to me at that time because it was in the post-office. I do not think he said in express words, 'I will have the draft returned.' I cannot say exactly what his language was at this time." The testimony of Mr. Freeman was as follows: "I am under the impression that it was a couple of days after the defendant, Devenish, paid the Caldwell checks, that Mr. Uhren brought the said checks back and left them with me. I know it was one day, and I think it was two. I did not, at the time Mr. Uhren returned the Caldwell checks to me, or at any time afterwards, agree to return the draft in controversy to the defendant. I believe I said I would write down about it, which I afterwards did. I did not ever accept, for the plaintiff in this action, the said Caldwell checks from the defendant Devenish, or from Mr. Uhren as his agent. I told Mr. Uhren at the time he left the checks with me that I had sent the draft off. I did not, on the 2d or 3d of January, 1884, at the defendant's bank in Tin Cup, tell him that I was surprised that his draft had been protested, and that it would be all right as soon as the plaintiff received the letter, for at that time I had not written the plaintiff about the matter. It was about a week afterwards that I wrote. \* \* \* I did not, as agent of the plaintiff, accept the Caldwell checks given for the draft in controversy. I had no authority from plaintiff to accept from defendant the said Caldwell checks for said plaintiff." For the reasons above given, we advise that the judgment be reversed, and the cause remanded.

**RICHMOND and BISSELL, CC., concur.**

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment of the court below is reversed.

**ELLIOTT, J.,** did not participate in the decision of this cause, having tried the cause below.

(15 Colo. 216)

**CRAMER et al. v. BRASHER.**

(*Supreme Court of Colorado.* Nov. 7, 1890.)

**SHERIFFS—PROCEEDS OF ATTACHMENT SALE—ATTORNEY'S FEES.**

Code Colo. § 109, requires a sheriff to deliver over the attached property or the proceeds thereof remaining in his hands unapplied on the judgment to defendant. *Held*, that a sheriff has no power to deduct from a balance in his hands, arising from the sale of attached property, counsel fees for defending an action of trover brought against him by a third party for the conversion of the goods levied on under the attachment.

**Commissioners' decision.** Appeal from district court, Arapahoe county.

*Wolcott & Valle*, for appellant. *E. P. Harman*, for appellees.

**RICHMOND, C.** The Kansas City Distilling Company brought suit in the district court of Arapahoe county against appellee upon a book-account, suing out a writ of attachment. The writ was placed in the hands of appellant, Frederick Cramer, who was the sheriff of Arapahoe county. He levied upon certain goods and chattels as the property of Brasher. One Marsh brought an action of trover against appellant, claiming that the goods and chattels so levied upon belonged to him, and that the same had been taken by appellant and converted to his own use. Appellant answers, averring that the goods and chattels were the property of Brasher, justifying the seizure under the writ of attachment, and also averring that the transfer of title by Brasher to Marsh was fraudulent as against creditors. The cause was tried upon this issue, and resulted in a judgment favorable to appellant. The case of the Kansas City Distilling Company was subsequently tried, and a judgment in its favor was rendered for \$801.65, with costs. The attachment was sustained, and the property ordered sold for the purpose of paying said judgment. After paying the judgment of the distilling company, and the taxed costs in full, there remained in the hands of the appellant the sum of \$214. Appellant employed counsel to defend the suit brought against him by Marsh, thereby incurring expenses for counsel fees in the action amounting to \$150. He filed his petition in the case of the Kansas City Distilling Company v. Brasher, setting up these facts, and asking the court to take testimony as to the reasonableness of the fees charged by counsel, and prayed that he be allowed to pay the same, or such amount as the court should deem reasonable, out of the sum of \$214 remaining in his hands. Brasher appeared, admitted the averments of the petition, but claimed that the petition did not state facts sufficient to authorize the allowance of anything to appellant. This

was the conclusion of the court, and the petition of appellant was denied.

The only question presented for consideration is whether or not the court should have allowed the sheriff, Cramer, to deduct from the balance remaining in his hands a reasonable sum for counsel fees. Section 109, Code Civil Proc., is as follows: "If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, and any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment." The last clause of this provision unmistakably provides for a disposition of the balance of any fund remaining in the hands of the sheriff, and distinctly commands the payment of such balance, after satisfaction of the judgment, to the defendant. By Gen. St. p. 273, § 90, it is provided that "no sheriff shall, directly or indirectly, ask, demand, or receive, for any service to be performed by him in the discharge of any of his official duties, any greater fees than are allowed by law, under penalty," etc. The above provision refers of course only to fees, and not to actual reasonable expenses incurred in caring for the property held by the sheriff under attachment, and this court in *Bank v. Tucker*, 7 Colo. 220, 3 Pac. Rep. 217, has determined that the sheriff is entitled to reimbursement for reasonable charges incurred in taking possession of, removing, and keeping property taken on a writ of attachment. We fail, however, to see the applicability of the conclusion of the court in this case to the question under discussion. The proceeding by Marsh was against the sheriff in trover for conversion. These two individuals were the only parties to that proceeding, and besides it has never been the practice to allow against the losing party, in ordinary actions at law, fees paid out by the successful party to counsel. The defense of the trover suit by the sheriff was for the benefit of the Kansas City Distilling Company, and any expense incurred by the sheriff in that proceeding, in our judgment, should have been paid by the company. It is true that the sheriff, in the performance of his duty in attaching property, or levying an execution upon it, assumes (in the language of another) a double-edged responsibility. The general rule is that the sheriff in the service of the execution writ or the attachment writ acts at his peril. While the property is not in the possession of the defendant, and it is not clear that it belongs to him, the sheriff is not bound to act without full and ample indemnity. *Murfree*, Sher. § 620; *Crock*, Sher. § 464. We think that in this case, before subjecting himself to an expense in defense of the title to the property in which the plaintiff in the attachment proceedings was directly and only interested he should have called upon the plain-

tiff, the Kansas City Distilling Company, and exacted of it either that it assume the responsibility of that defense or provide the means of employing counsel. In the absence of statute supporting the contention of appellant, we feel warranted in saying that the judgment should be affirmed.

BISSELL and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

(15 Colo. 141)

CAWKER v. APPLE *et al.*

(*Supreme Court of Colorado.* Nov. 7, 1890.)

REAL-ESTATE BROKERS—COMMISSIONS.

Where defendant placed land with plaintiffs for sale on commission, knowing that a portion thereof belonged to a railroad company, plaintiffs' right to their commissions upon procuring a purchaser ready and willing to pay the agreed price was not defeated by defendant's refusal to deed the land, unless he received pay for the portion owned by the company.

Appeal from district court, Arapahoe county.

Action for commissions for the sale of real estate. The complaint alleges the copartnership of appellees, Henry Apple and George A. Hamilton, plaintiffs below, as brokers and real-estate agents, under the firm name of Apple & Hamilton; that, in the year 1887, at the special instance and request of Samuel M. Cawker, defendant, plaintiffs sold certain real estate owned by him; that said sale was made in accordance with instructions given plaintiffs by defendant. A description of the premises is given, and it is alleged that the same contained 40 acres, less about 3 acres, occupied by the Union Pacific Railway Company with its right of way. It is further averred that the price of said land, so sold by plaintiffs, as aforesaid, was \$5,735, and that the plaintiffs' services for and on account of said sale were and are reasonably worth 5 per cent. of said sum, or \$286.17, of which amount no part had been paid. The defendant in his answer admits the copartnership and business of plaintiffs, as alleged. All other allegations in the complaint are denied. The case was tried to a jury in the court below, and a verdict rendered for the plaintiff in the sum of \$261.25. A motion for a new trial was overruled, and judgment for plaintiffs entered upon the verdict. No question upon the amount of the judgment is presented upon this appeal, the sole controversy being as to whether or not any commissions had been earned.

W. W. Cook, for appellant. C. P. Butler, for appellees.

HAYT, J., (*after stating the facts as above.*) The evidence in this case shows beyond controversy that appellant, Samuel M. Cawker, was the owner of a tract of land near the city of Denver, containing about 120 acres, and that he authorized appellees to sell the same, or a portion of it, at \$155 per acre, less the usual commissions for making such sale, which were to be retained by appellees. It is also shown

that this land was subdivided into 40-acre tracts, and that appellees procured a purchaser for one of said subdivisions, at the price and upon the terms fixed by appellant. It is further shown that about 3 acres of said subdivision belonged to the Union Pacific Railroad Company, leaving only 37 acres to which appellant could make title. Mr. R. W. Woodbury, the purchaser, procured by appellees, stood ready and willing to pay for this tract the sum of \$5,735. This being at the rate of \$155 per acre, he was acceptable to the owner. The consummation of the sale was prevented, however, by appellant's refusing to deed the tract, unless he received pay also for the land owned by the railroad company. Appellant knew at the time he placed the land with appellees for sale that the railroad company owned and occupied a portion thereof. He could not give the purchaser title to the lands so occupied, and was not entitled to pay therefor. Under the circumstances, we are satisfied that his demand is entirely without foundation, and doubtless made for the purpose of defeating the sale. Upon the facts, we think appellees were entitled to the commissions. In the case of *Finerty v. Fritz*, 5 Colo. 174, it is said: "But where an agent has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, he has performed his duty, and if, from any failure of the owner to enter into a binding contract, or to enforce a contract against the purchaser, the sale is not completed, the agent may recover his commissions."

The judgment is affirmed.

(15 Colo. 434)

TABOR *et al.* v. CLARK.

(*Supreme Court of Colorado.* Nov. 7, 1890.)

INJUNCTION—LIABILITY ON BOND—ATTORNEY'S FEES.

T. brought suit against C. and others, alleging that an agreement by C. to sell certain land was assigned to a corporation in which T. was a stockholder; that such agreement was of great value to the company; that certain of the directors, for their personal advantage, and by collusion with C., canceled the agreement; that immediately thereafter said directors, as individuals, purchased the land from C., and executed a trust-deed thereon, to secure notes for the purchase price; and that C. was proceeding to sell the land under the trust-deed. The relief demanded was that the sale to the directors be set aside, and the contract with the company reinstated. An injunction was granted restraining C., pending the trial, from negotiating the notes, and proceeding with the sale. Defendants recovered judgment. In an action on the injunction bond, the only damages proved were attorney's fees. *Held*, that the recovery should have been limited to the fees for services rendered in connection with the injunction, and that it was error to allow the attorney's fees for the entire litigation.

Appeal from district court, Arapahoe county.

In 1886, Tabor brought suit against Clark and others, alleging in his complaint that Clark, being the owner of the premises therein described, entered into a written contract for the sale thereof to certain parties, which contract was afterwards, with the knowledge and consent of Clark, duly assigned to the Denver Circle



Real Estate Company; that this contract was of great value to the company; that plaintiff was a stockholder in said company; that two of the remaining co-defendant's, viz., Henry and Loveland, acting as directors of the corporation, fraudulently, without any consideration whatever, and for their own personal advancement, canceled and annulled the written contract between Clark and the corporation; that Clark had full notice and knowledge of the fraudulent conduct of said Henry and Loveland, and colluded with them in connection therewith; that, after such attempted cancellation of the contract, Henry and Loveland as individuals immediately purchased from Clark the land in question, executing to him their promissory notes for upwards of \$60,000, the balance of the purchase money, and, to secure the same, gave a trust-deed upon the property; and that Loveland and Henry had defaulted in the payment of the notes thus given, and Clark was proceeding to advertise and sell the land in pursuance of the trust-deed. Plaintiff demanded that the sale to Loveland and Henry be set aside; that their trust-deed to Clark be canceled; and that the original contract with the corporation be restored, and given full force and effect. Plaintiff also sought to procure a temporary injunction restraining Clark, pending the trial, from negotiating the notes of Henry and Loveland, and from further proceeding with his sale of the property under the trust-deed; the trustees named in the deed being also made parties defendant to the suit. The temporary injunction asked for was granted, upon the filing of a bond conditioned according to law. A motion was made to dissolve, but was not separately considered or passed upon. The injunction remained in force until the final determination of the suit, when, the judgment on the merits being in favor of defendants, a dissolution necessarily took place. The present suit was instituted by Clark against Tabor and his surety, to recover damages upon the injunction bond thus given. The only damages claimed, or sought to be proved, were attorney's fees. The evidence offered covered these fees for the entire litigation, and the court charged the jury that, if they found for the plaintiff, they might allow as damages this total amount. A verdict was rendered for \$1,250. From the judgment duly entered thereon, the present appeal was taken.

*J. P. Brockway and Isaac N. Stevens, for appellants. Enos Miles, for appellee.*

HELM, C. J., (*after stating the facts as above.*) The cause in which the injunction bond now sued on was given was not primarily injunctive in its nature. It was brought to secure the cancellation of the trust-deed given by Henry and Loveland upon the premises in question, and to procure a reinstatement of the original contract between Clark and the Denver Circle Real Estate Company, as assignee. This contract appears by the complaint to have been of great value to the company. The cancellation thereof by the

two directors named is alleged to have been wholly without consideration and fraudulent, and Clark is connected by averment with the fraud. Were we to discard from consideration the injunctive feature of the proceeding, a full and complete cause of action would nevertheless appear in the pleading. The injunction was ancillary to the principal relief claimed. Its purpose was to render the ultimate decree in the main case, if given for plaintiff, effective. It simply inhibited Clark, *pendente lite*, from negotiating the notes, which would necessarily carry with them the security, and from selling the property in pursuance of the trust-deed to innocent third parties. It is needless to say that either of these steps would have proved seriously detrimental to plaintiff, had he recovered in the end. Under these circumstances, the charge of the court must be held erroneous. The injunction bond was given to protect appellee from injury by virtue of the issuance of the injunction. The attorney's fee should have been accordingly limited. Neither the principal nor the surety in that bond could by virtue of its provisions be held for the value of legal services rendered in the preparation and trial of the main case. 2 Suth. Dam. 68, and cases cited; High, Inj. §§ 973, 974. It was claimed in oral argument that the real and sole object of the suit in which the injunction issued, was to obtain a postponement of the sale under the trust-deed, and thus enable Henry and Loveland to avoid such sale by procuring the requisite sum of money, and taking up the notes. Tabor, so it was asserted, acted in the interest of those parties, and did not prosecute the suit in good faith for the purpose of securing the principal relief ostensibly claimed by the complaint. It is sufficient for us to say that, if these facts were satisfactorily demonstrated at that trial, nevertheless, we are not apprised thereof by the record now before us. Of course this record must govern the present decision, and we cannot, upon aught that appears therein, sustain the claim of counsel in this regard. We are aware of the fact that it may be difficult to apportion the value of legal services, under such circumstances as are here presented. Counsel, perhaps, cannot say exactly how much time and labor were consumed in resisting the ancillary injunctive part of the case; but it is no more difficult to separate the claims for service in connection with the principal case, and with the injunction, and to fairly approximate the sum due for the latter, than it is to estimate the amount to be recovered in many other cases upon which courts are called to adjudicate. Besides, the existence of this embarrassment does not furnish a legal reason why the parties to the injunction bond should be held for damages not in any way contemplated or provided for by their contract. For the reasons given, the judgment will be reversed, and the cause remanded.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

(15 Colo. 246)

**LONDONER v. PEOPLE ex rel. BARTON.***(Supreme Court of Colorado. Nov. 7, 1890.)***APPEAL—FROM JUDGMENT OF OUSTER.**

Under Code Colo. 1887, § 388, providing that appeals to the supreme court from the district, county, and superior courts shall be allowed in all cases where the judgment appealed from be final, and shall amount, exclusive of costs, to \$100, or relate to a franchise or freehold, no appeal lies from a judgment of ouster entered by a district court in an action for the usurpation of a public office.

Upon motion to dismiss appeal.

*Lucius P. Marsh and L. C. Rockwell*, for appellant. *Pence & Pence*, for appellee.

**HAYT, J.** This is an action for the usurpation of the office of mayor of the city of Denver. In the district court, a judgment of ouster was entered against appellant, from which this appeal is prosecuted. The right to this appeal is claimed upon the following provision of the Civil Code: "Appeals to the supreme court from the district, county, and superior courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of \$100, or relate to a franchise or freehold," etc. Section 388, Code 1887. It is well settled that he who relies upon the right of appeal must be able to show some positive legislative authorization for such right. In the case at bar, no money judgment was entered in the court below, from which an appeal could be taken; the sole claim being that the judgment relates to a franchise, and is therefore appealable. It seems clear, however, that the judgment appealed from relates to a public office, and not to a franchise. The difference between a franchise and a public office is plainly recognized by the Code in several instances. Thus the title to chapter 27 is "Of actions for the usurpation of an office or franchise;" and the distinction between the two is plainly maintained throughout the body of the act. A franchise with us has been defined as a particular privilege conferred upon individuals by grant from the government. 3 Kent, Comm. 458. Franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. The franchises are vested in the corporate entity, rather than in the officers. As the judgment in this case relates to a public office, and not to a franchise, the right of appeal finds no support in the statute. An examination of the opinion of the court, as delivered by Chief Justice HALLETT in the case of *Pollock v. People*, 1 Colo. 83, cited by counsel, will show the same to be in support of the conclusion we have reached in this case. In that case there were two statutes relating to appeals. The general statute providing for appeals where the judgment appealed from amounted to \$20, exclusive of costs, or related to a franchise or freehold, and a special statute providing for appeals in cases of *quo warranto*, reads as follows: "Appeals may be taken from the decision of the district court upon such terms as the said district court shall prescribe." The judgment from which the appeal was taken in that case was en-

tered upon an information in the nature of a *quo warranto* filed against appellants, charging them with having usurped and intruded into the corporate offices of the city of Central. It was not even claimed by counsel that an appeal would lie under the general provision allowing appeals from decisions relating to a franchise, but it was contended that the two provisions relating to appeals should be construed together, and the special act limited by the word "franchise" used in the general act; and, as the judgment did not relate to a franchise, it was claimed that the right to an appeal did not exist. The court decided against this claim, holding that the special statute enlarged the right to appeal in cases of *quo warranto*. From the language of the opinion, we think it evident that, had the right to appeal rested upon the provision in reference to appeals from judgments relating to a franchise, the appeal would not have been sustained. Since the decision in the case of *Pollock v. People*, the special act providing for appeals has been repealed. There is no judgment for damages in this case; and, as the judgment of the district court relates to a public office and not to a franchise, an appeal from such judgment will not lie under the general act. The appeal is accordingly dismissed.

(15 Colo. 223)

**PIERSON et al. v. TRUAX.***(Supreme Court of Colorado. Nov. 7, 1890.)***HOMESTEAD—ABANDONMENT—TEMPORARY ABSENCE.**

Gen. St. Colo. c. 51, § 8, providing that homesteads shall only be exempt while occupied as such by the owner thereof, or his or her family, does not require an actual personal occupation at all times and under all circumstances, so as to cause a forfeiture on account of a temporary absence from necessity or convenience.

**Commissioners' decision.** Appeal from district court, Pitkin county.

Appellee, plaintiff in the action, brought his suit by filing the following complaint, which was verified: "Plaintiff complains of defendants, and states that on the 4th day of February, 1886, the plaintiff became, and ever since has been, and now is, the owner in fee of the following described real estate, situate in the county of Pitkin, and state of Colorado: A lot one hundred and fifty (150) feet by fifty (50) feet in size, situate about one hundred and fifty (150) feet west of the Ute Spring ditch, in that part of the city of Aspen commonly called 'Ute,' said property being the same real estate conveyed to plaintiff on said 4th day of February, 1886, by Philip Edwards and Frank Hartzn. That on the said 4th day of February, 1886, and before and ever since that date, plaintiff was and now is a householder, and the head of a family. The said family consisted and now consists of plaintiff and the wife and children of plaintiff. That on said 4th day of February, 1886, plaintiff and his family commenced to occupy said premises, and resided thereon, occupying the same as a homestead, and have at no time since said date had any other residence, and have not occupied any other premises since said date, except as herein-

after mentioned. That the deed of conveyance from said Edwards and Hartzin to plaintiff was filed for record in the office of the recorder of said Pitkin county on said 4th day of February, 1886, and the same is of record in Book 29, on page 42, of the records of said office. That said premises, together with the improvements situated thereon, have not been, at any time since the 4th day of February, 1886, and are not now, worth any more than the sum of seven hundred dollars. That on the — day of November, 1886, one of plaintiff's children was sick, and the wife of plaintiff went to the city of Denver in the state of Colorado, for the purpose of procuring medical treatment for said child, and, during the absence of plaintiff's wife, he, the plaintiff, occupied a room in the city of Aspen, and temporarily rented said property hereinbefore mentioned, but left in said property a portion of plaintiff's household goods; that before the return of the wife of plaintiff, and on the — day of December, 1886, plaintiff received a severe bodily injury, which caused him to be confined to his room for a period of — days, and that, upon plaintiff's recovery from his said bodily injury, he took steps to occupy the premises herein first described, and said premises were, on the 15th day of March, 1887, vacated by the person to whom plaintiff had rented the same. That thereupon plaintiff proceeded to have the house situated on said premises repainted, and otherwise refitted, and while so engaged, and while a portion of the household goods of plaintiff and of his family were contained in said house, and on the 24th day of March, 1887, and at 40 minutes after 9 o'clock on the morning of said day, plaintiff caused to be entered of record on the margin of his recorded deed from said Edwards and said Hartzin the word 'Homestead,' which said entry was then and there signed by plaintiff, and was then and there attested by the clerk and recorder of the county of Pitkin, and state of Colorado, who then and there stated in writing in said attestation the date and time of day upon which said marginal entry was made. That on the — day of April, 1887, plaintiff and his family again occupied said premises, and have ever since occupied the same continuously. That plaintiff has always occupied said premises as his home from the date he purchased the same, and has not since said date had, nor has his family had, any other home, and that he has never abandoned said homestead at any time, and that neither he nor his family have ever left said premises except temporarily, and that even at such times a portion of the household goods of plaintiff and of his family was kept upon said premises, and in the house situated thereon. That, at the time plaintiff caused said marginal entry to be made, he was indebted to the defendant Pierson in the sum of one hundred and seventy-four dollars and forty-six cents, for goods, wares, and merchandise purchased by plaintiff from defendant Pierson between the — day of January, 1886, and the 1st day of March, 1887. That on the 28th day of March, 1887, said Pierson instituted a suit

in the honorable county court in and for the county of Pitkin, and state of Colorado, against plaintiff for the said sum, and on the same day a writ of attachment issued out of and under the seal of said county court, in said suit, and, on the same day, the defendant Hooper, a sheriff of the county of Pitkin in the state of Colorado, by his under-sheriff, levied upon the property hereinbefore described under said writ of attachment. That on the 14th day of April, 1887, judgment was duly given in favor of said Pierson and against plaintiff for the sum of one hundred and seventy-six dollars and sixty cents, and the costs of suit, by said county court in said cause, and thereafter an execution and order of sale issued out of and under the seal of said county court, in said cause, commanding the defendant Hooper, sheriff as aforesaid, to sell said described property to satisfy the judgment rendered in said cause, together with the interest and the costs. That, afterwards, the said Hooper, as sheriff, duly advertised said property for sale. (Notice of sheriff's sale omitted.) That said Hooper, as sheriff aforesaid, unless restrained by the order of the court, will sell the said property on the 5th day of August, 1887, and that said sale, if made, will be a cloud on the title of plaintiff to said property. Wherefore plaintiff demands judgment against defendants: (1) That said Hooper, his agents and deputies, be restrained by preliminary writ of injunction from selling said property under said execution and order of sale, and that, on the final hearing of this cause, said injunction be made perpetual. (2) That the certificate of levy in said suit in the complaint mentioned, on the property in the complaint described, be canceled. (3) For costs of suit. (4) For such other, further, and general relief as to the court may seem meet." To which a demurrer was filed: That the complaint does not state facts sufficient to constitute a cause of action; that it is admitted in the complaint that when the attachment of defendant was levied upon the premises described in plaintiff's complaint, neither the plaintiff nor any of his family was in the occupation of the said premises as a homestead; that plaintiff has already had his day in court, and, having failed to contest the validity of the attachment within twenty days after the service thereof upon him, he cannot impeach the judgment levy sustained by the court for any of the causes alleged in plaintiff's complaint; that the portion of the judgment mentioned in plaintiff's complaint which sustained the plaintiff's (now defendant's) attachment upon the said premises was the decision of a court of competent jurisdiction upon the identical issues raised in the plaintiff's complaint, and that plaintiff is thereby estopped from litigating those issues again," which was overruled. Appellant elected to stand by his demurrer, and prosecuted this appeal.

*D. H. Waite, for appellant.*

REED, C., (after stating the facts as above.) The only question presented for review is the judgment of the court in overruling the demurrer. The allegations in

the complaint, under the circumstances, are to be regarded as true; the only question being whether the matters alleged were sufficient to entitle the plaintiff to the relief asked. By section 1, c. 51, Gen. St., a homestead not exceeding \$2,000 in value is exempt from execution and attachment. By section 2 of the same chapter, the householder, in order to avail himself of such exemption, is required to cause the word "homestead" to be entered of record in the margin of his recorded title," etc. The ownership of the property is alleged, and a compliance with the requirement of section 2 by the proper entry prior to the levy of the attachment. Section 8 of same act provides: "Such homesteads shall only be exempt as provided in the first section of this act, while occupied as such by the owner thereof, or his or her family." It is alleged in the complaint "that plaintiff has always occupied said premises as his home from the date he purchased the same, and has not since said date had, nor has his family had, any other home, and that he has never abandoned said homestead at any time, and that neither he nor his family have ever left said premises except temporarily, and that even at such times a portion of the household goods of plaintiff and of his family was kept upon said premises and in the house situated thereon." This allegation is sufficiently full and definite. The temporary absences, as alleged, are not such as to preclude a party from claiming the benefits of the exemption. Temporary absence from necessity or convenience would not forfeit the right. The statute cannot be construed as requiring an actual personal occupation at all times, and under all circumstances. It is intended that the place shall be the only home of the family, and shall not be abandoned, and another occupied, with the intention of making such change permanent. It is urged in argument that the exemption, to be effective, should have been interposed in the suit by attachment. It would, without doubt, have been better practice; but the law having been, as shown in the complaint, complied with, and the exemption appearing of record, the levy of the attachment was wrongful, and the property was absolutely exempt from its operation. The sale of the property under execution would have been a further wrong against which the party had a right to provide, and we cannot say the court was not justified in entertaining the suit, and granting relief in the only way apparently available under the circumstances. If the allegations in the complaint could be successfully controverted by proof, they should have been traversed, and the issues of fact tried. If they could not be successfully controverted, the plaintiff was entitled to the protection of the court to retain his homestead under the statutory exemption. We advise that the judgment of the court below be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

# DILLON et al. v. RAND.

(Supreme Court of Colorado. Nov. 7, 1890.)

## APPEARANCE BY ATTORNEY—AUTHORITY—DEFAULT —CERTIFICATION OF AFFIDAVITS.

1. The authority of an attorney to appear for a party to an action in a court of record may be controverted while the action is pending.

2. The question of such authority may be raised upon due notice by sworn petition, or by motion supported by affidavit; and, if an issue be made upon such petition or motion, the same may be tried and determined by or under direction of the court as other issues of fact.

3. Where parties have not been served with summons, it is irregular to grant default against them without first disposing of a motion on file to vacate an appearance by attorney in their behalf.

4. The Code provides for the taking and certification of affidavits "taken in another state or territory of the United States, to be used in this state;" and, when an affidavit is so taken and certified, it is to be regarded as *prima facie* authentic.

(Syllabus by the Court.)

### Error to Arapahoe county court.

George Rand, plaintiff below, brought suit against "Levi Dillon, Isaiah Dillon, M. F. Dillon, and other sons of said Levi Dillon and Isaiah Dillon, whose names are to plaintiff unknown, as Dillon Brothers, and William F. Marrs, George W. Middleton, Edward Hunter, partners as Marrs, Middleton & Hunter." The relief sought was by judgment *in personam*. None of the defendants appear to have been served with summons. The defendants Marrs, Middleton & Hunter, however, appeared by P. L. Palmer, Esq., their attorney, and filed their answer. Subsequently, Mr. Palmer also entered his appearance as attorney for the defendants Levi Dillon, Isaiah Dillon, M. F. Dillon, and Leo Dillon; and thereafter said defendants were ruled to answer the complaint. Before the expiration of said rule, George C. Norris, Esq., appeared specially as attorney for the Dillons, and filed a motion to vacate the appearance entered for them by Mr. Palmer, on the ground that Palmer had no authority to appear for them or either of them. Before disposing of the motion to vacate the appearance of Palmer for the Dillons, the court entered default against three of them. Leave was granted to plaintiff to file affidavits in answer thereto, but he did not do so. Upon this showing, the court below overruled the motion of the Dillons to vacate the appearance entered for them by Mr. Palmer as their attorney, and proceeded to the trial of the issue between the plaintiff and the defendants who had answered, and to the assessment of damages against the Dillons, upon the default entered against them. The Dillons bring the case to this court by writ of error. The motion to vacate was supported by two affidavits. The affidavit of Mr. Palmer himself states that he was the attorney for the defendants Marrs, Middleton & Hunter in this suit; that he entered his appearance for Dillon Bros., at the request of Mr. Hunter of said firm, and upon the assurance of Mr. Hunter that he (Hunter) had full authority to cause the appearance of Dillon Bros., to be entered; that he was not retained by Dillon Bros., but

relied on the assurance of Hunter as aforesaid. The affidavit of M. F. Dillon states positively that he is a member of the firm of Dillon Bros.; that neither he nor any member of said firm ever in any way either directly or indirectly authorized any person to enter the appearance of said firm of Dillon Bros., or any of the members thereof, in any suit brought by the said George Rand in the state of Colorado or elsewhere; nor have they or either of said parties ever authorized the firm of Marrs, Middleton & Hunter, or any member of said firm, to employ counsel for them or either of them, or to enter their appearance in any such suit. The affidavit is subscribed and sworn to before the clerk of the county court of McLean county, Ill., and is attested by said clerk under the seal of said court.

Geo. C. Norris, for plaintiffs in error.  
Browne & Putnam, for defendant in error.

ELLIOTT, J., (after stating the facts as above.) It is well settled that the authority of an attorney to appear for a party to an action in a court of record may be controverted while the action is pending, and probably at any time before the expiration of the period in which the court may grant relief under section 75 of the Code. The question of such authority may be raised upon due notice by sworn petition, or by motion supported by affidavit; and, if an issue be made upon such petition or motion, the same may be tried and determined by or under direction of the court as other issues of fact. Ordinarily, such issue may be tried and determined in a summary manner without difficulty. Code, §§ 173, 204; *Williams v. Canal Co.*, 13 Colo. 469, 22 Pac. Rep. 806.

Neither of the Dillons had been served with summons. The question of Mr. Palmer's authority to appear for them had been properly raised by motion and affidavits. It was therefore irregular to grant the default against them without first disposing of the motion on file to vacate the appearance which had been entered for them by Mr. Palmer. The jurisdiction of the court over their persons depended upon the authority of the attorney to enter such appearance. Code, § 168; *Railroad Co. v. Nicholls*, 8 Colo. 188, 6 Pac. Rep. 512; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. Rep. 212.

It is objected that the affidavit of M. F. Dillon is not authenticated as required by the act of congress, providing for the authentication of records and judicial proceedings of the courts of other states. The affidavit under consideration is not a judicial record. Our Code of Procedure, §§ 338-340, provides for the taking and certification of affidavits "taken in another state or territory of the United States, to be used in this state." From the Code provisions above referred to, it is clear that when an affidavit is taken before the clerk of a court of record having a seal, and is certified by the clerk under such seal, it is to be regarded as *prima facie* authentic.

From the records before us, no presumption can be indulged that Mr. Hunter was authorized to employ Mr. Palmer as attorney for the Dillons. If he was so au-

thorized, plaintiff should have controverted the affidavits presented by defendants. No answer or response whatever was made to the affidavits denying Mr. Palmer's authority to appear for the Dillons. These affidavits showed positively and unequivocally that Mr. Palmer's appearance for them was wholly unauthorized. Hence, the entry of appearance for the Dillons should have been vacated, and all proceedings against them suspended, until the court should have acquired jurisdiction over them. The decision of the county court is reversed, and the cause remanded. From the record before us, we perceive no reason why plaintiff should not have judgment rendered upon the finding in his favor against Marrs, Middleton & Hunter. Reversed.

(44 Kan. 762)

RAINER v. COOPER et al.

(Supreme Court of Kansas. Dec. 6, 1890.)

DEMURRER TO EVIDENCE.

It is reversible error for the trial court to sustain a demurrer to the evidence of the plaintiff, when there is some evidence tending to prove every material fact necessary for a recovery.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Pratt county; S. W. LESLIE, Judge.

John A. Oliphant, for plaintiff in error.  
E. A. Austin, for defendants in error.

SIMPSON, C. On the 2d day of July, 1885, the plaintiff in error bought from one M. Sanders two frame buildings situate on lot 11, block 32, in the town of Saratoga, Pratt county. Sanders executed the following instrument in writing, and delivered it to the plaintiff in error: "Saratoga, Pratt County, Kansas, July 2d, 1885. This is to certify that I, M. Sanders, have this day sold and transferred to Martha Rainer, for the sum of two hundred and fifty dollars, the receipt of which is hereby acknowledged, the following buildings, to-wit: The two buildings now situated on lot No. eleven, (11,) in block thirty-two, (32,) Saratoga, Pratt county, Kansas, the same to be removed from said lot immediately. [Signed] M. SANDERS." On the 6th day of August, 1885, Sanders sold the lot to G. A. Sears, reserving the buildings for Mrs. Rainer. Sanders subsequently made an additional sale of the lot to the defendant in error H. P. Cooper. The exact date of this transaction is not given in the record, but Cooper did not comply with the conditions, and therefore never became the owner of the lot. The plaintiff in error, some time during the month of August, and probably on the 4th, attempted to remove one of the buildings to Pratt Center, but it was burned in the streets of Saratoga, who by, the record does not disclose. The same evening the other building was moved from the lot, and placed in the north-east part of the town of Saratoga, where it was occupied by one D. G. Gibbons. There is no evidence in the record tending to show directly by whom the removal of this building was made. In May, 1886, Martha Rainer, the plaintiff in error, commenced this ac-

tion in the district court of Pratt county against M. Sanders, G. A. Sears, H. P. Cooper, W. F. Gibbons, and D. G. Gibbons. Her petition attempts to set up two causes of action. The first alleges her purchase of the buildings from Sanders, and that the defendants in the month of August, 1885, took forcible possession of the same, and appropriated it to their use and benefit, and that its value was \$500. In her second cause of action she alleges that, at the time the defendants so took possession of the building and appropriated it to their own use, she had made an arrangement to have the said buildings removed to Pratt Center, at which place she had been given a valuable lot on Main street on which to place it; that said lot was of the value of \$600; that said lot was given her upon the express condition that she would remove this building from Saratoga and place it upon said lot; that, by reason of the appropriation of said building by these defendants to their own use, she was unable to comply with the conditions, and she was damaged by reason thereof in the sum of \$600. The defendants demurred to the petition, on the ground that it did not state a cause of action in the first or second count. The demurrer was sustained as to the second cause of action attempted to be stated in the petition, and overruled as to the first. Finally the action was dismissed as to all the defendants below except Cooper, and a judgment was rendered in his favor. He interposed a demurrer to the evidence of the plaintiff below that was sustained. The cause is brought here for review, and we are asked to reverse the judgment below, because the demurrer to the evidence of the plaintiff below was erroneously sustained, on the theory that, by the written contract of the purchase of the buildings in controversy by plaintiff of the defendant Sanders, the plaintiff was to remove the same immediately, and her failure to do so for the period of 35 days, and no excuse being given for such delay, prevents her from recovering against either of the defendants. It is claimed now that, by reason of Cooper failing to comply with the terms of his purchase of the lot, he never acquired any interest in the building; and, as Sanders did not insist or plead the delay in the removal of the building, Cooper alone cannot take any advantage of it. While all this may be sound, there was another reason given for sustaining the demurrer, and that was the fact that no cause of action was proved against either of the defendants,—that is to say, there was no evidence tending to show who removed the building from the lot. The fact that it was removed was established. The fact that one of the defendants was in possession of the building after removal was established. The fact that Cooper had made a contract for the purchase of the lot was established. Neither the plaintiff or her husband or any other witness that was introduced in her behalf made any statement as to the particular individuals who removed the building from the lot. The husband of Mrs. Rainer stated on the witness stand that Cooper said to him that he had sold the

building to Gibbons, and this was only a few days after the removal of the building. This case was tried to the court without the intervention of the jury. From our stand-point, it seems that Cooper's purchase of the lot with the building thereon, and his sale of the house to Gibbons, and Gibbon's occupancy so soon after removal, was some evidence tending to show a conversion by Cooper, and that the demurrer to the evidence ought to have been overruled. It is recommended that the judgment be reversed, and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 88)

WESTERN UNION TEL. CO. v. COLLINS *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

DEPOSITIONS—NEGLIGENCE OF TELEGRAPH COMPANY—EVIDENCE—DAMAGES.

1. Our statute requires the certificate of an officer, before whom a deposition has been taken, to show that the deponent was first sworn "to testify the truth, the whole truth, and nothing but the truth." A certificate by such officer, which shows that the deponents were sworn "to testify the whole truth or their knowledge touching the matter in controversy," is defective, and it is error to overrule a motion, to suppress such deposition, alleging such defect as ground therefor. JOHNSTON, J., dissenting.

2. It is not error to permit the introduction in evidence of a copy of a telegraphic message properly identified as a correct copy of the original, fourteen months after its receipt for transmission by the company, where it is first shown by the manager of the company at the receiving office that the original message is not in his office, nor under his control, and that, by the rules of the company, original messages are retained in the office of the company where received for a period of six months, and are then sent to Chicago and destroyed.

3. Where a telegraph company neglects to deliver a message to a live-stock shipper as to the state of the market at a certain point, in consequence of which neglect the shipper sends his stock to the next nearest market, at which he receives 10 cents per 100 less than the market price for the same stock ranged at the first point on the same day, the shipper is entitled to recover from the telegraph company the difference between the market prices of the two points, with the difference in freight added.

4. The meaning of a telegraphic message from a live-stock broker to a shipper, couched in such terms as to be readily understood by the shipper, but which is ambiguous, and, to a certain extent, unintelligible to persons not engaged in the stock business as shippers, may be explained by the testimony of the broker who sent it.

5. A person, who has suffered loss by the neglect of a telegraph company to transmit and deliver a message, and who serves upon the agent of the company a written demand for damages, and, in so doing, gives the agent a copy of said writing, but keeps the original, and the agent accepts service in writing on said original, and proof is made of the loss of such original, may prove the contents thereof by parol.

(Syllabus by Strang, C.)

Commissioners' decision. Error to district court, Atchison county; W. D. GIBBERT, Judge.

Waggner, Martin & Orr, for plaintiff in error. Smith & Solomon, for defendants in error.

STRANG, C. Action for damages for failing to deliver a certain telegraphic message. The facts are as follows: The plaintiff was a telegraph company, doing business between St. Joseph, Mo., and Sabetha, Kan. The defendants were partners, doing business at the latter place, and engaged in shipping hogs. They had purchased of the farmers in the neighborhood of Sabetha a lot of hogs which they designed shipping to market, either at St. Joseph or Kansas City. The hogs were to be delivered at Sabetha, by the farmers, on the 12th of January, 1885. Prior to that date, the defendants had employed one E. P. Roher, a live-stock commission merchant, or broker, at St. Joseph, to send them a dispatch from that point on the 12th, informing them of the condition of the hog market at that place on that day. Roher delivered a message containing the desired information, addressed to the defendants at Sabetha, to the plaintiff company at its office in St. Joseph, in time to have reached the defendants, so that they might have shipped their hogs to St. Joseph. But the message was never transmitted, or, at least, never delivered to the defendants, although they called for it at the company's office at Sabetha four times on that day. Not hearing from Roher, and supposing on that account that the market was not good at that point, the defendants shipped their hogs to Kansas City, where they were sold at an average price of \$4.20 per 100. Subsequently the defendants learned that if they had shipped to St. Joseph, on that day, they would have received \$4.30 per 100 for their hogs, and saved the freight from St. Joseph to Kansas City; and that, therefore, they had suffered a loss of 10 cents per 100 on the gross weight of their hogs, and the difference in freight between St. Joseph and Kansas City, aggregating \$225. Defendants claim that this loss was suffered by them because of the negligence of the plaintiff in failing to transmit and deliver to them, at Sabetha, the message delivered to it by Roher, at St. Joseph. The plaintiff denied negligence on the part of the company, and alleged negligence on the part of the defendants, which they, in turn, denied in their reply. A change of venue was taken, and the case sent from Nemaha county to Atchison county, where, on the 19th day of March, 1888, it was tried by the court without a jury. The court made findings of fact and of law, and entered judgment thereon, in favor of the defendants, for \$222.90.

The plaintiff filed a motion for new trial, which was overruled, and it now comes here with its case made alleging numerous errors on the part of the court trying the cause, and asks that the case be reversed. The first error discussed by the plaintiff in its brief is the action of the court in overruling a motion to suppress a deposition. The grounds of the motion are: *First*, the deposition has not been duly certified as provided by law; *second*, the witnesses were not sworn according to law; *third*, the deposition was not taken, sealed up, and authenticated as provided by law.

We regard the second ground stated in the motion for the suppression of the

deposition as a mere elaboration of the first, serving to point out the specific reason why the deposition is not properly certified. We will therefore treat these two grounds as constituting but one reason why the deposition ought to have been suppressed. This question involves a construction of our statute on this subject. Paragraph 4454, Gen. St. 1889, reads as follows: "The officer taking the deposition shall annex thereto a certificate showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing by some proper person, naming him; that the deposition was written and subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place specified in the notice." This is all the paragraph there is in our statutes relating to the character of the certificate to be annexed to a deposition by the officer taking the same. It will be seen, by an examination of this paragraph, that the language of the statute is that the certificate attached to the deposition by the officer taking it must show "that the witness was first sworn to testify the truth, the whole truth, and nothing but the truth." The language of the certificate attached to the deposition in this case is that the witnesses "were by me sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid." It is conceded that the certificate attached to the deposition by the officer taking the same must conform substantially to the requirements of the statute. The question on this assignment, then, is, are the words in the certificate, "sworn to testify the whole truth," substantially the same as the words, "sworn to testify the truth, the whole truth, and nothing but the truth," contained in the statute? Our first inclination upon examining this case was to say that, while the language of the certificate was not identical with that of the statute, it was substantially the same. But a more careful and analytical examination of the language of the statute satisfies us that it imports something more than the language of the certificate. To be sworn to testify the truth, the whole truth, and nothing but the truth, imposes upon the witness an obligation that is not imposed upon him when sworn to testify the whole truth. A witness, under examination, being asked if he could tell any more, in response said: "Yes, I could tell a good deal more, but that is all I know." It seems to us that this question and answer illustrate this case. What is there to prevent a witness who has already told all he knows—that is, the whole truth—from telling more that he does not know; that is, more that is not the truth? The statutory form requires him to tell nothing but the truth, while the form of the certificate does not obligate him to cease when he has told the whole truth. We, therefore, think the certificate in the deposition is insufficient. The authorities sustain this view of the case. In those states having statutes which prescribe the form of the certificate



to be annexed thereto, by an officer taking a deposition, the great weight of authority requires a strict conformity to the statutory requirements. In the states which have no statute prescribing a form for the certificate, and in which depositions are taken under a commission, or rule of court, greater laxity prevails in relation to the mode of taking and certifying them. In *Bacon v. Bacon*, 33 Wis. 147, the court says: "Where the statutes prescribe a form of oath to be administered to a witness, whose deposition is taken out of the state, that form must be observed, or the deposition will be suppressed." In *Baxter v. Payne*, 1 Pin. 504, Judge MILLER, delivering the opinion, says: "The deposition of William Pyncheon was offered in evidence, which was objected to by the defendant, for the reason that the justice does not certify how the oath was administered to the witness. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly; and therefore it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible. Before a deposition should be allowed to be read in evidence, every requisite of the statute must have been substantially and fully complied with. This deposition was taken at the instance of the plaintiff, for the reason that the witness resided more than 30 miles from the place of trial, in pursuance of a written agreement between the parties, and in their presence. In the commencement and body of the deposition, it is stated that the witness 'being duly sworn doth depose and say as follows.' The certificate of the justice sets forth that the witness 'was first sworn in the usual manner of taking depositions.' The statute requires that the deponent shall be sworn to testify the truth, the whole truth, and nothing but the truth. There was error in overruling the objection to the reading of this deposition." In *Goodhue v. Grant*, Id. 556, the same court says: "A deposition cannot be read in evidence, unless it plainly and satisfactorily appears from the certificate of the justice that all the requirements of the statute have been fully complied with, and no presumption will be indulged in to supply any defect." In pointing out what the certificate must show, the court says: "It must also state, according to sections 14 and 16 of the same act, that the deponent was sworn to testify the truth, the whole truth, and nothing but the truth. The legislature intended that every part or requisition of the rule should be equally important and binding; consequently the court cannot relax or change it." In *House v. Elliott*, 6 Ohio St. 498, the objection to the deposition was that the certificate annexed to the deposition did not show that the witness was first sworn. The court says: "This is a compliance with the form prescribed in Swan's Statutes of 1841, but does not meet the requirement of the Code. There must be a certificate annexed to the deposition, by the officer, that the witness was first sworn." The court in that case held that, where

the caption of the deposition showed that the witness was first sworn, the certificate must be held sufficient, as the caption must be considered a part of the certificate. Although nothing is said about it in the brief in this case, attention may be called to the fact that the deposition does not, either in the certificate, or in the caption thereof, in terms, show that the witnesses were first sworn. In *Malne*, the statute requires that a deponent, before giving his deposition, should be sworn to "testify the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken;" and the court, in *Brighton v. Walker*, 35 Me. 182, held that "a caption, which certifies that the deponent was first sworn, according to law, to the deposition by him subscribed, does not show a compliance with the statute requirement." "A recital in the caption that the deponent was sworn 'to testify the truth, and nothing but the truth' is fatally defective. It should appear that the deponent was, at least, sworn according to law; and, if it does not so appear, it is fatal." *Call v. Perkins*, 68 Me. 158; *Reed v. Boardman*, 20 Pick. 441-444, there cited. In *Lund v. Dawes*, 41 Vt. 372, the court says: "It is very clear from the statute above cited, and from the decisions in this state, that the certificate of the authority taking the deposition must show that the person making the deposition made oath to it, as prescribed by statute." In accordance with the decision of this court in *Brighton v. Walker*, 35 Me. 182, cited above, as the certificate of the magistrate does not show that the oath required by statute has been administered, the deposition of Parsons must be regarded as having been improperly admitted. "It is to be regretted that a verdict should be set aside for an error of the magistrate, which might have been amended at the trial, but the requirements of the statute cannot be disregarded." *Parsons v. Huff*, 38 Me. 137. See, also, *Fabian v. Adams*, 15 N. H. 371; *Bell v. Morrison*, 1 Pet. 351; *U. S. v. Smith*, 4 Day, 121; 2 Pet. Dig. 41. This case was pending in the trial court during several terms after the motion to suppress the deposition was filed. The depositions might have been withdrawn, with leave of court, and returned to the officer who took the same, and he might have corrected the form of the certificate, if the proper form of oath was really administered by him to the witness. Counsel for the defendants in error refer us to but one case upon this question,—*State v. Baldwin*, 36 Kan. 1, 12 Pac. Rep. 318. An examination of that case throws no light upon this question. The question there decided is neither the same nor similar to the one presented here.

The third ground contained in the motion for the suppression of the deposition is that the deposition was not sealed up and authenticated, as required by law. There is nothing in the record showing how the deposition was sealed up and authenticated, and therefore we cannot consider this question.

The second assignment for error is that the court erred in permitting a copy of

the message delivered by Roher to the plaintiff company for transmission to the defendants, to be read in evidence. The contention is that no proper foundation had been laid for its introduction. The copy offered was identified as a true copy of the original by Roher, by Lee, and, substantially, by Keneble, the book-keeper of the plaintiff company at St. Joseph. The evidence of A. F. Washington, who was manager of the office of the plaintiff company at St. Joseph, Mo., where the dispatch in question was delivered, shows that the original messages are kept in the office where received for six months, and are then sent to Chicago, and destroyed. The evidence of Jacob Levin, who succeeded Washington as manager of the plaintiff's office at St. Joseph, shows that the original message was not in the St. Joseph office, and not under his control; that original messages are kept in the office where received for transmission six months, and are, by the rules of the company, then sent to Chicago and destroyed. It is true, he says he did not see the original message in question in this case destroyed. But he says the rules of the company require them to be destroyed at the end of six months after received. The original message in this case was delivered to the company January 12, 1885, and the depositions of Roher and Lee, who identified the copy, and to which said copy was attached as an exhibit, were taken more than 14 months afterwards. We think the foundation for the admission of the copy was sufficiently established, and that the copy was properly admitted in evidence. The third point made by plaintiff in its brief is that the court erred in refusing to strike out of the deposition of Valentine W. Emmert his testimony that "the market value of good, average 300-pound hogs at St. Joseph, Mo., on the 12th and 13th days, respectively, of January, 1885, was \$4.30 gross." The argument is that the evidence of the value of the hogs at St. Joseph was too remote, as fixing any basis upon which to determine the amount of damage that the plaintiff had sustained. The defendants lived at Sabetha, Kan. St. Joseph was the nearest market of any importance, for hogs, to Sabetha. The evidence shows that the defendants designed shipping their hogs there; had made arrangements, by which they were to be informed of the condition of the market there; and would have shipped there, if the defendant company had done its duty and transmitted the information contained in the message it failed to send to the defendants. And the evidence shows that, if they had shipped to St. Joseph at the time they shipped to Kansas City, they would have received 10 cents a hundred more for their hogs than they did receive at Kansas City, and would have saved the freight from St. Joseph to Kansas City. We think the measure of damages adopted by the trial court the correct one.

The plaintiff complains next that Roher was permitted to explain the meaning of the message received in evidence. While the language of the message was such as to be readily understood by one engaged

in the shipment of hogs, it was couched in such terms as to render it ambiguous, and, to a certain extent, unintelligible to persons not engaged in such business. It was therefore entirely proper to permit its meaning to be explained to the jury by the person who sent it. The substance of the fifth assignment we think wholly immaterial, and therefore no error could be predicated thereon.

The sixth complaint is that the defendants, over the objection of the plaintiff, were permitted to prove what the hogs sold for in Kansas City, Mo., on the 14th of January, 1885. Kansas City, Mo., is the next nearest hog market to Sabetha after St. Joseph, and the market to which the defendants intended to ship their hogs, if they did not ship to St. Joseph, and the market to which they did ship them. The hogs were sold on the market there for the best price they would bring. The admission of this evidence was coupled with evidence showing that on the very day, January 14, 1885, on which the hogs were sold in Kansas City, they would have brought the price contended for by the defendants in St. Joseph, Mo. There can be no question, under the evidence, but that, if the plaintiff had done its duty, and transmitted and delivered the message received by it from Roher to the defendants, they would have shipped their hogs to St. Joseph, instead of Kansas City. It is equally certain, under the evidence, that if they had shipped to St. Joseph, and sold in the market either on the 13th or 14th days of January, 1885, they would have received 10 cents a hundred more for their hogs than they got for them in the Kansas City market. The defendants, therefore, suffered a loss, by shipping to the Kansas City market. Having suffered a loss, how is the amount of that loss to be ascertained? The law provides a measurement for loss or damages in cases of this kind, and resort must be had to the measurement so provided. The only difficulty there is in the matter is in selecting the proper measure by which to gauge the loss or damages. The plaintiff claims that the difference in price of the two markets, St. Joseph and Kansas City, is no proper measure of the damages suffered by defendants, and say that they could as well have sold them in the London or San Francisco market, and made the difference in price between either of those markets and St. Joseph the measure of damages. We do not think so. We will not speculate upon what might or might not be the proper measure of damages if the defendants had shipped their hogs to so remote a market as either of those named; but will content ourselves by examining the actual surroundings of the case, as disclosed by the evidence, and search for the proper measure of damages in that neighborhood. Looking over the real case in hand, we think the measure of damages approved and adopted by the trial court the simple, natural, and proximate measure for damages in cases of this kind, and therefore the proper measure to have applied in estimating the damages in this case. The shrinkage in the weight of the hogs, in transit, and the difference in the

price of feed in Kansas City and St. Joseph, in relation to which some evidence was introduced, and of which plaintiff complains, were not made a part of the judgment by the court below; hence no injury to the plaintiff flowed from that evidence. The plaintiff complains that the defendants were permitted to make oral proof of the contents of a written demand which was served upon the agent of the defendant company. It is alleged that there was no proper foundation laid for the proof so made. The plaintiff treats the copy of the written demand delivered to the agent as the original. But the evidence shows that, while a copy of the demand was delivered to the agent, he accepted service, in writing, upon the original, which was kept by the defendant serving the same. This original demand was then sent by the defendants to their attorneys, who received it, and had it about their office until it became lost; that they made search for it in their office among their papers where it was kept, and could not find it. The court, upon this showing, permitted parol proof of its contents. We see no error in this. We are compelled, however, to recommend a reversal of this case, because of error in overruling the motion to suppress depositions.

**PER CURIAM.** It is so ordered.

**HORTON, C. J., and VALENTINE, J., con cur.**

**JOHNSTON, J.** I am satisfied with all the conclusions stated, except the one which holds it to be prejudicial error not to have suppressed the depositions which were read. The statutory requirement in regard to swearing the witnesses should be substantially followed, and the fact of the swearing should be certified to by the officer taking the deposition. The record in this case not only recites that the witnesses were sworn at the beginning of their depositions, but the officer who took them certifies that the deponents were sworn "to testify the whole truth of their knowledge touching the matter in controversy." While this is not a strict literal compliance with the statute, the deviation is so slight and immaterial that the oath may be regarded as a substantial compliance with that required in the statute. As a substantial compliance is sufficient, I think the depositions were properly admitted in evidence, and, further, that the judgment of the district court should be affirmed. *Welborn v. Swain*, 22 Ind. 194.

(45 Kan. 127)

**KANSAS LOAN & TRUST CO. v. LOVE.**

(*Supreme Court of Kansas*. Dec. 6, 1890.)

**AUTHORITY OF AGENT—PAROL EVIDENCE.**

Where, in the trial of a case, the real question in controversy is the authority of a person to act as agent in procuring a loan upon real estate, and it is not established that such authority is in writing, it is competent to prove the same by parol evidence.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Coffey county; **CHARLES B. GRAVES**, Judge.

*Rossington, Smith & Dallas*, for plaintiff in error. *G. E. Manchester*, for defendant in error.

**GREEN, C.** This was an action commenced by the defendant in error in the district court of Coffey county to recover a balance claimed to be due him in consideration of the execution of a certain note and mortgage to plaintiff in error. The plaintiff below alleged that on the 1st day of October, 1886, he executed a note and mortgage to the defendant below for the sum of \$2,500; that the note and mortgage were received, and the mortgage placed on record by the loan and trust company, and it had failed and neglected to pay the sum expressed therein, except \$2,000; that it retained \$500, and refused to pay that sum to plaintiff. The loan company answered that the loan was made upon a written application which set out various terms and conditions; that \$400 might be retained out of the proceeds of the loan until the frame of a dwelling intended to be erected was put up, and the insurance on the building assigned as part security for the loan; that the loan company paid the sum of \$2,500 to J. W. Parker, as agent of the plaintiff below, with instructions to retain \$400 until the building was up, and the insurance effected; that Love afterwards requested the loan company to recall the money from Parker, which was done; that the sum of \$300 was held by it, and it was willing to pay said sum to the plaintiff on the performance of the conditions mentioned, but claimed that said conditions had not been complied with. The sum of \$125 was claimed as a commission for negotiating the loan. The reply to this answer was a general denial, with a specific denial of the agency of Parker, which was properly verified. The case was tried to a jury, and resulted in a verdict for the plaintiff below for \$325. The loan company brings the case here for review.

The plaintiff below made an application to J. W. Parker, a loan agent in Burlington, for a loan of \$3,000 on his farm. Parker had in his possession blank applications for loans, furnished by the Kansas Loan & Trust Company, one of which he caused to be filled out. In answer to the usual interrogatories, among other things, it was stated that the applicant wanted to build a home with the money to be obtained. The loan was to bear interest at 6 per cent. per annum, and the borrower was to pay 6 per cent. as a commission. This application was signed by the defendant in error. On the same day, Parker, the loan agent, made a report to the loan company, recommending the loan, and stating, among other things, that the applicant intended to use part of the money to build a house, and that \$400 could be retained until the frame was up. This application was forwarded to the company's office, at Topeka, and considered, but the company declined to make the loan on the security offered. It proposed, however, to make the loan for \$2,500, on the same security, at 7 per cent. interest, and 5 per cent. commission. This proposition was accepted, the loan negotiated, and \$2,000

paid to the plaintiff below. The real controversy in this case is whether or not the plaintiff ever authorized the retention of any portion of the loan until the frame of a proposed dwelling was up, and certain insurance was effected, for the benefit of the mortgagee, and this matter depends largely upon the question of Parker's agency. The plaintiff below contended that Parker was not his agent, and had no authority to make the statement he did in regard to the retention of a portion of the loan until certain conditions were complied with. The loan company, on the other hand, insisted that Parker was not its agent, but was the agent of the applicant for the loan; that after the money in controversy had been in Parker's hands some time, plaintiff requested the company to recall it; and that it held the sum of \$300, which it was willing to pay upon the performance of the conditions mentioned. The evidence disclosed the fact that there was but one person in the loan office, besides Parker and the applicant, when the application was signed, the clerk who filled out the same, a young lady by the name of Gilman. In the course of the examination of this witness, this question was asked by the attorney for the defendant below: "What did Mr. Love agree to, if anything, as to the retention of part of that loan?" This question was objected to on the ground that it was incompetent, irrelevant, and immaterial, and that the writing itself was the best evidence, and the objection was sustained by the trial court. This, it is claimed, is reversible error; that the loan company should have been permitted to show by this witness just what the plaintiff below did agree to. The evidence was certainly material, as the whole question at issue depended upon the authority of Parker in the premises; and we think it was competent. The objection that the writing was the best evidence was not good, because that was the very matter in dispute. The plaintiff below claimed that he had never signed any agreement that a portion of the money should be retained, and it was certainly a vital question as to what the contract was between the parties. It is not claimed that the application which was signed by the defendant in error authorized the loan company to withhold any portion of the money, so that threw no light upon the question; and the other statement signed by Parker, he claimed, was not his writing, and hence not the best evidence. We think the evidence should have been admitted. It is unnecessary to discuss the other errors as to the instructions requested and refused, as they are substantially covered in the general charge of the court. We recommend a reversal of the judgment.

**PER CURIAM.** It is so ordered; all the justices concurring.

(44 Kan. 710)

**PRACHT V. WHITRIDGE.**

(*Supreme Court of Kansas.* Dec. 6, 1890.)

**NEW TRIAL—SEPARATION OF JURY.**

Where a jury, after a cause is submitted to them, separate and go to supper, and again

separate and go to breakfast, and also separate and go to dinner, without having been admonished by the court, as required by law, before either of said separations, and no showing is made that the substantial rights of the parties against whom they find were not prejudiced by such separations, it is error to overrule a motion for new trial alleging such separations as ground therefor.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Marion county; **FRANK DOSTER**, Judge.

*King & Kelley*, for plaintiff in error. *T. J. Dickerson*, for defendant in error.

**STRANG, C.** On the 26th day of September, 1887, the plaintiff commenced two cases against the defendant before a justice of the peace. Afterwards, the cases were, by agreement, taken to the district court, and there consolidated, and tried together November 16, 1887, to a jury. At the trial, the defendant gave evidence of a set-off greater in amount than the plaintiff's claim, and the jury returned a verdict for the defendant for \$405.70. This verdict received the approval of the court, and judgment was entered thereon. The plaintiff in error relies on the following alleged errors for the reversal of the case: "*First.* Misconduct and utter disregard of the law by the court in allowing and directing the officer in charge to allow, the jury to separate without being admonished as required by the statute. *Second.* The plaintiff should have had a new trial on account of after-discovered evidence on the part of the plaintiff. *Third.* The claim of the defendant is barred by the statute of limitations."

The record shows that the case was submitted to the jury, and they retired some time during the afternoon session of the court. That they had not agreed when the court adjourned for the day, and, after the court had adjourned, and the judge had left the court-house and was out on the walk, he directed the officer having the jury in charge to allow them to separate, and go to supper, returning to the jury-room afterwards. That at breakfast-time the next morning, the officer again permitted the jury to separate and go to breakfast, and at the dinner hour, not having yet agreed, they were again permitted by the officer to separate and go to dinner. The record shows that at each of these separations the jurors mingled with other persons going to and returning from their meals. At none of these separations was the jury first admonished by the court as required by the statute. Was it error for the court to refuse to set aside the verdict of the jury under such circumstances, and grant a new trial? We think it was. Paragraph 4874, Gen. St. 1889, reads as follows: "If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or to express an opinion thereon until the case is finally submitted to them." The provis-

ion that the jury shall be admonished if they are permitted to separate is imperative. And it is required after the case is submitted to them the same as during the trial. We cannot say that this provision may be ignored by the courts. It was incorporated into the Code to guard trials by jury from improper influences. We think it a wholesome provision. Persons who have had but little experience in courts and upon juries are not likely to be mindful, without their attention called thereto, of the necessity of refraining from talking, or listening to the conversation of others, upon the subject of the trial, if allowed to separate,—commingle with the crowd. Some admonition is necessary to attract and fix their attention upon this matter. It frequently happens in trial courts that, with proper instruction by the court upon this subject, some one or more of the jurors heedlessly disregard the admonition. It was the necessity of something of this kind to protect jury trials that induced the legislature to enact this provision into law. In the Criminal Code, where, in favor of life and liberty, still greater importance is attached to guards thrown around trials by jury to prevent any improper influences creeping into the jury-room to affect the deliberations of the jury, the legislature has still further enacted into formal law the idea that it is improper for juries to separate after a case is submitted to them by including among the causes for which a new trial may be granted the separation of the jury, after retiring to consider the cause, without leave of court. This court said in *State v. Snyder*, 20 Kan. 306: "It is the duty of the court to enforce a rigid and vigilant observance of the provisions of the statute designed to preserve inviolate the right of trials by jury, and the purity of such trials." In *Wright v. Burchfield*, 3 Ohio, 55, in reviewing a case in which the jury had separated, after finding a verdict, before returning into court with it, the court says: "It has never been thought safe that juries should be permitted to converse with strangers before the verdict was given, or that the jury should separate before they were agreed." In *Sutliff v. Gilbert*, 8 Ohio, 409, in discussing a case where the jury, after finding a verdict, and sealing the same, separated before returning into court with their verdict, and such separation was alleged as ground for a new trial, the court uses the following language: "As a general rule, the jury shall not be permitted to separate, after retiring from the bar of the court, until they have agreed upon their verdict. Still there may be peculiar circumstances which would, to some extent, justify a separation. But should a jury, of their own pleasure, having been put in charge of a case, leave the room, and mingle with the people of the town or vicinity, and afterwards return to their room and agree upon a verdict, it would be a good ground for a motion to set aside the verdict, and for a new trial." In the case of *Perkins v. Ermel*, 2 Kan. 326, the separation of one of the jurors from his fellows was explained by affidavit, showing that the separation was the result of misapprehen-

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sion, and that nothing had occurred to prejudice his mind touching the case. In this case no showing is made. The jury separates three times without having been admonished by the court at either of said separations. They meet and converse with the people about the court-house, and in town, and no showing is made, or attempted to be made, that during said separations nothing occurred to prejudice their minds in relation to the case. If nothing had occurred, it would have been an easy matter to have shown the fact. There is always more or less talk among the people who are attending the court about the cases that are being tried, and juries are so liable to hear something that is likely to prejudice them if allowed to separate at all that we think it the safer rule to hold that they may not be permitted to separate without the statutory provision in relation to admonition be complied with by the court; and that, having done so, it is error for which a new trial should be granted, unless there is a showing made that satisfies the trial court that nothing occurred during the separation which could prejudice the substantial rights of the party against whom they find.

We have examined the second assignment, and are satisfied that the court committed no error in refusing a new trial on that ground. While there was evidence of surprise on the part of the plaintiff, there was also evidence in the affidavits produced by the defendant on the hearing of the motion which showed that the plaintiff was not surprised; that he knew of the defendant's claim for the engine long before the commencement of the suit. And, so far as the newly-discovered evidence was concerned, it was cumulative, and tended to prove that plaintiff did not purchase the engine, while the defendant showed by affidavits of at least two new witnesses that plaintiff had admitted that he had purchased the engine. It seems to us that, upon the showing made in that regard, the best view that could be taken of the evidence, so far as the interest of the plaintiff was concerned, it was a stand-off. The evidence being conflicting upon the subject, the conclusion of the trial court thereon is conclusive.

The third matter assigned for error on part of the trial court involves a question of the effect of the statute of limitations. As the case is reversed in the first error assigned, we do not consider it necessary to discuss the question raised on the statute of limitations. It is recommended that the case be reversed, and sent back for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 715)

EHRHARD v. McKEE.

(*Supreme Court of Kansas*. Dec. 6, 1890.)

TRIAL—SEPARATION OF JURY.

1. Where a jury in a civil action separate and mingle with the public after they had retired to consider of their verdict, without permission of the court, and without having been duly admonished, as the statute requires, a presumption against their verdict arises that will vitiate it,

unless it affirmatively appears that no prejudice was suffered by the losing party.

2. When it is shown that a jury separated without having been duly admonished, the burden is shifted to the prevailing party, and it will devolve on him to show that the jury was not subjected to any improper influence, and that no injury resulted to the unsuccessful party.

8. The admission of the statements of strangers to the action, not made in the presence of the party against whom they were offered, in respect to attempts made to prevent adverse witnesses from testifying in the action against such party, and to improperly influence other witnesses to testify in his favor, was prejudicial error.

(*Syllabus by the Court.*)

Error from district court, Clay county ;  
E. HUTCHINSON, Judge.

*Harkness & Godard*, for plaintiff in error.  
*J. S. Walker and T. B. Dawes*, for defendant in error.

JOHNSTON, J. This action was instituted by Adolph Ehrhard before a justice of the peace, to recover from Michael Jones \$99 as damages, alleged to have been sustained by reason of the stock of Jones trespassing upon plaintiff's land and destroying his crops. Judgment was given in favor of the plaintiff, and Jones appealed to the district court, where a trial with a jury resulted in a verdict and judgment in favor of Jones, and the plaintiff brings the case here, alleging error. Since the proceeding was instituted in this court, Jones has deceased, and the action has been revived in the name of his personal representative. Two of the errors alleged require attention, and their determination will compel a reversal of the judgment. One of the witnesses called in behalf of the defendant was permitted to testify, over objection, to statements purporting to have been made by a son of the plaintiff, and not in the presence of the plaintiff, to the effect that his son endeavored to induce the witness to testify in the interest of plaintiff in this action, and had asked to be allowed to train the witness "how to swear." Another witness for defendant was permitted, over objection, to give conversations had with strangers to the action, at which the plaintiff was not present, to the effect that a certain party had been hired to leave, so that the defendant could not obtain his testimony. These parties were strangers to the action, and the statements were clearly incompetent, and of a very prejudicial character, and not admissible in this action against the plaintiff upon the theory of conspiracy nor upon any other theory.

A new trial was asked because of the misconduct of the jury. The case was submitted to the jury on September 26, 1887, when they retired in charge of an officer, and remained in session until September 28th, when they reported to the officer in charge that they had agreed upon a verdict. The court not being in session at that time, they sealed up the verdict, and delivered the same to the officer, and thereupon were allowed to separate. At the convening of the court on the following day, the jury was brought in and asked if they had agreed upon a verdict,

and the foreman responded that they had, and the sealed verdict was thereupon opened and read by the clerk, which was a finding in favor of the defendant, but that each party should pay one half of the costs of the action. The record shows that the following proceedings were then had: "Whereupon the court reprimanded the jury for separating and going at large upon the pretense of having agreed upon a verdict which they must have known could not be received, and thereupon directed the jury to retire to their jury-room to consider of their verdict. To which action of the court, in directing the jury to retire after having been separated during the previous day and night, plaintiff objected, and asked that the jury be discharged for misconduct." The objection was overruled, and an exception taken. The jury again retired, in accordance with the direction of the court, and, failing to agree at an earlier time, they were kept by the officer continuously until the 3d day of October, 1887, when they agreed upon a verdict in favor of the defendant. The reprimand which the court administered to the jury was fully justified, and the natural tendency of their misconduct was to disqualify them for the proper performance of their duty. The result which they sealed up and delivered as a verdict finding in favor of both parties was plainly inconsistent and improper. The plaintiff contends that it was a feigned verdict, given in order to gain the privilege of separating. They may have been honestly mistaken as to their course, but, whatever may have been their motive, their action resulted in a separation without the permission or admonition of the court. They were permitted to mingle with the public, and, for aught we know, may have conversed with many others about the facts in the case, and may have received impressions concerning it other than those received during the progress of the trial. The result first returned is vastly different from the verdict finally rendered, as the record discloses that the great amount of costs incurred is probably now the most important consideration in the controversy. At any rate, it was necessary to hold the jury continuously together about five days afterwards to secure an agreement in favor of the defendant, relieving him from the payment of half the costs. No testimony was offered on the motion for a new trial to show that the misconduct did not influence the jury to the prejudice of the unsuccessful party. The statute provides that, when a case is finally submitted to the jury, they must be kept together, under charge of an officer of the court, and not allowed to separate or mingle with the public, except with the permission of the court, and after they have been duly admonished as to their conduct during the separation. Civil Code, §§ 278, 279. In the recently decided case of *Pracht v. Whitridge*, 44 Kan. —, ante, 192, it was held that a violation of these statutory provisions, by the separation of a jury without having been duly admonished by the court, creates a presumption against the verdict; and, if no showing is made that the substantial

rights of the unsuccessful party were not prejudiced, it will be sufficient ground for a new trial. This was the rule established in the case of *Madden v. State*, 1 Kan. 340; and the civil case of *Morrow v. Commissioners*, 21 Kan. 516, which has been referred to, decides nothing to the contrary. In the latter case, there was some discussion with reference to the effect of a separation, but no decision was in fact made for the reason that the record did not show that there had actually been a separation. The violation of the statutory provisions, with reference to separation and admonition, gives rise to a prejudice, which will vitiate the verdict unless it affirmatively appears that no prejudice was suffered by the losing party. When such misconduct is shown, the burden is shifted to the prevailing party, and if he can, by the affidavit of the jurors or other testimony, make it appear that the jury were not subjected to any improper influence, and that no injury resulted to the losing party, the verdict should stand.

If it appears from the showing made that nothing transpired to affect the integrity of the verdict, it should not be disturbed; but where there is a plain violation of statutory requirement enacted for the preservation of the purity of the verdict, such as the one we are considering, it devolves upon the prevailing party to show that the improper conduct did not prejudice the substantial rights of his opponent. In the absence of such a showing by the defendant in error, a new trial should have been granted. The judgment of the district court will be reversed, and the cause remanded for another trial. All the justices concurring.

(44 Kan. 707)

WALKER v. BRADEN *et al.*

(*Supreme Court of Kansas. Dec. 6, 1890.*)

EXECUTION—SALE OF MORTGAGED PROPERTY—  
DISTRIBUTION OF SURPLUS.

1. Where mortgaged personal property is sold on execution, and the mortgagee, who is not the defendant in the execution, or his legal representative, purchases the same, the court from which the execution was issued may, in any proper proceeding with all the interested parties before it, make an order that any surplus moneys remaining after the satisfaction of the execution, with interest and costs, shall be paid to the party or parties having the paramount right thereto, and if it be shown that the mortgagee has the paramount right thereto, the court should order that the surplus moneys should be paid to him.

2. And in such a case where there is no lien upon the property sold, except the execution lien, and the mortgage lien, the mortgagee will have the paramount right to the surplus moneys, although the officer selling the property may, after the sale, and prior to the payment of the purchase price, accept orders from the defendant in the execution to pay such surplus moneys to certain creditors of the defendant in the execution.

(*Syllabus by the Court.*)

Error from district court, Crawford county; GEORGE CHANDLER, Judge.

*D. B. Van Syckle*, for plaintiff in error.  
*John T. Voss* and *James T. Bridgens*, for defendants in error.

VALENTINE, J. This case has once before been in this court. *Walker v. Braden*, 34 Kan. 660, 9 Pac. Rep. 613. It appears that the defendant in error W. H. Braden, as sheriff of Crawford county, had three executions in his hands, issued from the district court of said county against the property of McFarland & Moore, under which executions he levied upon certain personal property known as the "Anchor Mill," seizing the same as the property of McFarland & Moore. The executions, with interest and costs, amounted in the aggregate to \$596.42. The property levied upon was worth \$1,500. The plaintiff in error, A. B. Walker, had a valid chattel mortgage upon the property for the sum of \$1,200, and interest. The sheriff, Braden, sold the property at public sale, and Walker bid upon it and purchased the same for \$1,600; afterwards, Walker refused to pay the amount of his bid, and the sheriff, Braden, sued him therefor in said district court, and obtained a judgment for the same, which judgment was afterwards affirmed by the supreme court. But the supreme court, however, in affirming the judgment used the following, among other, language: "The debt for which the property was sold is only \$535.42, and if the mortgage of the plaintiff in error is valid and subsisting, he may by appropriate action reach the surplus fund derived from the sale of the property, and have it applied upon his debt, and thus be partially relieved from the effect of his blunder, and the hardship of which he complains." 34 Kan. 669, 670, 9 Pac. Rep. 617. After such affirmation, Walker paid and satisfied the aforesaid executions, and the judgments upon which they were issued, which, in the aggregate, with interest and costs, then amounted to the sum of \$664.52, leaving a surplus of \$935.48, on Walker's bid, and he then instituted this proceeding in the said district court to obtain relief, making every person a party thereto who claimed to have any interest in the surplus fund, or in any of the matters in controversy. The various parties answered. The principal matters alleged in the answers were that McFarland & Moore owed several of such parties, and that they had received orders from McFarland & Moore on the sheriff, Braden, to pay over to them severally a sufficient amount of the surplus fund to satisfy their respective claims, which orders Braden had accepted; but it was not claimed that any one of the parties answering, except Braden, had any lien upon the property sold on the executions, or even that he had reduced his claim to a judgment. The case was tried on April 14, 15, 1887, before the court and a jury, and judgment was rendered against the plaintiff in error, Walker, and he now brings the case to this court for review.

We think the court below erred. "When there are surplus moneys arising from the sale of lands on execution, those having liens upon the lands sold have the same liens upon the surplus moneys which they had upon the lands previous to such sale." *Crock. Sher.* § 507. See, also, *Mitchell v. Milhoan*, 11 Kan. 617; *Butler v. Craig*, 29 Kan. 205-207, and cases there cited;



*Averill v. Loucks*, 6 Barb. 470; *Van Nest v. Yeomans*, 1 Wend. 88. This same rule we think applies to personal property. Ordinarily, when a sheriff sells property on execution, he should, after satisfying the execution with interest and costs, pay any surplus of the proceeds of the sale remaining in his hands to the defendant in the execution, or to his legal representatives. Whether he might in any case, upon his own volition and choice, pay such surplus to some other person, who might have the paramount right thereto, we need not now determine; but we do determine that where some other person than the defendant in the execution, or his legal representative, has the paramount right thereto, the court from which the execution was issued may, in any proper proceeding instituted before it for that purpose, with all the interested parties before it, make an order that the surplus moneys shall be paid to the party or parties having the paramount right thereto. In other words, when the property sold is the mortgaged personal property of the defendant in the execution, and there are no other liens upon the property than the execution lien and the mortgage lien, the court may and should, in any proper proceeding instituted for the purpose, order that the sheriff, after satisfying the execution with interest and costs, should pay the surplus moneys to the mortgagee. In this present case, we suppose that Walker's mortgage lien was in the first instance prior and paramount to Braden's execution lien, but Walker waived his priority of lien to the extent of the execution claims by bidding upon and purchasing the property. He, however, did not waive his priority of lien and rights to any greater extent, nor as to claims which were not liens in any sense upon the property. As to such claims his rights were still prior and paramount. Walker is entitled to the surplus. The judgment of the court below will be reversed. All the justices concurring.

(45 Kan. 8.)

LEE *et al.* v. FIRST NAT. BANK OF FT. SCOTT.

(Supreme Court of Kansas. Dec. 6, 1890.)

#### POWER OF PARTNER TO BIND FIRM.

1. A partner in a non-trading firm has no implied power to bind the firm by the execution of commercial paper in the name of the firm.

2. Where one member of a partnership of occupation and employment executes a note in the firm name to a bank, without the knowledge of the other member, and, in direct violation of the articles of copartnership, the payment of such note cannot be enforced against the firm.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

A. A. Harris, for plaintiff in error. Hill & Chenault, for defendant in error.

SIMPSON, C. Suit was brought by the First National Bank of Ft. Scott against Golden and Lee on the following promissory note: "Fort Scott, Kansas, Oct. 7,

1887. Ninety days after date we promise to pay to the order of the First National Bank of Fort Scott, Kansas, the sum of three hundred dollars, value received, payable at the First National Bank, Fort Scott, Kansas, with interest from maturity, at the rate of twelve per cent. per annum. Interest payable quarterly, and, if not paid when due, to bear the same rate of interest as the principal. The drawers and indorsers hereof severally waive demand of payment, protest, and notice of non-payment. \$300. G. S. GOLDEN & Co." Golden made no defense, but Lee pleaded a denial of the partnership, and that he had never executed the note, nor was it executed for him by any one acting by his authority, or under his direction, and that said note was not his obligation. There was a trial by the court at which these facts were developed: Golden and Lee formed a partnership some time in August, 1887, to carry on the real-estate, loan, and insurance business on commission at Ft. Scott. Lee did not know of the existence or execution of this note until after its maturity. The bank at the time of the making of the note did not know who composed the firm of J. S. Golden & Co., and required Golden to make a statement as to who composed the firm, and this he did in writing on the back of the note. It is claimed on this state of facts that this was merely a partnership of occupation or employment, and not a commercial or trading one, and that there was no authority, actual or implied, for the making of commercial paper in the firm name by one member thereof. The bank introduced the evidence of several real-estate agents at Ft. Scott, to show that it was customary for those in that business at Ft. Scott to borrow money from the banks. The primary question is whether or not the execution of this note was within the scope of the partnership. The test of the character of the partnership is buying and selling. If it buys and sells, it is commercial or trading. If it does not buy or sell, it is one of employment or occupation. *Winship v. Bank*, 5 Pet. 529; *Kimbrow v. Bullitt*, 22 How. 256; 1 Bates, Partn. § 327.

In partnerships of occupation, when one member executes a note in the firm name, the holder must show express or implied authority from the firm to make the note, before a recovery can be had. *Smith v. Sloan*, 37 Wis. 285; *Judge v. Braswell*, 13 Bush. 67; *Horn v. Bank*, 32 Kan. 518, 4 Pac. Rep. 1022. In commercial partnerships a note executed by one member in the firm name is *prima facie* the obligation of the firm, and if one of the parties seeks to avoid its payment, the burden of proof lies upon him to show that the note was given in a matter not relating to the partnership business, and that also with the knowledge of the holder of the note. *Deitz v. Regnier*, 27 Kan. 94. In *Bays v. Conner*, 105 Ind. 415, 5 N. E. Rep. 18, and in *Smith v. Sloan*, 37 Wis. 285, it is held that notwithstanding the fact that the proceeds of the note were applied to the payment of the debts of the firm, one member of a non-trading partnership cannot bind the other by the execution of a note in the firm name. This, for the reason that there is

a want of power, and the application of the proceeds is not controlling or decisive of the question of authority. The case of *Deardorf v. Thacher*, 78 Mo. 128, is one in which a member of a partnership of three persons who were engaged in the real-estate, loan, and insurance business, purchased of a lumber dealer quantities of lumber on the credit of the firm. The lumber was delivered by the dealer, without any knowledge on his part that it was not being bought for or applied to partnership business, and that he took the note in good faith according to the credit extended. The lumber dealer brought an action on the firm note that was executed by the member of the partnership who purchased the lumber. The other members of the firm denied, under oath, the execution of the note. The court held that they were not liable. The syllabus of the case is to the effect that "the members of a firm engaged in the insurance, real estate, and collecting business, have no implied power to bind each other by commercial paper in the name of the firm." The same rule has been applied to partnerships in mining in some English cases; in milling, (*Lanier v. McCabe*, 2 Fla. 32;) in establishing and carrying on water-works, (*Broughton v. Water-Works*, 3 Barn. & Ald. 1;) in gas-works, (*Bramah v. Roberts*, 3 Bing. N. C. 963;) in publishing, (*Pooley v. Whitmore*, 10 Hesk. 629;) in planting, (*Prince v. Crawford*, 50 Miss. 344; *Benton v. Roberts*, 4 La. Ann. 216;) in farming, (*Green-slade v. Dower*, 7 Barn. & C. 635;) in sugar refining, (*Livingston v. Roosevelt*, 4 Johns. 251;) in keeping a tavern, (*Cocke v. Bank*, 3 Ala. 175;) in owning a ship, (*Williams v. Thomas*, 6 Esp. 18;) in digging tunnels, (*Gray v. Ward*, 18 Ill. 32;) in carrying on a laundry, (*Neale v. Turton*, 4 Bing. 149;) in practicing law, (*Hedley v. Bainbridge*, 3 Q. B. 316; *Garland v. Jacomb*, L. R. 8 Exch. 216; *Levy v. Pyne*, 1 Car. & M. 453; *Breckinridge v. Shrieve*, 4 Dana, 375;) in practicing medicine or surgery, (*Cros-thwait v. Ross*, 1 Humph. 23; *Lewis v. Reilly*, 1 Q. B. 349;) and in keeping a store and rope-walk, (*Wagnon v. Clay*, 1 A. K. Marsh. 257.) In addition to all this, it is expressly stated in the articles of copartnership that it is formed for the purpose of carrying on the real-estate, loan, and insurance business on commission. It is also agreed in the articles of copartnership that neither of the said partners shall subscribe a bond, sign or indorse any note of hand, accept or indorse any draft or bill of exchange, or assume any other liability in the name of the firm, without the written consent of the other. These conditions embodied in the articles make it clear beyond all dispute that this was a partnership of occupation and employment, and not a trading or commercial one. It is said, however, on behalf of the bank, that it could not be bound by these unpublished restrictions; but, if we are right in the determination of the character of this partnership, then the plain duty of the bank, when one of the partners applied to it for a loan in the firm name, was to investigate his authority, and if investigation had taken place, knowledge of the restrictions would have followed. It is

recommended that the judgment be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 731)

# STATE INS. CO. v. GRAY.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

## INSURANCE—AUTHORITY OF AGENT—APPLICATION.

1. An agent, authorized to take applications for insurance, should be regarded to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company and not to the assured.

2. When the agent thus authorized by his company to take applications for insurance, without the knowledge of the applicant, writes false answers to questions contained in the application, contrary to the directions of the applicant, who makes true answers to such questions, the company will be estopped by the answers thus written by its agent. *Insurance Co. v. McLanathan*, 11 Kan. 533; *Insurance Co. v. Pearce*, 89 Kan. 396, 18 Pac. Rep. 291.

(*Syllabus by the Court.*)

Error from district court, Wilson county; L. STILLWELL, Judge.

*Case & Glassee*, for plaintiff in error. J. W. Sutherland, for defendant in error.

HORTON, C. J. On August 9, 1886, J. W. Jones, the agent or solicitor of the State Insurance Company of Des Moines, residing in Neodasha, in this state, called upon Absalom Gray at his residence near that city, and solicited insurance upon his house and household goods, and succeeded in taking his application for \$850 of insurance upon his property. Gray being unable to read or write, signed the application with his mark. On the 27th day of August, 1886, the insurance company issued to Gray a policy of insurance upon his property for the amount of his application. On the 17th day of February, 1887, the property insured was destroyed by fire without any fault of Gray. Subsequently, the insurance company refusing to pay any of the insurance upon the policy issued to him, he brought his action and recovered a judgment against the company for \$488.62, together with all of his costs. The insurance company excepted to the rulings and judgment of the district court and brings the case here.

The application signed by Gray with his mark contained the following: "It is understood by the assured that the company will not be bound by any representations of the assured or promises of the agent not contained herein. \* \* \* The above statements shall be the sole basis of the contract between the said company and myself, and are hereby made a part of the same. Having read the foregoing application and fully understanding its contents, I warrant it to contain a full and true description and statement of the condition, situation, value, occupancy and title of the property hereby proposed to be insured in the State Insurance Company of Des Moines; and I warrant the answers to each of the foregoing questions to be true, and I agree that this insurance

shall not be binding upon the company until accepted by them." This application was taken and forwarded to the company by its solicitor, J. W. Jones, whose authority was "to solicit applications for insurance in said company." Among other things, the policy contained this statement: "It is expressly understood and agreed by the parties hereto that application and survey No. 243,392 c. made by the assured is hereby made a part of this policy, and a warranty on the part of the assured, and that this policy is issued on the faith of the statement in said application and survey, as they thus appear in writing therein only." The premium on the policy was paid by a note signed by the assured with his mark, which had not, by its terms, become due at the time of the fire. Before the maturity of the note, it had been placed in bank for collection by the insurance company. Gray deposited in the bank the money to pay the same, but on account of the fire the company refused it and never accepted the same. Question 24 of the application was as follows: "Is the title to the land on which the property to be insured is situated, in your own name; what kind of title have you? Explain fully." And the answer thereto, as the same appears in writing in the application, is: "The land is in my own name. I hold a warranty deed." On the trial, it was conceded that the title, instead of being in the name of Gray alone, was in the name of himself and his wife jointly. Question 25 of the application was as follows: "Is there any other insurance on this property; if so, how much, and in what company?" And the answer thereto, as the same appears in writing in the application, is: "No." On the trial, it was conceded that at the time of taking the application there were two policies of insurance on the property, amounting to \$500. Question 26 of the application was as follows: "Are you the sole and undisputed owner of the property to be insured?" And the answer thereto, as the same appears in writing, is: "Yes." Upon the trial, with consent of the parties, the court submitted certain questions of fact to the jury, but reserved the other questions for its own determination. The questions of fact submitted to the jury, and their answers are as follows: "(1) When J. W. Jones asked question No. 25 in the application,—'Is there any other insurance on this property; if so, how much and in what company?'—who answered the question for the plaintiff? Answer. His wife. (2) What was the actual answer made to the question? State the same fully. A. There was five hundred dollars in Springfield Company. Did not know whether it was Springfield, Mo., or Ill. (3) Did Jones write in said application the actual answer that was made to said question, or did he write an answer not made? A. He wrote an answer that was not made. (4) After Jones had inserted the answers to the questions in the application as they now appear, did he read the same over to plaintiff or his wife, or to both? A. He did not. (5) Question 24, in the application, is in these words: 'Is the title to the land on which the prop-

erty to be insured is situated, in your own name? What kind of a title have you? Explain fully.' Did Jones read the question to the plaintiff or his wife or both? A. He did not. (6) Question No. 26, in the application, is in these words: 'Are you the sole and undisputed owner of the property to be insured?' Did Jones read the question to the plaintiff or his wife or both? State what the fact is? A. He did not. (7) Had the real estate on which the insured property was situated been purchased by the plaintiff with his own money? A. Yes. (8) Had Mary Gray, the wife, any actual interest in the real estate except such interest as she might have had by virtue of being the plaintiff's wife, and her name appearing in the deed as one of the grantees? A. She did not."

The principal contention is that the trial court committed error in admitting the evidence which showed that the statements written in the application were not those of Gray, the applicant, although signed by him, with his mark, and in ruling that the insurance company was estopped by the answers falsely or improperly written by its agent or solicitor, when he filled up the blank application. Since this action was tried in the court below, the opinion of Insurance Co. v. Pearce has been handed down by this court. See 39 Kan. 396, 18 Pac. Rep. 291. That case is so recent, and so fully in point, that further discussion upon the principal question involved in this case is unnecessary. This court ruled in that case that "if, after hearing a full and truthful statement of the condition of the property insured from the owner, an agent of an insurance company fills the blanks in a printed form of application furnished him by the company with misrepresentations and false statements, and the insured signs the same without knowing its contents and without other fault than that he relied upon the agent to write down his statement correctly, and pays the premium, obtains a policy, and sustains a loss, held, that the company is estopped from denying its liability under the policy, and, further, held, that the signing of the application under such circumstances will not prevent a recovery by the insured, as the transcribing such statement will be deemed to be the act of the company by its agent, and not that of the insured. Where an agent of an insurance company soliciting insurance, in describing the property insured, falsely and without the knowledge of the insured, fills the blanks in the printed forms of application of the company, he is the agent of the company in taking such application, and not of the insured, although there is a stipulation on the face of such application that the description of the property is made by the owner, or by his authority. Where it is provided in a policy that the statements in an application are warranties, and, if any of them are false, the policy shall be void. It is not forfeited when its own agent makes all the false statements contained in the application, and there was no fraud or attempt to deceive on the part of the assured." See, also, Insurance Co. v. McLanathan, 11 Kan. 533; Insurance Co. v. Mahone, 21

Wall. 152; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Baker*, 94 U. S. 610; *Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. Rep. 898.

As both Mr. and Mrs. Gray were old, feeble, and illiterate, and as Gray, who signed the application and premium note with his marks, and afterwards retained in his possession the policy, could not read or write, the cases of *Furneau v. Esterly*, 36 Kan. 539, 13 Pac. Rep. 824; *Johnson v. Insurance Co.*, 45 N. W. Rep. 799; and *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, have but little force. It ought not to be held that a person, not able to read or write, by merely holding a policy in his possession, which contains his application signed with his mark, thereby approves the action of the agent or solicitor in falsely or improperly taking his application and becomes, by holding such policy, a participant in the fraud committed by the agent or solicitor. As the evidence of Mrs. Gray tended to show that she was the agent of her husband, there was no error committed in admitting it. She may have been the agent of her husband, and acting for him, even when he was personally present. His age, feebleness, and illiteracy must be considered in connection with her statement of agency. The conversation between Gray and Jones, after Jones ceased to be the company's agent, was offered only to lay the foundation for impeachment; therefore, this evidence was not incompetent. The insurance company is in no condition to complain of the failure of the jury to return a general verdict; and therefore the instructions prayed for, which would have been competent, if it had been intended that the jury should render such a verdict, need not be considered. Before any evidence was submitted to the jury the parties agreed to submit certain questions of fact to the jury. The other questions were to be reserved and decided by the trial court. The court acted upon the stipulation of the parties, and no objection was taken by the defendant to the reception of the special verdict. By the agreement of its counsel, and its action when the special verdict of the jury was returned, the defendant waived a general verdict. The judgment of the district court will be affirmed; all the justices concurring.

(44 Kan. 753)

*GARDOM et al. v. WOODWARD et al.*

(*Supreme Court of Kansas. Dec. 6, 1890.*)

**FRAUDULENT CONVEYANCES—EVIDENCE OF INTENT.**

Upon a question of fact as to whether a sale of personal property was made for the purpose of hindering, delaying, and defrauding the creditors of the seller, it is competent for the seller, as a witness, to testify directly as to whether he in fact intended by the sale to hinder, delay, or defraud his creditors.

(*Syllabus by the Court.*)

Error from district court, Morris county; M. B. NICHOLSON, Judge.

J. K. Owens, G. N. Elliott, and J. T. Bradley, for plaintiffs in error. E. S. Bertram, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Morris

county, on February 17, 1888, by B. F. Woodward, F. A. Faxon, and J. C. Horton, partners, doing business under the firm name of Woodward, Faxon & Co., against F. A. Gardom, to recover the sum of \$794.25, on an account. At the same time an order of attachment was procured in the case upon the following grounds, as alleged in plaintiffs' affidavit therefor, to-wit: "That said defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors, and has property and rights in action which he conceals, has assigned and is about to dispose of his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors." The order of attachment was levied upon certain personal property as the property of Gardom, valued by the appraisers at \$1,650.36. On April 9, 1888, Gardom filed a motion to discharge the attachment upon the ground, among others, that the grounds set forth in the plaintiffs' affidavit for the attachment were not true. On the same day John A. McQuistan, with leave of the court, and under the provisions of chapter 137 of the Laws of 1877, (Gen. St. 1889, par. 4123,) filed an interplea, claiming that the personal property attached belonged to him. The plaintiffs replied to this interplea. On April 23, 1888, by consent of the parties and the court, a trial was had before the court, without a jury, upon both the motion and the interplea upon the same evidence. The decision of the court below was in favor of the plaintiffs and against Gardom and McQuistan, and they, as plaintiffs in error, bring the case to this court for review. It appears that the attached property once belonged to the defendant Gardom, but that, prior to the levying of the attachment, and on January 5, 1888, McQuistan purchased the same from Gardom for the sum of \$1,234.45, that amount being the amount of a promissory note, with interest, which McQuistan at the time held against Gardom. The plaintiffs claim that this sale was a sham made for the purpose of hindering, delaying, and defrauding the creditors of Gardom; but Gardom and McQuistan claim that the sale was made in the best of faith. Whether the sale was a sham or not, or whether it was made in good faith, was about the only material question presented to the court below for its determination. If it was a sham sale, then, as to the plaintiffs, the property belonged to Gardom, and the plaintiffs were entitled to their attachment; but, if it was an honest and *bona fide* sale, then the property belonged to McQuistan, and the plaintiffs were not entitled to their attachment. During the trial the defendant Gardom was examined as a witness on the part of himself and McQuistan, and he was asked the following, among other questions: "I wish to ask you about these matters. There are three charges made against you. One is that you were about to convert your property, or a part thereof, into money, for the purpose of placing it beyond the reach of your creditors. I wish you to state to the court whether or not you were about, at the

time of the attachment, at or before or about that time,—if you were about to convert your property, or a part thereof, into money, for the purpose of placing it beyond the reach of your creditors." The plaintiffs objected to the question upon the ground that it was "incompetent, irrelevant, and immaterial, and called for a legal conclusion; and the court below sustained the objection, to which Gardom and McQuistan excepted. The witness was also asked the following question, to-wit: "He charges you with having assigned your property, or a part thereof, with the intent to hinder, defraud, and delay your creditors. Is that true? Did you have any such intent?" To which the plaintiffs objected "as incompetent, and as involving a question of law," which objection was sustained by the court, and the ruling duly excepted to. It will be perceived that these questions were not objected to on the ground of their form, or that they were leading, but upon the grounds, in substance, that the evidence to be elicited by them would be incompetent, irrelevant, and immaterial, a legal conclusion, and a question of law. We think the court below committed error. A vital question involved in the case was whether the aforesaid sale was made in good faith, or was a mere sham, and made for the purpose of hindering, delaying, and defrauding Gardom's creditors. Whether the sale was in good faith or not depended upon the state or condition of Gardom and McQuistan's minds, their thoughts, intentions, motives; and the aforesaid questions were asked for the purpose of eliciting evidence tending to show what the condition of Gardom's mind in particular was, his intentions, and motives. Dr. Wharton, in his work on the law of Evidence, (section 508,) uses the following language: "A witness, also, is not to be permitted to testify as to the motives by which another person is or has been actuated. Motives are eminently inferences from conduct. The facts from which the inferences are to be drawn are to be detailed by the witnesses; for the jury the work of inference is to be reserved. Yet, where a party is examined as to his own conduct, he may be asked as to his motives, his testimony to such motive being based not on inference, but on consciousness." See, also, Whart. Ev. §§ 482, 955. In an article in the Albany Law Journal of December, 1876, the following, among other language, is used: "Upon the review of all the cases, it would appear that in cases arising under a statute where the statute makes the intent of the one doing an act involved in the issue essential, it is competent to inquire of him, as a witness, what his intent was, and his testimony goes to the jury with the other evidence contradicting or corroborating it." Volume 14, p. 387. In the case of *Com. v. Woodward*, 102 Mass. 155, 161, the following language is used: "The criminal purpose or intent must always be proved. It is usually inferred from the character and circumstances of the offense, or proved by preceding threats, accompanying declarations, or subsequent conduct or admissions. Now that the defendant him-

self is admitted as a witness, it must be competent for him to testify directly to that which is always a subject of proof or disproof by indirect evidence." In the case of *Seymour v. Wilson*, 14 N. Y. 567, the following is decided: "On an issue of fact as to whether an assignment or transfer of property was made to hinder, delay, or defraud creditors, it is competent, where the assignor is a witness, to inquire of him whether, in making the assignment or transfer, he intended to delay or defraud his creditors." See, also, the following additional authorities: *Wheelden v. Wilson*, 44 Me. 11; *Snow v. Paine*, 114 Mass. 520; *Fisk v. Inhabitants*, 8 Gray, 506; *Lombard v. Oliver*, 7 Allen, 155; *Perseus v. Willett*, 1 Rob. (N. Y.) 131; *Mathews v. Poultney*, 33 Barb. 127; *Pope v. Hart*, 35 Barb. 630; *Bedell v. Chase*, 34 N. Y. 386; *Thurston v. Cornell*, 38 N. Y. 281, 287, and cases there cited; *Thorn v. Helmer*, \*41 N. Y. 27; *Cortland Co. v. Herkimer Co.*, 44 N. Y. 22; *Kerrains v. People*, 60 N. Y. 221; *People v. Pease*, 27 N. Y. 45; *Norris v. Morrill*, 40 N. H. 395; *Hale v. Taylor*, 45 N. H. 405; *Delano v. Goodwin*, 48 N. H. 208. The condition of a man's mind with reference to what he thinks, feels, believes, intends, and his motives, is always a fact, and it is a fact which is often required to be ascertained both in civil and in criminal cases; and only one person in the world has any actual knowledge concerning that fact, and that person is the one whose condition of mind is in question; and where he is a competent witness to prove such condition he may testify to the same directly. Other witnesses can testify only to extraneous facts tending to prove this condition. He may also testify to such extraneous facts, but he may testify directly as to what the condition of his own mind is or was at any particular time or on any particular occasion. The court below held otherwise. The court below held that such direct testimony of the witness himself, as to the condition of his own mind, was worthless. If this testimony of the witness had been admitted, the finding of the court below might perhaps have been different from what it was. Indeed, it is probable that the finding of the court below, without this testimony, is erroneous, at least, as to McQuistan. The order and judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

(44 Kan. 736)

MOORE *et al.* v. WILEY *et al.*  
(Supreme Court of Kansas. Dec. 6, 1890.)

## ADVERSE POSSESSION.

Where an owner of real estate, consisting of three lots composing one tract, sells a portion of the same to B., pointing out and designating that portion of the tract which he claims and believes he is selling, and puts B. into the possession thereof, and B. immediately builds a dwelling-house thereon, and resides upon the property, claiming to own the same, for more than 15 years, he has obtained a good title thereto, under the 15-years statute of limitations, (Civil Code, § 16, subd. 4,) as against subsequent purchasers of the property, although, in fact, it was supposed by both the parties to the purchase and sale, at the time of the sale and afterwards, that it was the north lot

that was being sold, while in fact it was a part of the middle and south lots that was pointed out and designated, and into the possession of which the purchaser was placed, and although the deed from the vendor designated the north lot, and the purchaser paid the taxes on that lot, and the vendor and his subsequent grantees paid the taxes on the other property.

(*Syllabus by the Court.*)

Error to district court, Bourbon county;  
C. O. FRENCH, Judge.

*Dillard & Padgett*, for plaintiffs in error.  
*Bawden & Coon*, for defendants in error.

VALENTINE, J. This was an action in the nature of ejectment, brought in the district court of Bourbon county, on July 27, 1886, by H. C. Moore and Al. Popkess, against William Banks, to recover the possession of the south half of lot No. 3, in block No. 17, in the city of Ft. Scott. After the first trial, and on May 16, 1887, the plaintiffs, with leave of the court, amended their petition, and prayed not only for the recovery of the south half of said lot No. 3, but also for the recovery of the north half of lot No. 5, in said block. The defendant answered alleging that he had been in the actual and continued possession of the property described in the plaintiffs' amended petition for more than 15 years last past before the commencement of the action, under a deed duly recorded, claiming to be the owner of the property, and that, during all that time, he had resided upon the property, and paid all the taxes assessed against it, and had put valuable improvements thereon of the value of \$1,000. The plaintiffs replied, denying generally all the allegations of the defendant's answer. On September 12, 1887, the case was tried before the court without a jury, and the court found generally in favor of the defendant, and against the plaintiffs, and rendered judgment accordingly; and the plaintiffs, as plaintiffs in error, brought the case to this court for review. Since the case was brought to this court, the defendant William Banks died, and the case has been revived against his heirs at law as the defendants in error, to-wit, Jesse E. Wiley, Luella Wiley, Edward Banks, and Henry Banks.

The facts of this case, as they appear from the evidence, are substantially as follows: In February, 1870, and prior thereto, Joe Emmert owned lots numbered 1, 3, and 5, in block No. 17, in Ft. Scott. These lots so adjoined each other as to constitute one tract of land, and they constituted the west half of the block, and were each 50 feet wide north and south, by 150 feet long east and west. Lot No. 1 was the north lot; lot No. 3 was the middle one; and lot No. 5 was the south one. This block was bounded on the west by Little street, and on the south by Sycamore street. Some time in February, 1870, or before that time, Emmert sold lot No. 1 to Banks, and lot No. 5 to John Aikens; they intending at some time in the future to purchase the middle lot and divide it between them. Emmert, at the time, pointed out and designated to each of the purchasers the property which he claimed and believed he was selling to them, and each immediately took the possession of

that portion which he thought he was purchasing; but they were all mistaken as to the location of the property. Banks in fact took the possession of the south half of lot No. 3, and the north half of lot No. 5, the property which is now in controversy; while Aikens in fact took the possession of a part of Sycamore street. The mistake arose from an inaccurate or erroneous survey. Banks immediately built a dwelling-house upon the property now in controversy, and continuously resided therein until since this case was brought to this court, when he died. Some time after the purchase of this property by Banks, the Missouri, Kansas & Texas Railroad Company, by proper condemnation proceedings, took, as a part of their right of way, about one-half of lot No. 1, being that portion of the lot which would lie north-west of a line drawn from the north-east corner of the lot to the south-west corner thereof; but Banks had no notice of the condemnation proceedings, and has not received any portion of the condemnation money. As before stated, Banks resided in the house which he built upon the property in controversy in 1870, and had the actual and continuous possession of the property from the time of his first occupation thereof, in February, 1870, until after the trial of this case in the court below, believing all the time, until within about a year before the trial, that he occupied lot No. 1, and only that lot; and, during all that period of time, he paid the taxes assessed or levied upon that lot. In the mean time Emmert sold lot No. 3 to Hugh C. Custer, and by the deed from Emmert to Custer, and other deeds, the record title to the property in controversy has been transferred to the plaintiffs in this action, by whom, and their grantors, all the taxes levied upon the property have been paid. The plaintiffs claim under a warranty deed executed by their immediate grantor to them on February 3, 1886.

We think the judgment of the court below must be affirmed. As the court below found generally in favor of the defendant and against the plaintiffs, it must now be assumed that all its findings, conclusions, and inferences from the evidence, so far as there was any evidence to support them, were in favor of the defendant and against the plaintiffs; and such findings, conclusions, and inferences must, in this court, be held to be conclusive, so far as the evidence will at all warrant or justify the same. This is the view upon which we shall decide this case, and upon this view we might properly take the facts to be even more favorable to Banks than we have stated them. We shall take the facts to be that Emmert sold to Banks the very identical property of which Banks took the possession, and upon which he built his house, and made his improvements; for, at the time of the purchase and sale, Emmert owned all the property, the property in controversy, as well as lot No. 1, and had the right to sell the same, and he pointed out and designated to Banks the very property of which Banks took the possession as the property which he, Emmert, was selling, and Banks

purchasing, and Emmert put Banks into the possession thereof. This was in February, 1870. The deed was not executed until in October of that year; and when it was executed it did not convey the property pointed out and designated by Emmert, but conveyed other property. Prior to that time, Banks had built his house, and at that time he was residing upon the property, and perhaps in equity he could have compelled Emmert to convey to him the identical property which Emmert pointed out and designated to him as the property which he (Emmert) was selling. All the parties were mistaken. Both Banks and Emmert believed that Emmert, by the deed, was conveying the identical property which he had previously pointed out, designated, and sold to Banks. The facts would then seem to be that Banks purchased, took possession of, made valuable improvements and resided upon, one piece of property, and obtained a deed for another piece of property under the mistaken belief that the property which he purchased and resided upon was lot No. 1, when in fact it was parts of lots Nos. 3 and 5. He believed he occupied lot No. 1, and that he obtained a deed for the property which he occupied; and he continuously paid the taxes levied upon lot No. 1, and did not pay the taxes levied upon the property which he actually occupied. This property he occupied in the manner aforesaid for more than 15 years before this action was commenced, and therefore we would think that the 15-year statute of limitations (Civil Code, §16, subd. 4) would bar any action brought by any person holding the record title to recover the property from him. This is not a mere question concerning disputed boundary lines between adjoining proprietors, as was the case in the case of *Winn v. Abeles*, 35 Kan. 85, 10 Pac. Rep. 443. In this case the party claiming the property, partly, at least, under the statute of limitations, was a purchaser thereof, and he was put into the possession thereof by his vendor, who prior to the sale was the owner thereof. Nor is this a case of doubtful or questionable possession and claim of ownership, as against an owner or subsequent purchaser without actual knowledge of his possession or claim. Banks had the actual, absolute, open, and visible possession of the property. He was actually residing upon the same, and his possession was vastly superior to the possession held by any one of the parties claiming under the statute of limitations, as against the owner or innocent purchaser in the following cases: *Sheldon v. Atkinson*, 38 Kan. 14, 16 Pac. Rep. 68; *Sanford v. Weeks*, 38 Kan. 320, 16 Pac. Rep. 465; *Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. Rep. 916. Emmert had full knowledge in this case, and the parties subsequently purchasing the property could not have avoided knowing that Banks had the possession thereof, and that he was claiming to be the owner of the same, if they had looked at the property, and made proper inquiry. Banks had such a possession and claim of ownership as will satisfy all the authorities with regard to obtaining title, or quieting title or possession under the stat-

ute of limitations. *Sedg. & W. Tr. Tit. Land*, §§ 729, 730, 735-740. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 68)

KANSAS CITY & TOPEKA RY. CO. v. SPLIT-LOG *et al.*

(*Supreme Court of Kansas. Dec. 6, 1890.*)

EMINENT DOMAIN—COMPENSATION—EVIDENCE.

1. In an action to recover the value of a tract of land appropriated by a railway company for right of way, which, at the time of its condemnation, was not platted as a part of a city but was in use as farming land, it is erroneous to permit witnesses to testify to the value of lots on the principal business street of a city near by. The value of such lots furnishes no proper measure by which to ascertain the value of the land taken.

2. In such a case, it is also error to permit a witness to testify to the size of lots upon said business street, the number of such lots contained in an acre, and the value of such lots.

3. The jury are to value the land appropriated as a whole, in the condition it was immediately before it was condemned, and are not to consider what it would bring if divided into lots and blocks, and made a part of the city.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Wyandotte county; O. L. MILLER, Judge.

*M. A. Low, W. F. Evans, and Hutchings & Keplinger*, for plaintiff in error. *Benton, Rush & Hale*, for defendants in error.

STRANG, C. Appeal from the report of commissioners assessing damages for land taken by the plaintiff for right of way. Amount of damages assessed, \$32,760. Trial had on the appeal in the district court, before a jury, March 29, 1888, resulting in a verdict and judgment for the defendants in the sum of \$49,101.93. The plaintiff presented a motion for a new trial, which was overruled, and it brings the case to this court, and alleges that several errors occurred in the trial of the case below, for which it should be reversed.

The first error complained of is the admission of the following evidence of the witnesses Thomas Orr and E. W. Anderson: "Thomas Orr: Question. What was property down there on Eleventh and Kansas avenue, and from there out to Twelfth, and back to Tenth,—what was that worth? Answer. Worth just as much as it is now. By Mr. Hutchings. Wait; we object to the question, upon the ground it is not the property in controversy. Those are town lots, situated upon streets, while the property in controversy is unoccupied land. It is irrelevant to the inquiry here. By the Court. The question asked the witness is as to what this land on the corner of Eleventh and Kansas avenue was worth last fall, and he may answer that question by stating what he thinks it was worth at that time. (To which ruling of the court the defendant duly excepted.) A. I considered it worth just as much then as it is now. Q. What is it worth now? (Objected to by the defendant; same as last objection. Objection overruled by the court. Defendant duly excepted.) A. I paid at the rate of \$5.500 an acre, without improvements. By Mr.



Hutchings. We object to that. By the Court. This last answer is stricken out. Q. State what, in your opinion, it was worth at that time. Never mind what you paid, just give an opinion what land along there was worth? By Mr. Hutchings. We object to the question as to what property on Kansas avenue or Eleventh street was worth last fall, or any other time, because it is irrelevant. It is not the property in controversy, nor situated in the same manner. (Objection overruled by the court. Defendant duly excepted.) A. What is the question now? Q. What was the property along Kansas avenue, there along Tenth or Twelfth streets, worth last fall? A. Not what I paid now? Q. No, not of any special piece; but what would you generally regard it worth an acre or an acre property? (Objected to by defendant, same as last objection made, and for the additional reason that the question does not call for the market value. Objection overruled by the court. Defendant duly excepted.) Q. Tell us the market value of it last fall, in your opinion? A. I think about two hundred dollars a foot. By Mr. Hutchings. We move to strike out that testimony, upon the ground it is irrelevant to any inquiry involved in this case. (Motion overruled by the court. Defendant duly excepted.) E. W. Anderson: Q. What was the market value of property along Kansas avenue, at that point, last fall, during October and November, immediately south of the Splitlog tract? (Objected to by defendant's counsel, because no sufficient foundation has been laid for the question, and is incompetent, irrelevant, and immaterial. Objection overruled by the court. Defendant duly excepted.) A. It was worth at the corner of Sixteenth and Kansas avenue a hundred dollars a foot,—is what it sold for. By Mr. Hutchings. We move to strike that out as irrelevant and immaterial, and not responsive to the question. (Motion overruled by the court. Defendant duly excepted.)

The objection to this evidence is that it does not relate to the land in controversy, which is unoccupied land, but relates to town lots situate upon streets, and surrounded by improvements, and is therefore irrelevant. This objection goes to the competency of the evidence. While there is a want of harmony in the authorities, we think the weight of authority holds that where expert witnesses are called to testify as to values in damage cases, or where, under the exception to the general rule that none but experts may give opinions, non-expert witnesses, familiar with the subject of the controversy, are permitted to give opinions as to values, such evidence—that is, such opinions as to values—should be confined to the market value of the property in controversy in all cases where witnesses can be obtained who are familiar therewith. In the case at bar, it matters not, however, whether we are confined to such rule, or go further and permit witnesses to give their opinions of the market value of other property of like kind, similarly situated, as under either rule the evidence complained of under the

first assignment of error should have been excluded. The witness was not asked to give his opinion of the market value of the land in controversy, nor was his opinion sought in relation to the market value of like property, similarly situated. He was asked, "what was property along Kansas avenue, there along Tenth or Twelfth streets, worth last fall?" This property, thus inquired about, consisted of lots on the most important business street in the city of Armourdale, surrounded by or adjacent to lots with buildings and other improvements thereon, while the land appropriated by the plaintiff was a part of a tract of farming land, in use as such when condemned and taken by the railroad company. It had never been platted into blocks or lots as a part of any city, nor was it adjacent to any land which had been so platted, but was bounded on the north by the Union Pacific Railroad; on the west by 20th street; on the east by 16th street; and on the south, the side nearest to Kansas avenue, by unplatted lands of Mary Orr, and the Kaw Valley T. S. and B. Co. This land, and the lots, the value of which was proved by the witnesses, are entirely dissimilar. They are unlike in location. The lots are on a business street in the city, while the land appropriated is from 600 to 800 feet back of said street, and separated therefrom by two other tracts of land of like character, owned by other persons, neither of which is yet platted as an addition to the city. The property on Kansas avenue are business lots, while the land in controversy, if platted, would be at least two streets back of said avenue, and would not be available for business lots in a long time, if ever. The value of a lot on the principal business street of a city furnishes no criterion for estimating the value of a lot of like size on another street, even one block away from such business center, and much less for the value of farming land, not yet platted as a part of the city and cut off from the city by other lands not yet platted. The evidence complained of in this assignment is so palpably erroneous that we do not care to pursue the subject further. In a city like Armourdale, where real-estate agents, and dealers in real estate on their own account, are not scarce, it would seem that no difficulty should be experienced in finding witnesses who could testify as to the value of the property in controversy, and thus keep within the rule. The plaintiff objected to the following evidence of Thomas Orr: "Thomas Orr: Question. How many feet are there in a lot? (Objected to by the defendant as immaterial and irrelevant. Objection overruled by the court. Defendant duly excepted.) Answer. Lots in the locality of these corners are generally twenty-two feet five and six inches wide, while inside lots are twenty-five feet front. Q. About how many lots does that give to the acre? (Objected to as immaterial and irrelevant. Objection overruled by the court. Defendant duly excepted.) A. The corner lots would make eleven to the acre, while the twenty-five feet would be ten lots to the acre. Q. That would be at the rate of \$5,000 a lot, then? (Objected

to by the defendant's counsel on grounds last stated. Objections overruled by the court. Defendant duly excepted.) A. Yes, sir."

In cases like this, where the damages are limited to the value of the land appropriated, the proper inquiry is what was the market value of such land, for any present use, in the condition in which it was immediately prior to its condemnation by the company. Witnesses testifying as to the value of such land may consider any use to which the ground may be presently put in forming their opinions as to its value, and its surroundings may be shown to the jury, its nearness to or distance from a town, village, or city, or other improvements that tend to affect its value; but the jury are to value the land as a whole in the condition in which it was when taken. They have nothing to do with its subdivision into lots or blocks. They may consider its location, and the effect its location has upon its value as a whole; but the evidence as to how many lots it would make, and what they would sell for after the subdivision, is wholly improper. If an illustration was wanted to show the impropriety of such evidence, we do not know where we could find a stronger or more apt one than the evidence this witness furnishes. The witness is asked the size of lots on Kansas avenue, the value of such lots, and how many such lots an acre would make, and then it drops out that an acre of such lots are worth \$55,000, without improvements; that the witness paid at that rate per acre. Such evidence is certainly highly improper. It furnishes no proper measure of value, so far as the land appropriated is concerned, with which alone the jury has to do, and is well calculated to mislead the jury by furnishing a false and fanciful measure of damages. Without going further into this record, for the reasons given in connection with these, the first and third assignments, it is recommended that the judgment of the district court be reversed, and the case remanded for new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 705)

SMITH v. WISE *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

RIGHT TO JURY TRIAL.

In all cases in the district court the issues of fact may be tried by a jury. In some cases they must be so tried unless the parties consent that they may be otherwise tried. In other cases they may be so tried in the discretion of the trial court. Civil Code, §§ 266, 267, 289, 291, 292.

(Syllabus by the Court.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

J. A. Smith, for plaintiff in error. J. G. Hutchinson, for defendant in error.

VALENTINE, J. In all cases in the district court the issues of fact may be tried by a jury. In some cases they must be so tried unless the parties consent that they may be otherwise tried. In other cases

they may be so tried in the discretion of the trial court. Civil Code, §§ 266, 267, 289, 291, 292. The judgment of the court below will be affirmed. All the justices concurring.

(44 Kan. 742)

MERTEN *et ux.* v. NEWFORTH.

(Supreme Court of Kansas. Dec. 6, 1890.)

EXTENSION OF TIME TO PLEAD.

Where the demurrer of the defendant has been overruled, and time given him to answer, and he does not present or file his answer in time, his application for leave for further time to answer must be addressed to the discretion of the trial court. If sufficient diligence is not shown on his part, the court will not abuse its discretion in refusing to allow the answer to be filed out of time.

(Syllabus by the Court.)

Error from district court, Barton county; ANSEL R. CLARK, Judge.

G. W. Nimocks & Bro., for plaintiffs in error. Maher & Osmond, for defendant in error.

HORTON, C. J. On the 1st day of March, 1887, Philip Newforth commenced his action against R. Merten and Mary Merten for a specific performance of the conveyance of real estate upon a written bond or agreement given by the Mertens to Martin Gutzwiller on the 12th of March, 1877, and assigned to the Mertens by Martin Gutzwiller and wife on the 7th day of May, 1884. On the 28th of March, 1887, the defendants filed a demurrer to the petition, alleging that it did not state facts sufficient to constitute a cause of action. Upon the hearing, the demurrer was overruled by the trial court, and the defendants were given 30 days in which to file an answer. They did not answer within the 30 days, but a long time thereafter, and on the 5th day of October, 1887, filed two affidavits for permission to file an answer. The affidavit of R. Merten was to the effect that before answering in the case it was necessary for him to furnish to his attorney all the contracts and assignments that were outstanding concerning the title to the land; that he did all he could by request to secure these papers; but that they did not reach his attorney until the 5th of October, 1887. The affidavit further stated the general nature of his defense, among other things, that Martin Gutzwiller did not comply with the terms of the bond or agreement; that he abandoned the land and allowed it to go to tax-sale. The affidavit of his attorney was also to the effect that he did not secure, until the morning of the 5th of October, 1887, the papers necessary to enable him to make an answer in the case. No answer, however, was then presented. On the 7th day of October, 1887, the case was heard and judgment rendered in favor of the plaintiff and against the defendants. Subsequently, the defendants filed a motion for a new trial, and this motion was overruled. It does not appear that the motion for a new trial was filed in time. They excepted, and bring the case here.

The permission to file an answer out of time is largely in the discretion of the trial court. Where the demurrer of the defend-

ant has been overruled, and time given him to answer, and he does not present or file his answer in time, his application for leave for further time to answer must be addressed to the discretion of the trial court. If sufficient diligence is not shown on his part, the court will not abuse its discretion in refusing to allow the answer to be filed out of time. It may be, in the absence of further showing, that the trial court thought that the filing of the answer was asked simply for delay. It looks as though the demurrer had been filed for delay, because it was not well taken. It may be said to have been frivolous. *Sprattly v. Insurance Co.*, 5 Kan. 155; *Neitzel v. Hunter*, 19 Kan. 221; *Swerdsfeger v. State*, 21 Kan. 475. No sufficient diligence was shown in the affidavits, in obtaining the papers alleged to have been needed to prepare the answer, and no answer was presented to the trial court before the case was heard and disposed of. The demurrer was properly overruled. We have not considered the affidavits nor the answer filed after the 7th day of October, that being the day upon which the judgment was rendered. Under the circumstances of this case, the showing for permission to file an answer should have been made, and the answer itself presented before the trial. We perceive no abuse of the discretion of the court. *Pemberton v. Hoosier*, 1 Kan. 108; *Butcher v. Bank*, 2 Kan. 70; *Haight v. Schuck*, 6 Kan. 192; *McPherson v. Kingsbaker*, 22 Kan. 646; *Tefft v. Firey*, Id. 753; *White v. Treon*, 25 Kan. 484; *Bank v. Wentworth*, 28 Kan. 183; *Railway Co. v. Linson*, 39 Kan. 416, 18 Pac. Rep. 498; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. Rep. 314. The judgment of the district court will be affirmed. All the justices concurring.

(44 Kan. 745)

DEVER v. CLARK.

(Supreme Court of Kansas. Dec. 6, 1890.)

**LIBEL—PLEADING.**

1. The defendant, in a civil action against him for libel, may, where the alleged libel is specific, merely answer that the charge is true, but where the charge is in general terms the answer must allege the facts upon which he relies to make out the charge.
2. The pleadings in this case examined, and the allegations in the petition and answer held to show that the alleged libelous matters were so clearly and specifically stated as to authorize the defendant to introduce evidence in justification thereof.

(Syllabus by the Court.)

Error from district court, Geary county; NICHOLSON, Judge.

On the 9th day of July, 1887, Thomas Dever commenced his action against George A. Clark to recover damages for the publication of two alleged libels. The first publication was as follows: "A raid was made on the Clay Center joint last Tuesday, and 97 cases of beer and 12 jugs of bug juice seized. Tom Keefe was arrested, but Tom says he does not own the place, and that it has been closed since

May 1st. The beer and juice was transferred to the police court room. His honor now has more cases before him than ever, but it is a matter of some doubt whether each case contains \$2.50 for a certain limb of the law or not. Keefe says the authorities left the place open, and that about 4,000 cigars were stolen Tuesday night. Of course, here is cause for action for damages, but, so long as the city is represented by such ponderous brain and legal talent, the community will not suffer defeat in the courts. We understand a telegram was received Wednesday to the effect that the beer belonged to outside parties, and was only stored here for a time. This must be true, for we have noticed an unusual number of Clay Center people about the depot during the past two weeks. Between Tom Dever and Clay Center, Junction City's reputation is bound to go to the wall if some action in self-defense is not soon taken." The second publication was as follows: "The party organ seems to be very bitter against the city attorney for pulling the beer. What is the matter? It is rumored on the street that the attorney has a libel suit in soak."—[Union. The 'party organ' is 'bitter' against no one. So long as a person works for the interests of the city, the Republican will heartily indorse anything they may do, but when it comes to throwing the city into costs just for the sake of letting a certain limb of the law make \$2.50 per case, whether he wins the case or not, it is getting rather gauzy. The individual in controversy has no more right to the claim of being an attorney than the devil has to a seat in heaven. The Republican has no axe to grind in this matter further than it does not intend to remain silent and see the city filched without some return. The position which this paper has always taken on the prohibition question is too well known to require space in this article. It is very different from the course pursued by the Union. The Republican has stood up for the temperance cause when the editor of the Union winked at and illegally licensed the sale and barter of whisky and beer. While the Union has heaped all manner of abuse on the W. C. T. U., the Republican has defended these ladies in their effort to suppress the sale of the damnable stuff, and now that victory has been won, it does not intend to remain quiet and see a jack-legged lawyer prostitute the noble cause, and run the city into hundreds of dollars in costs for the sake of a paltry \$2.50 fee. A lawyer who has no more sense than to appeal a city case from the police court to the district court is legally too transparent for an intelligent community to tolerate. This same lawyer, according to the last statement of the city clerk, stuck the city for costs to the amount of \$46.10 in city cases which he appealed to the district court, and which were thrown out of said court. Upon a close examination of the clerk's statement, we find \$18.50 is the amount collected in the police court during the past quarter. During the same time the city paid its city attorney \$54.10. And for what? Was it for the cases he lost before the police court? We recapitulate:

Cost in district court because of an incompetent city att'y.....	\$ 46 70
Paid same attorney during quarter.....	54 10
	<hr/>
	\$100 80
Received from police court.....	18 50
	<hr/>
	\$ 82 30

We find that the city is loser to the tune of \$82.30 for taking the advice of one who knows nothing about law. Of course the tax-payers will have to stand this. The citizens of Junction City can stand legitimate expenses, but, when it comes to paying for the blunders of an incompetent individual, it is time to raise a kick, and the Republican is not afraid to head that kick. If it is necessary for the city to employ a lawyer, it will be cheaper to get one who has brains and ability enough to represent it intelligently, and protect its interests. We like to see a man busy, but not at the expense of the community. The Republican has no war to make on any officials so long as they perform the duties of their offices intelligently and faithfully, and protect the interests of the people; but it does not intend to remain quiet and see the city systematically flied and run into debt by a shyster who knows more about sawing wood than hedoes about the rudiments and the practice of law. If Mr. Dever has a libel suit in soak we would suggest that he remove it and substitute his head. If necessary, a very interesting chapter, backed by affidavits, can be furnished next week." On July 26, 1887, the defendant filed his answer as follows, omitting caption: "(1) In answer to plaintiff's first cause of action, the defendant says he admits the publication of the matter alleged, but he denies that the matters therein contained mean, or were intended to convey the meaning represented and set forth by the plaintiff in his petition; and for further answer defendant avers that the matters and things contained in said publication are and were true, and were published of and concerning the official conduct of the plaintiff as a public officer. (2) In answer to the second cause of action of the plaintiff, defendant says that he admits the publication of the matter alleged to contain the supposed libel, but he denies that the matters and things contained therein mean, or were intended to convey the meaning attributed to them as alleged in said petition. The defendant further says that the matters and things contained in said publication were true, and the same were published of and concerning the official conduct of the plaintiff as a public officer. (3) Except so far as hereinbefore admitted, defendant denies each and every allegation contained in plaintiff's petition." On August 20, 1887, the plaintiff filed the following motion, omitting caption: "Comes now said plaintiff and asks the court to require said defendant to file with and attach to his answer filed herein a bill of particulars, specifically setting out the matters and things contained in the articles published by said defendant, and which said defendant justifies in his said answer, by plea that said matters and things are and were true." On the 21st of Sep-

tember, 1887, this motion was heard, and the court made the following order thereon: "That said answer specifically set up all matters pleaded as true in justification or mitigation; and further, that each of said matters be specifically set out by a statement of the facts in relation thereto, and also that said defendant separately state and number each of his several defenses. The defendant asks and is by the court given 90 days from the rising of the court to file amended answer, and the plaintiff is allowed 20 days thereafter to plead thereto; and case continued until the next term of this court." On the 24th of December, 1887, the defendant filed the following amended answer or bill of particulars, omitting caption: "That in the following statement cited in plaintiff's petition, (the second cause of action thereof,) and contained in Exhibit B, attached to said petition, to-wit: 'A lawyer who has no more sense than to appeal a city case from the police court to the district court is legally too transparent for an intelligent community to tolerate,'—reference was made by the defendant to the case of the city of Junction City against W. D. Grant, and the two cases of Junction City, Plaintiff, v. Ida C. Blue, Defendant, attempted to be taken by said plaintiff as attorney of said city from the police court of said city to the district court of Davis county, Kan., filed in the office of the clerk of said court, and there numbered, respectively, 1750, 1748, and 1749. And defendant further says that the other matters published by defendant, and complained of in said petition of plaintiff, do not, in their nature, admit of particularization further than appears in the context of said publication." On December 30, 1887, the plaintiff filed the following motion, omitting caption: "Comes now said plaintiff and asks the court to strike out and render for naught the amended answer of the defendant herein filed, for the reason that said amended answer is not in accordance with the order of this court heretofore made in this cause, in which order said defendant was required and ordered 'to make his answer more definite and certain in that, to-wit, that said answer specifically set up all matters pleaded as true in justification or mitigation; and further, that each of said matters be specifically set out by a statement of the facts in relation thereto;' and also the further order 'that said defendant separately state and number each of his several defenses.'" On the 29th of March, 1888, the court overruled the motion to strike out the amended answer, and plaintiff excepted. The case then came on in its regular order for trial, and the plaintiff objected to going to trial upon the ground that a sufficient amended answer or bill of particulars had not been filed. This was overruled by the court. The plaintiff also objected to going to trial upon the merits and the pleadings as made up, which objection was overruled by the trial court, and the plaintiff excepted. The case was heard before the court with a jury, and the jury returned a verdict in favor of the defendant and against the plaintiff. Subsequently, the plaintiff filed his motion for a new trial, which

was overruled. Judgment was rendered in favor of the defendant, and against the plaintiff and for costs. The plaintiff excepted, and brings the case here.

*Thomas Dever*, for plaintiff in error. *J. V. Humphrey*, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) The principal contention in this case is that the defendant's answer was insufficient as a plea of justification; therefore, that the trial court committed error in permitting the defendant to offer any testimony in the case under his answer or amended answer. Section 125 of the Civil Code reads: "In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and, if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him." Section 126 of the Civil Code provides: "In the action mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages; or he may prove either." The requisites of an answer in an action for libel for justification depends upon whether the charge is general or specific. Where the charge is specific, it is sufficient to state that the supposed defamatory words or libelous publication set forth in the petition are true. Where the charge is in general terms, the answer must state the facts which show the defamatory words or libelous publication to be true. It is not sufficient merely to allege that the charge is true. Bliss states the rule as follows: "When the defamatory words, as set out, are sufficient of themselves to describe the offense, then a general affirmation of their truth has been held to be sufficient; but otherwise the plea or answer of justification must show the facts that constitute the offense with the same particularity as an indictment for the same offense. The plaintiff is, in fact, put on trial, and the defendant can only sustain himself by stating and proving the commission of a specific offense which would warrant the charge; and if there is a variance, or if the *quasi* indictment is less broad than the charge, or, if it omits an element necessary to constitute the offense charged, it is no justification. In regard to justification by showing that the publication was privileged, the Code has made no change. The facts that will thus shield the defendant are, as they always were, new matter to be pleaded." Section 361, Code Pl.; *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. Rep. 314; *Townsh. Sland. & L.* §§ 212, 355, 382; *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Castle v. Houston*, 19 Kan. 426; *Thompson v. Press Co.*, 33 N. W. Rep. 856; *Sunman v. Brewin*, 52 Ind. 140. If the charge be that the plaintiff is a swindler or a thief, or a perjurer, or a murderer, or that he stole a watch, or certified a lie, or was of intemperate habits, or received a bribe, or perverted the law, it is not sufficient merely to allege that the charge is true. The plea of justification must set up the facts upon

which the defendant relies to make out a charge. *Townsh. Sland. & L.* § 355; *Newell, Defam. c. 21*, §§ 68-84. In this case, considering the allegations of the petition and the answer as amended, we think the alleged libelous charges were so specific as to permit the defendant to offer proof in justification. These charges are fully set forth in the statement of the case, and need not be repeated here.

From the petition and answer, the court was clearly able to determine that the alleged charges were libelous, and we think the plaintiff must have been fully prepared, from the allegations of the petition and answer, to meet the proof of the defendant. Complaint is also made that the defendant was permitted, without a sufficient plea therefor, to prove mitigating circumstances. The record recites "that the defendant, to maintain the issues upon his part, offered his proof, and the plaintiff thereupon objected to the introduction of any testimony in justification or mitigation under the defendant's answer, and the court overruled the objection and permitted the introduction of such testimony, to which ruling and the introduction of such testimony the plaintiff at the time excepted." There is no testimony contained in the record, and, as the jury found in favor of the defendant and against the plaintiff, it is apparent that this verdict was rendered upon the plea of justification, and not on account of any mitigating circumstances; therefore, we cannot say, from the record, that any material error was committed in the ruling of the trial court. The same may also be said of the instructions given and refused, as none of the testimony is preserved. Plaintiff insists that the instructions could not be applicable to the case under any state of facts, and especially criticised one of the instructions that the jury might consider, in assessing the amount of damages, whether or no the alleged libelous charges were maliciously made. This instruction should be construed with the others given to the jury. In this light, the instructions might all have been applicable. Among other things, the court instructed the jury as follows: "(1) Libel is defined by our statute, so far as applicable to this case, as the malicious defamation of a person made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse. (2) Both of the articles complained of by the plaintiff in his petition, copies of which articles are attached to said petition, are libelous in themselves, and unless the defendant proves them to be true, by a preponderance of the evidence, then the plaintiff would be entitled to recover such damages as he has sustained by the publication of said articles. (3) The defendant, as already stated, pleads as a defense that the matters published by him and complained of by the plaintiff are true, and it devolves upon him to prove, by a preponderance of the evidence, the truth of said matter; and if he has succeeded in establishing the truth of the matter charged as defamatory in the plaintiff's petition, by a

preponderance of the testimony, then your verdict must be for the defendant. (4) And this is true, no matter what the motives of the defendant may have been in the publication thereof. It is no concern of yours. It is no concern of the plaintiff, or of anybody else, what the defendant's motives in such publication may have been. It is a complete defense to this action, if he has succeeded in establishing the truth of the matters published by him concerning the plaintiff. (5) Although the plaintiff alleges in his petition that he has, on account of the publications complained of, sustained a damage of one thousand dollars on account of each of said publications, it is not necessary for him to prove any specific damage; for the law presumes the reputation of the plaintiff to be good, as also it presumes that his official duties as a public officer were honestly performed, and his professional obligations properly discharged, and an article which tends to hold him up to the public view as an unskilled lawyer and an incompetent officer is libelous *per se*, ('*per se*' meaning 'of itself,') and entitles the plaintiff to damages, unless the defendant establishes the truth of said publication by a preponderance of the evidence." These instructions were clearly applicable under the statement made by the plaintiff in his brief, and intelligently presented the issues to the jury under the plea of justification. The judgment of the district court will be affirmed. All the justices concurring.

(44 Kan. 765)

LINNEY v. THOMPSON *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

ACTION ON NOTE—PLEADING—JURY TRIAL.

In an action upon a promissory note against the makers and the payee, who is also an indorser, and against M., a subsequent holder and indorser, in which action the plaintiff sets forth in his petition among other things that he is the owner, holder, and the indorsee from M. of the promissory note, and he commences his action in the county in which M. resides, and gets service of summons upon him in that county, and upon the other defendants in other counties in which they reside, and the other defendants claim that the plaintiff in the action is not the owner of the note, but that M. is, and that the note was indorsed by M. to the plaintiff merely for the purpose that the plaintiff might commence the action in the county in which M. resides, *held*, that the question as to whether the plaintiff is the owner of the note or not can be raised only by an answer, and not by a motion, and that any one of the parties has the right to have such question tried by a jury.

(Syllabus by the Court.)

Error from district court, Cloud county; E. HUTCHINSON, Judge.

*Kennett & Peck*, for plaintiff in error. *A. H. Ellis, E. S. Ellis, and F. T. Burnham*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Cloud county by Edward Linney, as the owner, holder, and indorsee of a promissory note for \$1,250, against A. A. Thompson, and 18 others, as the makers, and C. W. Culp, as the payee and indorser, and C. W. McDonald, as a prior holder and an indorser. Service of summons was obtained upon McDonald in Cloud county, and upon the

other defendants in Mitchell and Jewell counties. The defendant Culp demurred to the plaintiff's petition, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and then he filed an answer. The other defendants, except McDonald, filed a motion to set aside the summons, and the service of the same upon them, and to dismiss the plaintiff's action for the following reasons: "(1) That none of these defendants, nor any of the real defendants in this action, reside in the county of Cloud, nor were any of these defendants summoned in this action in said county of Cloud. (2) Because the alleged note sued on in this action is the property and is owned by the defendant C. W. McDonald, and the plaintiff in this action has no right, title, or interest therein. (3) Because the defendant C. W. McDonald is not a real party to this action; is not liable to the plaintiff upon the pretended indorsement of the note sued on; and because said defendant C. W. Culp does not reside in the county of Cloud, and was not summoned in this action within said county. (4) Because this action is not prosecuted in the name of the real plaintiff, party in interest, but is only prosecuted in the name of the plaintiff in furtherance of a conspiracy between plaintiff and the defendant C. W. McDonald, whereby it is agreed between said parties that the defendant McDonald should, without consideration, deliver the note sued on in this action to the plaintiff, and that plaintiff should bring this action in Cloud county against the said McDonald, said Culp, and these defendants solely for the purpose of enabling said McDonald to, in effect, bring suit in this action against these defendants, who neither reside nor can be summoned in Cloud county." The plaintiff then moved to dismiss the above motion, and for judgment upon his petition as upon default, all the defendants except Culp being in fact in default for want of an answer. The plaintiff's motion was overruled, and the defendants' motion was then heard over the objections and exceptions of the plaintiff, he all the time claiming that the defendants had made a general appearance in the action, Culp actually, and the other defendants by their motion, and that the questions sought to be raised by the motion could not be tried in any manner except upon a trial upon the merits of the action. The motion was to be heard, and we suppose was heard, upon affidavits and other evidence, and was sustained by the court, and the plaintiff's action as to these defendants was dismissed, and judgment was then rendered against him, and in their favor, for costs. The plaintiff then moved to set aside and vacate the aforesaid order, decision, and judgment for various reasons, which motion the court overruled; and the plaintiff then, as plaintiff in error, brought the case to this court for review.

It would seem that the main and principal question presented in the court below was whether the plaintiff, Linney, was the real owner and holder of the promissory note sued on. If he was not, then of course he could not maintain the action in

Cloud county, nor in any other county; but, if he was such owner and holder, then he had the right to maintain his action just as he brought it, in the county in which he brought it, and upon the service of summons which was actually made in the case. The defendants claim that Linney was not the owner of the note, and that McDonald was, and that they conspired together to bring the action just as it was brought for the purpose that it might be litigated in Cloud county, and they further claim that this was an abuse of judicial process authorizing the decision of the court below, and they cite such cases as *Van Horn v. Manufacturing Co.*, 37 Kan. 523, 15 Pac. Rep. 562, as authority. On the other hand, the plaintiff claims that the question as to whether he was the owner of the note or not was one going to the merits of the action; that it could not be determined except at a trial upon the merits, and upon such evidence only as might properly be introduced upon a trial of the case upon its merits, and could be determined only by a jury, unless both parties should choose to waive a jury; and he cites among others the case of *Drea v. Carrington*, 32 Ohio St. 595, as authority therefor. Several Kansas cases are also cited by the parties as follows: *Hendrix v. Fuller*, 7 Kan. 331; *Brenner v. Egly*, 23 Kan. 123; *Rullman v. Hulise*, 32 Kan. 598, 5 Pac. Rep. 176; on rehearing, 33 Kan. 670, 7 Pac. Rep. 210; *Van Horn v. Manufacturing Co.*, 37 Kan. 523, 15 Pac. Rep. 562. We do not think that any one of the Kansas cases is precisely in point. In none of the Kansas cases, except the *Brenner Case*, was the question to be heard and decided a vital question involved in the merits of the case, as in the present case, and the *Brenner Case* was tried upon its merits. In the *Van Horn Case*, the question was whether one of the defendants had been by fraud and deceit inveigled into a jurisdiction, other than the one in which he resided, for the purpose of suing him in the foreign jurisdiction. In the *Rullman Case*, the question was whether an attachment should be dissolved or not. See particularly this case on rehearing. In the case of *Hendrix v. Fuller*, all the defendants were non-residents of the county where the action was brought, but service of summons was accepted by counsel for one of the defendants before the other defendant was served with summons; while in the present case the voluntary appearance of Culp was not made, and his demurrer and answer were not filed, until after the service of the summons upon the other defendants was made. We think, however, that the case of *Drea v. Carrington*, 32 Ohio St. 595, is applicable to this case, and we are inclined to follow it. That case was decided under statutes almost precisely identical with the statutes of this state applicable in such cases. Section 55, art. 5, and section 60, art. 6, of the Civil Code, read as follows: "Sec. 55. Every other action must be brought in the county in which the defendant, or some one of the defendants, reside or may be summoned." "Sec. 60. Where the action is rightfully brought in any county, according to the provisions

of article five, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request."

In order that the district court of Cloud county should obtain jurisdiction by summons over the parties residing in Jewell and Mitchell counties, it was necessary, under the foregoing sections of the statutes, that the present case should have been "rightly brought" in Cloud county as against McDonald, and whether it was "rightly brought" in that county or not, as against any one of the defendants, depended solely upon the question whether Linney was the owner of the note sued on or not. If he was the owner of the note, then the suit was rightly brought in Cloud county; but, if he was not the owner of the note, then he could not have rightly brought an action on the note in any county. Under the allegations of the plaintiff's petition, he was the owner of the note. Therefore, the question whether the action was rightly brought in Cloud county or not depended solely upon the truth of the allegations of the plaintiff's petition; and in all such cases the supreme court of Ohio decides that the question must be raised by an answer, and not by a motion, and if the action is one for the recovery of money only, as this action is, then either party has a right to have the question tried by a jury. See, also, our Civil Code, § 266. The question whether the plaintiff was the owner of the note sued on or not is not only a question which should not be heard upon a motion merely, upon the hearing of which affidavits may be used, but it could hardly be heard and determined upon a pure plea in abatement. A decision sustaining a plea in abatement usually does nothing more than to abate the action, leaving all the questions involved in the merits of the action open to be subsequently litigated and determined in some other form, or at some other time, or in some other court or jurisdiction. But a decision of the present question in favor of the defendants would be a determination against the plaintiff upon the merits of his action. It would be a determination that he had no cause of action to be litigated or enforced against any person, at any time, in any form, or in any court or jurisdiction. It would be a decision that the allegations of his petition setting forth his cause of action were not true; and, if the allegations of his petition setting forth his cause of action were not true, he could not go to Jewell county, or to Mitchell county, or anywhere else, and maintain an action upon the note against the defendant, or against any one else. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

(45 Kan. 65)

#### YOUNG v. YOUNGMAN.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

#### OBJECTIONS TO INSTRUCTIONS—FRAUDULENT CONVEYANCES.

1. A general objection to the charge of the court, without specifying wherein it is objection-



able, is unavailing to the plaintiff in error, and will not be examined.

2. The testimony in the case examined, and held to be sufficient to sustain the verdict and judgment that were given.

(*Syllabus by the Court.*)

Error from district court, Cherokee county; GEORGE CHANDLER, Judge.

Cowley & Wiswell, for plaintiff in error. Ritter & Skidmore, for defendant in error.

JOHNSTON, J. This was replevin for a small stock of groceries and drugs. The goods were formerly owned by J. S. Patton, who was largely indebted to several creditors, and, while so indebted, transferred the goods to O. L. Young. The judgment creditors of Patton sued out executions, and placed them in the hands of S. I. Youngman, a constable, who seized the stock of goods as the property of Patton. Young then prosecuted this action for the recovery of the stock, but the verdict is that he was not the owner of the property, and that the defendant did not wrongfully detain the same from his possession.

Plaintiff complains that the verdict is contrary to the evidence, but from an examination of a large volume of testimony taken with reference to the good faith of the transfer, we cannot say that the conclusion reached by the jury is not correct. After the sale, the goods remained in Patton's house, who still remained in control, claiming to be acting as the clerk of the plaintiff at a salary of \$25 per month. The plaintiff devoted very little time or attention to the business, and, taking the testimony of the plaintiff, the statements of the parties, with respect to what had been paid for the goods, were not harmonious or satisfactory. The case presented is one of conflicting testimony, and, in that state of the testimony, we cannot disturb the verdict or judgment. There is a general complaint as to the charge of the court, but no specific objection is pointed out, and we will not undertake to search for errors that are not specifically assigned and pointed out. *Wheeler v. Joy*, 15 Kan. 389. Judgment affirmed. All the justices concurring.

(45 Kan. 85)

CHICAGO, K. & W. R. CO. v. MULLER.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

EMINENT DOMAIN—COMPENSATION—EVIDENCE.

1. In the trial of a case, upon appeal from an award of damages in condemnation proceedings, the court permitted the plaintiff, as a witness, to answer the question, "How much less was the farm worth immediately after the railroad went through, per acre, than it was before?" Held, that it was error, as it involved substantially the subject-matter the jury were called upon to determine. JOHNSTON, J., dissenting.

2. Where a witness is asked, upon cross-examination, a question as to his knowledge of values, and volunteers the following statement: "A neighbor of mine right north of me has one hundred and twenty acres, and was offered six thousand dollars,"—and the court refused the request of the defendant to withdraw such statement from the jury, held error.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Sedgwick county; T. B. WALL, Judge.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Sluss & Stanley, for defendant in error.

GREEN, C. George Muller owns the N. W.  $\frac{1}{4}$  of section 28, township 29 S., range 2, in Sedgwick county. The plaintiff in error condemned a right of way for a railroad over said land, and 5 12-100 acres were taken, for which the commissioners allowed \$439.40. The defendant in error appealed from this award to the district court, and a jury assessed his damages at \$800, and a judgment was rendered accordingly. The railroad company excepted and brings the case here.

1. The first error alleged is in the admission of evidence. The plaintiff was asked how much less the land was worth immediately after the railroad went through, per acre, than it was before. An objection to this question, on the ground that it called for a conclusion, was overruled, and the witness was permitted to answer: "Five dollars less an acre." This, with similar evidence, it is claimed, is clearly prejudicial, because it is a statement of the judgment and conclusion which the jury should reach and not the witness; that it was improper to permit the witness to usurp the province of the jury and give his own opinions and conclusions. In the case of *Railroad Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322, the following question and answer were held to be erroneous: "Question. How much less, in your opinion, is this farm worth after the railroad company had established its track through it, irrespective of any benefits from any improvement proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintaining of said railroad track, to be continued permanently? Answer. About \$2,100." The court said, with reference to this evidence: "The court below certainly should not have permitted this evidence to be introduced. It involved substantially everything that the jury were called upon to determine, and left nothing for the jury to decide. It invaded the province of the jury. It really amounted to letting the witness himself determine by his own opinion what the plaintiff's damages were, and the amount which the plaintiff should recover in the action. It had no reference particularly to the market value of the land, either before or after the right of way was taken; nor any reference to any specific fact which might tend to show what such market value was, or to increase or diminish the same; but it involved all these things, and a great deal more. Upon the questions involved in this case we would refer generally to the following authorities: 3 Suth. Dam. c. 16; *Stock-Yard Co. v. Moore*, 5 Amer. & Eng. R. Cas. 352, note, and cases there cited; *McReynolds v. Railway Co.*, 14 Amer. & Eng. R. Cas. 175, note, and cases there cited; *Neilson v. Railway Co.*, Id. 244, note, 17 N. W. Rep. 310, and cases there cited; *Railroad Co. v. Foreman*, 20 Amer. & Eng. R. Cas. 225, note, and cases there

cited." We can see no very great distinction between the two questions. Each calls for the opinion and conclusion of the witness, and, upon the authority of the case *supra*, it was error to permit the question and answer. *Railroad Co. v. Hall*, 14 S. W. Rep. 259; *Elliott, Roads & S.* 198; *Mills, Em. Dom.* § 165; *Railway Co. v. Nickless*, 71 Ind. 271; *Dalzell v. Davenport*, 12 Iowa, 437; *Hosher v. Railroad Co.*, 60 Mo. 329; *Tingley v. Providence*, 8 R. I. 493; *Railroad Co. v. McKinley*, 64 Ill. 338; *Railroad Co. v. Burkett*, 42 Ala. 83; *Railroad Co. v. Ball*, 5 Ohio St. 568; *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. Rep. 295.

2. In the cross-examination of the plaintiff, the question was asked as to what sales had been made in the neighborhood, upon which he based his judgment as to values, and, without being asked, he volunteered this statement: "A neighbor of mine right north of me has one hundred and twenty acres, and was offered six thousand dollars." The defendant in error moved that this statement of the witness be stricken out. The request was denied, and a proper exception made. This, we think, was error, and the court should have withdrawn the statement from the jury. The plaintiff in error complains of certain instructions given and refused, but we see nothing prejudicial in these. While the thirteenth instruction, in relation to damages for the accidental setting out of fires, or the accidental killing of stock, may not have been applicable and supported by the evidence, the defendant below was not prejudiced thereby, as the jury allowed nothing for such injuries. For the reason indicated, as to the admission of evidence, we recommend a reversal of the judgment.

PER CURIAM. It is so ordered.

HORTON, C. J., and VALENTINE, J., concur.

JOHNSTON, J. I agree that there must be a reversal, but I base my conclusion solely on the second ground of error stated in the commissioner's opinion.

(46 Kan. 74)

KANSAS FARMERS' MUT. FIRE INS. CO. v. AMICK.

NAILL *et al.* v. KANSAS FARMERS' FIRE INS. CO.

(Supreme Court of Kansas. Dec. 6, 1890.)

EXECUTION—LIEN—GENERAL AND SPECIAL ASSETS.

1. Where a general judgment is rendered against a mutual fire insurance company and its property generally, but the insurance company was doing two kinds of business, a first-class and a second-class, and the policy upon which the judgment was rendered belonged to the second-class business only, and the company at the time had no second-class assets, the judgment and a general execution issued thereon and following the judgment are valid, and may be enforced as to any property belonging to the insurance company.

2. While a void execution or an execution issued upon a void judgment may be questioned in any court or anywhere, yet a valid execution following a valid judgment, though irregular, or issued upon an irregular judgment, cannot be

questioned except in the court from which it was issued.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. BENSON, Judge.

Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

*Stambaugh, Hurd & Dewey*, for the Kansas Farmers' Mut. Ins. Co. *J. N. Davis* and *F. A. Waddle*, for D. W. Naill and Lydia A. Amick.

VALENTINE, J. In the present controversy two petitions in error are presented to us for our consideration, one from Franklin county, in which "the Kansas Farmers' Mutual Fire Insurance Company of Abilene, Kansas," is the plaintiff in error, and Lydia A. Amick is the defendant in error; and the other from Dickinson county, in which D. W. Naill and Lydia A. Amick are the plaintiffs in error, and "the Kansas Farmers' Fire Insurance Company," is the defendant in error. The facts with respect to this controversy, stated briefly, are substantially as follows: On March 3, 1882, the above-mentioned insurance company was organized as a corporation, a mutual fire insurance company, under the name of "The Kansas Farmers' Mutual Fire Insurance Company of Abilene." On November 7, 1883, this company issued a fire insurance policy to Lydia A. Amick on property situated in Franklin county, and belonging to the second class, as defined by section 1, c. 111, Laws 1875. On December 27, 1883, a fire occurred which destroyed the insured property. On January 25, 1884, the insurance company passed a resolution to reinsure all second-class business, if satisfactory terms could be made, and to quit the second-class business. But of course they never reinsured Mrs. Amick's property, for it had already been destroyed by fire. On December 23, 1884, Mrs. Amick commenced an action in the district court of Franklin county on said insurance policy against the insurance company to recover for her loss occasioned by the aforesaid fire. Early in 1885 the insurance company, under chapter 130 of the Laws of 1885, created a guaranty fund of \$50,000. On October 7, 1885, a general judgment was rendered in the aforesaid action in Franklin county in favor of Mrs. Amick, and against the insurance company, for \$1,326, and costs, and no reference was made in such judgment, or in any of the proceedings either to a first-class or to a second-class business. On January 14, 1886, the insurance company changed its name to "The Kansas Farmers' Fire Insurance Company." On July 9, 1887, upon proper proceedings previously instituted by the insurance company in the supreme court, such court affirmed the aforesaid judgment of Mrs. Amick against the insurance company. *Insurance Co. v. Amick*, 37 Kan. 73, 14 Pac. Rep. 454. On July 27, 1887, an execution was issued from the Franklin county district court upon such judgment, and was returned not satisfied. On March 21, 1888, proceedings were instituted by Mrs. Amick in the district court of Franklin county on motion in aid of execution, and for the appointment of a receiver. See

Civil Code, § 254, subd. 4. On April 2, 1888, this motion was heard, and on the hearing thereof it was shown that the insurance company had no assets belonging to its second-class business; but what had become of such assets has not been shown. It seems to be admitted that it had assets belonging to its first-class business. On August 13, 1888, said motion was decided, and D. W. Naill, the sheriff of Dickinson county, was appointed receiver, and on September 20, 1888, the insurance company, for the purpose of having the aforesaid order of the district court of Franklin county appointing such receiver reversed, brought the case to this court on petition in error; and that is the first petition in error above mentioned. On November 20, 1888, the company filed a *supersedeas* bond, but that bond provided merely that the obligors should pay all the damages that Mrs. Amick might sustain by reason of the proceedings in error from the order of the district court appointing the receiver, provided such order should be affirmed in whole or in part. On May 22, 1889, a general execution in favor of Mrs. Amick, and against the property generally of the insurance company, was issued from the Franklin county district court to D. W. Naill, the sheriff of Dickinson county. The insurance company was described in the execution as "the Kansas Farmers' Mutual Fire Insurance Company, *alias* the Kansas Farmers' Fire Insurance Company." The sheriff was about to levy upon property of the company when on June 25, 1889, proceedings were commenced by the insurance company in the Dickinson county district court against the sheriff and Mrs. Amick to perpetually enjoin them from levying that execution, or any other execution issued upon the aforesaid judgment, upon any property of the insurance company belonging to its first-class business, or upon its guaranty fund. A temporary injunction was granted at the time by the district judge, and a proper undertaking was given by the insurance company. On July 24, 1889, Mrs. Amick filed an answer setting up the Franklin county judgment and her interests and rights thereunder. On July 27, 1889, the insurance company replied by filing a general denial. On April 4, 1890, Mrs. Amick filed a motion to vacate the aforesaid temporary injunction, and the motion was heard on the same day. On June 10, 1890, a trial was had upon the merits of the action before the court, without a jury, and a perpetual injunction was granted restraining and enjoining the defendants in that action, Naill and Mrs. Amick, from interfering with any of the assets or property of the insurance company, except such as pertained exclusively to its second-class business; and also from interfering with the insurance company's guaranty fund. It was shown at the trial that the insurance company had no assets or property belonging to its second-class business, but what it had done with the same was not then or at any other time shown. The defendants in that action then filed a motion for a new trial upon various grounds, which motion was overruled; and on September 2, 1890, they brought

the case to this court for review on petition in error; and this is the second petition in error above mentioned.

We think the order of the district court of Franklin county, appointing the receiver, must be affirmed, and the judgment of the district court of Dickinson county granting the perpetual injunction must be reversed. The judgment sought to be enforced by Mrs. Amick was a general judgment in her favor, and against the insurance company and its property generally, and the execution followed the judgment. The judgment reads as follows: "It is therefore considered and adjudged by the court that the said plaintiff, Lydia A. Amick, have and recover of and from the said The Kansas Farmers' Mutual Fire Insurance Company, defendant, the sum of thirteen hundred and twenty-six dollars, so as aforesaid found to be due from the said defendant to the said plaintiff, together with the costs of this action taxed at \$104.30, and that execution issue." If this judgment should be applied only to the second-class assets or property of the insurance company, it should have been so rendered; but it was not so rendered, and it must now be held to be valid and binding and conclusive, precisely as it was rendered. It is now nearly seven years since the fire occurred. It is nearly six years since the action to recover for the loss was commenced. The action was contested, but a general judgment was nevertheless rendered in favor of Mrs. Amick and against the insurance company, and it is now more than five years since such judgment was rendered, and certainly the validity or regularity of the judgment cannot now be questioned; neither can the execution issued upon the judgment and following the judgment be questioned.

A void execution or an execution issued upon a void judgment, may be questioned in any court, or anywhere; but a valid execution following a valid judgment cannot be questioned anywhere, except as follows: If the execution were valid, but irregular, or issued upon an irregular judgment, it might be questioned in the court from which it was issued; but it could not properly be questioned anywhere else. The order of the district court of Franklin county will be affirmed, and the judgment of the district court of Dickinson county will be reversed. All the justices concurring.

(45 Kan. 73)

#### MAYER V. WATERS.

(Supreme Court of Kansas. Dec. 6, 1890.)

FIXTURES—BUILDINGS ON GOVERNMENT RESERVATION—USE AND OCCUPATION.

1. Buildings erected on a military reservation by a post trader, under authority from the war department, for the purposes of trade, do not become a part of the realty, and the owner, when he ceases to be post trader, may remove and dispose of the same as his own property.

2. The military authorities are invested with power to prescribe rules and regulations for the erection, maintenance, and removal of buildings erected by a post trader on a reservation, but such rules and regulations when made are subject to waiver and modification.

3. A formal regulation was made that as owner could not sublet such buildings to another

without permission of the military authorities, and one who was an owner of buildings that had been erected by a post trader on a military reservation leased the same to a trader for a stipulated rental, without express permission, but with the knowledge and acquiescence of the military authorities, and the trader occupied the same and paid rent to the owner for about four years, when an order was made by the commanding officer that the owner should remove the buildings within a reasonable time. The order was not enforced, but the trader, with the knowledge of the officers, was permitted to use the building as before. On account of this order, the trader declined to pay rent to the owner, although he continued in the uninterrupted possession of the buildings, with full knowledge that the owner demanded the payment of rent. *Held*, that the action of the officers did not relieve the trader from liability to the owner for the use and occupation of the buildings.

(Syllabus by the Court.)

Error from district court, Geary county; M. B. NICHOLSON, Judge.

J. R. McClure, for Mayer. J. V. Humphreys, for Waters.

JOHNSTON, J. Charles E. Mayer brought this action against Moses Waters to recover \$1,770, alleged to be due for the use and occupation of certain buildings owned by the plaintiff and situate on the Ft. Riley Military Reservation, consisting of a store building, a club-house, and a residence. On November 25, 1879, Moses Waters, who was then, and since then has been, the duly-appointed post trader at the Ft. Riley Military Reservation, entered into a written lease with Charles E. Mayer, the owner of the buildings, for a term of one year from April 1, 1880, at a rental of \$30 per month, payable in quarterly installments. Waters took possession under this agreement, and, although no written lease was afterwards executed, he continued to occupy and use the buildings as post trader until the commencement of this action, and paid rent for the same until February 1, 1883. After that time, he declined to make any further payment, claiming that certain military orders and proceedings which had been had, relieved him of liability to Mayer for the use of his buildings. In June, 1883, he applied to the post council of administration at Ft. Riley for the appointment of a board of officers to appraise the value of the buildings occupied and used by him, stating that they were in need of repairs, and that unless he could purchase them at a fair price he must request that the owner be directed to remove them, so that he could erect in their places such buildings as his business required. The application was forwarded by the post commander to the head-quarters of the department of the Missouri, and Gen. Pope, who was in command, returned the same, with an indorsement directing the commanding officer at Ft. Riley to cause the owner of the buildings to remove them from the reservation within a reasonable time, and that he could not be allowed to rent them. Moses Waters was informed by the post commander of this decision, and that Mayer would have a reasonable time to remove the buildings, but that Waters would be allowed to occupy the same until further orders. Mayer had no notice of this ap-

plication or of the proceedings thereon until after the same had been taken, nor until September 20, 1883. The case was submitted to the court, without a jury, on oral and documentary evidence, and the court found that Mayer was entitled to recover rent for the use of his premises from February 1, 1883, to September 20, 1883, (when he received notice of the military proceedings aforesaid,) at the rate of \$30 per month, but that the plaintiff was not entitled to recover for the use of the premises after receiving notice of the proceedings had by the military authorities. Each of the parties excepted to the findings and judgment of the court, and both are here alleging error.

It is insisted on behalf of Waters that, under an act of congress and certain military regulations, Mayer was without authority over the buildings, or to collect rent for the same, and, as he could not lawfully collect rent, Waters was not legally liable for their use and occupation. Congress has enacted "that every military post may have one trader, to be appointed by the secretary of war, on the recommendation of the council of administration, approved by the commanding officer, who shall be subject in all respects to the rules and regulations for the government of the army." 19 U. S. St. at Large, 100. Among the rules and regulations for the government of the army are found the following: "Post traders will actually carry on the business themselves, and will habitually reside at the station to which they are appointed. They will not farm out, sublet, transfer, sell, or assign their business to others." "Post traders will be permitted to erect buildings for the purpose of carrying on their business upon such part of the military reservation or post where they are assigned as the commanding officer may direct. Such buildings will be in convenient reach of the garrison." "When a trader is removed from his post, he has a right to remove and dispose of the material of the buildings erected by him as his own property. He cannot lease or sell his buildings to another post trader without the permission of the military authorities; but such permission would have the same force as a license to a new post trader to erect such a building at that spot." It is urged that Mayer had leased the buildings when he was not a post trader, and also without license from the military authorities; and, this being in violation of the regulations, he had no right to collect rent from Waters or any one else. It is true that Mayer was not a post trader when the original lease was executed, nor has he held that position since that time, and it is also true that he never received from the military authorities express permission to rent the buildings. It appears that the buildings were originally erected by Robert Wilson, a post trader at Ft. Riley, under due license from the war department. He sold them to Henry F. Mayer, who was also post trader at the same place, and Henry F. Mayer, in turn, sold them to his son, the plaintiff, in 1876; but the plaintiff was not then, and never has been, a post trader at Ft. Riley, although he was the partner of

one McGonegal, who was the post trader for the years 1871 and 1872. We think that Waters was liable to the plaintiff for the use and occupation of the buildings, both before and after the military proceedings hereinbefore referred to. This is not a controversy between the United States and the plaintiff, and no step taken has divested the plaintiff of the ownership of the buildings occupied and used by Waters.

The military authorities have full power to regulate the erection, maintenance, and removal of buildings used for carrying on the business of a post trader, and to prohibit the assignment and subletting of the business to another; but the strict observance of the rules may be waived by the government, and the failure of the owner of the buildings to conform to these rules and regulations does not change the ownership of the buildings, or relieve a party who has taken possession of the same, under a lease from the owner, from paying for their use. It does not appear that direct permission was given for the lease or transfer of the buildings from the original owner to the several parties through whose hands they passed; but it does appear that the transfers were made with the knowledge and acquiescence of the military authorities, and it is conceded that the plaintiff never knew there was any objection to his renting these buildings until he received notice of the proceedings that were taken in reference to the removal of the same. These proceedings were had at the instance of Waters, and without any notice to the plaintiff. The officers of the department are not vested with power to appropriate such property for the use of the government, and the proceedings taken did not change the relation existing between Mayer and Waters. The buildings were personal property when they were erected, and remained such until this action was begun. It has been held by the attorney general of the United States that "buildings erected by post traders on a military reserve, in conformity to this order, are erected for the mutual benefit of the government and the trader, and are not to be regarded as buildings would be if erected by trespassers, or even by tenants under leases in which no provision is made therefor. They are erected under a license from the government, and for the mutual benefit of both parties. Under these circumstances, I am of opinion that, by the proper construction of the license, these buildings were not intended to become a part of the realty after their erection, but were to continue the property of the traders, and therefore, when a trader is removed from his post, I have no doubt that he has a right to remove the building from the place where it was erected, and, when removed, he can dispose of the materials as his own property." 14 Op. Attys. Gen. 125. It was held in the same opinion that such license did not authorize a lease or conveyance of the buildings to others for their occupation and use, without the permission of the military authorities; that the right was confined solely to the removing of the buildings from the premises.

The officers had full authority to order the removal of the buildings, and to enforce such order; but so long as they permitted the buildings to remain upon the reservation, they were without authority to relieve the trader from paying for their use and occupation. The order made was that Mayer should remove the buildings from the reservation within a reasonable time; but, instead of enforcing the regulation or the order, the officers permitted the buildings to remain until the commencement of this action. The buildings have been used continuously for the business of the post trader, and it does not appear that there was any necessity for their vacation, or that the trader was using them for any improper purpose. This continued use, with full knowledge of the ownership and rights of the plaintiff, must be regarded as a waiver of the regulation, and a sufficient permission for the leasing of the buildings to Waters. This seems to have been the view of the war department, as the adjutant general, in response to a letter addressed to him with reference to the occupancy of these buildings, said: "If the trader occupies buildings belonging to you, without being willing to purchase them, or pay rent to you as you demand, you should seek a remedy in the civil courts." As late as January 24, 1888, the commanding officer at Ft. Riley, in response to an application for a military order to compel the post trader to pay for the use of the buildings, stated: "It is not understood why Mr. Mayer does not have recourse to process of civil law to adjust his rights in this case. He should be informed that there is a special reason for this, in view of the control of the civil authorities on the reservation at Fort Riley." In this case, Waters first entered into a written lease for the property, and continued to pay rent thereon to plaintiff for about four years, thereby recognizing the title and ownership of plaintiff, and that the relationship of landlord and tenant existed between them. He has remained in undisturbed possession of the buildings ever since, with full knowledge that compensation for their use was demanded by plaintiff, and he cannot now be permitted to deny the title of the landlord, or repudiate his implied liability for the use and occupation of the buildings. The fact that he has latterly refused to pay rent for the use of Mayer's property will not terminate his relation as tenant, or relieve him from liability for the use and occupation of the property. *Thompson v. Sanborn*, 52 Mich. 141, 17 N. W. Rep. 730; *Tayl. Landl. & Ten. c. 13, § 3*.

We are asked to render such judgment in the case as the court below should have rendered in case of a reversal; but as the case was submitted upon testimony which is not harmonious, and as the condition of the buildings and the amount of the repairs that have been expended have not been stated or agreed upon, we are unable to direct the judgment that should be entered. The judgment of the court below will therefore be reversed, and the cause remanded for a new trial. All the justices concurring.

(45 Kan. 59)

## MERRILL v. HUTCHINSON.

(Supreme Court of Kansas. Dec. 6, 1890.)

## EFFECT OF QUITCLAIM DEED.

A quitclaim deed, duly recorded, taken by the purchaser in good faith and for a valuable consideration, will prevail over a prior unrecorded deed, where the subsequent purchaser had no notice of the former deed, and could not have discovered its existence by an investigation of the public records, or by the exercise of reasonable diligence in making proper examinations and inquiries.

(Syllabus by the Court.)

Error from district court, Reno county; L. HOUK, Judge.

*Hettinger Bros. and Vandever & Martin*, for plaintiff in error. *Whiteside & Gleason*, for defendant in error.

JOHNSTON, J. George Merrill brought this action in the district court of Reno county to recover two lots situate in the city of Hutchinson. Henry King was the fee-simple owner of the lots for several years prior to May 10, 1877, at which time he executed a conveyance of the same to the plaintiff, but the deed was not recorded until more than 10 years had elapsed. Merrill now claims title and right of recovery under this conveyance. Hutchinson, the defendant, claims title through certain tax proceedings and a conveyance made to him by Henry King and wife on July 16, 1885. It appears that King paid the taxes on the lots until 1877, and, not being paid for that year, the lots were sold for taxes, and were bid in by the county. No taxes thereon were afterwards paid by any one until January, 1883, when the tax certificate was assigned to L. A. Bigger, and a tax-deed was executed to him on January 16, 1884, which was recorded on the same day. Bigger paid taxes thereon up to 1885, and about that time he sold the property to Isaac A. Kitzmiller, but the deed was not executed until March 17, 1886, and it was recorded on March 24, 1886. On April 12, 1886, Kitzmiller and wife conveyed the lots to William E. Hutchinson, and on July 16, 1885, Henry King and wife executed a quitclaim deed, purporting to convey the property to Hutchinson, which instrument was recorded on July 17, 1885. The plaintiff contends that the tax proceedings were irregular in two respects, and this is not denied by the defendant; and hence, we may assume that the tax proceedings alone will not sustain the defendant's claim of title. It is said by the defendant that the court below held against the validity of the tax proceedings; but it also held that the quitclaim deed of Hutchinson was obtained from King after making diligent inquiry to ascertain the condition of the title, and without notice of the unrecorded deed of plaintiff, and therefore adjudged the quitclaim deed to be superior to the prior unrecorded deed of plaintiff. This is the only question in the case.

It appears that, when King conveyed the lots to Hutchinson, he had forgotten the previous conveyance to Merrill, and he supposed that he still held the original title to the lots, and the complete title except as it was affected by the tax-title which had been taken and which had then

passed to Hutchinson. Before purchasing the lots from King, Hutchinson searched the records, and in good faith made diligent inquiry and examination as to the condition of the title, and found nothing indicating the prior conveyance, or that Merrill had or claimed any interest in the property. Kitzmiller had taken possession of the lots, and made permanent improvements thereon, before the purchase of the same by Hutchinson. None of the parties connected with the tax proceedings, or who paid the taxes, or who took possession and made improvements on the property, knew anything of the prior deed, and Merrill did not disclose the fact until long after the tax-deed and subsequent conveyance had been placed on record, nor for a long time after the permanent improvements had been made. The plaintiff urges that the defendant cannot be regarded as a *bona fide* purchaser, and cites *Johnson v. Williams*, 37 Kan. 179, 14 Pac. Rep. 537. It was there held that, where the grantor gives only a quitclaim deed, the purchaser is put upon inquiry; but it was not decided that the mere taking of such a deed deprived him from being considered a *bona fide* purchaser under all circumstances. It was said that "a person who holds real estate by virtue of a quitclaim deed only from his immediate grantor, whether he is a purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries." In deciding the case, however, it was remarked that "it may be that, with reference to some equities or interests in real estate, the purchaser who holds only under a quitclaim deed may be deemed to be a *bona fide* purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret, and concealed, and not only unknown to the purchaser, but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible also that a purchaser taking a quitclaim deed may, under the registry laws, be considered a *bona fide* purchaser with reference to a prior unrecorded deed with respect to which he has no notice, nor any reasonable means of obtaining notice." The facts of the present case bring it within the suggestion made in the cited case, and we think the rule suggested should be adopted for the determination of this controversy. See authorities cited in *Johnson v. Williams*, *supra*. The form of the deed alone did not conclude Hutchinson, nor prevent him from becoming a purchaser in good faith. It simply operated as a warning to him, and put him upon inquiry. It was his duty, then, to look further, and ascertain why the deed was made without covenants of warranty; and he took it loaded with such outstanding equities or interests as he might have discovered by the exercise of reasonable diligence. As we have seen, he examined the records, inquired of those in possession, and who paid taxes thereon, and of every one who had any apparent interest in the property, and could not learn from any of them that

Merrill had any claim upon the property; and King, the owner of the record title, to whom Hutchinson applied for a deed, had forgotten the conveyance to Merrill, so that it could not be learned from that source. The reason why King gave, and Hutchinson took, a deed without covenants of warranty was the outstanding tax-title, under which parties had taken possession and made improvements; and these circumstances justify the making of a quitclaim deed, and would naturally set at rest any doubts which might arise in the mind of Hutchinson on account of the form of the deed. He paid a fair consideration for the lots, and, although his conduct has been criticised, we find nothing in it to impeach his good faith. It may be remarked that the deed from King purported to convey the property, and did not in terms limit the conveyance to the mere interests of the grantors, nor did it contain any express restriction upon an absolute conveyance. King evidently intended to convey a complete title to the property, except that which had been acquired through tax proceedings, and Hutchinson supposed, and had a right to suppose, that having acquired the rights of the tax-title purchaser, and a conveyance from King, he was vested with a complete and perfect title. The interest of Merrill was so concealed as to be undiscoversable by any reasonable search, and his conduct in the premises does not appeal strongly to the equitable consideration of the court. He purchased the property when it was of little value, and withheld the deed from record for about 10 years. During this time he paid no taxes and made no improvements thereon, and did nothing to disclose his ownership. With an unrecorded deed in his pocket, he stood by while others who had obtained deeds placed them on record, erected buildings and other improvements on the lots, and paid accumulated taxes thereon, never intimating that he held an interest in the property. After the value of the property had been greatly enhanced by the improvements made, and by the growth and general prosperity of the city, he uncovers a deed and asserts title. The act relating to conveyances provides for the recording of all instruments conveying real estate, or whereby any real estate may be affected; and that, from the time of filing the same with the register of deeds, they shall impart notice to all persons of the contents of the instruments; and that all subsequent purchasers and mortgagees shall be deemed to purchase with notice. It then provides that "no such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record." Gen. St. 1889, pars. 1128-1130. The duty of placing the deed on record was enjoined by the statute, and required by public policy; but the plaintiff ignored both, and it is now too late for him to assert his title against one who purchased in good faith and without notice of the outstanding interest. Even a purchaser at sheriff's sale, other than a judgment creditor, who has parted with

value on the strength of the record, and that there is no outstanding equities or titles which are discoverable by ordinary diligence, is entitled to the protection of the recording act. As to him, it has been said: "If the record shows the title clear in a party, and the purchaser has no notice of any outstanding equities or titles, he may, as a rule, safely purchase from such party, and the holder of the unrecorded title is estopped to set up his title as against one who purchasing has parted with value on the strength of the record; and this is true, whether the purchaser obtains title from the apparent owner by voluntary conveyance, or purchase at a sheriff's sale." *Lee v. Birmingham*, 30 Kan. 312, 1 Pac. Rep. 73. In the same case it is remarked that "every claimant of title owes a duty of notice to the public. Generally speaking, the record is the means of information, and the spirit of our laws is to encourage reliance upon the record. Where that fails, and the claimant knows of the failure, he owes to the public the duty of in some way making good the omission; and, if he is derelict in this duty, he may be estopped from afterwards setting up his title against one who has purchased and parted with value on the strength of the record." In *Lewis v. Kirk*, 28 Kan. 505, it is said that "a purchaser in good faith of real estate is never bound to take notice of secret equities, liens, interests, trusts, or incumbrances, which cannot be discovered from an inspection of the public records, or cannot be ascertained by inquiries from the parties in possession. He may always rely upon the public records, and such inquiries as they suggest, and such inquiries as are proper of the parties in possession; and if, from all these, the title appears to be clear, he will then obtain a good title, although there may be some outstanding equity or lien in favor of some other person." The defendant acted in good faith, and was not derelict in examining the record, or in making inquiries of those in possession, or of those likely to know of outstanding equities or titles. The plaintiff, on the other hand, was at fault in failing to give the notice which the law and fair dealing with the public requires. In consequence of his fault, the property was purchased for a valuable consideration, taxes were paid, and improvements made thereon, and he who is in fault should suffer the loss which his conduct has occasioned. We think the title of the defendant under the quitclaim deed is paramount to that of the plaintiff, and the ruling of the district court must be upheld. The judgment will be affirmed. All the justices concurring.

(44 Kan. 743)

CHAPPELL *et al.* v. COMINS *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

## DISCHARGE OF ATTACHMENT—AFFIDAVIT—APPEAL.

1. An order of the district court discharging an order of attachment is reviewable in this court before there is a final disposition of the case in the court below. The case of *Snively v. Buggy Co.*, 36 Kan. 106, 12 Pac. Rep. 522, followed.

2. Affidavits in support of, or in opposition



to, a motion to discharge an order of attachment, ought to be confined to the truth or falsity of the causes set forth in the affidavit for attachment. The material facts involving the merits of the action are rarely, if ever, involved in an inquiry as to whether or not the order of attachment was wrongfully issued.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Barton county; ANSEL R. CLARK, Judge.

*Maher & Osmond*, for plaintiffs in error.  
*G. W. Nimocks & Bro.*, for defendants in error.

SIMPSON, C. In this case the plaintiffs in error complain of an order of the district court of Barton county discharging an attachment. In this court a motion is made to dismiss the petition in error, for the reason that it is not shown in the record that the case has been finally disposed of in the district court. The theory of the motion is that an order of the district court discharging an attachment is not subject to review in this court until after the final disposition of the case by the court in which it originated. This is not the law. Such an order is reviewable in this court, even if there has not been a final judgment rendered below; but, if the district court had refused to discharge the attachment, such refusal could not have been reviewed in this court until after final judgment below. The case of *Snively v. Baggy Co.*, 36 Kan. 106, 12 Pac. Rep. 522, contains an elaborate discussion of this question, and is decisive of this motion. The motion should be overruled.

The motion to discharge was supported and opposed by elaborate affidavits on both sides, and, as there were no witnesses examined orally on the hearing, we must pass upon the questions of fact as if we had original jurisdiction. *Keith v. Stetter*, 25 Kan. 100. The material facts are that Mrs. J. W. Chappell and her daughter Floy were the owners of a stock of millinery goods at Great Bend; that Mrs. H. G. Comins, through her agent, one Moore, traded a lot in some addition to the city of Chicago for the stock of goods, the husband and father of Mrs. Chappell and her daughter acting as their agent, Mrs. Comins assuming to pay an indebtedness of \$800 that was owing on the stock. This indebtedness not being paid when it became due, this action was commenced against Mrs. H. G. Comins & Co. to recover the amount of that indebtedness. Mrs. Comins, subsequent to the purchase, had taken into partnership the wife of Moore, who made the trade as the agent of Mrs. Comins. An attachment was obtained and levied on the stock of merchandise. The causes for attachment alleged in the affidavit are, first, that the defendants are about to remove their property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud their creditors; and are about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors; and have property and rights in action which they conceal; and are about to assign, remove, and dispose of their property, or

a part thereof, with the intent to defraud, hinder, and delay their creditors; and have assigned, removed, and disposed of their property, or a part thereof, with the intent to defraud, hinder, and delay their creditors; and fraudulently contracted the debt and incurred the obligation for which the above-named suit has been brought. The causes for attachment, as alleged, were each and all denied under oath. In the affidavits filed in support of the attachment, there is absolutely no evidence to support, or that tends remotely to support, the truth of any of the alleged causes for attachment. The issues of fact made by the affidavits on both sides are as to the value of the Chicago lot, and as to whether Moore made false representations as to its value, location, and surroundings, and as to whether Mrs. Moore, when she went into partnership with Mrs. Comins, assumed the payment of \$800 as a debt of the new firm. These questions of fact are to be determined at the trial of the case, and do not control the order of attachment. Suit was brought against the defendants in error because they failed, neglected, and refused to pay the \$800 that it is alleged they assumed to pay. There was no evidence that they fraudulently contracted this debt. They did not contract it; it was contracted by the plaintiffs in error, and they would not certainly claim that the defendants in error fraudulently assumed to pay it. There is no evidence to sustain the attachment. We recommend that the order be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 45)

#### MULVANE v. CITY OF SOUTH TOPEKA.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

##### EXCAVATION IN STREET—DANGER SIGNALS.

A city is under no legal obligation to provide danger signals along an excavation, in a public street, as to one traveling outside of the street, or except at the crossings or intersections of such street, by other streets or highways; and when a person, in driving over a vacant lot or tract of ground, is precipitated over an embankment into the street and injured, the city is not liable in damages for such injury.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*Welch & Welch*, for plaintiff in error. *S. B. Isenhardt*, for defendant in error.

GREEN, C. The plaintiff in error instituted this suit in the district court of Shawnee county, to recover damages from the city of Topeka for a failure to place danger signals at a point where a well-traveled way, which had been used, as he claimed, for more than 15 years by the traveling public, although not a regularly laid-out road, intersected a street of such city, which had been excavated a distance of some four or five feet below the surface, across such traveled way. The case was tried to a jury, and resulted in favor of the city. The plaintiff below brings the case here, and assigns error in the giving of the

sixth instruction, and the refusal of an instruction requested by him. These assignments we shall consider together, as they raise substantially the same question. In the sixth instruction, the court said to the jury: "I further instruct you that, before you can find for the plaintiff, you must find from the evidence that, at the time of the alleged accident and injuries complained of, plaintiff was in a public street or public highway in the city of South Topeka. If the plaintiff was not in a public street or public highway when he was precipitated over the bank into the excavation on Kansas avenue, then he cannot recover. Therefore, if you find that the defendant city excavated the avenue up to the west line of the avenue,—that is, up to the private land belonging to Ritchie or other land-owner,—and that plaintiff approached Kansas avenue across the open private land of Ritchie or other person, and was not in a public street or public highway when the plaintiff and his carriage were precipitated over the bank into the excavation, then the plaintiff cannot recover. The city was not required to put up danger signals at any point along the excavation in the avenue, except at the crossing or intersection of the avenue by public streets or public highways; and, unless the plaintiff approached the avenue by a public street or public highway, where it was the duty of the city to put up danger signals, then he cannot recover in this action." The evidence is not preserved in the record, and we shall assume that the facts authorized the giving of this instruction, which we think is a correct statement of the law. It is stated in the petition that the plaintiff was passing on said by-road entering Kansas avenue, and was wholly ignorant of the excavation in said Kansas avenue, and was not aware of any danger, and, while attempting to drive on to said avenue about 9 o'clock at night, was accidentally precipitated into said excavation, with his team and carriage, whereby he was injured; that the accident occurred by and through the negligence of the defendant city, in leaving said excavation on Kansas avenue, where the by-road entered the same, wholly unguarded in the night-time by lights or otherwise. Was this such an omission, upon the part of the city, as made it chargeable with negligence, and was the law as laid down by the trial court correct? We must resolve these questions in favor of the city. There was no obligation resting upon the city to provide a way over private property to its public streets and avenues; and the fact that the ground over which the plaintiff passed had been used by the public for a number of years would not cast upon the city any duty to erect barriers, or place danger signals, upon such ground, unless the city had full and complete control over the same as a part of the public streets of the city. There was nothing to indicate that this ground had ever been dedicated to the public in such a way as to render the city liable, or give the plaintiff any right to use it as a traveled way. It is not the duty of a city to provide means of access from private property to its streets, nor is it liable for

a failure to guard its streets from approach at points where such approach is dangerous. *Goodin v. City of Des Moines*, 55 Iowa, 67, 7 N. W. Rep. 411; *Zettler v. City of Atlanta*, 66 Ga. 195; *Young v. District of Columbia*, 3 MacArthur, 137. The judgment of the district court of Shawnee county should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 47)

HICKS v. NELSON et ux.<sup>1</sup>

(Supreme Court of Kansas. Dec. 6, 1890.)

REDEMPTION FROM TAX-SALES.

1. Where land is sold for taxes September 5, 1882, the period of redemption expires with September 5, 1885.

2. Where a county treasurer, by a mistake in computation of time, gives in a redemption notice one day more than three years for redemption, the notice will not be held to be bad on its face.

3. Where the redemption notice gives the full statutory time of three years for redemption, and one day more, and the last day named in the notice is Sunday, the owner will not be permitted to set aside a deed for the land following such notice, without showing that he was misled by the notice, and that he offered to redeem on the last day named in the notice, or, if the last day was Sunday, on the next day.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge:

Malcolm Nicolson, for plaintiff in error.  
George G. Cornell, for defendants in error.

STRANG, C. Action in ejectment for the possession of the E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 8, township 12, range 11, Wabaunsee county, Kan. Defendants below claim the land under a tax-title. The statute provides that "any owner, his agent or attorney, may, at any time within three years from the day of sale, and at any time before the execution of the deed, redeem any land, or town lot, sold for taxes, or any part thereof, or interest therein, by paying to the treasurer of the county the amount for which said land was sold, and all subsequent taxes and charges thereon," with interest as provided by the act. The statute also requires the county treasurer, at least four months before the expiration of the time limited for redeeming lands sold for taxes, to publish in some paper published in or of general circulation in his county, once a week for four consecutive weeks, a list of all unredeemed lands and town lots, describing each tract or lot as the same was described on the tax-roll, stating the name of the person to whom assessed, if any, and the amount of taxes charged, and interest, calculated to the last day of redemption, due on each parcel, and give notice that unless such lands or lots be redeemed on or before the day limited therefor, specifying the same, they will be conveyed to the purchaser. The trial court made the following findings of fact, to-wit: *First*. That the plaintiff holds title to the real estate in controversy, to-wit: The E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 8, township 12, range 11 E., containing 80 acres of land, in Wabaunsee

<sup>1</sup> Rehearing denied, post, 565.

county, state of Kansas, by a chain of valid conveyances, duly executed and delivered, beginning with a patent from the United States, dated April 15, 1871, and ending with a deed to the plaintiff, dated August 18, 1880. *Second.* That said real estate was sold on the 5th day of September, 1882, for the taxes of 1881, and under said sale a tax-deed, valid on its face, was on the 11th day of September, 1885, duly executed and delivered to C. S. Kinderdine by the county clerk of Wabaunsee county, Kan.; and the defendant Lewis Nelson is in possession of said real estate under title derived from said tax-deed by conveyance duly executed and delivered to him by said Kinderdine on the 11th day of May, 1886. *Third.* That, prior to the execution of said tax-deed, the county treasurer of Wabaunsee county, Kan., published a redemption notice of lands sold for taxes in 1882, of which the following is a copy, to wit: "County treasurer's office, Alma, Wabaunsee county, Kansas, February 13th, 1885. Notice is hereby given that the lands described in the following list, situate in the county of Wabaunsee, and state of Kansas, were sold on the 5th day of September, 1882, for the unpaid taxes of 1881, and costs and charges thereon. The period of redemption under said sale will expire in three years from the day of said sale, or on the sixth day of September, 1885. The sum set opposite the several tracts includes the taxes, interest, and charges up to the last day of redemption. Now, therefore, unless the said lands shall be redeemed on or before the sixth day of September, 1885, they may be conveyed to the purchaser thereof on and after the 6th day of September, 1885. JOSEPH FIELDS, County Treasurer." *Fourth.* That the 6th day of September, 1885, was Sunday. *Fifth.* That, before this suit was commenced, the plaintiff tendered to defendant the full amount of taxes, and interest, on said land. And the following conclusions of law: *First*, that the defendant Lewis Nelson does not unlawfully detain said real estate from said plaintiff, and that said plaintiff is not entitled to recover the possession thereof; *second*, that the defendants are entitled to recover their costs. And thereupon the said plaintiff, to all the foregoing conclusions of law, and each of them, duly excepted.

The sole question involved in the case is the sufficiency of the redemption notice. There are two questions raised on the notice. It is first asserted by the plaintiff in error that the notice is not sufficient because, since the last day of the period for redemption (the 6th of September) is Sunday, the notice should have extended the period for redemption to and including the next day, (the 7th.) The land was sold on the 5th day of September, 1882. Under the rule of this court, (*English v. Williamson*, 34 Kan. 212, 8 Pac. Rep. 214, and *Cable v. Coates*, 36 Kan. 191, 12 Pac. Rep. 931,) the day of sale should have been excluded. The period of redemption then would have expired on September 5, 1885. September 5, 1885, was not Sunday; and, as the period for redemption expired with that day, it mattered not that the next day was Sunday. The plaintiff had his full

three years in which to redeem, with the expiration of Saturday, the 5th.

It is argued that, because by the terms of the notice the plaintiff was given the right to redeem on the 6th, he should have had all of that day; and, as the 6th was Sunday, he should have also had the whole of the next day, (the 7th.) We do not think this argument is tenable. The statute gives three full years in which to redeem, and until the deed is executed, but the notice should give but three years. If, however, the treasurer by a mistake in computation gives in the notice one day more than three years for redemption, that will not render the notice invalid upon its face. Nor should the owner be permitted to take advantage of such mistake, to set aside a deed following such notice, without showing that he was misled thereby, and that he offered to redeem on the last day named in the notice, or, if the last day named was Sunday, on the next day. It is also said the notice was invalid by reason of its uncertainty, or want of definiteness, in fixing the final day for redemption. That part of the notice claimed to be obnoxious to this criticism reads as follows: "The period of redemption, under said sale, will expire in three years from the day of said sale, or on the sixth day of September, 1885." It is argued that the date of expiration for the period of redemption is not definitely fixed; that the notice is that the period for redemption will expire on one or the other of two periods,—to-wit, "in three years from the day of sale, or on the 6th day of September, 1885,"—and that this feature of the notice is subject to the criticism of this court in the case of *Blackstone v. Sherwood*, 31 Kan. 36, 2 Pac. Rep. 874, and is therefore invalid. The notice in this case differs from the notice criticised in the case cited. In the notice in that case, the date of sale was not given, and there was nothing from which to compute the three years for redemption. In this case, the date of sale is given in the notice, and a computation will show when the three years will expire. We think the notice in this case must be held to be good. It is therefore recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 20)

#### HENTIG v. REDDEN.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

##### INTEREST—TAXES PAID AFTER TAX-SALE.

In an action of ejectment for the possession of real estate, where the defense is based upon a tax-title, and the case is decided adversely to the defendant, and a motion is made by the defendant to ascertain the amount he is entitled to recover by reason of taxes, penalties, and costs, paid on said real estate, together with interest thereon, and said motion is not heard and decided at once, 7 per cent. prior to 1889 is the rate of interest the defendant is entitled to receive subsequent to the decision in ejectment.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*F. G. Hentig and E. A. Austin*, for plaintiff in error. *A. L. Redden, Irwin Taylor, and H. H. Harris*, for defendant in error.

STRANG, C. This was a hearing on a motion by the defendant in the district court, in a case there pending, in which the title to certain lots had been settled against him, to ascertain the amount due from the plaintiff in the case, for taxes, penalties, and costs paid by him on said lots, together with interest thereon, and to have said amount declared a lien on said lots. The matter was referred to Byron Roberts, as referee. Mr. Roberts heard the parties, and made a report, but there being some technical objection to the report, it was, by consent of both parties, set aside. Whereupon, the matter was again referred to Mr. Roberts, the court, at the time, making an order directing the referee how to proceed to ascertain the amount of taxes, penalties, costs, and interest due from the plaintiff, the successful party in the suit, to the defendant. The referee again heard the parties, and made a report, which is complained of by the plaintiff here. The insufficiency of the record renders it impossible for us to investigate the findings of the referee. The most we can do is to examine the order of the court, which furnishes the basis for the findings of the referee, and refer to certain offers of the plaintiff to make certain proof, which offers are contained in what purports to be a bill of exceptions. The plaintiff claims in his brief that these offers were rejected by the referee; but the record shows that they were received by the referee, and the record is controlling; but a glance at the offers shows that they were not made in accordance with any rule for the introduction of evidence. There was no witness produced, sworn, and questioned by whom it was proposed to make the proof offered, nor was any records produced, identified, or offered, by which the proof was to be made. There was nothing but a bare statement by the party of a set of conclusions that he said he could prove. Such statements are not offers to prove anything. An offer to prove must be supported by a witness, or record, or some form of evidence, by which the offer can be made good. The plaintiff complains of the order of the court. He says the court directed the referee to find when the action of ejectment for the lots was decided, and says that a decision of the ejectment suit had nothing to do with the question of taxes. That she is entitled to 20 per cent. interest on sums paid up to the time when the amount of taxes is found by the court, without any regard to the decision of the ejectment suit, or the settlement of the title to the lots. The contention of the plaintiff below is that, after the decision of the ejectment case, the rate of interest on the sums paid is 7 per cent. This is the view the court took of it, in making the order complained of. We think the court was right, and that after the decision against the defendant below, on the question of title to the lots in litigation, if for any reason the amount of taxes is not immediately ascertained, the rate of interest thereafter is but 7 per cent.

This seems to have been the real difficulty in the case. It is therefore recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 39)

STORCH v. HARVEY *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

RENEWAL OF LEASE—EXERCISE OF OPTION.

1. In an action to recover rent for the use of real estate, there was a written lease "for the term of one year, with the option of the second party to keep said premises three years, if so desired, at the same rate of rent as the first year." The lessee occupied the premises and paid rent for the same about one year and five months, and the principal question tried was whether the lessee elected to exercise his option and hold over the year under the written lease, or was holding under another and different lease claimed by the lessee to have been entered into just prior to the expiration of the year. The jury found that a new lease was made. *Held*, that there was sufficient testimony to sustain the finding, and that it was not necessary that the new lease should be in writing.

2. Where the defendant in a case has testified, and the plaintiff, who had previously taken defendant's deposition, introduces and reads a portion of the same relating to a certain transaction with a view of contradicting the testimony given by defendant on the trial, it is not error for the court to permit defendant to read other parts of the deposition which related to the same subject or transaction.

(Syllabus by the Court.)

Error from district court, Atchison county; W. D. GILBERT, Judge.

*Hudson & Tufts*, for plaintiff in error. *W. W. & W. F. Guthrie*, for defendants in error.

JOHNSTON, J. George Storch brought this action against A. B. Harvey & Co., to recover \$493.95, alleged to be due as rent for a store building in Muscotah. A written lease was executed on February 6, 1884, "for the term of one year, with the option of the second party to keep said premises three years, if so desired, at the same rate of rent as the first year." The rent agreed to be paid was \$282 a year, in monthly installments of \$23.50. The defendants went into possession of the premises, and continued to use the same until July 1, 1885, paying rent up to that time. The possession of the premises was then surrendered, and the property was leased to others, and the rent was paid to and received by plaintiff. The plaintiff claims that the defendants, by occupying the building beyond the year stipulated in the lease, exercised their option to hold it for three years, and were liable for the rent under the terms of the lease for the full time. On the other hand, the defendants claim that they only held the property under the lease for the year specified, when they elected not to exercise the option to hold longer under the lease; that they desired the use of the building for a short time after the expiration of the year, and until they could complete a building which they were about to erect for their own use; and that prior to the expiration of the year they entered into another con-

tract with plaintiff to lease the building temporarily, at a rental of \$23.50 per month, for such time as they desired to use it. The case was tried with a jury, which adopted the theory of the defendants, and gave a verdict in their favor. The plaintiff complains of the result, and assigns numerous grounds of error; but the real question involved, and which was submitted to the jury, was whether a second contract was made, as the defendants claim.

It is conceded that the defendants surrendered the possession of the property on July 1, 1885, and that they paid the rent for the term of one year, and also at the rate of \$23.50 per month for the time which they held it beyond the year. The rent for the fractional month from June 6, 1885, to July 1, 1885, was \$19.50, which was paid by defendants, and accepted, and no further demand for rent was made until December 6, 1887, which was 10 months after the expiration of three years. The testimony of Harvey was to the effect that he went to Storch about a month previous to the expiration of the term, and notified him that they would not hold the premises under the lease beyond the term; and at the same time entered into another contract with him, by which they were to hold the premises at a rental of \$23.50 per month until their own building was completed. They proceeded with the erection of their own building, a fact well known to plaintiff's agent, and finished it on July 1, 1885, when they moved their goods over from the plaintiff's building, and rent was then accepted by the plaintiff for the actual time which defendants occupied the premises. There is also testimony tending to show that plaintiff accepted the possession of the premises, and let the same to others, taking compensation therefor. If the defendants had held over the term without declaring their purpose, it might be taken as evidence that they had elected to exercise their privilege, and hold the lease for the additional period of two years, under the terms of the lease; but the jury have found, upon sufficient testimony, that defendants were occupying the premises, after February 6, 1885, under a new and independent contract. It was the duty of the lessees, if they desired to continue under the lease, to give prompt notice of their purpose; but as they did not desire to continue the lease, no election was required. However, if a notice had been necessary, it was given in good time, and accepting defendant's testimony, as we must, the exercise of the option was not a mere mental operation of the defendants, unknown except to themselves, but they made a new contract, which leaves no room for contending that the further occupation of the premises indicated an intention of the defendants to hold under the original lease.

Plaintiff seems to contend that a writing was necessary between the parties, in order to change the terms of the lease, or the conditions under which they continued in possession of the premises. There is no change of the original lease. It terminated at the end of the year, unless the defendants desired to and did elect to ex-

tend it. They did not desire to exercise this privilege, and so notified the plaintiff; and the new lease was for so brief a period that it was unnecessary to commit it to writing.

Considerable complaint is made of the rulings of the court in the admission of testimony; but we find no such errors as would justify the overturning of the verdict. The agency of McLain is sufficiently shown to warrant the introduction of testimony of what was said and done by him in connection with the leasing of the premises. He resided in Muscotah, where the property was situated, and was invested with authority to care for the property, and to collect the rents therefor. The second contract leasing the premises, however, was made directly with the plaintiff himself. The deposition of one of the defendants had been taken in advance of the trial, and after this party had testified at the trial the plaintiff read a portion of the deposition which he had given, with a view of contradicting him, and inquired of him if he had so testified. The defendants then, over the objections of the plaintiff, read additional portions of the deposition which related to the same subject; and of this they now complain. It would be manifest injustice to introduce a portion of the testimony of a witness on any subject, without allowing the introduction of all that was said by the witness on that subject. The court committed no error in admitting the other answers or statements of the witness concerning the same transaction.

The ruling of the court on the giving and refusal of instructions is a subject of complaint; but we find no prejudicial error, and think that the charge given fairly presented the case to the jury. The findings of the jury appear to be sufficiently definite, and these answer some of the numerous objections urged against the rulings on the testimony. The real, and in fact about the only, question in the case is one of fact, as to whether a second contract was made, and upon this there is a sharp conflict in the testimony; but the verdict of the jury settles that conflict in favor of the defendants, and we find no sufficient ground for disturbing the verdict. The judgment will be affirmed. All the justices concurring.

(44 Kan. 741)

#### STATE INS. CO. v. CURRY.

(*Supreme Court of Kansas.* Dec. 6, 1890.)

#### INSTRUCTIONS.

In the absence of the evidence, or any statement of its purport, it cannot be said that an instruction requested by one of the parties, however correct as an abstract statement of the law, was applicable to the case, or that its refusal was material error.

(*Syllabus by the Court.*)

Error from district court, Butler county; A. L. L. HAMILTON, Judge.

W. M. Duff and Thomas H. Bain, for plaintiff in error. G. P. Aikman, for defendant in error.

JOHNSTON, J. This was an action brought by the State Insurance Company against William Curry to recover \$33.50,

alleged to be due upon a promissory note executed by Curry on December 31, 1885, in payment of a premium on a policy of insurance. The answer of the defendant was that there was a failure of consideration; that the company had not complied with the laws of the state of Kansas; and that the policy issued to Curry by the company was not in accordance with the agreement of the parties. The company brings the case to this court, alleging that the district court erred in not giving certain instructions which it requested.

The objection to the ruling of the court is not available, for the reason that neither the evidence nor any statement of its purport is preserved in the record. In the absence of the evidence, it cannot be said that an instruction, however correct as an abstract statement of the law, was applicable to the case, or that its refusal was material error. *Auld v. Kimberlin*, 7 Kan. 601; *Town of Leroy v. McConnell*, 8 Kan. 273; *Head v. Dyson*, 31 Kan. 74, 1 Pac. Rep. 258; *Commissioners v. Boyd*, 31 Kan. 765, 3 Pac. Rep. 523; *Stetler v. King*, 43 Kan. 316, 23 Pac. Rep. 558. The judgment of the district court will be affirmed.

All the justices concurring.

(45 Kan. 43)

**SEATON V. SMITH et al.**

(*Supreme Court of Kansas*. Dec. 6, 1890.)

**RECEPTION OF VERDICT—ABSENCE OF COUNSEL.**

Where, during the progress of a trial, and after the jury had retired, counsel for defendant asks permission of the judge to leave the court-room and go to his law-office, with the understanding that the judge is to send a bailiff for him, when the jury returns into court, and the judge fails to send word to counsel, and receives the verdict of the jury in his absence, and that of the defendant, and the verdict is read aloud to the jury, and no dissent made to the question as to whether it is their verdict, and the jury is not polled, *held*, that such omission upon the part of the trial judge is not such an error as will cause a reversal of the judgment.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Harvey county; L. Houk, Judge.

*Brown & Kline*, for plaintiff in error. *Bowman & Bucher*, for defendants in error.

**GREEN, C.** This case was appealed from justice's court to the district court of Harvey county, where it was tried by a jury, and a verdict rendered for \$33 for plaintiffs below. The only error relied upon is the failure upon the part of the trial court to send a bailiff for the counsel for defendant in the court below, when the jury returned into court with a verdict. It appears from the record that, after the jury had been out for a few hours, the counsel who had charge of the case for the defendant below made an arrangement with the court whereby he was permitted to retire from the court-room and go to his law-office, and that he was to be called by a bailiff when the jury had agreed upon a verdict. This, it is claimed, the court failed to do. When the jury did come into court with a verdict, the same

was received, in the absence of the counsel, and the jury discharged, without giving the defendant any opportunity to poll the jury. Was this error? The record discloses the fact that the verdict was received by the court, read aloud in the presence of the jury by the clerk, and after such reading the court inquired if that was the verdict of each and all of the jurymen, to which the jury made no dissent; but the jurymen were not polled. Ordinarily, it is the duty of counsel, in charge of a case upon trial, to remain in the court-room until its final disposition. It was a matter of courtesy, upon the part of the trial judge, that permission was given to counsel to retire from the court-room. It was extended without the knowledge or consent of the other parties to the action. It could hardly be claimed that it was a part of the judge's duties to send for counsel when his presence was necessary. It had doubtless escaped the judge's mind, in the press of his official duties, that he was to dispatch a messenger to counsel, upon the return of the jury with a verdict. It being a matter outside of the duties of a judge, and made solely for the convenience and accommodation of counsel, we do not think the plaintiffs below should be obliged to try the case a third time for this omission upon the part of the trial judge to notify the counsel. There is no showing made that the defendant below was in any wise wronged, or that any different result would have been reached. It is possible that the jury could have been polled if counsel had returned to the court-room in a reasonable time. He simply retired upon the promise of the judge to send word to him. This he omitted to do, and, it being a favor extended to counsel alone, we think the case should not be reversed for this oversight of the judge, and the judgment should be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(45 Kan. 17)

**TAYLOR V. MINTON et al.**

(*Supreme Court of Kansas*. Dec. 6, 1890.)

**RIGHTS OF EXECUTORS INTER SE.**

One executor cannot sue his co-executor for money or property in his hands belonging to the estate of the deceased.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Pratt county; S. W. Leslie, Judge.

*J. F. King*, for plaintiff in error. *B. E. Johnson*, for defendants in error.

**STRANG, C.** Action on a promissory note. Martin Taylor and E. C. Minton were executors of the estate of Samuel Taylor, deceased. Minton did most of the business, and handled the money, which he deposited in his own name in a bank. Some time before the estate was settled, and the administration closed up, Taylor and Minton looked over Minton's account as executor, and it was found that Minton had used for himself \$120 of funds belonging to the estate. To make the

amount good, he made his promissory note to Martin Taylor, his co-executor, but made it to Taylor individually, instead of to him as executor. The other defendant, E. McFeeters, signed the note with Minton. When the note became due Minton failed to pay it, and Taylor brought an action in his own name against Minton and McFeeters. The case was commenced before a justice of the peace, where the plaintiff filed the note as a bill of particulars. The defendants failed to appear, and judgment was rendered against them by default. Defendants then appealed to the district court, where the case was tried by the court and jury without any further pleadings, resulting in a verdict for defendants. Motion for a new trial. Motion overruled. The question presented to this court is raised on the instructions of the court to the jury, which are as follows: "(1) You are instructed that the law implies that every promissory note that is made and delivered was given for a good and valuable consideration, and in this case the burden of proof is upon the defendants to establish, by a preponderance of the evidence, that the note in question was given without consideration passing from plaintiff to defendant E. C. Minton; and, unless defendants have done this, the jury should find for the plaintiff such sum as you find is due and unpaid on said note. You are further instructed that the want of consideration destroys the validity of a note in the hands of the payee, and this without regard to the good faith of the transaction in which the note was given; and in this case, if the jury believe from the evidence that the note was given without any good or valuable consideration passing from the plaintiff individually to the defendants, or one of them, your verdict should be for the defendants. (2) The plaintiff in this case is suing in his individual capacity, and not as a representative of the estate of Samuel Taylor, deceased. All evidence in relation to the consideration of account of defendant Minton with said estate is withdrawn from your consideration; and, in order to find for the plaintiff in this case, you must believe from the evidence there was a good and valuable consideration passing from the plaintiff individually to the defendants, or one of them, for which said note was given." The defendant Minton admitted that he was short in his accounts with the estate of Samuel Taylor, deceased, at the time he gave the note, in the sum of \$120, and that he gave the note to Martin Taylor to make good his account with the estate, but denied that he ever owed Martin Taylor anything. The case seems to have been treated by the district court as one between Martin Taylor and the defendants, without any regard to the representative capacity of either Taylor or Minton. Viewing the case within these limits, there seems to be no serious error in the instructions of the court. But it is difficult to refrain from looking beyond these narrow limits, since, the moment the evidence appears, it becomes apparent that Martin Taylor took and holds the note for the use of his father's estate. All the evidence on

both sides proves this. Looking at the case in the light of the real position of the parties, Taylor and Minton, and treating them as co-executors, as, under the evidence, they were, both at the time the note was given, and at the time of the trial, the action cannot be maintained. Being co-executors, the possession of the funds of the estate by either is the possession of the other; the possession being in law a joint one. Funds in the hands of Minton belonging to the estate of which he and Taylor were co-executors, if transferred by him to Taylor, are still in the joint possession of both. The giving of the note by Minton to Taylor did not cancel Minton's engagement to the estate. He was still liable to the estate for the money of the estate that had reached his hands. He might have been required by the probate court to turn it over for distribution without regard to the note. Nor did the receipt of the note from Minton charge Taylor with the money the note was intended to represent, so long as the money actually remained in Minton's custody. Notwithstanding the note, until the estate was settled up, or the probate court required him to turn over the money for distribution, Minton had a right to the custody thereof. If the note could be treated as a part of the assets of the estate, Minton had the same right to the custody of it that Taylor had, and the possession of the note by Taylor was, in law, equally the possession of Minton. The statute provides a simple and direct method whereby funds in the hands of an executor may be released from his custody for the benefit of the creditors or distributees of the estate. It is therefore recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(44 Kan. 721)

TILFORD *et al.* v. CITY OF OLATHE *et al.*  
(*Supreme Court of Kansas.* Dec. 1, 1890.)

MUNICIPAL CORPORATIONS—ANNEXATION OF FARMING LAND.

Farming land adjacent to a city of the second class, which has been platted into blocks and lots, may, by ordinance, be annexed to such city. *Following City of Emporia v. Smith*, 42 Kan. 433, 22 Pac. Rep. 616.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Johnson county; J. P. HINDMAN, Judge.

*John T. Little*, for plaintiffs in error. *S. T. Seaton*, for defendants in error.

GREEN, C. This action was commenced in the district court of Johnson county, to perpetually enjoin and restrain the city of Olathe from exercising any authority over certain territory which the city had, by ordinance, annexed to and included within its corporate bounds; and also to restrain the city assessor from assessing the annexed territory for the year 1888. The injunction was denied in the court below, and the plaintiff in error brings the case here for review. The case was tried



in the district court upon an agreed statement of facts, which showed that the annexed territory had been platted as "Stevenson Place," and duly acknowledged, and that such plat had been filed in the office of the register of deeds of Johnson county, and that the territory included within Stevenson place was adjacent to the city of Olathe. The facts in this case brings the real question in controversy within the rule laid down in the case of *City of Emporia v. Smith*, 42 Kan. 433, 22 Pac. Rep. 616, where this court held that owners of farming land that lies adjacent to a city of the second class, who voluntarily subdivide their adjacent lands into blocks and lots, and thus create the conditions upon which cities of the second class are authorized to make their subdivisions a part of the city, cannot defeat such annexation by a claim that the extent of their homestead is reduced to one acre, without their consent. We see no distinction between the case at bar and the case above, and we deem it unnecessary to enter upon any further discussion of the homestead right which was claimed in that case, as well as in this, and content ourselves by recommending an affirmance of the judgment in this case upon the authority of that case.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 101)

#### STATE V. ALTEN.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

##### INTOXICATING LIQUORS—ILLEGAL SALES.

1. In a prosecution for selling intoxicating liquor, the state elected to stand for trial upon each of three counts on sales made as testified to by four persons, which the defendant insisted constituted but one sale. A conviction upon each count followed, but the court set aside the conviction as to two of the counts, and approved it as to the third. *Held*, that the court, in overruling the verdict as to two counts and sustaining it as to the third, did not trench on the province of the jury, and, as there was sufficient testimony to sustain the third, the defendant has no cause to complain.

2. The evidence examined, and *held* to be sufficient to show that the liquor sold was intoxicating.

(*Syllabus by the Court.*)

Appeal from district court, Riley county; R. B. SPILMAN, Judge.

*Green & Hessin*, for appellant. *L. B. Kellogg*, Atty Gen., and *F. L. Irish*, for the State.

JOHNSTON, J. This is an appeal from a conviction of Charles Alten, who was charged in 17 counts of an information filed against him for selling intoxicating liquors. He was found guilty on 7 counts, but the court set aside the conviction as to 2 of the counts, and approved it as to the others. The defendant sold cider to numerous persons, charging them at the rate of 25 cents a bottle and \$1 a gallon for the same. The contention was, and is, that the liquor sold was not intoxicating; but a reading of the record discloses sufficient evidence to sustain the verdict. One witness says, "it intoxicated us to some extent," and that he "felt pretty good and bolsterous." Another witness said, "it

kind of livened me up a little so I could feel it," and that "it intoxicated me a little," and made him feel like singing songs. Another testified, "it made me intoxicated, — kind of tipsy." Another stated that it affected him about the same as the drinking of whisky did. And there was still another who said it made him "dizzy-headed." There is considerable more testimony of a like character in the record, and, although defendant produced testimony tending to show that the liquor sold was not an intoxicant, we are inclined to think that the weight of evidence is with the state. At any rate, there is sufficient to uphold the verdict that has received the approval of the trial court. *State v. McLain*, 43 Kan. 439, 23 Pac. Rep. 651.

A further claim is made as to the action of the court in sustaining the motion for a new trial as to the sixteenth count, and overruling it as to the fifteenth and seventeenth counts. The state was required to elect upon which counts of the information it would stand for trial, and among others elected to stand upon the three counts last named. The evidence upon which the state relied for conviction in these three counts was that of Charles Ryan, W. Stevens, James Mallon, and John Mallon. It is claimed that the testimony of these witnesses shows that while all obtained liquor from the defendant, yet that it only constituted a single transaction and sale, and that the court in determining the motion decided that the charge in the sixteenth count was a sale, and that those in the fifteenth and seventeenth counts were not, and in that way usurped the province of the jury in determining the guilt or innocence of the defendant. The objection is not good. The state elected to stand upon the sixteenth count, and there is sufficient evidence to sustain the finding of the jury thereon. It is unnecessary to examine the question of whether there was testimony to sustain the finding upon the fifteenth and seventeenth counts, as the state is not complaining of the rulings made, and the defendant cannot complain of a decision in his favor. The court did not trench upon the functions of the jury, because the jury had already found the defendant guilty upon the sixteenth count, and the only question to be determined is whether the jury was justified in finding the verdict of guilty upon that count. This being sufficient, the conviction must stand. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 99)

#### CALVERT V. WHITMORE.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

##### ELECTIONS—CONTEST—NAMES OF CANDIDATES.

If, for a certain office, there is but one person running of a given name, say the name of G. L. Calvert, he should be permitted to show, in a proper action brought therefor, that ballots cast bearing respectively the names "Calvert," "A. L. Calvert," and "J. C. Calvert," were meant and intended by the voters so casting them to have been cast for G. L. Calvert.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Original proceeding in *quo warranto*.

*J. W. Lewis and Bagley & Andrews*, for plaintiff. *D. Overmyer and W. C. Webb*, for defendant.

STATE v. ROMAIN *et al.*

(*Supreme Court of Kansas. Dec. 6, 1890.*)

## LARCENY—EVIDENCE—COLLATERAL CRIMES.

1. At the trial of two persons charged with the larceny of a load of wheat, it is not error for the trial court to reject evidence tending to show that the father of one of the persons charged tried to hire other persons to haul the wheat to town, and declared that he had hired the prisoners to do so.

2. It is never permitted the state to attempt to prove collateral crimes, either by the cross-examination of a defendant or by evidence offered in chief, but a mere passing reference to other crimes in the course of a cross-examination is not considered prejudicial error in a case where on the whole record there is no room for doubt as to the guilt of the defendants.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Appeal from district court, Russell county; *W. G. EASTLAND*, Judge.

*L. B. & M. J. Beardsley and David Rathbone*, for appellants. *L. B. Kellogg*, Atty. Gen., and *G. W. Holland*, for the State.

SIMPSON, C. This is an original action in this court. The petition alleges that the plaintiff, *G. L. Calvert*, is and was a resident of Itasca township, in Sherman county, on the 1st day of November, 1889; that at the regular election in November, 1889, the plaintiff and defendant were candidates for the office of justice of the peace in and for said township; that the defendant, *Charles W. Whitmore*, received 159 votes, and that the plaintiff received 157 votes; and, in addition to the 157 perfect ballots that were cast for the plaintiff, the following imperfect votes were cast: One for *Calvert*, one for *A. L. Calvert*, and one for *J. C. Calvert*. He further alleges that the three ballots cast bearing respectively the names of "*Calvert*," "*A. L. Calvert*," and "*J. C. Calvert*," were meant and intended by the voters so casting them for this plaintiff, *G. L. Calvert*, and in truth and in fact were so voted for plaintiff for said office; that in erasing the name of *Charles W. Whitmore*, and writing instead thereof the name of the plaintiff on said ballots, the persons preparing the same meant and intended to write on each of said ballots the name of *G. L. Calvert*, but by mistake wrote the names as aforesaid; that, prior to said election, the electors of said township met in mass convention, and nominated, as candidates for justice of the peace, *W. K. Brown*, *Charles W. Whitmore*, and this plaintiff, *G. L. Calvert*, and that these three persons were the only candidates for said office at said election; that, at the time of the election, this plaintiff had an office in the town of Goodland, in said township, and that no person bearing the name of *A. L. Calvert* or *J. C. Calvert* resided in said township, and that the only other person residing in said township bearing the name of *Calvert* was a farmer, residing on a claim in the most remote corner of the township, and who was not a candidate, and who was entirely unknown to the great body of the electors of said township; that the names of the electors casting the three ballots above named are known to the plaintiff, and are ready and willing to testify that said ballots bearing the names of "*Calvert*," "*A. L. Calvert*," and "*J. C. Calvert*" were so prepared and voted by mistake, but were in fact cast for the plaintiff for justice of the peace. He then alleges the canvass of the vote, the issuance of a certificate of election to defendant, that the plaintiff filed his oath of office, and offered an official bond for approval, demanded the possession of the office, etc. To this petition a demurrer is interposed, because it does not state a cause of action. We think the petition contains every necessary allegation to state a good cause of action on the part of the plaintiff, and therefore recommend that the demurrer be overruled, and the defendant allowed 30 days to answer.

PER CURIAM. It is so ordered; all the justices concurring.

v.25p.no.5—15

SIMPSON, C. The appellants were convicted at the March term, 1890, of the district court of Russell county, of stealing 54 bushels of wheat of the value of \$23.76. They appeal to this court, and ask a reversal of the judgment for various reasons. They admitted in open court that they hauled the wheat in the night-time to town, and it is in evidence that they tried to sell it. In fact, without the admission, the proof of the taking was conclusive. By way of defense they alleged that one *Jesse Clough*, the father of one of the defendants, hired them to haul the wheat to town. As an excuse for doing so in the night-time, they claim that *Jesse Clough* said that the wheat was mortgaged. The pretended agreement with *Jesse Clough* is testified to by his wife, the mother of one of the defendants, *Clough* himself not being produced, or his absence satisfactorily accounted for. The evidence of the defendants, with that of *Mrs. Clough*, constituted a good defense, if true; but it is evident that the jury did not believe in the truth of the story. Complaint is made of the cross-examination of the defendant *Romain*, and it does seem that the extreme limit was reached in that direction. To what extent a defendant can be cross-examined, as to his previous residence and history, is a matter largely in the discretion of the trial court, and dependent on the developments of the trial. We decline to say in this particular case that such discretion was abused. Complaint is also made that the state attempted to show the commission of other crimes by the defendant *Romain* prior to the one with which he was charged at this trial. The only recitation in the record that approaches such an attempt is certain questions asked of *Romain* on cross-examination. The inquiry as to whether or not he had brought another load of wheat into town and sold it seems to have been provoked by his own statement on his examination in chief, and in our view is not prejudicial.

The other inquiry, as to whether or not he had not taken two chickens from a

farmer as they were driving along the road from the house at which they had taken the wheat, on their way to town, ought not to have been permitted, and yet it was a trivial matter; and, in view of our strong conviction that the verdict of the jury is most amply sustained in every respect, we will not reverse for such an immaterial error.

Objection is made to the ruling of the trial court excluding the evidence of Duffy, by whom the defendants sought to prove that Jesse Clough offered to sell or mortgage this particular wheat to him. The defendants sought also to prove by one Clarkson that prior to December 9th (the day the wheat was taken) Jesse Clough tried to hire Clarkson to haul the wheat to town, and afterwards told Clarkson that he had hired defendants to do so. These offers were rejected by the court, and this is alleged as material error. It is true that in an action for the possession of personal property the declarations of a party thereto, as to his ownership while in possession, accompanying some principal fact, which they serve to explain and qualify, are sometimes said to be a part of the *res gestæ*, and are admissible in evidence. (*Relley v. Haynes*, 38 Kan. 259, 16 Pac. Rep. 440;) but this rule has no application to this case. Clough is not a party. The title to the wheat is not being determined as between him and some other claimant, and his declarations are hearsay to all intent and purpose. There was no error in excluding this class of declarations. Neither was there error in excluding the evidence proposed to be given by Knapp that Romain told him that he was going to haul wheat for Jesse Clough. This was a self-serving declaration of Romain, and could not be given to the jury in this manner. There is no force in the criticisms upon the instructions of the trial court to the jury. Taking them all together, they stated every element constituting the crime. The defendants were given the full benefit of every presumption of innocence. The record shows the guilt of the defendants, and does not show such prejudicial errors as to entitle them to another trial. We recommend that the judgment of conviction be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 31)

GILBERT *et al.* v. BOARD OF EDUCATION OF THE CITY OF NEWTON.

PEARSON v. SAME.

(*Supreme Court of Kansas. Dec. 6, 1890.*)

SCHOOL TREASURER—LIABILITY FOR SCHOOL FUNDS—ACTION ON BONDS—LIABILITY OF SURETIES.

1. Where a treasurer of the board of education of a city of the second class gives an ordinary official bond upon taking the possession of his office, and afterwards upon the order of the board of education gives an additional bond with substantially the same condition as the first bond, but with different sureties, and when his term of office expires he fails to deliver to his successor in office the balance of the school fund due to the school corporation, and the board of education commences an action therefor against him and his sureties on both bonds, *held*, that two causes of action are not improperly joined.

2. In such a case, as the board of education is the general representative of the school organization as a corporation, *held* that it, and not the successor in office of the aforesaid treasurer of the board of education, is the proper party to commence the action as plaintiff.

3. In such a case, where the first bond after it was given became insufficient, and the board of education ordered that the treasurer should give another and an additional bond, which he did, *held*, that there was sufficient consideration for the giving of such additional bond.

4. In such a case, where the treasurer of the board of education was also the general manager of a private corporation, and had the control of its funds as well as of the school funds, and he deposited its funds and the school funds together in a certain national bank, in the name of the private corporation, with the knowledge and consent of the officers of the bank, such funds to be subject to his control, and to his checks for schools and school corporation purposes, as well as for the private corporation purposes, *held* that, although the treasurer as the general manager of the private corporation may have drawn out the funds in the bank so as to cause a deficit in the amount of the school funds deposited in the bank at the time of the execution of the second bond, still, as more than enough moneys were afterwards deposited in the bank by the private corporation and its general manager to make good such deficit, such deficit was paid and satisfied; and, for any other deficit in the school funds occurring subsequently to the execution of the second bond, the sureties on the second bond as well as the sureties on the first bond are liable.

(*Syllabus by the Court.*)

Error from district court, Harvey county; L. HOUK, Judge.

*Brown & Kline* and *Bowman & Bucher*, for plaintiffs in error. *Ady & Nicholson*, for defendant in error.

VALENTINE, J. On January 30, 1889, the board of education of the city of Newton commenced an action in the district court of Harvey county against G. W. Holmes, an ex-treasurer of such board, and his sureties on two certain bonds, to recover \$3,857.14, an alleged balance due from Holmes as said ex-treasurer, which he had not at any time accounted for. The defendants W. G. Pearson, who signed only the first of the aforesaid bonds, and Fox Winnie, A. B. Gilbert, Joseph Gerson, and McKinney Smith, who signed only the second of such bonds, and some of the other defendants, demurred to the plaintiff's petition upon the grounds—*First*, that several causes of action were improperly joined in the action; and, *second*, that the petition did not state facts sufficient to constitute any cause of action. The demurrers were all overruled. The record shows that Pearson then answered, that a trial was afterwards had upon such answer, and that judgment was rendered against him for the amount stated in the plaintiff's petition; but the particulars are not stated. The defendants Winnie, Gilbert, Gerson, and Smith also answered, setting forth in their answers—*First*, a general denial; *second*, that the bond which they signed, the second bond, was executed without any consideration; *third*, that the default of Holmes, if any, occurred prior to the execution of the second bond, and that all the school moneys which Holmes had at the time of the giving of the second bond, or which were afterwards received by him, were properly

applied and accounted for. A trial before the court and a jury was afterwards had between the plaintiff and these four defendants, and judgment was rendered in favor of the plaintiff and against these defendants for the sum of \$3,939.87, with interest and costs. The defendant Pearson, for himself, has filed in this court a petition in error for the purpose of reversing the order and judgment of the district court as against him. The defendants Winnie, Gilbert, Gerson, and Smith have filed another and a separate petition in error in this court for the purpose of reversing the order and judgment of the district court as against them; and these two petitions in error we shall now proceed to consider. The facts of this case briefly stated are substantially as follows: On April 5, 1887, G. W. Holmes was elected treasurer of the board of education of the city of Newton, a city of the second class, and on April 28, 1887, he qualified by taking the oath of office, and by giving a proper bond in the sum of \$20,000, with the defendant Pearson and others as his sureties, and he at once entered upon the discharge of his duties as such treasurer. On October 3, 1888, upon the order of the board of education, he gave another bond in the sum of \$30,000, with the defendants Winnie, Gilbert, Gerson, Smith, and one other as his sureties. On December 17, 1888, he resigned his office as treasurer of the board of education. Afterwards a successor was duly appointed and qualified, but Holmes failed and refused to pay over to his successor in office the sum of \$3,857.14, the balance due to the school corporation; and he made default in that amount. During the time while he was treasurer of the board of education he was also the general manager of the Kansas Investment & Guaranty Company, and had the control of its funds; and he also acted for and had the control of funds belonging to other corporations, and also had funds of his own. During that time he deposited in the First National Bank of Newton all the funds of which he had the control, whether they were his own or belonged to the public school fund, or belonged to some one or more of the other parties for which he did business, and he deposited the same in the name of the Kansas Investment & Guaranty Company. This was all done with the knowledge and the consent of the officers of the bank.

1. It is claimed that, in this action, two causes of action were improperly joined, —one upon the first bond, and the other upon the second bond. There is some plausibility in the argument of the plaintiffs in error attempting to sustain this claim, and yet upon the peculiar facts of this case, and the authorities cited, we think the claim is not tenable. In the first place, the plaintiff sets up the facts of its case, and asks for relief as though the entire facts of the case could constitute only one cause of action. In the second place, it alleges only one default on the part of the treasurer, Holmes, and that default occurred after the second bond was given, and indeed not until after Holmes had resigned his office; and this default is the only one for which the plaintiff has sought

to recover, or has recovered in this action. Besides, the condition of the two bonds were, and are, substantially the same; and all the sureties on the two bonds are equally liable for any and all the defaults made after the second bond was executed, and for the only default for which the plaintiff asked to recover, or did recover, any judgment; and if any one of the sureties should pay more than his proper share in making this default or the judgment good, all the other sureties on both the bonds would be equally liable for contribution. Under the authority of the following cases, we do not think that several causes of action were improperly joined in this action: *Holan v. School-Dist.*, 10 Neb. 406, 6 N. W. Rep. 472; *Powell v. Powell*, 48 Cal. 234.

2. It is further claimed that this action is not prosecuted by the proper party as plaintiff. It is claimed that the treasurer of the board of education, the successor to Holmes, the person who is entitled to the custody of the money when obtained, should be the plaintiff in the action instead of the board of education, which, it is claimed, has no right to the custody of the money. Now the board of education of a city of the second class, as the plaintiff in this action is, is the general representative of the legal organization created in such cities for the purpose of carrying on and conducting the public schools. Section 4 of chapter 122, art. 11, of the Laws of 1876 reads as follows: "The public schools of each city organized in pursuance of this act shall be a body corporate, and shall possess the usual powers of a corporation for public purposes by the name and style of 'The Board of Education of the City of —', of the State of Kansas;" and in that name may sue or be sued, and be capable of contracting and being contracted with, of holding and conveying such real and personal estate as it may come into possession of, by will or otherwise, or as is authorized to be purchased by the provisions of this act." Gen. St. 1889, par. 5726. The board of education is the representative of the corporation, the real party in interest, and the treasurer of the board is not. See, also, Gen. St. 1889, among others, pars. 5731, 5737. See, also, *Coffman v. Parker*, 11 Kan. 9. A school corporation in a city is a school-district.

3. It is further claimed that there was no consideration for the second bond, and this for the reason, as is claimed, that the first bond was all that Holmes was required to give, and that the board of education had no power to require him to give any other further or additional bond. We think this claim is erroneous. In the first place, the bond originally given, while it may have been sufficient at the time it was given, was clearly insufficient when the second bond was given. The first bond was only for \$20,000, while, at the time the second bond was given, Holmes had over \$40,000 belonging to the school corporation in his possession, or under his control; and when the first bond became inadequate, as it did, we think the board of education, as the representative of the school corporation, had

ample authority to require, as it did, that Holmes should give another and an additional bond, as he did. See the sections of the statutes above cited and others.

4. The next thing to be considered in this case has relation to the question whether the default for which the plaintiff recovered in this action occurred, as a fact, prior or subsequently to the execution of the second bond. If it occurred prior thereto, the judgment in this case is evidently erroneous; but if it occurred subsequently, then the judgment is right. It is admitted by the parties that Holmes, in fact, had \$4,467.47 less of school moneys in his hands and in the bank at the time of the execution of the second bond than he ought to have had; but it is claimed by the plaintiff, and we suppose it is a fact, that more than that amount of money other than school money was afterwards deposited in the bank by Holmes and the investment and guaranty company, in the name of the company, in the same manner as the other deposits were made, and that such amount then became, like all the other moneys deposited in the bank by Holmes, subject to the order of Holmes for school purposes, and, therefore, that any deficit which may have existed at any time after that time would be considered as occurring under the second bond as well as under the first, and the sureties on the second bond would be liable for such deficit as well as the sureties on the first bond. It appears that, in all cases when Holmes received school funds, he at once deposited them in the exact form in which he received them in the First National Bank of Newton, in the name of the Kansas Investment & Guaranty Company; but they were at all times afterwards, while they remained in the bank, subject to his checks for schools and school corporation purposes. Hence, as the moneys were absolutely under his control as the treasurer of the board of education, and subject to his checks for schools and school corporation purposes, they must be considered as school moneys; and, as they were actually deposited in the First National Bank of Newton, that bank must be considered as a custodian or depository of the funds for the school corporation. Also as they were deposited in the name of the Kansas Investment & Guaranty Company, with the knowledge and consent of its general manager, Holmes, and with the knowledge and consent of the banking officers, the Kansas Investment & Guaranty Company must also be considered as a custodian or depository of the funds for the school corporation. It was a kind of double or joint custody of such funds by the bank and the investment and guaranty company, and both were liable for such funds,—for their safe-keeping, and for their return or payment whenever called for by Holmes as treasurer of the board of education, or by his successor in office, or by any other person or board legally representing the school corporation, and having the legal authority to call for the same. Holmes and the investment and guaranty company were certainly at all times liable for this money, and therefore, whenever there was any deficit in the school fund caused by

Holmes or the investment and guaranty company drawing the same out of the bank in the name of the investment and guaranty company, any deposit which might be subsequently made by Holmes, or by the investment and guaranty company, would at once inure to the benefit of the school fund, so far at least as to make good any deficit in, or any balance due, such school fund, and would apply instantly in liquidation and satisfaction of such deficit or balance. Therefore, as there was more than enough money deposited in the bank by Holmes and the investment and guaranty company after the execution of the second bond to make up the deficit which existed at the time of the execution of such second bond, we think the sureties on the second bond were liable for any deficit or default which may have occurred or existed at any time subsequent to the execution of such second bond. In all cases where accounts exist between parties, including bank accounts, a cause of action does not exist with reference to each item of the account, but only as to the balance that may be due to one or the other of the parties; and it exists in favor only of that party in whose favor the balance is due. *Waffle v. Short*, 25 Kan. 503; *Tootle v. Wells*, 39 Kan. 452, 18 Pac. Rep. 692. And each new item added to the account, in favor of the person against whom the balance is due, operates as payment or partial payment of such balance; and it will generally operate in payment or partial payment of the oldest item of the account not yet paid or satisfied. *Shellabarger v. Binns*, 18 Kan. 345; 1 *Morse, Banks*, § 355. Hence, as more than one deficit occurred in the school fund, and in the account between the school corporation and Holmes, and the investment and guaranty company and the bank, one of such deficits existing before the execution of the second bond, and the other occurring subsequently thereto, the deposits made in the bank by Holmes and the investment and guaranty company after the occurrence of the first deficit would certainly operate as a payment and satisfaction of that deficit, even if it were made subsequently to the second deficit.

Other questions have been presented by counsel, but we do not think that they require any comment. The orders and judgments of the court below in both the cases which we have been considering will be affirmed. All the justices concurring.

(45 Kan. 22)

CHALLISS V. MAYOR, ETC., OF THE CITY OF ATCHISON.

(Supreme Court of Kansas. Dec. 6, 1890.)

JUDGMENT—RES ADJUDICATA—PRIVIES.

1. The term "privity" denotes mutual or successive relationship to the same rights of property.

2. A judgment rendered upon personal service, not reversed or vacated, affecting real estate, or some interest therein, in favor of a plaintiff and against a defendant, is binding and conclusive between the same parties, and the privies of such parties.

(Syllabus by the Court.)

Error from district court, Atchison county; ROBERT M. EATON, Judge.

This was an action in the court below, brought by Luther C. Challiss against the city of Atchison, its mayor and councilmen, to enjoin them from exercising any corporate jurisdiction or authority over the north half of the north-west quarter of section 7, township 6, range 21, in Atchison county. After the defendant had filed its answer, the case was tried before the court without a jury. The court made and filed the following findings of fact: "(1) That the plaintiff, for more than ten years last past, has been, and still is in part, the owner of the north half of the north-west quarter of section seven, township number six, of range number twenty-one, in the county of Atchison, and state of Kansas, so owning, exceeding the one-half interest thereof, and to such extent interested in said described tract of land. (2) That, for more than ten years last past, the city of Atchison has been a city of the first class, located in Atchison county, state of Kansas, and for many years before had been a city of the second class, and has been incorporated as a city by legislative act on February 12, 1858. (3) Said described 80-acre tract of land adjoins said city of Atchison, as so originally incorporated, on the south thereof; and on February 20, A. D. 1860, George T. Challiss, then the owner thereof, platted the said tract of land as 'Spring Garden Addition to the City of Atchison,' and duly acknowledged it, and on said day caused such plat to be certified, and filed such plat for record in the office of the register of deeds of said Atchison county. Said tract of land is one-half mile long, east and west, by one-quarter of a mile wide, north and south, and was laid off, as platted, into 24 blocks of 28 lots each, with an alley through each block, and streets dividing such blocks. (4) On July 16, 1867, upon written petition theretofore, on June 16, 1867, filed in the office of the county clerk of said Atchison county with the board of county commissioners of said county, signed by said George T. Challiss, W. L. Challis, Luther C. Challis, and James K. Dickson, and verified by their written affidavit thereto attached, representing that they were the owners of a majority of the lots and subdivisions of the said Spring Garden addition, and concerning which they desired action to be taken to have the same declared vacated as such addition, and on said day, by order made therefor, the said board of county commissioners caused due notice of the filing of such petition to be advertised in the Free Press, a daily and weekly newspaper then published in the city of Atchison, in said county, and by public notice posted on the said described tract of land for more than three weeks next following said 16th day of June, A. D. 1867. That said application had been made, and that on July 16, 1867, at 9 o'clock forenoon, the said board of county commissioners would take testimony regarding the occupancy of said described land, and on said day at said time, such notice having been published and posted, and due proof thereof made, said board of county commissioners proceeded to hear the said petitioners, and take testimony upon their

said petition. And thereon, it being duly made to appear to the said board of county commissioners that no inhabitants owning any of the soil of said tract, and dwelling upon any definite pieces or parcels of the land thereof of the quantity of five or more acres in a body, protested against such petition, and no protest being made in such respect, the board of county commissioners found the said petition duly sustained upon the hearing. And thereon said board of county commissioners made its certificate, declaring the provisions of section 1 of chapter 128 of the Laws of A. D. 1864 duly applied to said entire 80-acre tract of land, and thereon did describe the entire portion thereof as constituting the entire said Spring Garden addition as thus expunged; and, upon the said lithographic map of said tract so of record in the office of the register of deeds, and upon such hearing presented to said board of county commissioners for investigation, did denote and mark the said entire Spring Garden addition, as to which the said order of the said board made the application of said section one of said act to apply, and as thereby obliterating the survey of said entire Spring Garden addition. And said board of commissioners, on said day, made its certain order upon the records of the board of county commissioners' proceedings of said county, declaring the provisions of said section one of said act to apply to said entire Spring Garden addition tract of land, and thereon that the survey thereof, as such town-site, had been expunged and obliterated upon the written petition of said named petitioners, duly verified by affidavit, and upon due order therefor of said county board, duly advertised and published in said county, and by public notice posted on said land, and upon the hearing thereon had pursuant to such order and notice. And thereon said board of county commissioners did, on said day, forthwith file a duly authenticated certificate of such action and proceedings had, and description and descriptive map of said Spring Garden addition so declared vacated, in the office of the register of deeds of said county, upon the original record of the said plat and filing thereof of such Spring Garden addition, and did cause to be written across the face of such recorded plat, and duly signed by the chairman of said board and county clerk of said county, as follows: 'Expunged by order of the board of county commissioners this 16th day of July, 1867. GEO. STORCH, Chairman. C. W. RUST, County Clerk,'—and which said record and proceedings and certificate and descriptive map have since remained in full force and of record and on file as so then made. (5) At the time said proceedings were had before said county board, the only occupants of said Spring Garden addition tract were said petitioners, George T. Challis and J. K. Hudson, and a colored man by the name of Mills, and such tract had not been previously occupied to any greater extent; and said George T. Challis occupying one block thereof, and said Dickson occupying two or three lots, and said Mills one lot, and said persons, with said other petitioners,

owning said entire tract, and same not being otherwise improved, nor any public improvements made thereon. (6) After said July, 1867, the owners and occupants of said tract of land denied their liability for city taxes, but the mayor and council of said city continued to cause said tract of land to be taxed in lots and blocks, and as liable to city taxes, up to and including A. D. 1867, while the owners thereof claimed that their said property was in Shannon township, and not in the city of Atchison, and existed as acre property, and not as lots and blocks; and, in about A. D. 1874, said George T. Challiss, one of the owners of interest in said tract, commenced action as plaintiff in this court against M. Quigg, county treasurer of Atchison county, Kan., Chas. Krebs, as county clerk of said Atchison county, and the mayor and council of the city of Atchison, state of Kansas, as defendants, to enjoin and set aside all taxes theretofore, since A. D. 1867, levied upon said property as lots and blocks, or in said city of Atchison, and to enjoin the further levying of taxes by lots and blocks, or as in said city; and, upon issue thereon duly joined, this court did find the issue for the plaintiff as in his petition alleged, and thereon did adjudge and decree that the several defendants, and their successors in office, should be, and therefrom were, enjoined and barred from setting up or exercising any right to so tax said property so as theretofore done, and thereon giving judgment in favor of said plaintiff, and against said defendants, for all costs of said action, and which said judgment was so rendered and entered on December 31, 1875. And thereafter the said city officials of said city for A. D. 1875 and 1876 caused said property to be assessed and taxed by lot and block subdivisions, and as in said city, and thereon said George T. Challiss, as such owner, about A. D. 1876, commenced another action as plaintiff against M. Quigg, county treasurer of the county of Atchison, and the mayor and council of the city of Atchison, state of Kansas, defendants, to enjoin the sale of the property of said tract for such taxes, on the ground that same was not subject to taxation by lot and block subdivision, but as acres only, and not in said city of Atchison, but in Shannon township only, and to enjoin the further assessing of such property by lot and block subdivisions, or as in said city; and thereon, upon issue duly joined, the said action came on for trial on July 25, 1877, and thereupon the court did consider and adjudge as follows: 'Upon due consideration does find alone upon the ground that said property was so assessed and taxed as lots and blocks, and thereon that such taxation for each year, A. D. 1875 and 1876, was unauthorized, illegal, and void for that reason.' And thereon did consider and adjudge that said M. Quigg, as county treasurer, and his successors in office, should be enjoined and restrained from taking any steps for the collection of such taxes, and did give judgment in favor of the plaintiff and against said defendants for costs of suit, and did so render such judgment without deciding upon the question made as to

whether said property was or was not within said city of Atchison. And thereupon the mayor and council of said city of Atchison did not exercise any control or jurisdiction over said territory and the same in any way, and therefrom, until A. D. 1889, said territory and the inhabitants thereof were taxed in Shannon township of said county, and voted therein, and were not taxed, and did not vote as in said city of Atchison, and, in making conveyances of property in said territory, same was described as having been formerly platted and described as in certain lots or blocks of Spring Garden addition, and, in the conveyances of one tract where abutting on street as originally designated on said plat, the description thereof was extended to the center of such original street, and no improvements were made or attempted to be made in said territory by authority of said city, and during all such time the property of such territory was assessed and extended on the tax-roll by description 'as acres and parts of acres in certain localities formerly platted as a part of Spring Garden addition.' (7) In A. D. 1867 the said city of Atchison, as then existing, had a population of five or six thousand people, and increased so that in September, 1888, said city, not counting said Spring Garden addition, had a population of 17,000 to 20,000 people; and additional occupants had been added to said Spring Garden addition tract during the last preceding two or three years, so that the number had increased to from one to two hundred people, mostly residing near together in the north-east corner thereof. (8) On February 28, 1888, the mayor and council of the city of Atchison passed an ordinance, the second section of which provided as follows: 'Sec. 2. Spring Garden addition. The north half of the north-west quarter of section number seven, (7,) township number six, (6,) of range number twenty-one, (21,) in the county of Atchison, and state of Kansas,'—and with a large number of other descriptions, and therein ordaining that the same and each thereof should be added to the city of Atchison, and the limits of said city extended and enlarged so as to include the same, and public notice that the same would be presented to the district court of Atchison county, Kansas, at the next term of said court, was duly given, and a copy of such ordinance, with due proof of such notice being given, was filed in said court on March 30, A. D. 1888, and same remained pending until September 10, 1888, when said court entered its order in the proceedings of said court, 'in the matter of the extension of the corporate limits of the city of Atchison.' \* \* \* It was ordered that the said ordinance be modified and the limits extended and enlarged as designated in said order following, by bringing into said city certain tracts and parcels and pieces of ground adjoining thereto, named and described as follows, to-wit: and then describing as follows as affecting the property in question: 'Spring Garden addition. The north-half of the north-west quarter of section seven, township number six, of range number twenty-one, in the county of Atchison,



and state of Kansas.' The plaintiff took no part in such proceedings, and had no notice thereof other than by the passage of such ordinance, and the publication thereof, and the published notice that same would be presented to the district court, as hereinbefore stated; and said Spring Garden addition tract was not at said time, or ever, circumscribed by platted territory, or as taken into said city. (9) On and after September 10, 1888, the mayor and council of said city assumed to exercise jurisdiction over said Spring Garden addition tract as a part of said city, and caused the building of a string of sidewalk, and the grading of a street, and the erection and support of two public electric lights, and exercised police jurisdiction over such territory, and caused the same to be assessed by the city assessor of said city for taxation for 1889, and return for such assessment was made to the county clerk of said county, and the property of said territory for said year 1889 has been placed on the tax-roll of said county as within the city of Atchison, and city taxes, together with state and county taxes, extended against such property as in said city; and since September 10, 1888, the defendants have in every respect exercised jurisdiction, and treated said territory like other territory of the city of Atchison, subject to the control and government of the mayor and council thereof."

Thereon the court made and filed the following conclusions of law: "(1) That the platting and filing for record of the said Spring Garden addition plat made the same a part of the city of Atchison at the expiration of twelve months therefrom. (2) That the said city of Atchison, being an actually existing city at the time such proceedings were had before said county board, their proceedings for the vacation of said Spring Garden addition were without jurisdiction and null and void. (3) That Spring Garden addition has been a part of the city of Atchison since A. D. 1861, and the ordinance for the annexation thereof, and the order and action of this court thereon, on September 10, 1888, was immaterial, and in no wise affected the *status* of said territory. (4) That said Spring Garden addition was a legal part of the city of Atchison at the commencement of this action; and thereon judgment must be given for the defendants, and against the plaintiff, and for costs of this action." Subsequently, the court rendered judgment against the plaintiff, and in favor of the defendants for all costs. The plaintiff excepts, and brings the case here.

W. W. & W. F. Guthrie, for plaintiff in error. H. C. Solomon, for defendants in error.

HORTON, C. J., (after stating the facts as above.) An ordinance of the city of Atchison which took effect February 29, 1888, attempted to extend the corporate limits of that city so as to include an 80-acre tract adjoining the city, generally known as "Spring Garden Addition," described as the north half of the north-west quarter of section number 7, township number 6, of range number 21, in Atchison county.

On the 14th day of October, 1889, Luther C. Challiss commenced his action to enjoin the official authorities of the city of Atchison from exercising jurisdiction over the real estate. He alleged in his petition that the proceedings of the mayor and council of the city of Atchison, in attempting to extend the limits of Atchison city so as to include Spring Garden addition, were without jurisdiction and void. The trial court, after hearing the evidence, rules that the annexation proceedings of 1888, set forth in the petition, were immaterial, and in no wise affected the *status* of the real estate. If this had been the only conclusion of law made by the court below, the plaintiff would have been entitled to judgment, because the answer of the defendants admitted the passage, approval, and publication of the ordinance complained of, but denied generally all the other allegations of the petition. The district court, however, ruled that by a plat filed on February 20, 1860, the 80-acre tract in controversy became a part of the city of Atchison as Spring Garden addition; that from that date it had always been embraced within the corporate limits of the city of Atchison, and was a part of such city at the commencement of this action. Therefore the prayer of the petition was denied, and judgment rendered in favor of the defendants, and against the plaintiff for costs. It is evident from the record, and especially from the findings of fact of the trial court, that much testimony was presented and considered by the court not clearly embraced within the issues of the pleadings. The pleadings, however, might be considered as amended so as to embrace the findings found by the trial court. It appears from the findings of fact that in July, 1867, the owners and occupants of the 80-acre tract of land denied the jurisdiction of the officials of Atchison city over the real estate, and in 1874 George T. Challiss, one of the owners of the tract of land, commenced his action in the district court of Atchison county against M. Quigg, the county treasurer of the county, and Charles Krebs, the county clerk of the county, and the mayor and council of the city of Atchison, to enjoin and set aside all taxes levied upon the property as lots and blocks since 1867, and, also, to enjoin the further levy of taxes by lots and blocks upon the real estate. On December 31, 1875, judgment was rendered in favor of the plaintiff, and against the defendants, enjoining them from setting up or exercising any right to tax the real estate as lots or blocks. The officials of Atchison city subsequently caused the said real estate to be assessed by lots and block subdivisions as within the corporate limits of Atchison city. George T. Challiss commenced another action in 1876 against the county treasurer of Atchison county, and the mayor and council of the city of Atchison, to enjoin the sale of the real estate for such taxes, on the ground that the same was not subject to taxation by lots or blocks, but by acres only, and not subject to taxation within the city of Atchison, but in Shannon township only, and, also, to enjoin them from further assessing said property

by lots and block subdivisions, or as within the city. On July 25, 1877, judgment was rendered in that action for the plaintiff, and against the defendants, and the court decided that the taxation by the officials of Atchison city for 1875 and 1876 was unauthorized, illegal, and void, and enjoined the county treasurer from taking any steps for the collection of the taxes. After that, the mayor and council of the city of Atchison did not exercise any control or jurisdiction over the real estate in controversy, until after the adoption of the ordinance referred to in the petition. During all that time, the real estate was taxed in Shannon township, and the voters residing thereon voted in Shannon township, and not in Atchison city. There is an inference from the findings of fact that Luther C. Challiss is in privity with George T. Challiss, who recovered the various judgments referred to, but this is not clearly found. It appears that on February 20, 1860, George T. Challiss was the owner of the 80-acre tract of land, and that subsequently he platted it as "Spring Garden Addition." One judgment was rendered on the 31st day of December, 1875, and the other on the 25th day of July, 1877. Luther C. Challiss has been the owner of a part of the 80-acre tract about 10 years. Both of the judgments were rendered more than 10 years before the commencement of this action; one judgment being rendered 14 years before the commencement of this action, and the other 12 years. If the annexation proceedings of 1888 in no wise affected the status of the 80-acre tract, as ruled by the trial court, then the judgments rendered in favor of George T. Challiss, and against the city of Atchison, not having been reversed or vacated, are binding and conclusive against the defendants, not only in favor of George T. Challiss, but also in favor of all in privity with him. If the judgments in favor of George T. Challiss are conclusive, and the annexation proceedings are without force, all of the property owned or claimed by George T. Challiss at the rendition of his judgments cannot be regarded as any part or portion of the city of Atchison, under the platting and records of 1860 or 1861. In this case, this court acts only as a court of appellate jurisdiction, and not as a court of original jurisdiction. The trial court, while deciding that the annexation proceedings of 1888 are immaterial, nevertheless decided against the plaintiff. We shall not pass upon the various questions raised and presented in the briefs which have not been ruled upon by the trial court. It will be time enough to consider these questions when the court below has rendered some decision thereon. Under the circumstances, in order that substantial justice may be done to all the parties, we have concluded it best that a new trial should be granted.

If the plaintiff in this case is in privity with George T. Challiss, who obtained the judgments referred to, or if such judgments in any way protect this plaintiff against the exercise of authority by the officials of Atchison city, then, clearly, the relief prayed for by him must be granted

if the annexation proceedings are immaterial or without any force. We more readily perceive the necessity of a new trial because the evidence introduced by the parties is not embraced in the record, and we cannot very well review supposed rulings of the trial court which are not contained in the conclusions of law, nor apparently anywhere else in the record presented to us. The case will be remanded with directions to grant a new trial. All the justices concurring.

(45 Kan. 66)

**CITY OF GIRARD V. BISSELL.**

(Supreme Court of Kansas. Dec. 6, 1890.)

**PHYSICIANS—LICENSES.**

Section 3 of chapter 40 of the Session Laws of 1881 confers express authority upon cities of the second class to pass an ordinance providing for the levy and collection of a license tax upon doctors, practicing medicine in such cities. Following City of Newton v. Atchison, 31 Kan. 151. 1 Pac. Rep. 288.

(Syllabus by Green, C.)

Commissioners' decision. Appeal from district court, Crawford county; J. S. West, Judge.

Arthur Fuller, for appellee.

GREEN, C. The appellant in this case was tried, and found guilty of violating an ordinance of the city of Girard, which provided for a business license tax upon each and every business, occupation, calling, vocation, and profession, operated, carried on, practiced, or maintained, in said city. The case was first tried before the police judge of the city, and appealed to the district court, where the defendant was again found guilty, and fined in the sum of five dollars. The case was tried to the court upon the following agreed statement of facts: "(1) That the said city of Girard, Kan., plaintiff, is a city of the second class, organized under the laws of the state of Kansas, and has been a city of the second class for more than three years last past; (2) that said defendant, O. J. Bissell, was, on the 11th day of September, 1889, and prior thereto, and upon divers other days between that date and the 1st day of December, A. D. 1889, a resident of said city of Girard, and therein engaged in the practice of medicine, as a physician and doctor, without having paid the license tax, and obtained a license from said city therefor; (3) that said defendant was, at the dates above specified, registered as a physician and surgeon in the office of the clerk of Crawford county, Kan., as follows: Date of registration, May 16, 1889; residence, Girard, Crawford county, Kan.; nativity, American; years practice, 43; in Kansas, 6 years; diploma conferred, March, 1847; college, medical department, Willoughby university, Willoughby, Lake county, Ohio." The appellant challenges the power of the city council to pass such an ordinance as the one under which he was convicted in the court below. Section 804 of the General Statutes of 1889, being section 3 of chapter 40 of the Session Laws of 1881, confers express authority upon the city council, in cities of the second class, to

levy and collect a license tax on doctors. The ordinance in question makes it unlawful for any person to practice medicine, or to follow the profession of physician or doctor of any kind, without first having paid a license tax of \$10 annually. The agreed statement of facts clearly indicates that the appellant comes within the operation of this ordinance. He was engaged in the practice of medicine, as a physician and doctor, and had not paid the license tax.

The question of the authority for such legislation, upon the part of city governments, has long since been settled by this court, and it will not be necessary for us to discuss the matter here. Judge Dillon, in his work on Municipal Corporations, (3d Ed., § 357, note,) has summed the law up in a single sentence: "Unless specially restrained by the constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations." See *Campbell v. City of Anthony*, 40 Kan. 652, 20 Pac. Rep. 492, *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. Rep. 288, and authorities there cited, for a full and elaborate discussion of the question. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 12)

#### CITY OF SALINA v. COOPER.

(*Supreme Court of Kansas*. Dec. 6, 1890.)

#### CRIMINAL LAW—WITHDRAWAL OF PLEA OF GUILTY —PLEA TO JURISDICTION—APPEAL.

1. Where a defendant was arrested for selling liquor in violation of a city ordinance, and taken before the police judge, and called upon to plead to the complaint filed against him, and admitted that he sold beer in original packages; and, upon said admission, the police judge entered the plea of guilty on his record and adjudged the defendant to pay a fine and costs, and stand committed until such fine and costs were paid; and in a few minutes after the entry of such judgment the defendant asked leave of the court to withdraw the plea of guilty and enter the plea of not guilty, and presented an affidavit stating that when arrested he became very much excited, that there was a large crowd in the court room, that he was not asked by the court if he wanted counsel, nor was he given an opportunity to employ any one, that he was not guilty of selling intoxicating liquors in violation of law or the ordinances of the city, and that he had never admitted that he had sold liquor in violation of law; and the police judge overruled said application, and the case was appealed to the district court, where application was again made to withdraw the plea of guilty, upon a similar showing, and refused; and defendant was again sentenced to pay a fine and costs,—*held* that, under the showing made, the district court should have permitted the defendant to withdraw the plea of guilty entered by the police judge, and should have allowed the plea of not guilty to be substituted.

2. It is proper for the district court to overrule a plea to the jurisdiction of the court, which substantially raises the question of the guilt or innocence of the accused.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Saline county; R. F. THOMPSON, Judge.

J. G. Mohler, for appellant. W. T. Frazier and Garver & Bond, for appellee.

GREEN, C. This is a criminal appeal from Saline county. The defendant was arraigned in the police court of the city of Salina, a city of the second class, to answer four complaints filed against him, charging him with unlawfully bartering, selling, and giving away intoxicating liquors, contrary to the ordinances of the city. It appears from the record that the defendant pleaded guilty to each one of the complaints, and sentence was duly passed upon him, and entered of record. After conviction and sentence, he filed a motion, supported by affidavit, for leave to withdraw the former pleas of guilty, and enter a plea of not guilty to each complaint. This motion was denied. The case was then appealed to the district court, when application was again made to withdraw the pleas of guilty and enter pleas of not guilty, which was refused. The appellant then interposed his plea to the jurisdiction of the court. The facts, as claimed by the appellant, material to the application for leave to withdraw the pleas of not guilty, as well as the plea to the jurisdiction of the court, are that, when arrested by the city marshal, he was immediately taken before the police judge, who read to him the four complaints, and asked him if he was guilty; that appellant admitted that he sold beer in the city of Salina in the original packages in which they had been shipped into the state, and, upon being pressed to answer whether he was guilty or not, said he was guilty of selling beer in original packages; that, upon making such admission, the police judge accepted the same as a plea of guilty upon each complaint; that, when arrested, he became very much excited, and was not asked by the court if he wanted counsel, neither was he given an opportunity to employ any one to appear for him; that there was a large crowd in the court room, and but a short time was consumed from the period when he was brought before the court until judgment was entered against him in the four cases; that appellant was not guilty of selling intoxicating liquors in violation of law or the ordinances of the city of Salina, and did not admit that he sold intoxicating liquor in violation of law or the ordinances of the city; that he was and is a citizen of the state of Missouri, and agent of the Ferd Heim Brewing Company of Kansas City, Mo., a corporation of the state of Missouri, duly chartered under the laws of said state; that the business of said corporation is to brew, manufacture, and sell lager beer, an intoxicating liquor; that said corporation brewed a lot of lager beer, and put it in original packages, and sent a carload of their product from their brewery, in Kansas City, in the state of Missouri, in original packages, as made up at said brewery, where the same was manufactured, to Salina, in Saline county, Kan., in charge of the defendant, as agent for said importers, the Ferd Heim Brewing Company; that said goods were in original packages in a store-room leased by defendant, as agent of said brewing

company; that all the selling, bartering, or giving away by defendant of beer in Salina was the selling and bartering of the same, in original packages, and lawful under the laws and constitution of the United States. The plea to the jurisdiction was also overruled, and the defendant was thereupon sentenced, upon the plea of guilty, entered in the police court, and adjudged to pay a fine of \$50, and stand committed until such fine and costs were paid. The appellant asks a reversal of this sentence and judgment.

1. The first assignment of error which we shall notice is the action of the court below in overruling and denying the motion of the appellant for leave to withdraw the pleas of guilty, entered by the police judge, and enter the pleas of not guilty. The cases were on appeal from the police court, and the district court seemed to have considered them just as they came from the police judge, with the plea of guilty standing against the defendant in each case. Was it manifest error for the court to refuse this request? It appears from the uncontradicted statement of the appellant that he had been arraigned before the police judge in the presence of a large crowd; was very much excited, and was not asked whether he wanted an attorney, neither was he given an opportunity to secure one; and claimed that the police judge had no right to construe what he said, in regard to the sale of beer in original packages, as an admission that he was guilty, or that he intended to say that he was guilty, as charged in each of the complaints; that everything was done so hurriedly, and under so much excitement, that he did not know what was going on or being done, and was not aware that he had had a hearing until he sent for and procured counsel; that he was entirely innocent of the offenses charged against him. We think the court below, upon this showing, should have sustained the motion, and permitted the defendant to withdraw the former pleas of guilty, entered against him by the police judge. All fairness should be accorded to a defendant in a criminal case, in every stage of an examination or trial. No advantage should be taken on account of his being in court without counsel. It always should be one of the first duties of a court, where a defendant is charged with a crime, and is about to be called upon to plead, to inquire whether he has or is able to procure counsel, and if not, and he desires it, to see that he has an attorney to represent him. When a plea of guilty has been entered against a defendant, who is without counsel, and there is a question as to whether he intended to plead guilty, the court should permit the withdrawal of such plea, in furtherance of the substantial rights of the defendant. Under the state of facts disclosed by the record, it was clearly the duty of the court to accord such a right to the appellant in this case. The law has been well stated in the case of *Cochrane v. State*, 6 Md. 400. *LE GRAND, C. J.*, said: "It must be confessed that there is no little indistinctness in the reported cases whether the rights to withdraw the plea of not guilty and to demur

belongs unconditionally to the prisoner, or is a matter of favor to be granted by the court. We think, however, that the better opinion, is clearly the justice in the matter, that the prisoner has the right." In the case of *Myers v. State*, 18 N. E. Rep. 42, the supreme court of Indiana held that a judgment should be set aside which had been rendered against a defendant on a plea of guilty, upon a proper showing that the sheriff had told the defendant that the state's attorney would accept a sentence of two years, if defendant would plead guilty; that the sheriff advised him to do so; that he was ignorant, and was arraigned without the privilege of consulting counsel; and that he was innocent. The court, in the course of the opinion, said: "The rule is that courts may exercise a discretion in allowing or refusing leave to withdraw pleas of guilty, and that an appellate court will not interfere unless there has been an abuse of such discretion. We think that this is a case in which this court is justified in holding that the court below ought to have exercised its discretion in favor of appellant, or, in the language of the law, that the court below abused the discretion which it was authorized to exercise. No possible harm could have resulted, or can now result, to the state by allowing appellant to withdraw his plea of guilty, and substitute a plea of not guilty. If he is innocent of the charge, as he has all the while, and under all circumstances, claimed, he ought to have a fair opportunity for a defense. If he is guilty, the state may have an opportunity to establish that guilt under a plea of not guilty. In the conclusion we have reached here we are sustained by the authorities." As to the authorities sustaining this doctrine, see *Nicholls v. State*, 5 N. J. Law, 539; *People v. McCrory*, 41 Cal. 458; *People v. Scott*, 59 Cal. 341; *Swang v. State*, 2 Cold. 212; *State v. Hale*, 44 Iowa, 96; *State v. Stephens*, 71 Mo. 535.

2. The next assignment of error is in overruling and denying the plea of the appellant to the jurisdiction of the court. We see no error in this. All that was set out in the plea was plainly a matter of defense, and could be shown when the cases were tried upon their merits, and the plea did not properly challenge the jurisdiction of the court. It is unnecessary to notice the other assignments of error, as our view of the first complaint considered will necessitate a reversal of the judgment of the court below. We recommend a reversal of the judgment in this case.

PER CURIAM. It is so ordered; all the justices concurring.

*In re* READY.

(44 Kan. 702)

(*Supreme Court of Kansas. Dec. 6, 1890.*)

APPEAL IN CRIMINAL CASES—STAT OF EXECUTION  
—BOND.

1. Where a defendant is convicted for a felony, bailable under the statute, and he takes an appeal from his conviction within 30 days after the judgment is rendered against him, and files the transcript of such conviction with the clerk of the supreme court, and makes his application

to the supreme court, or any justice thereof, within 90 days after his appeal is taken, the execution of the judgment will be stayed by the order of the supreme court, or any justice thereof, upon the appellant giving bond in such sum as the court or justice shall prescribe; the bond to be approved by the court, or any justice thereof.

2. In default of giving the bond prescribed by the court, or a justice thereof, the appellant will remain in the custody of the sheriff of the county where he is convicted, during the pendency of the appeal, until the further order of the supreme court.

(*Syllabus by the Court.*)

Original proceeding in *habeas corpus*.

*J. J. Hitt*, for petitioner. *L. B. Kellogg*, Atty. Gen., for respondent.

HORTON, C. J. At the April term of the district court of Shawnee county, for 1890, Rough Ready was convicted of unlawfully and feloniously taking, stealing, and carrying away from the person of William Glaze, with violence, and against his will, \$35. He was sentenced to confinement in the penitentiary of the state at hard labor for 15 years, commencing on the 26th day of April, 1890. Soon after sentence, he was taken by the sheriff to the penitentiary, and placed in charge of the warden thereof. Ready appealed from his conviction and sentence of the district court to this court within 30 days after the judgment was rendered against him. He filed his transcript, as prescribed by the statute, with the clerk of this court, and made his application to the court within 90 days after his appeal was taken for a stay of the judgment and sentence, and asked that he be permitted to give a bond in such sum as the court should order. His bond was fixed, but he has been unable to give or procure the same. It is insisted under the provisions of the statute, in default of giving a bond in the sum prescribed by this court, that he should remain in the custody of the sheriff until the further order of this court, and it is further insisted that his restraint and confinement by the warden of the penitentiary of the state, during the pendency of his appeal in this court, is unlawful, and contrary to the provisions of the statute. Paragraph 5349 of the General Statutes of 1889 reads: "An appeal to the supreme court, from a judgment of conviction, shall stay the execution, when the judgment is for a fine, or fine and costs only. In all other cases, the execution of the judgment shall be stayed by the order of the supreme court, or any justice thereof, upon the appellant giving a bond in such sum as said court or justice shall prescribe, said bond to be approved by said court, or any justice thereof; and in default thereof the defendant shall remain in the custody of the sheriff until the further order of the supreme court; provided, that, when the conviction is for an offense not bailable, the supreme court, or a justice thereof, shall make an order for the safe-keeping of the appellant in the jail of the county in which the offense was alleged to have been committed, or, in case of no sufficient jail in such county, then in the jail of the county nearest having a sufficient jail; and provided, further, that the appellant availing himself of the benefits of this act shall take

his appeal within thirty (30) days after the judgment is rendered, and shall file the transcript with the clerk of the supreme court, and shall make his application to the supreme court, or justice thereof, within ninety (90) days after the appeal is taken." Under the provisions of this section, Ready was entitled, upon his default in giving the bond prescribed by the court, to remain in the custody of the sheriff of Shawnee county until the further order of this court, while his appeal was pending. It appears however, from an opinion handed down at this term of the court, that his appeal has been disposed of. The judgment of the district court has been affirmed, and therefore this court, at this time, cannot release or discharge him from imprisonment. The execution of the judgment rendered against him must be complied with, in accordance with the order of the district court. The petitioner will recover his costs. All the justices concurring.

(44 Kan. 723)

STATE *ex rel.* COCHRAN v. WINTERS *et al.*  
(*Supreme Court of Kansas. Dec. 6, 1890.*)

INTOXICATING LIQUORS—SALES IN ORIGINAL PACKAGES.

Under the decision of the supreme court of the United States in the case of *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, an importer of intoxicating liquors, into any state from any other state or country, could, by himself or agent, prior to the passage of the "Wilson bill," sell such liquors so long as they remained in the unbroken packages in which they existed during their transportation, without regard to the laws of the state into which such liquors were imported, and without regard to the size of the packages.

(*Syllabus by the Court.*)

Appeal from district court, Chase county; FRANK DOSTER, Judge.

*Madden Bros.*, for appellant. *L. B. Kellogg*, Atty. Gen., and *F. P. Cochran*, for appellee.

VALENTINE, J. This is an appeal by the defendant W. H. Winters from an order of the judge of the twenty-fifth judicial district, made at chambers in Marion county, on July 25, 1889, sentencing the defendant to pay a fine of \$100, and to be imprisoned in the county jail of Chase county for the period of 30 days, and to pay costs, for an alleged contempt in violating an order of injunction granted by such judge at chambers in Marion county on July 1, 1890, restraining the defendant from selling intoxicating liquors at Strong City in Chase county. The injunction was allowed and granted without notice to the defendant upon an *ex parte* application by the county attorney of Chase county, and it reads as follows: "State of Kansas, county of Chase, in the district court of said county. State of Kansas vs. William H. Winters and Mary O'Byrne. It being shown to me by verified petition of the plaintiff that the defendant Mary O'Byrne is the owner of the certain frame building standing and being on lots 6 and 8 in block 6 in Carter's addition to the city of Strong City, Chase county, Kansas, and that she authorizes and knowingly permits the defendant William H. Winters to occupy and

use the same for the illegal sale, barter, and gift of intoxicating liquors, and as the resort of persons for the drinking of intoxicating liquors, and that the defendant William H. Winters occupies and uses said premises for all of such illegal purposes, and that neither of said defendants had authority under the law to sell intoxicating liquors, and that, by reason of all such illegal sales and said other illegal practices, the said premises have become and are a common nuisance: It is therefore ordered that the defendants, and each of them, and their agents, clerks, servants, and lessees, be enjoined from keeping open, or permitting to be kept open, the said premises for said uses, and from bartering, selling, or giving away, or keeping for barter, sale, or gift, or permitting to be drunk thereon, any intoxicating liquors without a permit so to do from the probate judge of the said county of Chase. And it is further ordered that, before this order takes effect, the plaintiff execute a bond to said defendants, conditioned according to law, in the sum of one hundred dollars. Witness my hand, at chambers, in Marion county, Kansas, this July 1st, 1890. FRANK DOSTER, Judge of the 25th Judicial District." Afterwards, and on July 10, 1890, said judge, at chambers, in Marion county, upon a letter of the county attorney of Chase county informing him that the defendant was selling intoxicating liquors in Chase county, issued an order to the defendant Winters requiring him to show cause before the judge at his chambers in Marion county on July 12, 1890, why he, the defendant, should not be adjudged guilty of contempt in violating the said order of injunction. The defendant made a special appearance before the judge on the day last above mentioned, and moved to discharge the order requiring him to show cause, for various reasons, including a want of jurisdiction on the part of the judge, which motion was overruled. The judge then required the county attorney of Chase county to file a written complaint, which the county attorney did, and the defendant again moved to be discharged for various reasons, which motion was overruled; and the judge then, over the objections of the defendant, ordered an immediate hearing upon such complaint without any other or further notice, writ, summons, or process, and the hearing was then had. Upon this hearing the following facts were agreed to by both the parties as constituting "the facts of this case, and all the facts therein:" "It is agreed and admitted that the property that was sold by the defendant was the property of the Pabst Brewing Company, a corporation duly and legally incorporated under and by virtue of the laws of the state of Wisconsin; that the only sales, and offers to sell, made by the defendant, were made as agent duly and legally appointed for the Pabst Brewing Company; that the only sales, and offers to sell, of liquors were in sealed cases, and as the same were manufactured and put up by the Pabst Brewing Company of the state of Wisconsin, and were imported by them upon railways from the state of

Wisconsin to the state of Kansas to the defendant, their agent; that no cases or kegs sold or offered for sale were broken or opened upon the premises; that as soon as the same was purchased by parties it was removed from the premises; that none of such sales, or offers to sell, were made to minors or persons in the habit of becoming intoxicated, and that none of said liquors so sold, or offered for sale, were drunk or used upon the premises; that the defendant is a resident of the United States, and made each and all of the sales he did make as the agent and employe of said Pabst Brewing Company aforesaid, and in no other way; that said defendant Mary O'Byrne is the owner of the premises in controversy, and that she has never been served with any injunction in this case; that the defendant, in making the sales that he did make, made the same under the faith and belief that he had a legal right to sell intoxicating liquors, and did not intend by such sales to violate any order of the court, and construed the order of the court to mean a restraint of illegal sales, and not of sales legally made under the law; that all the articles so sold by the defendant were the manufactured articles of intoxicating liquors made and manufactured by said Pabst Brewing Company, and that each of said cases was substantially made of wood, and each of them contained twenty-four quarts of beer, and each bottle of beer corked, and the cork fastened in with a metallic cap wire, bound and covered with tin-foil, and each case was sealed with a metallic seal; that the beer in all of the kegs was corked up firmly in wooden kegs, and transported by railway as aforesaid; and that to open said cases the said metallic seals had to be broken, and to open said kegs of beer aforesaid the same had to be broken or bored with an auger; that the only way and manner that the same was sold by the defendant was in said kegs and cases aforesaid; that in the same car in which the cases of beer referred to were shipped and put up and loaded on the cars and received by the defendant were also single bottles of beer firmly corked and protected as above stated and wrapped in paper, as well as pint, half pint, and quart bottles of whisky wrapped in paper, each constituting a single package by itself, received as such, and sold as such before and since the injunction was granted, and in no other manner."

The attorney general, in his brief filed in this court, uses the following among other language: "The substantial question in this case is whether or not the defendant Winters was protected by the decision of the supreme court of the United States in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, in the sales of single bottles of beer and single pint, half pint, and quart bottles of whisky, in violation of the prohibitory laws of the state of Kansas, by reason of the fact that such single bottles of beer and whisky were imported into the state of Kansas in the same car in which cases of beer, shipped and sold in accordance with the usages of the wholesale liquor trade, were imported. These single bottles of beer and whisky were sim-

ply wrapped in paper, and thus imported and sold by the defendant Winters under the guise of 'original packages.' The sales were made after the decision in the said case of *Laisy v. Hardin*, and prior to the passage of the 'Wilson bill.' The defendant had no druggist's permit, and the sales were not made for medical, scientific, or mechanical purposes under the provisions of the prohibitory law.

We think the attorney general is correct with respect to the question to be considered and decided. It has seldom if ever been considered in any civilized country that the same freedom with respect to the traffic in and the use of intoxicating liquors should be allowed as is freely permitted with respect to nearly all the other kinds of property subject to traffic or use. Intoxicating liquors are never considered as coming within the category of the necessities of life, nor even as good or wholesome food or drink, or proper articles for general consumption. They are never considered like wheat or corn, or boots or shoes, or any of the other harmless articles of traffic or use which need no regulation or restriction. They are considered almost as outlaws. In their unrestricted sale and use they are pernicious, deleterious, baneful. They operate as tempters and seducers, alluring people into vice and crime, and constitute a perpetual menace and threat against the peace and quiet and good order and welfare of society. Their proper classification would rather be with such dangerous articles as dynamite, nitro-glycerine, venomous reptiles, dangerous animals, poisons, articles containing the germs of infectious diseases, and "infernal machines," than with any of the harmless or innocuous articles of commerce. Hence, in all civilized countries, they are considered as the proper subjects of regulation, restriction, and, to some extent, prohibition; and all this has generally been considered as coming within the proper scope of the police power of the several states or governments. In this state the sale and use of intoxicating liquors are regulated, restricted, and, to some extent, prohibited by law; and the supreme court of the United States has held such law to be valid. *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. Rep. 8; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. But, in a subsequent case from Iowa, that court decided that the liquor laws of the several states will not apply to sales made by the importer or his agent of intoxicating liquors imported from other states or countries, so long as such liquors remain in the unbroken packages in which they existed during their transportation. *Laisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681. This decision was made upon the supposed authority of that provision of the federal constitution which gives to congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Const. U. S. art. 1, § 8. This court does not agree with that court upon this question. *State v. Fulker*, 43 Kan. 237, 22 Pac. Rep. 1020. But it is our duty to follow that court, and we shall do so. In the *Laisy v. Hardin* decision, and in other de-

cisions, the words "original package" are used. These words are not found in the constitution, but still it is thought necessary that we should ascertain what was really meant or intended by their use. Evidently the "original package" referred to in those decisions was and is the package of the importer as it existed at the time of its transportation from one state into the other. The whole subject has relation to commerce and to interstate commerce, and to nothing else; hence the words must mean the package as transported by the importer himself, or by his agent, either a common carrier or a private carrier for the purposes of commerce, and therefore it would seem that it is for the importer to determine how large or how small the packages should be, and the manner in which the package should be made up, and the materials used in making it up. Certainly an importer has as much right, under the federal constitution, to import into a state and sell against its laws a single gill of intoxicating liquor as he has to import into such state and sell against its laws a gallon or a barrel or a hogshead of the same interdicted article. In some cases of interstate commerce it would scarcely seem necessary that any package should be used. For instance, in the transportation of live-stock, the individual articles transported might be horses, cows, sheep, or hogs, and these articles might be very large or very small, even little pigs, and none of them placed in packages. In the present case the liquors transported and sold we suppose were never in any other packages than the ones in which they were sold; hence these packages must have been "original packages." In the *License Cases*, 5 How., Mr. Justice CATRON used the following language: "To hold that the state license was void, as respects spirits coming in from other states as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require, the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other states, and that the products of New Hampshire would find an unrestrained market in the neighboring states having similar license laws to those of New Hampshire." Page 608. In the same cases Mr. Justice WOODBURY used the following language: "If the proposition was maintainable that, without any legislation by congress as to the trade between the states, [except that in coasting, as before explained, to prevent smuggling,] anything imported from another state, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a state, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring state. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and, if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quanti-



ty, and by the most irresponsible and unsuitable persons, with perfect impunity." Pages 625, 626. In the case of *Lelsy v. Hardin*, 135 U. S. 159, 10 Sup. Ct. Rep. 681, Mr. Justice GRAY, in his dissenting opinion, which was concurred in by Justices HARLAN and BREWER, used the following language: "If the statutes of a state, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another state, and sold by the importer in what are called 'original packages,' the consequence must be that an inhabitant of any state may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other states of the Union intoxicating liquors of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those states on the subject, and although his own state should be the only one which had not enacted similar laws." Pages 159, 160, 135 U. S., and page 702, 10 Sup. Ct. Rep. In the case of *In re Beine*, 42 Fed. Rep. 545, Judge CALDWELL used the following language: "A question was raised in the argument as to whether the smallness of some of the packages sold by some of the petitioners did not deprive them of the protection given to vendors of original packages. Single bottles of beer and whisky packed and sealed or nailed up in boxes made of pastboard or wood, were shipped and sold in that shape. The boxes containing one bottle were not packed in any other box, but shipped singly and separately as so many distinct and separate packages. It is not perceived why, in the absence of a regulation by congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export. The idea that small packages of liquor cannot be treated as original packages, because they are small, springs from the conviction back of it that liquor in any form, or in any sized package, is not a legitimate subject of commerce. That question is put at rest by the decision of the supreme court of the United States until congress shall act. As long as packages of liquor in any form or size may lawfully be sold by the importer or his agent in a prohibition state, the size of the package is not of much consequence. Whether the package be large or small, the practical effect will be to seriously impair the efficacy of all laws intended to protect society from the evils of the liquor traffic." Pages 546, 547. See, also, to the same effect, *Collins v. Hills*, 77 Iowa, 181, 183, 41 N. W. Rep. 571. We know of no opinion or *dictum* of any court or judge that in the slightest degree conflicts with the foregoing expressions of opinion regarding the size or form of "original packages;" and in all probability there is none. It has also been suggested, but not by the attorney general, that the district judge in this case intended not only to restrain the defendant from making illegal sales of intoxicating liquors, but also to restrain him from making legal sales thereof. Such a thing can hardly be sup-

posed; but, if it should be, still if a sovereign state through its highest instrumentalities, its legislature, its executive, and its highest courts, has no power or jurisdiction to prevent an importer from selling intoxicating liquors in original packages brought from another state or country, we suppose that a district judge at chambers hardly has such power. The order and judgment of the judge of the court below will be reversed. All the justices concurring.

(45 Kan. 1)

MCFARLAND V. BATE *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

## ASSIGNMENT BY FIRM FOR BENEFIT OF CREDITORS.

1. The voluntary assignment by a firm of the partnership estate for the benefit of their creditors, without reservations, preferences, or stipulations, exacting full releases from participating creditors, and which is valid in other respects, will not be rendered void because the individual property of the partners is not included in the assignment.

2. A provision in an assignment conveying partnership property, excepting such articles as may be exempt by law, is nugatory, and to be treated as surplusage, and, where it does not appear that any part of the property was set apart or reserved for the benefit of the assignors, it will not invalidate the assignment.

(Syllabus by the Court.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

Garnishment proceeding. The matter was submitted to the court upon the following agreed statement of facts:

"In an action pending in the district court of Lyon county, Kan., wherein H. J. McFarland, assignee, was plaintiff, and Anna Bate and M. K. Moulton, partners, doing business as Bate & Moulton, were defendants, after judgment in favor of the plaintiff, and the return of an execution wholly unsatisfied issued on such judgment, an order of garnishment was issued to M. C. Little, and, in order to determine his liability as such garnishee, the following facts were agreed upon: 'It is agreed, for the purpose of having the liability of M. C. Little, as garnishee in the above-entitled action, (H. J. McFarland, Assignee; v. Anna Bate and M. K. Moulton, Partners, doing business as Bate & Moulton,) determined, that the plaintiff abovenamed did, in the Lyon county district court, obtain judgment against said defendants on May 17, 1887, in the sum of \$581.20. That the same is still wholly unpaid. Plaintiff's judgment was for a partnership debt against the firm of Bate & Moulton. That the debt on which said judgment was rendered accrued prior to December 10, 1886. That on December 10, 1886, said defendants executed the paper hereto attached, (deed of assignment.) That at the time of the execution of said paper the defendant Anna Bate was the owner of lot 102 on Constitution street, Emporia, Lyon county, Kan., on which were situated two dwelling-houses, the same being independent of each other, and arranged for the purpose of being used separately and independently of each other as residences, and were so used, one of them being used by said Anna Bate as a homestead, and

the other occupied by a tenant, who paid her rent therefor; and the said dwelling so occupied by said tenant, for some time after said pretended deed of assignment was executed, with the appurtenances thereto, was of the value of \$2,000. That, thereafter, said Anna Bate, on February 8, 1887, conveyed said last-mentioned dwelling, by deed executed, to Geo. R. Bate. That no portion of the proceeds of such property, either in rents or purchase money, ever came to the hands of said Little, but that the whole of the said purchase money was applied to the payment of the individual debts of said Anna Bate. That, some time prior to the execution of the deed of assignment hereto attached, the said Anna Bate was informed that said dwelling-house was subject to the payment of her debts. That afterwards, and at the time of the execution of said deed of assignment, she left the said dwelling out of said deed of assignment, because she desired to reserve the same for her own use, for her support, and for the payment of her individual debts. That, at the time of the execution of said deed of assignment said Anna Bate was individually indebted to divers persons in the sum of \$2,800, which sum far exceeded the value of all her individual property not exempt under the statute. That at the creditors' meeting held according to law, under said deed of assignment, December 30, 1886, the plaintiff appeared by the present counsel herein, and, with a full knowledge of all the above facts, voted for said Little at the election of assignee. That at the time of said assignment the said firm, with both the said members thereof, were insolvent.

"Copy of paper referred to: 'Know all men by these presents, that whereas, Bate & Moulton, a firm composed of Mrs. Anna Bate and Mrs. M. K. Moulton, of the city of Emporia, county of Lyon, and state of Kansas, are indebted to divers persons in considerable sums of money, which they are unable to pay in full, and said firm are insolvent, and not able to pay their debts in full, and they are desirous to convey all their property for the benefit of all their creditors, under the laws of the state of Kansas in regard to assignment for the benefit of creditors: Therefore we, the said firm of Bate & Moulton, composed of Mrs. Anna Bate and Mrs. M. K. Moulton, in consideration of the premises and for one dollar to us in hand paid, the receipt of which is hereby confessed, paid by M. C. Little of the city of Emporia, aforesaid, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do bargain, sell, assign, transfer, and set over, unto the said M. C. Little all our stock of millinery and fancy goods, underwear, gloves, hosiery, embroidery, etc., and our entire stock in trade contained in our place of business, being a store-room in Fluke's block, in said city of Emporia, known as "Bate & Moulton's Millinery Store," also the counters, shelves, show-cases, stoves, and fixtures and furniture contained in said store, being and including the entire stock in trade and fixtures, and all articles used by said firm in carry-

ing on their business, and belonging to said firm, except such articles as may be exempt by law from levy and sale on execution. All this, however, subject to a certain chattel mortgage to F. W. Drake, of Emporia, to secure one hundred and sixty-four dollars, and also one chattel mortgage to Ella C. Drake, to secure eighty dollars, both dated December 8, 1886. To have and to hold the assigned property unto the said M. C. Little in trust for the uses and purposes herein expressed, and under the said laws of the state of Kansas—*First*. To pay the costs and charges of these presents, and the lawful expenses of executing the trust herein created. *Second*. To sell and dispose of said assigned property in pursuance of law, and the orders of the proper court, and out of the proceeds pay the costs and expenses, aforesaid, and distribute and pay the remainder to the creditors of the said firm of Bate & Moulton for all liabilities and debts which said firm may be owing: provided, however, that if there shall not be sufficient funds with which to pay all said debts in full, then the same are to be paid ratably, and in proportion to amount of each. *Third*. The residue of said proceeds, if any there be, after paying all said debts in full, the said M. C. Little is to pay to said firm or their assigns. In witness whereof we have hereunto set our hands this 10th day of December, A. D. 1886. BATE & MOULTON. MRS. ANNA BATE. MRS. M. K. MOULTON.'

"State of Kansas, Lyon county—ss.: On this 10th day of December, A. D. 1886, personally came before me, a notary public in and for said county and state, Bate & Moulton, and Mrs. Anna Bate, and Mrs. M. K. Moulton, to me personally known to be the same persons and firm who executed the foregoing instrument, and duly acknowledged the execution of the same. In witness whereof I have hereunto set my hand and notarial seal the day and year last above written. [Seal.] J. F. DRAKE, Notary Public. My commission expires Nov. 4th, 1888."

"I hereby accept the trust created by the above instrument, and agree faithfully to perform the same. M. C. LITTLE. Dated Emporia, Kansas, December 10th, 1886."

"It is further agreed that said garnishee had in his hands certain funds arising from the sale of personal property belonging to the firm of Bate & Moulton, and conveyed to him by the foregoing deed of assignment, and was not otherwise chargeable to him as garnishee."

The questions submitted to the court were whether or not the failure to include the individual property of one of the partners, not exempt from execution, would, under the circumstances, invalidate the deed of assignment; and, if so, was the plaintiff estopped to claim it because he participated in the election of the assignee at the creditors' meeting? The court found generally in favor of the garnishee, and entered judgment in his favor for costs. The plaintiff asks a reversal of that judgment.

*Cunningham & McCarty*, for plaintiff in error. *M. C. Simpson* and *Kellogg & Sedgwick*, for defendants in error.

JOHNSTON, J., (after stating the facts as above.) The deed of assignment is assailed upon two grounds: *First*, because of a reservation in the instrument, in these words: "Except such articles as may be exempt by law from levy and sale on execution;" and, *second*, the failure to include in the deed the individual property of Anna Bate, one of the assignors. As to the first objection, it may be said that only partnership property was conveyed, or intended to be conveyed, by the deed of assignment, and, as none of it was or is exempt, there was no reservation for the benefit of the assignors; and it does not appear that any portion of the partnership property was set apart or reserved for the benefit of the assignors. It has already been decided that such an exception is nugatory, and will not invalidate the assignment. *Dodd v. Hills*, 21 Kan. 707; *Guptil v. McFee*, 9 Kan. 30. As to the second objection, it appears that the assignment only covered the partnership property, and that one of the partners had individual property beyond what was exempt from the process of creditors. It is contended that the exclusion of the individual property from the assignment was sufficient to invalidate it. There is nothing deceptive or misleading in the terms of the instrument; nor do we find anything indicating an intentional fraud upon any of the creditors. The whole partnership property was surrendered without reservation or preference. All the creditors of the assignors were free to participate in the assigned assets, and no releases were exacted from those who did participate, nor any conditions imposed which would debar or hamper them from proceeding against the individual or other property not included in the assignment. It is true, it was only a partial assignment, but such a transfer is not necessarily invalid. Its validity depends upon the statute regulating assignments, and it is well settled that, unless prohibited by statute, the debtor may assign a portion of his property for the benefit of his creditors, if all may unconditionally participate in that which is assigned, and if that which is not assigned is open and available to the remedies of all creditors. *Estabrook v. Messersmith*, 18 Wis. 572; *Carpenter v. Underwood*, 19 N. Y. 520; *Bates v. Ableman*, 13 Wis. 644; *Burrill, Assignm.* 203, 232, 272; *Bump, Fraud. Conv.* 369, 391. The same principle has been sustained where it was held that the assignment of all partnership property for the benefit of creditors is not invalid by reason of the fact that the individual property was not also assigned. *Auley v. Ostermann*, 25 N. W. Rep. 657; *Blair v. Black*, 9 S. E. Rep. 1033; *Trumbo v. Hamel*, 8 S. E. Rep. 83; *Blake v. Faulkner*, 18 Ind. 47; *Ex parte Hopkins*, 2 N. E. Rep. 587.

We are cited to several cases holding against the validity of partial assignments, but these authorities are based on statutes requiring that all the property or estate of the creditor shall be conveyed, or where one of the conditions of the deed making a partial assignment was that the creditors accepting its terms should give releases in full of their several debts.

It may now be considered to be established by the weight of authority that a partial assignment, which exacts releases from accepting creditors, and deprives them from access to the residue not assigned, is invalid. In this case, however, no releases were required, no preferences given, nor any reservations made, and our statutes do not prohibit partial assignments; and hence the cases cited do not apply here. Although our statute relating to assignments requires that such property as is conveyed shall be for the benefit of all the creditors of the assignor in proportion to their respective claims, it does not require that all the estate of the debtor shall be assigned. *Gen. St. 1889, par. 342*. The legislative purpose is further indicated in the subsequent paragraphs of that act, wherein it is provided that only an inventory of the property assigned shall be filed, and not an inventory of all the debtor's estate; and also that the affidavit attached to the inventory shall be likewise limited. The court proceeded upon this theory when it held that, in the absence of any statute prescribing the manner of closing up partnership estates, a surviving partner might make an assignment of partnership property for the benefit of the creditors of the firm. *Shattuck v. Chandler*, 40 Kan. 516, 20 Pac. Rep. 225. It is certain that the surviving partner could not assign the individual assets of his deceased partner, and equally certain that the individual property is subject to the payment of the unsatisfied claims of the firm's creditors. We conclude that partial assignments are not prohibited by our statutes, and that the assignment of a firm need not necessarily include the individual estates of the partners. So far as the record shows, the action of the assignors was fair and honest, the assignment was openly made by them, and it purported to convey partnership property only. There was nothing in the instrument which tended to show that it included the individual property; nor does it appear that the individual property not assigned was concealed or placed beyond the reach of the plaintiff or any other creditor. The unassigned residue was accessible to all the creditors, and the record shows that all of this residue has been taken to satisfy the claims of the individual creditors of Mrs. Bate. The assignment upon its face is valid, and we find nothing in the record which renders it void. The judgment of the district court is affirmed. All the justices concurring.

(87 Cal. 166)

EBY v. BOARD OF SCHOOL TRUSTEES *et al.*  
(No. 13,172.)

(Supreme Court of California. Dec. 13, 1890.)

MANDAMUS—QUESTIONS DETERMINED—PARTIES.

1. On proceedings for a writ of mandate to compel the officers of a school-district to rebuild, on the old site, a school-house destroyed by fire, as they had been directed by the electors of the district in school meeting assembled, the officers cannot raise the question of the paramount title to the site, as its possession by the district for a

number of years for school purposes is *prima facie* evidence of ownership in the district.

2. While the question of title could not be litigated in this *mandamus* proceeding, the court below properly admitted evidence showing the dedication of the site to school-house purposes, and its possession by the district, so as to enable the court to determine whether or not, in its discretion, it should award the writ.

3. Under Code Civil Proc. Cal. § 1086, which provides for the issuance of a writ of mandate "on the application of the party beneficially interested," a tax-payer of the district, whose children attend the school, is a proper party to apply for a writ of mandate to compel the compliance of the officers of the district with a vote of the electors as to the location of the school-house site. Overruling *Linden v. Alameda Co.*, 45 Cal. 7.

In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

*John F. Ellison*, for appellant. *Chipman & Garter*, for respondents.

WORKS, J. This is a proceeding for a writ of mandate to the board of school trustees of Red Bank school-district, in Tehama county, and the members thereof—A. W. Coffman, C. L. Allen, and Alfred McClure—commanding them to immediately proceed with the erection and construction of a school building upon a certain lot within said school-district, of which the district is alleged to be the owner, and to complete the same within a reasonable time. The verified petition for the writ states, among other things, substantially, the following: That some years prior to October 14, 1886, the district had built and occupied a school-house on a lot therein described; that on October 14, 1886, said school-house had been destroyed by fire; that in April, 1887, the board of trustees called a meeting of the qualified electors of the district, of whom petitioner is one, to be held on the 25th day of April, 1887, "for the purpose of determining a proposition to change the location of the school-house of said district from the said old site to a position a little less than one-half mile south thereof;" that due notice of such meeting was given by posting notices as required by law; that said meeting was held at the time and place appointed, and was organized by electing J. G. Allnut, chairman, and A. W. Coffman, being the clerk of said district, acted as secretary; that it was resolved by a majority vote of the electors at said meeting that the site of the school-house should not be changed, but should remain upon the lot occupied by the house which had been destroyed by fire, and that the trustees of the district be "instructed to erect any school buildings or structures, contemplated or proposed to be erected, upon the location, and at the place above described, and not elsewhere," and that the minutes of the meeting be entered upon the records of said district; that the secretary, Coffman, neglected and refused to keep the minutes of the meeting, or to enter them upon the records of the district; that bonds of said district had been issued and sold for the purpose of raising money to build a school-house in and for the district, and that upon the 1st day of December, 1887, the proceeds of

the sale of the bonds, amounting to \$810, were deposited in the county treasury of Tehama county, to the credit of the district, and subject to be applied to the building of such school-house; that petitioner has demanded of the board and the several members thereof that they "proceed with the erection and construction of said school-house upon the premises known as the 'Old Site,'" but that they have neglected and refused so to do, and, contrary to the instructions and resolutions of said meeting, are proceeding to build a school-house at another and different place, and to use and apply the funds aforesaid for that purpose; that by the refusal of the board to build on the old site, and the building in a different place, taxation upon the property of the district will be increased, the property of plaintiff will be injuriously affected, and the school privileges and opportunities of the children of plaintiff will be greatly delayed and impeded, and the plaintiff is, and will be, greatly and irreparably injured and damaged, he being the owner of a large amount of taxable property in said district, and having children that are entitled to attend school therein. The answer of the board, and of a majority of its members, denies that at the meeting held on April 25, 1887, the electors of the district resolved not to change the site of the school-house, or that the board was instructed by that meeting to proceed to build on the old site, and alleges, on the contrary, that a resolution, offered at that meeting, to instruct the trustees to build on the old site was defeated by a majority of one vote; denies that the secretary neglected or refused to keep or record the minutes of that meeting, and alleges, on the contrary, that the secretary did take the minutes of that meeting and duly record them in the proper book of the district; denies that the district owns the old site; denies that, by building on a different site, taxation on the property of the district will be increased, or that plaintiff will be injured or damaged; alleges that, subsequent to the meeting of April 25th, another meeting was duly called and advertised for June 6, 1887, which was duly held on that day for the purpose of determining as to a change of the school-house site, and at which it was unanimously resolved to instruct the trustees to build the school-house on the new site, a little less than half a mile south of the old site, where the trustees have commenced to build it. The court found for the plaintiff on all the material issues, and awarded a peremptory mandate, which, after reciting the facts found, is in the following language: "Therefore we do command you that, immediately after the receipt of this writ, you proceed with promptness, diligence, and dispatch to construct and erect upon the said premises, location, and site, hereinbefore particularly described, a school-house in and for said Red Bank school-district, and to use and apply the said fund now deposited in the treasury of the county of Tehama, state of California." The appeal is from the judgment, and from an order denying defendant's motion for a new trial. The answer of the defendants denied that the

school-district owned the land on which the old school-house stood. It is contended by the appellants that the question of title to real estate could not be tried in a *mandamus* proceeding, and that therefore, upon an answer being filed, raising the question of title, the proceeding should have been dismissed. It is true that, where a question of title to real estate is directly in issue, *mandamus* is not the appropriate remedy to determine such question. *Babcock v. Goodrich*, 47 Cal. 508; *Weaverville & M. W. R. Co. v. Board Sup'rs*, 64 Cal. 70. But where the question is incidental merely, and may affect the discretion of the court in awarding or denying the writ, it is proper that the court should be satisfied on the subject. Here it appeared that the district was and had been for a number of years in possession of the school lot, using it for school purposes, under such circumstances as to authorize its continued use for those purposes. The mere fact of possession was *prima facie* evidence of ownership. Whether such possession was based upon a paramount title or not was a question which could not be put in issue by the answer and litigated in this proceeding, nor could the defendant ask for a dismissal on the sole ground that by its answer the title to real estate was put in issue. In *Weaverville & M. W. R. Co. v. Board Sup'rs*, supra, it was said: "It appears by the findings that the plaintiff was incorporated in 1863, and that it in some way obtained possession of the wagon-road which it was incorporated to construct and operate; and that it has ever since retained the possession of it. Such possession was *prima facie* evidence of ownership. Whether based upon paramount title or not was a question which could not be inquired into except in an action or proceeding in which some person who claimed a better title was a party; and it could not be tried by a board of supervisors, nor in a proceeding to determine whether a mandate should issue to compel the performance by said board of a duty imposed upon it by law. The question of title can be inquired into and determined in a proper proceeding, but clearly not in this." So in this case, if the proper residents in the school-district had taken the necessary steps to impose upon the board of trustees the duty of constructing the school-house on this property, the board could not evade the performance of its duty by asserting that the district had no title to the property. It was not a question for the board to pass upon. It was enough that they were directed, in the manner provided by law, to erect the school-house, and they should have acted accordingly. Pol. Code, § 1617, subd. 26. Certain evidence tending to show the possession of the property by the school-district, declarations of the owners of the land tending to show a dedication of the property to the district for school purposes, and other like testimony, was admitted, and it is claimed by the appellant that this was error for which the cause should be reversed. As we have said, the question whether the school-district had or had not a good title to the property was one not proper to be litig-

ated in this action. But it was entirely proper for the court below to be assured, by proper evidence, that the possession of the district was such as to secure to it the continued use of the property in case a school-house should be constructed upon it in order to determine whether the court should or should not, in its discretion, award the writ. For this purpose, the evidence was proper, although not necessary to the plaintiff's case. Other items of evidence admitted are objected to, but we find that no error was committed in ruling upon the evidence for which the case should be reversed. It is insisted that the finding that the school-district was the owner of the land was not sustained by the evidence. We think the evidence was sufficient to show a dedication and acceptance of the property, and the adverse use of it for school purposes, sufficient to sustain the finding, but if it were not, as the question of title was one not proper to be litigated in this action, an erroneous finding on the point would not be cause for reversal. Other findings are attacked for the same reason, but we think all of the findings, necessary to justify the issuance of the writ, are sustained by the evidence.

Appellant's counsel further contend that, inasmuch as it does not appear that respondent's taxes will not be increased by the matters complained of, he is not a party beneficially interested in the sense of section 1086 of the Code of Civil Procedure, which requires the writ of mandate to be issued "upon affidavit, on the application of the party beneficially interested;" and, therefore, that the proceeding cannot be maintained upon his application, in his name alone. There can be no doubt upon the findings, which are justified by the evidence, that it was the duty of the board of trustees to build the school-house upon the old site, as instructed by the meeting of April 25, 1887, within a reasonable time after the money for that purpose had been deposited in the treasury; and that a reasonable time within which to commence the building had elapsed before the commencement of this suit is sufficiently evinced by the admitted fact that the trustees had commenced to build on another site than that selected by the meeting of April 25th, before the commencement of this suit. The interest of the plaintiff in the performance of this duty by the trustees of the district resulted from his being a resident elector of the district, having a family of minor children entitled to school privileges therein. After the site for the school-house had been lawfully established and fixed by the meeting of the electors, he was entitled to all the benefits and conveniences incidentally resulting therefrom to him individually, besides his interest in common with other residents of the district, in having the trustees perform an official duty enjoined by law for the common benefit of all. It is claimed, however, that if the removal of the school-house works a detriment to him it must effect a corresponding benefit to others equally entitled to such benefits; and therefore that he has no right to complain. This may be true in the case of a lawful lo-

cation or removal of a school-house, but it is not true in case of an unlawful removal; for, while all would be entitled to the benefits and conveniences accruing from a lawful location or a lawful removal of a school-house, no one would be entitled to any benefit from an unlawful removal. It is true that the injury to respondent is the same in kind as that suffered by all others from whose residences the new site is more distant than the old, if any such there are, and this seems to be the only plausible ground upon which it is contended that respondent is destitute of the beneficial interest necessary to the prosecution of this action in his own name; and the case of *Linden v. Alameda Co.*, 45 Cal. 7, is cited to sustain this position. That was a case of *mandamus* to compel the board of supervisors to order an election to determine the question of removal of the county-seat, on the petition of 1,452 of the qualified electors of the county, of whom the applicant for the *mandamus* was one. In sustaining a demurrer to the application, the court held that the words, "on the application of the party beneficially interested," as used in section 1086 of the Code of Civil Procedure, necessarily mean that the interest of the applicant "must be of a nature which is distinguishable from that of the mass of the community;" and further said: "The party applying here appears to have no interest, beneficial or otherwise, other than such interest as each one of the fourteen hundred and fifty-one persons, besides himself, who signed the petition to the board of supervisors may be said to have. \* \* \* The interest of each and all of them is only the general interest that every citizen has in the proper discharge of public duties confided by law to public officers. Obviously, this is not such an interest as would support an application by any private citizen who may see fit to volunteer to bring a suit in behalf of the public interests." But the principle announced in *Linden v. Alameda Co.* has been disregarded, and, in effect, that case has been overruled by later cases. The point decided in that case is that, to entitle a private party to apply for a writ of mandate, his interest in the subject-matter of the suit must be of a different nature from that of the mass of the community. Yet in *Hyatt v. Allen*, 54 Cal. 353, which was an application to this court for a writ of mandate to the assessor of the city of Stockton, in which the applicant appeared to have no other interest than that of a tax-payer, in common with all other tax-payers of that city, this court, through Mr. Justice SHARPSTEIN, said: "We think that the petitioner, who is a tax-payer within the district of which respondent is assessor, is 'a party beneficially interested' in having all the taxable property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ in this case." Maxwell v. Supervisors, 53 Cal. 390, was a proceeding for a writ of review to the board of supervisors to review the action of that body, in behalf of the county of Stanislaus, in entering into a contract for printing, in which the applicant was interested only

as a tax-payer in common with all other tax-payers of the county, and in which the objection that the applicant was not "beneficially interested," within the meaning of section 1069 of the Code of Civil Procedure, was overruled. The language of section 1069 as to the "beneficial interest" of the applicant for a writ of review, is identical with that of section 1086 relating to the interest of the applicant for a writ of mandate; and no reason is perceived why it has not the same meaning in both sections. These cases wholly disregard, and are utterly inconsistent with, the rule announced in *Linden v. Alameda Co.*, since the beneficial interest of one tax-payer in a question of taxation is not different in kind or nature from that of the mass of tax-payers, or from that of any other tax-payer in the same district or community. These later cases seem to be in accord with the weight of authority in other states and in England, as stated by Mr. Justice STRONG, in delivering the opinion of the court in the case of *Railroad Co. v. Hall*, 91 U. S. 354, in which *mandamus* was maintained at the suit, and in the name, of two merchants to compel the respondent to operate its road across the Missouri river, etc., although these merchants had no interest in the proceeding, except to receive and ship goods over the road, as did all other merchants engaged in like business. See, also, *Dill. Mun. Corp.* (3d Ed.) § 865, and notes. Besides, in this case, the respondent, as one of the patrons of the school, has, as such, an interest in the erection of the school-house other than that of a mere tax-payer, and his interest may have been different from that of any other tax-payer in that the removal of the school-house to a distant place might have deprived his children of the benefit of attending the public schools. The nuisance cases referred to are not in point. The rule as to the requisite interest of a plaintiff in this class of cases is specifically prescribed by section 3493 of the Civil Code, which does not apply to cases of *mandamus*. If the respondent has not the requisite beneficial interest to enable him to maintain this action in his own name, no other person except the district corporation has; and that corporation is controlled by the defendants. Therefore, there is no remedy at law whatever, in favor of any party, unless the respondent can maintain this action. Perhaps the illegal diversion and use of the building fund might be enjoined by a court of equity, at the suit of a member of the district corporation; but this would not be an adequate remedy; and, even if it were, it is well settled that an equitable remedy does not deprive a party of the legal remedy of *mandamus*. Judgment and order affirmed.

We concur: FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.

PATERSON, J. I concur in the judgment. I do not understand that *Linden v. Alameda Co.* has been overruled by the decision in any later case, and it seems to me the cases are distinguishable. A tax-payer has an interest "which is dis-

tinguishable from that of the mass of the community." Every citizen has an interest "in the proper discharge of public duties;" but every citizen is not the owner of property for state or municipal purposes.

THORNTON, J. I agree with PATERSON, J., and concur in the judgment.

WINN v. SHAW. (No. 13,909.)<sup>1</sup>

(Supreme Court of California. Dec. 5, 1890.)

INJUNCTION—TO COUNTY AUDITOR—ILLEGAL PAYMENT OF CLAIMS.

An injunction will not be granted at the suit of a tax-payer to restrain the county auditor from issuing a warrant for the payment of an alleged illegal claim allowed against the county by the board of supervisors, as the county may compel the auditor to refund the money in an action at law if the warrant is in fact illegally issued.

In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Action by W. B. Winn against Rody Shaw, as auditor of San Benito county, to restrain defendant from issuing a warrant on the treasury for the payment of a claim against the county allowed by the board of supervisors. The complaint alleged that plaintiff is a tax-payer of the county. Two newspapers are published therein, which are ready and willing to do the county printing at reasonable market rates. The county board directed its clerk to give notice of its intention to purchase land to be used for court-house and jail purposes, but no such notice was ever published in any newspaper. The county board, nevertheless, completed the purchase, and directed the auditor to draw his warrant on the treasury for the purchase price, and the auditor has declared his intention to comply with such order, wherefore plaintiff prays he may be enjoined. To this complaint, the auditor demurred, on the ground that it states no cause of action. The demurrer was overruled, and defendant excepted. On the trial it appeared that plaintiff was the proprietor of the Free Lance, one of the two newspapers published in the county; and that he and the proprietors of the Advance, the other paper, had entered into an agreement fixing the rates for county printing at about double the rates fixed by a resolution of the county board. In compliance with the order of the board, the county clerk offered to publish the notice of purchase in such papers at the rates fixed by the board, but both publishers declined. The clerk then posted notices in three public places in each supervisor district in the county, as required by section 25, subsec. 8, of the county government act, when there are no newspapers in the county. The board consummated the purchase, and then directed the auditor to draw his warrant for the price. The court below enjoined the auditor from so doing, and he appeals.

Briggs & Hudner, for appellant. Montgomery & Scott, (Michael Mullany and Wm. Grant, of counsel,) for respondent.

<sup>1</sup> Reversed on rehearing, post, 968.

PER CURIAM. The demurrer to the complaint in this cause should have been sustained, on the authority of *Linden v. Case*, 46 Cal. 174; *McCoy v. Briant*, 53 Cal. 249; and *Merriam v. Supervisors*, 72 Cal. 519, 14 Pac. Rep. 137. If the claim was illegal as one not authorized by law, as claimed by respondent, the remedy of the county at law is ample. The county is fully protected, in the manner pointed out in the cases cited, and a tax-payer is not entitled to maintain injunction. As said in the last of said cases: "If other safeguards are needed, the legislature can provide them. It is not the province of the courts." Judgment reversed, and case remanded, with directions to sustain the demurrer to the complaint.

(86 Cal. 430)

WILLIAMS v. DENNISON. (No. 13,987.)

(Supreme Court of California. Nov. 25, 1890.)

APPEAL—NOTICE—BOND.

1. A notice of an appeal from a final judgment and from an order denying a new trial, "and from each and every order and judgment made and entered in said cause," will bring up nothing for review which would not be subject to review if the notice had omitted the words, "and from each and every order and judgment made and entered in the case;" and hence the notice is not open to the objection of being indefinite.

2. A single undertaking is sufficient on an appeal from a final judgment, and from an order denying a new trial.

In bank. Appeal from superior court, city and county of San Francisco.

Action by C. B. Williams against E. F. Dennison for money had and received. There was a judgment for plaintiff. Defendant served the following notice of appeal: "You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the state of California from the judgment therein entered, in the said superior court, on the 28th day of February, 1890, in favor of the plaintiff in said action, and against said defendant, and from the whole thereof. Also from the order overruling the motion for a new trial, and from each and every order and judgment made and entered in said cause." The undertaking on appeal was in double the amount of the judgment and costs, and recited that the appeal was from the judgment and the order denying the new trial, and from each and every order and judgment made and entered in said cause. Plaintiff moves to dismiss the appeal.

B. McKinn, for appellant. J. C. Bates, for respondent.

Fox, J. The appeal in this case must be treated as an appeal from the judgment and order denying the motion for new trial. Under the notice, nothing will come under review on the hearing which would not be subject to review if the notice had omitted the words, "and from each and every order and judgment made and entered in said cause." Treating the appeal as being from the judgment and the order denying the motion for new trial only, as we think it must be treated, and the same not being separately taken, the undertaking is sufficient in form and in substance. *Chester v. Association*, 64 Cal.



42; *Corcoran v. Desmond*, 71 Cal. 102, 103, 11 Pac. Rep. 815. The other cases cited in support of the motion to dismiss the appeal are not in point. Motion to dismiss the appeal denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

WORKS, J. I concur. The notice of appeal and undertaking are in bad form, and in some cases might render the appeal abortive, but there is nothing in the record here to which the unnecessary recitals therein can apply except the appeal from the judgment and order denying a new trial. But, while this mode of procedure is harmless in this instance, it should not be encouraged.

(87 Cal. 62)

MITCHELL v. SOUTHERN PAC. R. CO. (No. 12,779.)

(Supreme Court of California. Dec. 12, 1890.)

CARRIERS—INJURIES TO PASSENGERS—EVIDENCE.

1. In an action against a railroad company for injuries to a passenger, occasioned by a train running off the track, evidence that at the time the accident occurred the train was running down a steep incline on a new and curved track, at an unusual and dangerous rate of speed, is sufficient to cast on defendant the burden of showing that the accident was not caused by any want of care on its part.

2. Where plaintiff was on the platform of the car when he was injured, and testifies that he went there because he feared that some accident would result from the unusual speed of the train, and intended in that event to jump into the sand on the side of the road, it is a question for the jury whether his action was that of a person of ordinary care and prudence.

3. Civil Code Cal. § 484, absolving railroad companies from responsibility for injuries received by passengers while riding on the platform of a car in violation of the printed and posted regulations of the company, does not apply where the person so injured went upon the platform, in the exercise of ordinary care and prudence, to escape the consequences of an accident which he feared from the unusual speed at which the train was running.

4. It is error to refuse to admit evidence that the other passengers remained seated in the car and were not injured, as their actions are part of the *res gestæ*, and tend to show what they regarded as prudent conduct under the circumstances.

5. The conductor testified that he left the smoking-car several minutes before the accident occurred, plaintiff going out with him; that the train was not then running as fast as it had been, and that he gave certain orders and then returned to the smoking-car, leaving plaintiff on the platform. Held, that it was reversible error to exclude a question put to one of the passengers whether the conductor did return to the smoking-car after he and plaintiff left it, and before the accident.

THORNTON, J., dissenting.

SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Gell & Morehouse, for appellant. D. M. Delmas, for respondent.

PATERSON, J. This is an action to recover damages for personal injuries sustained by plaintiff while traveling as a passenger on one of defendant's trains. Appellant contends that the judgment and

order should be reversed because plaintiff failed to show negligence in the management of the train, or any defect in the defendant's railroad track. It is doubtless true, as claimed by appellant, that in cases of this character the burden of proof is upon the plaintiff to establish negligence on the part of the defendant, and that the mere fact that a passenger was injured while on his journey is not sufficient to raise a presumption of negligence on the part of the carrier. But in this case not only is the injury admitted, but the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time the accident occurred the train was running down a steep incline leading to the bed of a river on a new and curved track, at an unusual and dangerous speed. This showing was sufficient to throw upon the defendant the burden of proving that the injury was not caused by any want of care on its part. *Boyce v. Stage Co.*, 25 Cal. 460; *Lawrence v. Green*, 70 Cal. 417, 11 Pac. Rep. 750; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266; *Buel v. Railroad Co.*, 31 N. Y. 314.

At the time the accident occurred the plaintiff was standing on the platform of the smoking-car, and it is claimed that he cannot recover for the injury sustained by him, and that defendant is relieved from responsibility therefor by the provisions of section 484, Civil Code, which reads as follows: "Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section." Plaintiff admitted at the trial that defendant had proper notices as required by this section posted in all of its cars, and that he had full knowledge of their contents before the accident. He testified that he had gone out upon the platform immediately before the accident in consequence of the fear that some disaster would occur; that his attention was directed to the speed of the train as soon as it passed over the top of the grade and began to descend; that the great and unusual speed at which the train was going, taken in connection with the fact that the road was new and temporary, led him to believe that an accident would occur, and that he went out upon the platform intending to jump therefrom to the sand on the inside of the curve, where he believed he would escape with less injury than if he remained in the car, and that he had no sooner reached the platform than the car was overturned and he was thrown upon the ground; that he had been for a long time in the employ of Wells, Fargo & Co., had acquired a knowledge and skill in the movement of trains, could distinguish

between the degrees of speed by the motion of the train, and that the train ran faster on the day of the accident than ever before. The evidence of the defendant tends to show that the plaintiff had been upon the platform several minutes before the accident occurred, but if the jury believed the testimony of the plaintiff it was for them to say whether the circumstances were such as would lead a person of ordinary prudence to act as the plaintiff did. The inquiry is, where there has been an unsuccessful attempt to escape danger in an accident, was the attempt which was made an unreasonable or rash act, or was it one which a person of ordinary care and prudence might do under the circumstances? The answer to this inquiry cannot be made to depend upon the result of the attempt to escape, nor upon the result which would have occurred if the attempt had not been made. It would be unreasonable to require a passenger in case of accident to judge with absolute certainty the degree of danger attending him if he made no effort to escape, and the absolute consequences of an effort to escape. He must act upon the probabilities of an effort to escape as they appear to him, and choose that hazard which seems to him as a person of prudence to be the least. Of course the facts that he was injured in the attempt to escape, and that those who remained in the car escaped without injury, are circumstances which the jury should consider in determining whether he acted as a man of ordinary prudence would under the circumstances, but, where he has acted in the manner described, it cannot be said that his attempt to escape constituted contributory negligence. *Twonley v. Railroad Co.*, 69 N. Y. 160; *Railroad Co. v. Mowery*, 36 Ohio St. 418.

In *Buel v. Railroad Co.*, 31 N. Y. 319, the court said: "The statute exempts the railroad company from liability to a passenger who shall be injured while on the platform of a car, etc., in violation of the printed regulations of the company, posted up at the time in a conspicuous place, inside of its passenger cars then in the train, provided the company at the time furnish room inside its passenger cars sufficient for the proper accommodation of the passengers. Laws 1850, c. 140, § 46. There was in this case a printed regulation, pursuant to this statute, posted in a conspicuous place inside the car, prohibiting passengers from standing or riding on the platform of any car. But neither the statute nor the regulation has any application to a case like the present one. \* \* \* The statute was intended to prevent the imprudent act of standing or riding on the platform, but not to absolve railroad companies from responsibility for every injury which might happen at that place, when a passenger is passing over it, while justifiably entering or leaving the cars." In that case it was held that, although the plaintiff was injured while attempting to escape from the car in a collision, and although the passengers in the same car with him, who kept their seats, escaped uninjured, he could not be held guilty of contributory negligence; that he acted

with ordinary care and prudence. We have carefully examined the instructions of the court to the jury, and find no error in any of them.

The court erred in sustaining plaintiff's objections to the questions asked by defendant as to the conduct of the passengers who remained in the car, and whether any of them were injured. Evidence of the action of other passengers in such cases is competent as a part of the *res gestæ*, and to show what they, being in the same dangerous situation, deemed prudent conduct. They all have an equal interest in protecting themselves, and will be presumed to have done what appeared to them to involve the least hazard. This error was cured, however, by other testimony—which appears not to be disputed—showing that there were only three passengers in the car besides plaintiff, and that they all remained in their seats until the car was overturned, and all escaped unhurt.

There is another error assigned, based upon the refusal of the court to allow defendant to ask how often plaintiff had traveled over the road, prior to the accident; but, as evidence on the topic went in afterwards without objection, no prejudice can be predicated on the ruling complained of.

There was one error which we think was prejudicial, and which entitles the appellant to a new trial. The plaintiff testified that the car left the track immediately after he reached the platform; that "just as I [he] had stepped out of the car-door the crash came." It was claimed by the defendant, and it attempted to show by evidence, that plaintiff was improperly on the platform; that he was not there through fear of an accident; that he had been standing on the platform in violation of its regulations several minutes before the accident occurred, and was consequently guilty of contributory negligence. The conductor testified that he left the smoking-car two or three minutes before the accident occurred, and that plaintiff went out with him; that the train was not going as fast then as it had on former occasions at the same point, and while plaintiff was on board; that he gave the brakeman orders to let off the brakes, walked back into the smoking-car, and took his seat while the plaintiff remained standing on the platform. The defendant then called S. W. Smith, who was one of the three passengers in the car at the time of the accident, and he was asked to state whether Mr. Clark, the conductor, returned into the smoking-car after he and plaintiff left it, and before the accident occurred. Plaintiff objected to the question on the ground that it was immaterial, the court sustained the objection, and defendant excepted. The question whether plaintiff went upon the platform under the circumstances narrated by him was a most important one; in fact the main question in the case is whether he acted as a prudent man would under the circumstances. In determining that question, the length of time he remained upon the platform, and the conduct of others on the train, including the officers of the

train, is material, competent, and important. The testimony of the conductor, if true, would tend not only to impeach the testimony of the plaintiff as to the length of time he stood on the platform, but directly to prove that there was no apparent reason for alarm at the time the accident occurred. To enable the jury to decide whether the conductor's version of the circumstances or that of the plaintiff was correct, the testimony of Smith, a disinterested witness, might have been important. It certainly was material and competent, and should have been admitted. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.

I concur in the judgment. WORKS, J.

I dissent. SHARPSTEIN, J.

THORNTON, J. I dissent. The exclusion of the testimony of Smith, on which the reversal is ordered, could not possibly have caused any injury to the defendant. Evidence of the return of the conductor before the catastrophe occurred in which the plaintiff was injured was already in and uncontradicted. The conductor had already testified to the fact of such return. The time of the return of the conductor from the platform could not possibly show how long the plaintiff stood on the platform, as the conductor, when he returned, left the plaintiff standing on the platform. The evidence shows that the conductor and plaintiff went on the platform at the same time. The conductor returned, leaving plaintiff on the platform. How could the time of the return of the conductor show how long plaintiff remained on the platform after such return? If the return of the conductor from the platform could show anything as to the time when the plaintiff remained on the platform after such return, the fact of his return was already in evidence and uncontradicted. A case carefully and laboriously tried should not be sent back for a new trial for an error, if any, so trifling.

(87 Cal. 84)

CITY OF NAPA v. HOWLAND. (No. 12,800.)

(Supreme Court of California. Dec. 12, 1890.)

EJECTMENT—PARTIES—EVIDENCE—DEDICATION—FINDINGS.

1. In ejectment, where plaintiff city claims the land in dispute by dedication, and the court has found that there was such a dedication, a further finding that after the dedication the owners of the land directed that it be so designated on the maps of the city is immaterial, and the fact that it is not supported by the evidence will not affect the judgment for plaintiff.

2. Though the owner of the land had no title thereto at the time he dedicated it, he and his grantees are estopped to deny the fact of dedication; and a title subsequently acquired by him inures to the benefit of the public, by virtue of such estoppel.

3. Where defendant in ejectment admits that he is in possession of the land when it is demanded of him, the tenant from month to month by whom he holds possession is not a necessary party defendant.

4. In ejectment by a city for land claimed to have been dedicated as a levee and street, where maps are produced on behalf of plaintiff, the error of admitting them without evidence that the former owner of the land filed or adopted them is waived by defendant's failure to object to them, and his discussion of them in argument, as evidence on the issue of dedication.

5. A finding that land was dedicated as "a public levee" is supported by evidence of dedication as a "public landing," the word "levee," as applied to land such as that in question along a navigable stream, having the same meaning as "landing."

In bank. Appeal from superior court, Napa county; A. J. BUCKLES, Judge.

F. E. Johnson, for appellant. O. R. Coghlan, for respondent.

PATERSON, J. This is an action of ejectment. The main question involved in the issues is whether the lands in controversy have ever been dedicated for the use of the public as a levee and street. The court found from the evidence that the property was dedicated to public use by the owners thereof about the year 1850, and that ever since said dedication the land has, by direction of the owners of the fee thereof, been designated and represented on the maps of the city of Napa, as public streets and levees; that the public used the same exclusively until March 1, 1875, when defendant, without authority or right, ousted plaintiff therefrom, and has ever since wrongfully held exclusive possession of the property. The plaintiff had judgment against defendant for the possession of the lands, but the defendant was permitted to remove his warehouses and fences.

1. The evidence on behalf of the plaintiff is ample to support the finding as to dedication.

2. The court found, finding 2, that the land had been dedicated by the owners, Coombs and others. This was the ultimate and essential fact, and the subsequent finding that the land by direction of the owners had, after such dedication, been designated on the maps of the city, was a finding upon an immaterial matter, at least upon a matter that was not controlling. The latter finding may be excluded as not supported by the evidence, and yet the judgment will be supported by the finding upon the question of dedication. The maps were not necessary to support the finding of dedication. The evidence of the acts and declarations of Coombs was sufficient to show a dedication.

3. If it be assumed that Coombs had no title at the time he dedicated the property, he and his grantees are nevertheless estopped from denying the fact of dedication. His claim was confirmed by the board of land commissioners in April, 1854, and a patent was issued to him in 1866. His newly-acquired estate "feeds the estoppel." God. Easem. p. 95, and cases cited in note; Tyler, Ej. pp. 725, 726; Washb. Easem. p. 62.

4. When the city marshal served a notice on defendant demanding that he deliver up possession of the premises, the defendant admitted that he held possession of the property, and said he would not surrender it. This testimony of the marshal was not contradicted by defendant. The

premises were in possession of a tenant of defendant under a letting from month to month. Under these circumstances it was not necessary that the tenant be made a party defendant. *Finnegan v. Carraher*, 47 N. Y. 497.

5. It is claimed that the court erred in its ruling in regard to the Thompson and Pierce maps. If the evidence necessary to render them proper for consideration under the ruling of the court was not produced by plaintiff, the defendant ought to have moved to strike them out. Instead of calling the attention of the court when plaintiff rested its case to the fact that there was no evidence showing that the former owners of the land had made, filed, or adopted the maps, counsel for defendant in the argument of the case considered and discussed the effect of the maps as evidence on the issue of dedication or no dedication. Therefore, if it be assumed that there was, at the time that the maps were offered and admitted in evidence, an express and binding understanding between counsel and the court such as is claimed, we think that the failure to move to strike them out, and the manner in which they were treated by counsel in the argument, constituted a waiver of the limitation. Furthermore, there is no exception in the record upon which error can be predicated. There is no ruling which we can review. The court did not err in admitting the map called "Plan of Napa City, filed for record at the request of Nathan Coombs."

6. It is said that the evidence does not support the finding of dedication "as a public levee and for public street purposes," because it shows a dedication, if any, for a public landing. It matters but little what name is given to the place, so long as the fact appears that it was dedicated for public use. "A landing is a bank or wharf to or from which persons may go from or to some vessel in the contiguous water." *State v. Graham*, 15 Rich. Law, 310. The word "levee," as applied to portions of the public highways bordering on navigable streams and sloughs in the interior cities and towns of this state, has the same meaning as "landing." The judgment and order are affirmed.

We concur: FOX, J.; WORKS, J.; McFARLAND, J.; SHARPSTEIN, J.

(87 Cal. 78)

*Ex parte WILLIAMS.* (No. 20,724.)

(*Supreme Court of California.* Dec. 12, 1890.)

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS—IMPRISONMENT IN HOUSE OF CORRECTION.

1. St. Cal. 1877-78, p. 953, relating to the house of correction in the city and county of San Francisco, provides that the criminal court of such city and county may sentence a prisoner on conviction to the house of correction in any case where he might be imprisoned in the county jail. *Held*, that this is not a special or local act relating to the punishment of crime, within the meaning of Const. Cal. art. 4, § 25, as it does not change the punishment or degree of any crime under the existing uniform laws, but only provides a place where punishment may be inflicted.

2. Nor is it an act regulating the practice of courts of justice within the meaning of such sec-

tion of the constitution, as it relates only to the execution of their judgments, which is a matter subject to legislative discretion.

In bank. *Habeas corpus.*

N. S. Wirt, for petitioner. *Geo. A. Johnson*, Atty. Gen., and *J. D. Page*, Dist. Atty., for respondent.

PER CURIAM. In this case, by leave of the court, an amended petition was filed, after the decision which was filed July 24, 1890, (24 Pac. Rep. 602;) and on such amended petition the petitioner was permitted to reargue the case on the question of the constitutionality of the act of 1878, under which petitioner was sentenced to the house of correction. After a patient hearing and investigation we deem it necessary only to add to that which was said in our former opinion that, in our judgment, the act is not in conflict with section 25, art. 4, of the constitution. It is not special or local, either for the punishment of crimes or misdemeanors, or regulating the practice of courts of justice. The laws for the punishment of crimes and misdemeanors are uniform throughout the state, in the matter of determining what is a felony, and what a misdemeanor, and the legal consequences flowing from the conviction of either. They are uniform in prescribing the punishment of imprisonment, when such punishment is allowed at all, for each of the several offenses for which that punishment is provided. This act does not change the punishment, or the degree of the crime. All that it does is to authorize the court in San Francisco, in its discretion, to cause the punishment to be inflicted in one place, instead of either of two or three others where it might be done. If the legislature has no power to authorize courts to do this, then it is powerless to provide for imprisonment for felony in more than one place in the state. We find no such limitation upon the power of the legislature in the premises. If, as is claimed in argument, the imprisonment must be in a state-prison in order to be equal and uniform, then there must be but one state-prison; for if more than one, even though the government and discipline in all be the same, it would be impossible that the climatic and other conditions would be the same, and hence the conditions of punishment would be unlike. Such cannot be the meaning of the constitution or the law. It is the fact of imprisonment, and the labor during confinement, and the civil consequences that attach to the conviction, that constitute the punishment, and not the place where the imprisonment is carried out.

Nor is the act one regulating the practice in courts of justice. Practice is that course of proceeding by which the investigation is had, and the judgment reached. When reached, the place and manner of executing the judgment (it being uniform in character with other judgments in like cases) is subject to legislative discretion; and the legislature may prescribe that all judgments upon conviction for felony shall be executed in one place, or that those in different parts of the state may be executed in different places, or, having

prescribed different places for such purposes, it may, as it has, leave it to the discretion of the court in each instance to determine in which of them the judgment shall be executed. Let the writ be discharged, and the prisoner remanded.

(87 Cal. 40)

**SPAULDING v. NORTH SAN FRANCISCO HOME-STEAD & RAILROAD ASS'N.** (No. 12,685.)

(*Supreme Court of California.* Dec. 12, 1890.)

**PETITION FOR STREET GRADING—PRESUMPTION OF REGULARITY.**

1. St. Cal. 1871-72, p. 804, provides that certain street grading cannot be ordered by the supervisors unless a majority of the frontage of lots petition therefor. Certain grading was done upon a petition from which it did not certainly appear whether the petitioner owned a majority of the frontage or not. *Held* that, since the board must necessarily have passed upon the sufficiency of the petition before ordering the work done, it was properly presumed to be sufficient, and testimony to the contrary was rightly excluded. Distinguishing *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Supervisors*, 79 Cal. 388, 21 Pac. Rep. 849.

2. The act further provides that the board shall publish notice of its intention to order the work done, and that lot-owners who feel aggrieved by the proposed improvement shall file a remonstrance, which shall be passed upon by the board, and its decision shall be conclusive. *Held*, that one who failed to file such remonstrance was concluded by the decision, and could not attack it by way of defense to a suit to collect the assessment for the improvement.

3. Where a contract was made for doing the work for 50 cents per yard, but afterwards, without the contractor's request, the board published a new notice of intention, which resulted in a new contract with him to do the same work at 60 cents per yard, for which action no reason appears, it must be presumed that the board acted regularly, and that for some defect in the proceedings the new contract was necessary.

In bank. On rehearing. For former report, see 24 Pac. Rep. 600.

*E. J. Pringle and D. H. Whittemore*, for appellant. *W. H. H. Hart and J. W. Wood*, for respondent.

**McFARLAND, J.** This is an appeal by defendant from a judgment enforcing a street assessment against a lot on Lombard street. The case was heard in department, and the judgment was affirmed; and the facts of the case are stated in the opinion then rendered by Commissioner Gibson, filed July 8, 1890. A hearing in bank was ordered, because it was strenuously urged that the decision was in conflict with *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Supervisors*, 79 Cal. 388, 21 Pac. Rep. 849. But, after argument on rehearing, and mature consideration, we are satisfied with the conclusions reached in department. *Mulligan v. Smith*, and *Kahn v. Supervisors*, arose upon a special statute which did not provide for an adjudication of the jurisdictional fact that a majority of the frontage of lots fronting on the work proposed to be done was represented by the owners thereof in a petition for the work; and did not provide for a hearing to any of the owners of such frontage on that issue. But we think that section 4 of the act in question in the case at bar (St. 1871-72, p. 805), does not provide for such adjudication by, and such

hearing before, the board of supervisors, and that the decision of the board that a majority of such frontage was represented in the petition was a decision which the act says "shall be final and conclusive." In *Freeman on Judgments*, § 523, it is stated as a rule (founded on numerous authorities there cited) that "whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack." The rule embraces "a large number of persons and tribunals not ordinarily spoken of as 'judges' nor as 'courts,'" for "their authority in this respect is judicial," (section 539;) and it was expressly applied by this court to boards of supervisors in *People v. Hagar*, 52 Cal. 182. The rule stated in the latter case governs, we think, the case at bar. In *Turrill v. Grattan*, Id. 97, the only question which seems to have been raised was as to the sufficiency of the petition itself, which was a question not of fact, but of law. In the case at bar, we think that the petition was sufficient. A diagram, which was not as full in details as it might have been, was presented with the petition; but it was not inconsistent with the main body of the petition, which sufficiently stated the facts required by the statute. The point that the contract was invalid because there had been a previous contract is sufficiently answered in the said opinion of the commissioner; and we may add that the remedy for any such objection to the contract is provided for in section 12 of the act. It may be remarked also that it is doubtful whether the points which appellant seeks to make against the petition and to the rulings of the court are properly presented in the record. The judgment and order denying a new trial are affirmed.

We concur: **PATERSON, J.; Fox, J.; SHARPSTEIN, J.; THORNTON, J.**

(87 Cal. 49)

**BENSON v. SHOTWELL.** (No. 12,661.)<sup>1</sup>

(*Supreme Court of California.* Dec. 13, 1890.)

**VENDOR AND VENDEE—CONTRACT OR OPTION—RIGHTS OF VENDEE.**

1. In an action to quiet title, defendant claimed under the following contract, signed by plaintiff, which defendant contended was a contract of sale, while plaintiff insisted that it was an option: "Sept. 7, 1888. Received from \* \* \* one thousand dollars, being deposit on account of sale by me to him of, [a described lot] for the sum of \$16,000. \* \* \* Purchaser to have rent of lot from and after September 1st. Possession of lot given and guaranteed to purchaser on transfer of title. Fifteen days given to purchaser for examination of title and making of deed. If title not satisfactory to purchaser, sale to be null and void, and above deposit returned to him." *Held*, that this was a valid contract of sale and not an option.

2. The abstract of title disclosed that the title had at one time come into "H. P. Hepburn," and that there was no deed from him, but one from "H. P. Hopkins." Plaintiff claimed that the original deed in his possession was signed by H. P. Hepburn, but refused to allow defendant to submit this deed to his counsel, or to have it recorded, and on the last of the 15 days he tendered

<sup>1</sup> Rehearing denied, post, 681.

defendant a conveyance, and demanded the balance of the purchase money. *Held* that, though plaintiff had a good title, it was not satisfactorily proved according to the terms of the contract, and defendant was justified in refusing to complete the contract. *WORKS, J.*, dissenting.

3. The lot was occupied by various tenants, some of whom had attorned to plaintiff, and some had not. Those who had not attorned occupied shanties, and could not be found in the day-time at all. It also appeared that the buildings and fence of the adjoining lot on one side projected over the line, and had so projected for many years. The owner of the encroaching lot was a non-resident who had no resident agent authorized to act. *Held*, that plaintiff could not and did not give possession within the terms of the contract.

4. When, under such circumstances, plaintiff brings an action to quiet title, he can only have a decree upon condition that he restore the money paid by defendant upon the contract.

In bank. Appeal from superior court, city and county of San Francisco; *F. W. LAWLER, Judge.*

*A. N. Drown*, for appellant. *Edward J. Pringle*, for respondent.

*Fox, J.* Action in form *quia timet*, or one brought under section 738, Code Civil Proc., for the purpose of determining the adverse claim of defendant to beach and water lot No. 717, San Francisco. Defendant denies that he asserts any claim to the lot, other than that which he derives under a certain contract with the plaintiff for the purchase thereof; alleges payment of \$1,000 under said contract, with offer to fully perform on his own part, but inability and refusal to perform on the part of plaintiff; and, in addition, files a cross-complaint against plaintiff, demanding a return of said \$1,000, with interest, together with damages for non-performance on the part of plaintiff, and other relief. Findings and judgment for plaintiff, motion for new trial denied, and defendant appeals. Respondent claims that the transaction between himself and appellant was not a sale, or contract for the sale, of the lot, but a mere sale of an option to buy the lot; that the \$1,000 was paid for the option, and that defendant not having exercised the option, and made the purchase, the transaction is finally closed, and he, plaintiff, is entitled to have his title quieted, and to retain the \$1,000. Defendant, on the other hand, insists that the transaction was a sale. The contract was in the words and figures following: "San Francisco, September 7, 1883. Received from J. M. Shotwell one thousand dollars, being deposit on account of sale by me to him of beach and water lot No. 717, [describing it,] for the sum of sixteen thousand dollars (\$16,000.) Purchaser to pay the commission of two hundred dollars (\$200) for selling, to Messrs. Moxley and Fisher. Purchaser to pay for paving crossing of Howard and Steuart streets, now being done, at an amount not exceeding one hundred and twenty dollars (\$120.) The seller to pay all other street work now being contracted for or already done. Purchaser to pay taxes for current year 1883-4. Purchaser to have the rent of lot from and after September 1st. Possession of lot given and guaranteed to purchaser on transfer of title. Fifteen days

given to purchaser for examination of title and making of deed. If title not satisfactory to purchaser, sale to be null and void, and above deposit returned to him. [Signed] JOHN BENSON. Witness, CHAS. C. FISHER." The thousand dollars was paid simultaneously with the execution, delivery, and date of this paper. The 15 days consequently expired on the 22d of September. There is no question in our minds that this was a good and valid contract for the purchase and sale of the lot; the deposit to be returned in case the title did not prove satisfactory, or of inability on the part of the seller to comply with its terms. It comes fairly within the provisions of sections 1726 and 1729 of the Civil Code. It was signed by the party to be charged, and by the only party who was required to sign it. Civil Code, § 1741; *Fabian v. Callahan*, 56 Cal. 159. The payment of the deposit by the other party was a sufficient acceptance of its terms, and by the express terms of the paper that payment was not, as claimed by respondent, for an option, but "a deposit on account of sale." For the amount of that deposit, the vendee had and has a lien upon the property, in case of failure on the part of the vendor to make good his part of the contract, unless the vendee is himself first in default. Civil Code, § 3050; *Pom. Eq. Jur.* §§ 167, 1263, and cases there cited.

At or about the time of making the contract, respondent delivered to appellant an abstract of title, which appellant had revised and continued down to date at his own expense, and then placed it in the hands of a well-known examiner. On the 17th of September he received the report of his examiner, and immediately notified the respondent in writing of certain defects in the record title, calling his attention thereto, and, as to one which seemed to be an important one, suggesting that possibly it arose from clerical error in the record, and asking for the original papers, that he might submit them to his counsel and examiner; also calling his attention to certain facts in regard to the occupancy and possession of the lot, and to the fact that "to avoid trouble and give undisputed possession it will be necessary to oust them all." Receiving no response to this, appellant again wrote to the respondent on the 19th as follows: "I am waiting patiently your reply to my note of the 17th inst., referring to matters requiring your attention in clearing up title, etc., to water lot No. 717. If you will be kind enough to inform me where I can find you during business hours, and at what time, I will meet you. I wish to close up the business without further delay." After receiving this letter, respondent called, and claimed that he had the original of the deed to which exception was taken in the chain of title shown by the abstract, which, according to the record, was signed "Hopkins," but which he claimed was in fact signed "Hepburn," as it was required to be, in order to make the title correct, but he refused to let the appellant take it to submit it to counsel, or to put it upon record. His attention was then also particularly called to the condition of the lot as

to the matter of possession, but he took no measures to prepare himself for delivery of possession as required by his contract. On the 22d of September, the day when, by the terms of the contract, the transaction was to be closed, he sent his agent with his deed of the premises, and made a tender thereof, and demanded the remaining \$15,000. Appellant counted out to him the money, and, as he was about to put it in a bag and carry it away, appellant said, "Wait a minute, gentlemen, you must go down and put me in possession of the lot, and then you can take the money away," and added that upon receiving possession of the whole lot, and with the correction of the deeds, he was ready to complete the purchase. The evidence given upon the trial shows the title from two sources: (1) An alcalde grant, made January 3, 1850. (2) A deed from the California land commissioners, dated August 26, 1854. In tracing the title down from the alcalde grant, it came into H. P. Hepburn. There, according to the records of the recorder's office, and as shown by the abstract, there was complete break in the chain of title. The next deed in order of date was from H. P. Hopkins, and there was no deed of any date from H. P. Hepburn. It was admitted upon the trial, and so appears in the record, that the land is within the grant to the pueblo of San Francisco. If that is true, and it must be taken as true for the purposes of this case, here was a fatal defect in the record title. It could not be helped out by a good chain of deeds from the land commissioners down, for, if the land was within the grant to the pueblo, the commissioners had no title to grant, and nothing was acquired or taken under their deed. It therefore became important that the connection should be complete with the alcalde title. According to the record the plaintiff utterly failed to connect himself with that title. Under the contract defendant was entitled to a good paper title, sufficient in law, and was not bound to accept a title resting upon the statute of limitations, or take the risk of determining from facts which he might learn *de hors* the record, whether or not the statute of limitations could be successfully pleaded against an adverse claim. *Hartley v. James*, 50 N. Y. 42. True, plaintiff claimed, and upon the trial proved, that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn. But, at the time when it was his duty to show good title, he allowed the matter to rest upon his naked assertion, and refused to submit his proof for examination, or to permit the deed to be recorded correctly. Defendant had a right, therefore, to stand by the record, and to govern his conduct accordingly. Some other discrepancies in the chain of this title were also pointed out as defects, at the time, but they do not seem to have been seriously insisted upon, and, comparatively, at least, they were immaterial.

As to possession, the evidence shows that there were on the lot several tenements, a blacksmith shop, a shoemaker's shop, a stable, and several shanties, ships,

cabins, and the like; that one or two of these tenements were occupied by persons attorning to the plaintiff, and paying a small monthly rental; that others of them were occupied by persons whose names even could not be learned,—persons sleeping there at night, and absent during the day,—the regular tenant claiming that they slept there by his permission, but he did not even know the names of some of them. Along the rear end of the lot, certain buildings, supposed to stand on the corners, and a fence running from one to the other of them, constituted the rear line of occupancy, but it was found upon survey that these buildings and this fence were inside the line of the lot 1 foot 8½ inches, and that for at least 12 or 13 years this strip had been so fenced out of this lot, and used and occupied by the tenants on the adjoining lot, which belonged to Mrs. Klumpke, then in Europe, with no agent here authorized to act for her in the matter of determining or deciding whether she claimed it or not. These facts appear from the evidence, without substantial, and it seems to us without any, conflict. Under these circumstances, the defendant claimed and demanded that when he paid his money he should be given not only a good paper title, but the actual possession of the lot, and of the whole lot. When demand was made, and the money counted out, plaintiff's agent sent some persons down with defendant to put him into possession, but the tenants said they could not give it. Several of the small tenements were locked up, and the occupants absent, and the strip on the outside of the fence was completely covered, to a depth of several feet, with lumber belonging to the tenant of Mrs. Klumpke. The parties returned without a surrender of possession. It is claimed on the part of respondent that the tenants who were under lease from plaintiff said while there that they would acknowledge the defendant as their landlord, and attorn to him, and that this was all that was required. But this was not the measure of plaintiff's obligation, according to the letter of his bond. According to that paper, defendant was entitled to an actual *possessio pedis* of the whole lot. The language of the contract implied nothing less. Constructive possession, and the duty to attorn, would follow the title, and, if that was all that was meant, there was no need to have said anything about possession in the contract. But in that instrument it is expressly provided that the possession of the lot is to be both "given and guaranteed to purchaser on transfer of title." Nor is this relieved or modified by the other provision that he is to receive the rent from and after September 1st. That assures him, in case the contract is carried out, the rent from a day anterior to the date of the contract, but does not bind him to take the lot with all its incumbrances at the time of final completion of the terms of the agreement. Besides, this proposed attornment was from only two or three of the many occupants of that lot. The others knew no landlord, and were unknown to any. Their tenements were locked up, and access to them



could not be had, without a violation of law. Still more, as to an important portion of the lot, it was certain that an adverse right had grown up, which, if asserted, would defeat the title as to that portion, and it was not known then, or even at the time of this trial, whether it would be asserted or not. By the terms of the contract, delivery of possession and the transfer of title were to be simultaneous, and both were to be concurrent with the payment of the money. The conditions of the contract were mutual and dependent—concurrent—within the meaning of section 1437, Civil Code. Under it, respondent was not entitled to demand payment of the money until he delivered that possession. Civil Code, § 1439; *Hill v. Grigsby*, 35 Cal. 661–663; *Society v. Hildreth*, 53 Cal. 723. The word “possession,” as used in this contract, is to be understood and construed in its ordinary and popular sense. Civil Code, § 1644. According to the uncontradicted evidence, appellant offered to perform, according to the strict letter of the contract, (Id. §§ 1437, 1498;) and no objection was made to the mode of such offer, (Id. § 1501.) Nothing which transpired afterwards met the measure of his rightful demand. The subsequent written surrender of possession to plaintiff by his tenants, which was afterwards shown to defendant, did not meet the calls of the contract. It was a mere statement of surrender, not accompanied or followed by an actual surrender, and, as before stated, was from only a portion of the actual occupants. The court found in favor of plaintiff, and against defendant, on all these questions of performance, and offers to perform, on the part of the respective parties. Without specifying them separately, we think the findings upon these questions are clearly against the evidence, and that the evidence on the subject is without substantial conflict. The case must therefore go back for a new trial, and it remains only to consider the points made on the questions of remedy and relief.

Appellant, although not appearing to be in default, has not asked for specific performance. Respondent has not chosen to bring his action to rescind, but rather seeks to quiet title. If he had sought to rescind, appellant not being in default, respondent would not have been entitled to that relief until he had restored all that he had received under the contract. Id. § 1691; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. Rep. 772, and cases there cited; *Booth v. Hoskins*, 75 Cal. 276, 17 Pac. Rep. 225; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. Rep. 74. He cannot avoid this obligation by coming into equity to quiet his title. The complaint in this case must be treated as a bill in equity. *Brandt v. Wheaton*, 52 Cal. 430; *Hancock v. Plummer*, 66 Cal. 338, 5 Pac. Rep. 514. This action has always been held to be on the equity side of the court. *Polack v. Gurnee*, 66 Cal. 267–269, 5 Pac. Rep. 229, 610. He who asks equity must do equity. *Ballard v. Carr*, 48 Cal. 75; *Guttenberger v. Woods*, 51 Cal. 523. Under this contract and this evidence, plaintiff cannot come into a court of equity, and ask to quiet his title against

the claim of defendant, without restoring the money he has received. *Chandler v. Chandler*, 53 Cal. 269. The real subject of controversy here is the contract of sale, and the rights of defendant thereunder. The judgment must necessarily adjudicate those rights, and will pass only incidentally upon plaintiff's title. *Parnell v. Hahn*, 61 Cal. 131. It may be that respondent can make good title, but he did not at the time show good record title; was unable to put his vendee in possession, and has never yet shown that his title, even if good paper title, has not been defeated as to a part of the lot by adverse possession. Under such circumstances the appellant was entitled to recover the money paid. *Sanders v. Lansing*, 70 Cal. 429, 11 Pac. Rep. 702. It is suggested that we can order a modification of the judgment, requiring plaintiff to repay to defendant the sum of \$1,000, with interest thereon from September 22, 1883, and that thereupon plaintiff's title be quieted. On the evidence such a judgment would seem to be equitable between the parties, but it would not be supported by the findings as they now stand, and this court cannot make findings for the court below. If in the court below the parties shall consent to so adjust their differences, no doubt the court will facilitate them in so doing. All that we can do is to order that the judgment and order appealed from be reversed, and it is so ordered.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

WORKS, J. I concur in the judgment on the ground that possession was not given as provided in the contract. I do not concur in the conclusion reached that a good title was not shown. The respondent showed by producing his deed that the record was incorrect, and that the deed was made by the proper party. This was done on the day the contract was to be consummated, and was sufficient. Besides it was satisfactory to the appellant, as he only required as a condition upon which he was willing to pay the purchase money, that possession of the property be given him.

(3 Cal. Unrep. 321)

DE GUYER *et al.* v. BANNING. (No. 13,240.) (Supreme Court of California. Dec. 12, 1890.)

MEXICAN GRANTS—DESCRIPTION—CONFIRMATION—CONFLICTING PATENTS.

In ejectment, plaintiffs claimed under a Mexican grant that had been confirmed by the federal district court in 1857, and had been patented to plaintiffs by the United States in 1858, in accordance with the decree of confirmation which described the land by specified boundaries, giving lines and monuments. The survey made by the surveyor general in carrying out the decree of confirmation conformed to the exterior boundaries, as described in the decree, which mentioned no reservation within the limits of these exterior boundaries. There was a clause in the certificate of survey which read: “Excepting, reserving, and excluding from the tract, as thus surveyed, that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines.” The land in controversy was an island lying within these lines. This island, to-

<sup>1</sup> Rehearing granted.

gether with other land lying within the inner survey, was patented to defendant by the United States in 1881. *Held*, that the Mexican grant, as confirmed and patented by the United States to plaintiff, included the whole space lying within its exterior boundaries, and that defendant had acquired no title under his patent. BEATTY, C. J., and McFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge. *Houghton, Silent & Campbell and J. S. Chapman*, for appellants. *Bicknell & White and Smith, Winder & Smith*, for respondents. *J. E. Foulds, amicus curiæ*.

Fox, J. This is an action of ejectment for the recovery of the possession of a tract of land, comprising 18.88 acres, commonly known as "Mormon Island," situate in the inner bay of San Pedro, in the county of Los Angeles. Defendant had judgment, from which, and an order denying a motion for new trial, plaintiffs appeal. Plaintiffs claim under a Mexican grant, alleged, in the petition for confirmation thereof introduced and received in evidence, to have been made early in the present century, under which it is claimed that juridical possession was given in 1817, and that the same was repeatedly acknowledged by the Spanish and Mexican governments, and particularly so by a decree of the governor of the province of California, dated December 31, 1822; of which grant, confirmation was made by the district court of the United States, February 10, 1857, and patent thereon issued December 18, 1858. Defendant claims under a patent issued by the government of the United States, as upon a sale of the property as government land, describing the same as lot No. 1 of section 8, in township 5 south, range 13 west, San Bernardino meridian, in California, dated December 30, 1881. In addition to pleading his title, the defendant pleaded the statute of limitations, but upon that plea the court found against the defendant. The only question, therefore, to be determined upon this appeal, is whether or not the title passed by the Mexican or Spanish grant as the same was finally confirmed and patented by the government of the United States. The grant is of the Rancho San Pedro, made to Christobal Dominguez. The decree of confirmation is for eight and a half leagues, a little more or less, of which specific boundaries are given in the decree, giving lines and named monuments, some of which are natural, and some artificial, and extending around all sides of the grant. One of these lines, as specifically described in the decree, runs directly across the outer or western border of "the inner bay of San Pedro" to La Coleta, and includes said inner bay within the exterior boundaries of the grant. As described in the decree, no exception within the exterior lines there given is made, but everything passes by the grant, which lies within those exterior boundaries. It is proved and conceded that the exterior boundaries, as described in the survey, made by the surveyor general, and recited in the patent, are identical with those given in the decree itself. But after completing the survey of the exterior bounda-

ries, as the same are described in the decree, the surveyor adds this paragraph: "Excepting, reserving, and excluding from the tract, as thus surveyed, that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines, to-wit,"—and then follows with the courses and distances of the survey of such inner bay, and including therein 1,100.50 acres. What was the purpose, and what was the legal effect, of this paragraph in the certificate of survey, and the subsequent field-notes of the survey in this paragraph referred to? An understanding of the character of the "inner bay of San Pedro" may help to solve that problem, if it is one capable of solution. According to the map attached to the record it is a body of water jutting into the main body of the land, towards the east, from the principal or main bay of San Pedro, covering in its exterior limits 1,100.50 acres. The body of the main-land of the grant surrounds it on the north, south, and east. It was claimed by counsel at the argument, but we do not see that the fact appears in the record, that it is inaccessible to sea-going ships, but that at times of high water it is navigable with small craft. Manifestly, and we say this more from what seemed to be conceded at the argument than from any direct evidence in the record, it is a tract of water below ordinary high-water mark, but not a portion of the deep sea, or into which deep sea going vessels can be taken. Within it Mormon island is situated. At high water, this island consists of a pile of rocks, covering not much more than an acre, above the surface of the water, but at medium low water it is an island of considerable extent, and at extreme low water, according to the testimony of the defendant himself, it is not an island at all, but is accessible, dry shod, from the main-land.

The exception and reservation, if it be one in law, is "that portion thereof covered by the navigable waters of the inner bay," etc. The very language of this exception would certainly exclude from the exception the island, which cannot be, in the nature of things, "covered by the navigable waters," and this exclusion would extend to the island as shown at ordinary low-water mark. This conclusion must be inevitable, and not open to debate, if we are to be governed by these words of exception and reservation. If, on the other hand, courses, distances, and quantity are to govern in the construction of this clause, and the determination of what is covered by the reservation, then the island is necessarily a part of, and is not excluded from, the reservation. But the very language of the exception forbids such a construction. There is no word in the entire certificate of the surveyor to show that all within the survey of the inner bay is reserved, but only that part thereof which is covered by the navigable waters. This conclusion would determine this case were it not for the fact that the 18.88 acres patented to defendant, and of which he admits himself in possession, include much more than the island, as the same appears

at even ordinary low tide. • Because of this fact, it becomes necessary to go further, and inquire whether the United States had any property right within that inner bay, at the date of the patent made by the government to defendant, which its officers had the power to convey.

Returning again to the Mexican grant, of which it is conceded that juridical possession was given in 1817, and final confirmation made by the constituted authorities of the Mexican government in 1822, we find that the judicial department of our own government, in 1857, finally adjudged, determined, and decreed that this inner bay was included within, and was a part of, said Mexican grant, and in and by said decree gave the entire boundaries, showing that it was so included. This was a final adjudication that the lands within the inner bay never were, never became, and never could become, unless by subsequent purchase, the property of the United States. It had passed into private ownership before the conquest, and this government was, by its treaty, bound to protect the title thereof in the Mexican grantee, or his successors in interest. By its decree of confirmation, the government did so protect this title, and determined that it had no interest in the lands. There was nothing in the decree to indicate or intimate that the inner bay, or any part thereof within the lines of the boundaries there given, was excepted or reserved from the grant, or to authorize the surveyor to either survey or make such an exception or reservation. The grant was one by boundaries, and not by quantity, and was complete within itself.

Turning to the patent, which, as before stated, is dated December 18, 1858, we find that it commences with and consists of recitals of the presentation of the grant for confirmation, and of all the proceedings down to and including the decree of confirmation, and the dismissal of appeal therefrom, followed by a recital of the certificate of survey and plat made by the surveyor general, and then, and not till then, proceeds with the granting clause, as follows: "Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of congress aforesaid of March 3, 1851, have given and granted, and by these presents do give and grant, unto the said \* \* \* and to their heirs, the tract of land embraced in the foregoing survey, in the respective shares," etc. There is not in the entire granting portion of this patent, nor at any place in the entire instrument, except in the recital of the certificate of survey, a word to indicate that any exception or reservation whatever is made, either in the Mexican grant, in the decree, or in the grant or relinquishment finally made by the United States. The latter is "of the tract of land embraced in the foregoing survey." What "foregoing survey?" The one which is complete in itself, and confessedly conforms minutely to the original grant, the juridical possession given thereunder, the monuments then established, both natural and artificial, and to the decree of final confirmation; or to that survey amended by adding thereto a

complete, independent, and unauthorized survey, embracing 1,100.50 acres, lying wholly within the lines of the authorized survey, but to be taken out of the grant or relinquishment thereby made? This reference to survey in the granting clause of the patent is not free from ambiguity, but, when construed in the light of the decree of confirmation, under authority of which the patent was made, and of the law as to what the government then possessed, and could grant in the premises, it must be held that the words "foregoing survey" refer to the first of the complete surveys given in the recital,—the one which confessedly conforms to the original Mexican grant, and the decree of confirmation thereof; and that the second survey recited therein, descriptive of a reservation attempted to be made by the surveyor, but for which there was no warrant in law or in the decree, is surplusage, and of no effect. The patent was, in effect, but the execution of the decree of confirmation. *U. S. v. Minor*, 114 U. S. 242, 5 Sup. Ct. Rep. 836. The officers of the government had no power to execute the decree in part, and by the same act, or any other, to withhold execution of the balance, or make reservation of a part of that which had been adjudged to be already the property of the claimants. Nor is there anything in the language of the patent which necessarily leads to the conclusion that the president, in executing this patent, attempted to make any such reservation, or do less than execute the decree as a whole. The act of the surveyor in making this second survey, and describing it as of an exception or reservation, was without authority, not binding upon his superiors or the government. The presumption is that the officers whose duty it was to prepare and execute the patent did not consider themselves bound by it, nor attempt to act upon it, and there is no language employed by them in the patent which necessarily overrides this presumption. "When a decree gives the boundaries of a tract to which the claim is confirmed with precision, (as was done in this case,) it is conclusive not only on the question of title, but also as to the boundaries which it specifies," (*U. S. v. Hancock*, 133 U. S. 196, 10 Sup. Ct. Rep. 264;) and it was the duty of the surveyor, in making survey of the claim finally confirmed, "to follow the decree of confirmation as closely as practicable," (*Id.*; also *Act Cong.* July 1, 1864; 13 St. 334.) This statute, it is true, was passed after this survey, but it established no new law,—was merely declaratory of what always was the duty of ministerial officers in executing the decrees of court. In this case, it was practicable to, and he did, follow the decree of confirmation minutely and exactly, and made a complete and perfect survey according to the same. That which he did afterwards in the way of making *addenda* to his survey, was in excess of his authority, and void. That the court had authority to fix and determine these boundaries definitely in its decree was settled in the *Fossat Case*, 2 Wall. 710, and *U. S. v. Fossatt*, 21 How. 447, and that when so fixed they are conclusive is affirmed in *U. S. v. Hancock*, supra,

probably the very last case decided by that court of last resort upon such a question. It was also held by this court in its last decision upon this question. *Association v. Knight*, 24 Pac. Rep. 823, (filed September 4, 1890.) And it was long since established by the supreme court of the United States, and has been steadily followed in this court, that when a specific tract of land is so confirmed according to ascertained boundaries, fixed by the decree, the confirmee takes title, upon which he may maintain action in ejectment. *Stanford v. Taylor*, 18 How. 412; *Mining Co. v. Clarkin*, 14 Cal. 551; *Soto v. Kroder*, 19 Cal. 95. In such a case, the patent from the United States is evidence only of pre-existing title. *Waterman v. Smith*, 13 Cal. 418. "Segregation was made by the decree." *Mining Co. v. Clarkin*, supra. Both affirmed in *Mahoney v. Van Winkle*, 38 Cal. 456. That when the boundaries are fixed by the decree the survey must conform thereto was also held by this court in *Hale v. Akers*, 69 Cal. 167, 10 Pac. Rep. 385. "The survey is not an independent act, but is an act performed under the decree, and preparatory to its [the decree] being carried into effect by a patent," (*More v. Massini*, 37 Cal. 436,) and which patent is but the execution of the decree, (*U. S. v. Minor*, supra.)

But it is claimed on the part of respondent that, notwithstanding the authorities cited, and the principles therein established, the reservation attempted to be made by the surveyor general and the survey thereof was correct and lawful, for the reason, as he claims, that no title passed by the Mexican grant to any lands within the exterior boundaries of the grant, except such as were situate above ordinary high-water mark of the sea-shore. In the recent case of *Association v. Knight*, supra, we held that the pueblo did not take and hold, under the laws of Mexico, and under those laws could not acquire title to, lands situate below ordinary high-water mark of the sea-shore, and cited authorities to show that such was the Mexican law, and also the decree of confirmation in that case to show that by such decree, the boundary of the pueblo, at the point under consideration, was fixed by and at high-water mark, and so found and established by the decree. But this is not a parallel case. Here there is no question of what are or can be the rights of a pueblo under the Mexican or any other law. There is no pueblo at this point, and neither party claims under one, or under the laws relating to pueblos. One is claiming under a Mexican grant, the other under the United States, direct. In that case it was conceded as having been long since established by the decisions of both state and federal courts that the Mexican government could, and sometimes did, make private grants of lands extending below the ordinary high-water mark of the sea-shore. This was so held in *Teschemacher v. Thompson*, 18 Cal. 11, and in *Ward v. Mulford*, 32 Cal. 365, and the grants there referred to, like the present one, were confirmed, patented, and respected by the government and the courts. But even if this contention of the

respondent, that nothing passed by the Mexican grant, or the patent issued in execution of the decree of confirmation thereof, lying below ordinary high-water mark, be true, it still follows that so much of the judgment appealed from in this case as adjudges and decrees that the defendant is the owner, and entitled to the possession, of the tract of land described in said judgment, to-wit, the 18.88 acres described in defendant's answer, and in the patent to him, is erroneous; for, according to his own testimony, which is uncontradicted, more than 17-18 of that tract lies below ordinary high-water mark, and is, therefore, land which, if it was not granted by the Mexican government, but remained a part of the public domain, became, on the 9th day of September, 1850, the property of the state of California; and the government of the United States, or its officers, had no power to make a grant thereof, or give title thereto, at the date of defendant's patent. Defendant makes no other claim to the property, except that based upon his patent from the United States, and his possession thereunder. If the island was not included in the grant under which plaintiff claims, defendant's title to that might be good, but even then it could not be good to the land below ordinary high-water mark. In our judgment, however, the title, not only to the island, but to the whole of said inner bay within the exterior lines of the Mexican grant, as described in the decree of confirmation, and in the survey of exterior boundaries, passed to the claimants under said grant, and is vested in the plaintiffs. Judgment and order reversed.

We concur: SHARPSTEIN, J.; PATERSON, J.

I dissent: BEATTY, C. J.

THORNTON, J. I concur in reversing the judgment and order herein, but for other reasons than those stated in the opinion of Justice Fox. I am of opinion that the decree of confirmation of the Rancho San Pedro includes what is called the "Inner Bay of San Pedro." The patent, however, contains a reservation from grant, which reservation is confined to and embraces only that portion of the inner bay above mentioned which is covered by the navigable waters of the bay. It appears from the testimony that Mormon island is not so covered. It is not so covered by the waters of the bay at ordinary high tide. I am of opinion that plaintiff is entitled to recover the island, and such other portion of the tract of land sued for, described in the complaint as containing 18.88 acres, as is not covered by the navigable waters of the inner bay aforesaid. The judgment and order should be reversed, and the cause remanded, that the limits of such portion may be determined by the court below, and, when so determined, judgment should be rendered for it in favor of the plaintiffs.

McFARLAND, J. I dissent. This is a pure action of ejectment. Plaintiffs' asserted title to the demanded premises rests upon

a patent of the United States issued for a Mexican grant under the act of congress of March 3, 1851. By the thirteenth section of that act it is provided that after a claim under a Mexican grant shall have been confirmed, "a patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of such confirmation, and a plat or survey of the said land duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same." In the case at bar, plaintiffs claim title under a patent for a tract of land known by the name of "San Pedro." The patent recites a plat and survey made under said thirteenth section of said act of March 3, 1851, and contains full copies of such survey and plat; and it then conveys to the grantees "the tract of land embraced and described in the foregoing survey." There is no other description of the land granted. Now "the foregoing survey" does not include the land sued for in this action; indeed such land is expressly excluded; and that certainly seems to me to end the case. How can a plaintiff in ejectment recover land which is not included in the title-deeds on which he relies? I am clearly of the opinion that the judgment and order should be affirmed.

(87 Cal. 109)

JONES V. DUCHOW. (No. 13219.)

(Supreme Court of California. Dec. 13, 1890.)

LIBEL—EVIDENCE—RES GESTÆ—IMPEACHMENT OF WITNESS.

In an action for libel, in publishing that plaintiff had been compelled to leave his former place of residence to escape punishment by a mob, a letter, not under oath, written and signed by reputable citizens of the place, four months before the alleged departure of plaintiff, giving him a good character, is neither admissible as part of the *res gestæ*, nor to contradict witness for defendant, who testifies that plaintiff was, at the time of his departure, denounced by all good citizens. BEATTY, C. J., and FOX, J., dissenting.

In bank. On rehearing. For former report, see 23 Pac. Rep. 371.

F. D. & G. W. Nicol, F. W. Street, and E. A. Rodgers, for appellant. J. H. Budd and I. M. Kolloch, for respondent.

PER CURIAM. Upon rehearing and further consideration of this case we are satisfied that the court below did err in the particulars pointed out in the opinion filed herein, February 28, 1890, and the same will stand as the opinion and order of the court on this appeal.

We dissent: BEATTY, C. J.; FOX, J.

THORNTON, J. I concur in the judgment of reversal herein, for the reason that the letter allowed in evidence to contradict the witness, Gift, was erroneously admitted. It was admitted on the offer of plaintiff to contradict a statement of Gift brought out on cross-examination by plaintiff, which statement was collateral

to the issue. The plaintiff was bound by Gift's statement, and could not be allowed to contradict it.

(85 Cal. 603)

Ex parte BARRY. (No. 20,607.)

(Supreme Court of California. Sept. 11, 1890.)

CONTEMPT—PROCEEDINGS OF COURT—NEWSPAPER PUBLICATION.

A publication made by a newspaper immediately after a judge of the superior court has sustained a demurrer to a petition with leave to amend, falsely charging him, in so doing, "with deliberate lying about the law, deliberate, intentional falsification in his official capacity, and deliberate, intentional denial of justice," with being a "fool," an "impudent rascal, a criminal on the bench," is a flagrant abuse of the liberty of the press, and an "unlawful interference with the proceedings of a court," within Code Civil Proc. Cal. § 1209, subd. 9, and the offender is punishable by fine and imprisonment, as for a contempt.

In bank.

E. P. Cole, for petitioner. H. S. Philbrook, *amicus curiæ*.

WORKS, J. This is an application for a writ of *habeas corpus*. The following affidavit was filed in the superior court of the city and county of San Francisco, charging the petitioner with contempt of court: "State of California, city and county of San Francisco—ss.: William J. Dixon, being duly sworn, deposes and says that one Henry Bingham is the defendant in an action wherein the people of the state of California, upon the relation of Charles J. Swift, is plaintiff; that said action is now pending in the superior court of the city and county of San Francisco, state of California, and is still undetermined; that said Henry Bingham did interpose and file a demurrer to the complaint in said action, which said demurrer was, after full argument, on the 2d day of August, 1889, by the court sustained, and, on said last-mentioned day, the said plaintiff was given leave to amend his said complaint within ten days thereafter; that the time granted said plaintiff by said court to amend his said complaint has not yet expired; that one James H. Barry is the editor of a paper published weekly in the city and county of San Francisco, state of California, which said paper is called the 'Weekly Star,' that on the 3d day of August, 1889, and while said action was then and there pending in said superior court, said James H. Barry did published and cause to be published at the city and county of San Francisco, state of California, in the said paper, the Weekly Star, the following false, malicious, untrue, libelous, and defamatory matter of and concerning Honorable F. W. Lawler, judge of the superior court of the said city and county of San Francisco, state of California: 'A Criminal Judge. We charge Francis W. Lawler, judge of the superior court of San Francisco, with deliberate lying about the law, deliberate, intentional falsification in his official capacity, and deliberate, intentional denial of justice. He is not merely a fool, but an impudent rascal; a criminal on the bench. He ought to be impeached and removed from office, and disfranchised, indicted, and punished

by fine and imprisonment; made a convict of. But our criminal machinery and our legislature are so often elected and used, (just as Lawler acts,) not to punish wrong-doing, but on purpose to protect it, that such a proceeding is hopeless. If the information which we have received is wrong, let the editors of the Weekly Star be at once arrested on a charge of criminal libel. We invite and defy Lawler to venture to defend himself, even in a San Francisco court by this proceeding. We shall make the crime of this judge so plain, that even the wayfaring men, though fools, shall not err therein. The case is this: A suit has been brought against Supervisor Henry Bingham to determine whether he is entitled to the office of supervisor. This suit was assigned by the Buckley judge, Levy, to the other Buckley judge, Lawler, upon which every lawyer in town knew beforehand what Lawler would do, though they could not have foreseen just how he would begin to do it. When the case came up before Lawler yesterday, Bingham's attorney "demurred;" that is, he said the superior court had [no] authority to try a case like this. In reply, the complainant's attorney showed that the constitution expressly provides that the superior court has jurisdiction over all such cases. And this impudent falsifier of the law and denier of justice, Francis W. Lawler, allowed the demurrer, absolutely giving for a reason that, "although the constitution does give the superior court jurisdiction over all such cases, yet this is not all cases, but merely one case, and therefore this court has no jurisdiction over it. This seems impossible. But we affirm it to be true, and upon the affirmation, we are deliberately taking the risk of being publicly dishonored. It is exactly as if the burglar Jimmy Hope had been discharged by Judge Toohy without trial, on the ground that the "law only provided for the trying of all burglars, and therefore did not provide for trying this one"—\* \* \* with intent then and there unlawfully to interfere with the proceedings of a court of justice, and to insult the said Francis W. Lawler, Esquire, judge of said court, in the discharge of the duties of his office, and to expose him to obloquy and contempt. W. J. DIXON. Subscribed and sworn to before me this 9th day of August, 1889. GEO. H. PIPPY, Deputy County Clerk."

Upon the affidavit being filed, the matter was referred for hearing to Hon. WILLIAM T. WALLACE, J. McM. SHAFER, and J. P. HOGE, judges of said court, who heard the same, found the petitioner guilty, and adjudged that he be imprisoned in the county jail for the term of five days, and pay a fine of \$500. The petitioner contends that there were certain defects in the manner of charging and bringing him before the court; but we think there were no such defects in the proceedings as would entitle the petitioner to his discharge.

Again, it is contended that the publication of the article above set out was not a contempt of court, because the case of *People v. Bingham*, therein referred to, had been finally disposed of, and therefore

the language used could not in any way affect or interfere with the proceedings of the court in said action. But the affidavit shows that the action was still pending and undisposed of. A demurrer to the complaint had been sustained with leave to amend. The time for amendment had not yet expired. A mere formal amendment might have been made, and the same question as to the merits again presented. The language was well calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure. It seems to us to be too clear for argument that the publication was made at such a time as to affect or have a tendency to affect the proceeding then pending in court, and this contention of the petitioner cannot prevail. The act complained of was an "unlawful interference with the proceedings of a court," and therefore within subdivision 9 of section 1209 of the Code of Civil Procedure. This being so, the citation of other authorities to support the contention of respondent that the publication of the article was a contempt of court was unnecessary.

We do not understand the learned counsel for the petitioner to attempt to justify the language used in this publication, but much is said about the liberty of speech and of the press. It is said in broad language: "The liberty of speech and of the press is unlimited and unrestrained upon all subjects whatsoever, whether it be the decision of the court, or the character of the judge. The only check upon this liberty is the responsibility for the abuse of it." This may be true in the sense that the liberty to speak and write on any subject cannot be restrained or prevented in advance, and that the only remedy is to punish subsequently for any publication that amounts to an abuse of such liberty. That is precisely what has been done in this case. If the language used was improper, but affected the judge in his individual capacity, and was not an interference with the proceedings of the court over which he was presiding, the remedy could not be by a proceeding for contempt. So the question is twofold,—was the publication an abuse of the liberty of the press? and, if so, was it an interference with the proceedings of the court? The last of these we have already determined. As to the former, the liberty of the press to fairly criticize the official conduct of a judge, or the decisions or proceedings of the courts, and to expose and bring to light any wrongful, corrupt, or improper act of a judicial officer, is one that should be carefully preserved and protected by the courts. If a public supervision and censure, through the press or otherwise, is necessary to suppress corruption, and keep the channels of justice pure and untainted, the right to exercise such supervision, and to censure and expose wrong-doing, should be and must be upheld by the courts. But the publisher of a newspaper who assumes to criticize or censure a public officer, or the proceedings of a court, must know whereof he speaks. If he censures unjustly or charges falsely, he must be held strictly accountable. While

his right of free speech is protected, his abuse of it must be punished. The great trouble with the freedom of the press at the present day, so far as it affects the courts, is that it is used indiscriminately in many cases, not with the laudable purpose of correcting abuses, and exposing wrong-doing, but to gratify ill will and passion, or pander to the passions or prejudices of others. This tendency should be severely condemned and punished, not only for the protection of the courts, and the preservation of a pure and independent judiciary, but as a means of upholding the liberty of the press in its true sense. The publication complained of here was a most flagrant abuse of the liberty of the press, and was justly punished as such.

Certain technical objections to the proceedings of the court below, including the form of the judgment, are raised and discussed at some length by the petitioner, but none of them are well taken. Writ denied, and prisoner remanded.

We concur: MCFARLAND, J.; PATERSON, J.; FOX, J.; THORNTON, J.

(87 Cal. 91)

*Ex parte* TAYLOR. (No. 20,733.)

(Supreme Court of California. Dec. 13, 1890.)

CONSTITUTIONAL LAW—VALIDITY OF CITY ORDINANCE—SPECIAL LEGISLATION.

1. Const. Cal. art. 11, § 6, provides that municipal corporations shall not be created by special laws, and that all charters heretofore granted shall be controlled by general laws. Pen. Code, § 370, and Civil Code, § 3479, declare the obstruction of a street a public nuisance, and Pen. Code, § 372, provides that one who maintains a public nuisance is guilty of a misdemeanor, when the punishment for the offense is not otherwise prescribed. Pen. Code, § 19, declares that, "except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail," etc. *Held*, that section 9 of the charter of San Jose, empowering the city council "to define, prevent, and remove nuisances," and to fix penalties by fine or imprisonment, is constitutional, and one imprisoned for maintaining a nuisance in a street contrary to an ordinance made in pursuance thereof, and providing a penalty of the same character, though less in degree than that prescribed by the statute, will not be released on *habeas corpus*.

2. But, even if the charter and ordinance are unconstitutional, the prisoner is not entitled to be discharged, since maintaining a nuisance in a public street is an offense under the above statutes, and the indictment charges that the acts were done "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

In bank. *Habeas corpus*  
Morehouse & Tuttle, for petitioner.  
William B. Hardy, for respondent.

Fox, J. The petitioner is convicted of violation of an ordinance of the city of San Jose, in relation to streets and sidewalks. It is claimed that the ordinance is void because in conflict with the constitution, and with general law; by reason whereof the city council had no authority to pass the same. The city of San Jose is a munic-

ipal corporation, existing under a special charter, passed before the adoption of the present constitution. By section 9 of that charter, the council is authorized and empowered "to pass all necessary and proper laws, \* \* \* to lay out, alter, vacate, improve, cleanse, water, and repair streets and sidewalks, \* \* \* to define, prevent, and remove nuisances, \* \* \* to impose and appropriate fines, penalties, and forfeitures for any and all violations of city ordinances, and, for a breach or violation of any city ordinance, may fix the penalty by fine or imprisonment," etc. The ordinance referred to forbids the obstruction of the streets or sidewalks, and provides a penalty for the violation thereof. It is not contended that the act of the petitioner, for which he was arrested and convicted, was not a violation of the terms of the ordinance, or that the penalty imposed is in excess of or different from that authorized by the ordinance. Reference is made in support of the petition, to section 6, art. 11, of the constitution. This is the section which provides that municipal corporations shall not be created by special laws, and that all charters heretofore granted shall be controlled by general laws. Upon the faith of this provision, it is claimed that a municipal corporation has no authority to determine and declare what shall constitute a nuisance upon a public street, and to provide for the punishment of one who maintains such a nuisance, because the general law has provided for the same. In support of that proposition, we are cited to sections 370 and 372 of the Penal Code, and 3479 of the Civil Code. Section 370 of the Penal Code, and 3479 of the Civil Code, declare the obstruction of any public park, square, street, or highway, a public nuisance; and section 372 of the Penal Code provides that one who maintains a public nuisance, or willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor, when the punishment for the offense is not otherwise prescribed. Punishment therefor is not otherwise prescribed in that chapter of the general law, but section 19 of the Penal Code declares that, "except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both." It thus appears that, under the general law, the obstruction of a street or highway is a nuisance; that a person maintaining a nuisance in the street is guilty of a misdemeanor, and is upon conviction punishable therefor, as prescribed in said section 19. Is the ordinance in conflict with this general law? We think not. The ordinance does not declare the obstruction of the street to be a nuisance, or a misdemeanor; but, proceeding upon the theory that the state law itself so declares and provides, it simply forbids the obstruction, or declares that such obstruction shall be unlawful. In the exercise of its police power, and the authority expressly granted by the charter, it provides for the removal of the



obstruction, and prescribes a penalty for refusal to remove it upon the notice prescribed to be given by the municipal authorities having charge of that department of the local government. That penalty is not of a different character from, or in excess of, the one prescribed by the general law, but is of the same character, only less in degree. But why should the municipality legislate upon the subject at all? A brief review of the legislation, both state and municipal, and of the decisions of this court upon the subject, will furnish an instructive answer to this question. Municipal charters have in this state universally conferred upon local municipal governments power to legislate for the maintenance and care of their public streets. It is conceded here, and this court has held, that streets include sidewalks, as well as the road-way, (*Bonnet v. San Francisco*, 65 Cal. 230, 3 Pac. Rep. 815;) and that the obstruction of a sidewalk is a public nuisance, (*Marini v. Graham*, 67 Cal. 130, 7 Pac. Rep. 442.) But in the latter case it was also held that a legalized obstruction of the sidewalk was not a nuisance. This was under an ordinance which, by implication, authorized the obstruction of a sidewalk, to the extent of three-tenths the width thereof. It thus recognized the fact that, notwithstanding the statute, the power of the municipality over the streets was such that it might make a legal authorization of an obstruction. The act constituting the offense in this case was the obstruction of the sidewalk for the depth of 2 feet in width and 40 feet in length, of the inner side thereof. The ordinance in this case, from the date of its passage, December 10, 1881, until amended June 9, 1890, by clear implication, authorized the obstruction here made; but on the latter date it was so amended as to forbid it. This obstruction has been maintained for many years, but under the authority of *Marini v. Graham*, supra, it could not be punished as a misdemeanor because it was a legalized obstruction. Since the amendment, however, it has ceased to be legalized, and is now maintained in direct violation both of the statute and the ordinance. The passage of the ordinance in its original form was necessary to legalize the act, if it could be legalized; and, as seen, this court has held that it could be so legalized, and the parties had the right to act upon the authority of that decision so long as it remained unreversed. The effect of the amendment was to render the act no longer legal, and the continuance of the act thereafter constituted a public offense, for which the party was and is amenable to the law.

A somewhat similar question to the one here under consideration arose under the same general laws, and a municipal ordinance, in the case of *Ex parte Casinello*, 62 Cal. 538, and the conviction and judgment was there held valid. We are of the opinion that the city of San Jose had authority, under its charter, to pass the ordinance; that the same is not in conflict with the general law; and that a conviction under either is a bar to a prosecution under the other. Even if this is not so,

the prisoner is not entitled to be discharged, for it is conceded that the acts charged constitute a violation of the statute in relation to the obstruction of streets. The complaint states facts which constitute a public offense under the statute, and alleges that they were done "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of California," and the judgment is not in excess of that authorized by the statute. Both the offense and the penalty were within the jurisdiction of the justice's court. In *Re Sic*, 73 Cal. 142, 14 Pac. Rep. 405, relied upon by the petitioner, the question whether the judgment was valid, notwithstanding the invalidity of the ordinance, was not raised or considered. The defendant has acquired no right to maintain the obstruction, by prescription, for none such could be so acquired. *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. Rep. 433. Let the writ be discharged, and the prisoner remanded.

WE CONCUR: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

PATERSON, J. I concur in the judgment on the ground last stated by Mr. Justice Fox.

McFARLAND, J. I concur in the judgment. The defendant was convicted of placing, and suffering to remain, on the inside of a sidewalk something which obstructed the free passage of said sidewalk; and I do not think that an ordinance making such act an offense is in conflict with the general law of the state found in section 370, which declares the obstruction of a lake, river, park, street, highway, and other enumerated places, to be a public nuisance, and the person who maintains it to be guilty of a misdemeanor. There are many matters connected with streets, sidewalks, awnings, trap-doors, etc., which are particularly within the scope of municipal regulation, and which cities and towns may legislate about without intruding upon any general law now in existence. The charter of San Jose giving power to pass the ordinance in question was enacted after said section of the Code; and it is evident that the legislature, by passing a law preventing nuisances on public highways throughout the state at large, did not intend to prohibit the municipality from dealing further with streets and sidewalks within its corporate limits. The matter involved in the *Sic* Case, 73 Cal. 142, 14 Pac. Rep. 405, was smoking opium, and maintaining places where that vice might be practiced; and the legislature had legislated upon that subject in great detail. The crime was the same in all parts of the state. But it is quite apparent that acts, which would be of little consequence if done on public roads running through sparsely settled regions, might be very serious evils if done on the crowded streets and sidewalks of populous towns and cities. But I agree, also, that, in this particular case, the judgment

can be sustained under the state law, even though the ordinance be considered invalid.

*Ex parte* RINALDO. (No. 20,784.)

(Supreme Court of California. Dec. 13, 1890.)

In bank. *Habeas corpus*.

Morehouse & Tuttle, for petitioner. Wm. B. Hardy, for respondent.

PER CURIAM. This case is precisely like that of *Ex parte* Taylor, ante, 258, (No. 20,783, this day decided,) and on the authority of that case it is ordered that the writ be discharged, and the prisoner remanded.

(3 Cal. Unrep. 330)

RANKIN *et al.* v. AMAZON INS. CO. (No. 12,807.)<sup>1</sup>

(Supreme Court of California. Dec. 13, 1890.)

INSURANCE—CONDITIONS OF POLICY—BREACH—WAIVER.

1. Where a fire insurance policy refers to a survey of the insured premises and the application as a warranty on the part of the insured, the right of the company to rely on such application and survey is not defeated by the fact that they were not furnished until after the policy was delivered, and that they were written on blanks prepared for the use of another insurance company.

2. In an action on a policy, evidence that the insured premises were idle for two months, during which time the insured employed only one watchman, who habitually slept in a building 300 feet away, with the approval of the insured, shows a failure on the part of the insured to comply with a condition of the policy requiring him to employ a watchman "to be in and about the premises by day and night" during the time that they are idle, and not merely negligence on the part of the watchman in performing his duty, and is a good defense to the action.

In bank. Appeal from superior court, city and county of San Francisco; JOHN W. ARMSTRONG, Judge.

Action by Ira P. Rankin and others against the Amazon Insurance Company on a fire insurance policy. From a judgment for plaintiffs, defendant appeals.

T. C. Van Ness and Huggin, Van Ness & Dibble, for appellant. Doyle, Galpin & Scripture, (Philip G. Galpin, of counsel,) for respondents.

FOX, J. 1. The policy of insurance upon which this action was brought was applied for November 21, 1884, and was written up assuming the risk from 12 o'clock noon on that day, for the term of one year, but was counter-signed by the general agents at San Francisco, November 24, 1884, and presumably was not delivered until that day. When delivered a part of the written portion thereof was on a rider attached and properly authenticated, the blank being insufficient to furnish room for all the written portion. On that rider, and as a portion of the written part of the policy, was the following: "Reference is hereby made to a survey and diagram, on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." The court below evidently concluded, and in that conclusion we concur, that in fact there was no survey and diagram on file in the office of Mitchell & Son,

either on the 21st or the 24th of November. But the uncontradicted evidence is that Mitchell & Son were the insurance brokers who acted for and on behalf of the assured in getting the insurance, and that they promised that such a survey and diagram should be prepared, and a copy thereof furnished the insurers. Such a survey and diagram was prepared by the engineer of the Owens River Mining & Smelting Company, owners of the property covered by the insurance, and was on file in the office of Mitchell & Son, on the 4th day of December, 1884; but the evidence still leaves it uncertain whether it was so on file on the 3d day of December, 1884, at which time the policy was taken to the office of the insurers, and the written portion thereof rewritten upon another rider, which was duly authenticated and attached, increasing the amount of insurance allowed by \$600, and winding up with the same expression as before: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." At some time, but at what precise time does not appear, a copy of this survey and diagram, dated December 4, 1884, the survey constituting a voluminous document consisting of questions and answers, and written upon a blank prepared for the use of another insurance company, and not of this defendant, was presented to and filed with the agents of defendant, as and for a copy of the survey and diagram, and as and for the application, referred to in the written portion of the policy, which the brokers had agreed to furnish. This document was offered in evidence. It was signed "Owens River Mfg. and S. Co., by Hoyt & Son, Applicants." The policy ran to the Owens River Mining & Smelting Company, "loss, if any, payable to Rankin, Brayton & Co." To this evidence "plaintiffs objected, upon the ground that at the time when the papers were presented to the company the insurance had already been effected, and the rights of Rankin, Brayton & Co. had vested; and upon the further ground that there was no authority upon the part of Hoyt & Son to make any contract on behalf of the Owens River Smelting & Mining Company; and upon the further ground that the paper was dated December 4th, and was made the day after the policy was made, according to the date of the last rider in the policy." This objection was sustained, to which ruling the defendant excepted, and it is now assigned as error. The question as to the authority of Hoyt & Son was unimportant. This policy, though taken in the name of the mining and smelting company, was for the immediate benefit of these plaintiffs, and the policy on its face was made, "loss, if any, payable" to them. The authority of Mitchell & Son to effect the insurance for them was amply proved, and uncontradicted. It is also uncontradicted that they promised to procure and place on file the survey and diagram. The only question is whether the fact that it was not on file when the policy was delivered defeats the right of the defendant to rely upon it, and in-

<sup>1</sup> Rehearing granted.

roduce it in evidence as a part of the contract. If this question depended solely upon the clause of the policy written upon the riders, and hereinabove quoted, the right of defendant to rely upon the diagram and survey as a part of the contract of insurance, and introduce it in evidence as such, might be seriously questioned, and there are several authorities which might be cited in support of the negative of that proposition, some of which are more directly in point than *Caldwell v. Center*, 30 Cal. 543, cited and relied upon by respondents. But appellant does not rest its right either solely or mainly upon that clause. There is in the policy another clause which provides: "For further particulars reference is made to an application and survey No. —, furnished by and a warranty on the part of the assured, which is hereby made a part of this policy." Mitchell testifies that when he procured the policy he promised to procure and furnish such an application and survey, and that he did procure and furnish this one in compliance with that promise, and it is contradicted that he did so, and that this was the only one furnished. The contract was to be in two parts, as all these contracts are, each dependent upon the other. One of the parts was finished at one time, and in this instance, either the other was finished at another time or has never been finished. If finished, they constitute one contract; if never finished, there was never any contract. This paper, which was furnished by the agent of the insured in pursuance of his promise, answers the calls of the other part of the contract; is in the form of an application and survey, accompanied by a diagram illustrating the survey, and furnishes the ordinary information upon which the insurer's part of such a contract is usually based. It was furnished and accepted as the basis of the insurers' part of the contract in this case. That the delivery did not occur at the same time, and that it was written upon a blank prepared for the use of another corporation, makes it none the less a part of the contract upon which this action is brought, and as such it was error to refuse to admit it in evidence. The fact that it was not made at or before the execution of the policy may have deprived it of the quality of an express warranty by operation of law, under section 2605 of the Civil Code, but it still operates as evidence of representations made as inducement for the issuance of this policy, (Civil Code, §§ 2571-2577,) and as such it was proper matter to submit to the jury. Whether warranty by operation of law or not, it was declared such upon the face of the contract, and unless unlawful the court has no power to eliminate it from the contract. In either event, whether warranty or mere representations, the defendant was entitled to have it go to the jury; particularly so since, even if mere representation, and found to be false in a material point, it gave the injured party a right to rescind the contract (Id. § 2580) at any time previous to the commencement of the action, (Id. § 2583,) and it was admitted that, before the commencement of the action, the defendant had tendered a re-

turn of the premium, and notified the parties that the policy was canceled.

2. The next point urged by appellant is that the court erred in refusing to give an instruction asked by appellant, and in giving the instruction which it did give, in reference to what is called the "watchman clause" of the policy. The policy, as originally written or printed, contained this clause: "It is understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured to be in and upon the premises day and night." This clause was changed at the instance of the insured, by striking out the word "upon," and inserting in lieu thereof the word "about." The clause as thus framed and accepted was an express promissory warranty on the part of the insured, and that it was made and accepted with full notice, and not merely an oversight on their part, is evidenced by the fact that the change was made at their instance. The question for the jury to determine was whether or not this promissory warranty was kept on the part of the insured. Exception is taken to the refusal of the court to give each of three separate instructions asked by appellant, but only one of these exceptions is urged in argument in this court,—the first. We think that instruction, as written, was correctly refused, not because it did not correctly state the law as applicable to such contracts, but because it not only stated the substance of certain evidence, but undertook to state the effect of the whole evidence tending to prove whether or not the contract had been complied with in that regard. In the instruction which the court did give, it correctly declared that the clause of the policy above quoted was a warranty that the insured would employ a watchman to be in and about the premises day and night, when the mill was idle, and that if they had failed to do so they could not recover. Neither do we think the court erred in what it subsequently said on the subject of the effect of an omission of the watchman to do his duty by negligence. That portion of the instruction is in harmony with section 2629, Civil Code, and the authorities cited in Deering's note to that section.

3. The verdict is not supported by the evidence, and is against the law as laid down by the court in its instructions, and as established by the authorities. Insurance contracts, like others, must be enforced according to the intention of the parties. *Wells v. Insurance Co.*, 44 Cal. 406, 407. There is no ambiguity about this contract in this particular. The insured covenanted to employ a watchman to be in and about the premises day and night, during such time as the mill was idle. There is no dispute in the evidence touching these facts: That for two months before this fire occurred the mill was idle; that the mill, "frame buildings, adjoining and communicating," with the machinery and property therein, was the immediate subject of the insurance; that during the two months the mill had so remained idle, up to and at the time of the fire, but one person had been or was employed as watch-

man; that he had no special instructions as to watching, either day or night; that as matter of fact he did not watch the whole of any night, but habitually, and with the knowledge and approval of the superintendent, slept at night in a building 300 or 400 feet away from the mill, and was sleeping there when the fire occurred. This building was situate upon land belonging to, or in possession of, the mining and smelting company, but it would do violence to common sense to hold that it was "in" or "about" the insured property, or that a man who habitually and nightly slept in it was, while sleeping there, a watchman in or about the insured property 300 or 400 feet away. And if, as shown without contradiction, he habitually and nightly slept there, with the knowledge and approval of his employer, it is too much to say that he was a watchman employed to be in or about the insured premises during the night-time. An employment which knowingly and habitually suffers such a course of procedure is not such an employment as is demanded by the terms of this contract. These facts do not show mere negligence in the performance of duty, but rather failure to employ for such performance. The evidence of a failure to comply with the conditions of this clause of the policy is much stronger than it was in the case of *Trojan Min. Co. v. Fireman's Ins. Co.*, 67 Cal. 27, 7 Pac. Rep. 4, and there it was held that recovery could not be had because of such failure. The facts here disclosed justify and call for the adoption and repetition of the language used in *Wenzel v. Insurance Co.*, 67 Cal. 440, 7 Pac. Rep. 817: "It is apparent from the uncontradicted evidence in the case that Lynch [McMurray] was not employed as a watchman of the premises, within the sense and meaning of the contract." There is nothing in *Sierra, etc., Min. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 236, 18 Pac. Rep. 267, cited by respondent, in conflict with this view. Judgment and order reversed, and cause remanded.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

I concur in the judgment: THORNTON, J.

(87 Cal. 122)

PEOPLE v. PEREZ. (No. 20,713.)

(*Supreme Court of California.* Dec. 15, 1890.)

CRIMINAL LAW—INFORMATION—DEMURRER—VERDICT—JUDGMENT.

1. A demurrer to an information will be overruled where the information is sufficient without the part excepted to.

2. On an information for grand larceny, a verdict of "guilty as charged" is a conviction of grand larceny.

3. Where one has been convicted on an information for grand larceny, a judgment that for the crime of which he was charged and convicted he be punished by imprisonment in the state prison for the term of nine years is sufficient.

In bank. Appeal from superior court, city and county of San Francisco; MURPHY, Judge.

*Carroll Cook and J. E. Foulds*, for appellant. *Geo. A. Johnson*, for respondent.

Fox, J. 1. The demurrer to the information was properly overruled. All that part of it to which exception is taken may be stricken out, and it still remains a good information under the statute. The presence of the language excepted to does not prejudice the defendant, or affect the validity of the information.

2. The information is for grand larceny, and a verdict of "guilty as charged" is a conviction of grand larceny. *People v. Whitely*, 64 Cal. 211; *People v. Price*, 67 Cal. 350, 7 Pac. Rep. 745.

3. The judgment roll shows a full compliance with the requirements of section 1200 of the Penal Code at the time of the arraignment for judgment.

4. The information was for, and the conviction was of, grand larceny committed in the city and county of San Francisco. The judgment of the court was that for the crime of which he was so charged, and for which he had been so convicted, it is "ordered, adjudged, and decreed that the said Antonio Perez be punished by imprisonment in the state-prison of the state of California at San Quentin for the term of nine (9) years." This was sufficient, under the statute. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

(87 Cal. 97)

MARTIN *et al.* v. COOPER *et al.* (No. 12,862.)

(*Supreme Court of California.* Dec. 13, 1890.)

BOUNDARIES—NATURAL MONUMENTS—COURSES AND DISTANCES.

The patents for two grants of land did not call for each other as coterminous boundaries, and neither was described with reference to the other, but each grant was described as being bounded, along the sides nearest the other, by a river, one by the left bank and the other by the right bank, and in each courses and distances were given as the meander line of the bank referred to. In an action to establish the boundary between the two grants, the court below found that the river had changed its channel considerably since the patents were issued, and that the banks, as they then existed, could not now be found or traced. *Held*, that it was error for the court below to adopt, as the boundary between the two grants, a line established by plaintiffs' surveyors by running the courses and distances along the river bank as called for by defendants' patent, and then, for the purpose of establishing the line of plaintiffs' grant, laying off a line parallel to the line of defendants' grant so surveyed, and a uniform distance of seven chains therefrom, allowing that to be the width of the river running between the two grants, where the testimony is undisputed that the river, now and of old, varied in width at different points. *BEATTY, C. J.*, and *SHARPSTEIN, J.*, dissenting.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

*William Matthews*, for appellants. *Julius Lee*, for respondents.

Fox, J. This is an action to quiet title to a tract of land which the plaintiffs allege lies within the Rancho Rincon de las Salinas, for which they are the owners, as tenants in common, seised in fee. The defendants deny that the plaintiffs are the owners of said tract of land, and aver that the same is a part of the Rancho Moro

Cojo, of which the defendants are the owners in fee. The court found in favor of the plaintiffs upon all the material issues, and decreed accordingly. Defendants moved for a new trial, which was denied, and from that order, and from the judgment, defendants appeal. It was incumbent upon the plaintiffs to prove that the lands in controversy are within the Rancho Rincon de las Salinas. Whether they are or not depends upon the location of the north-easterly line thereof, which, according to the patent issued to the plaintiffs' grantor, is along the left bank of the Salinas river. The Rancho Moro Cojo, under which defendants claim, lies upon the opposite side, and is bounded by the right bank of the river. The patent of neither rancho calls for the other as a coterminal boundary, but each is described as being bounded along the sides which are nearest each other by the river, one by the left bank and the other by the right bank, and in each course and distances are given as the meander line of the bank referred to. In each case, if the bank can be found, courses and distances must yield to the natural monument. The survey for the patent of the Rancho Rincon de las Salinas was made in 1861; that for the patent of the Rancho Moro Cojo some three years earlier. The court finds that since these surveys the course of the river has been subjected to several sudden, violent, and considerable changes, caused by freshets, cutting away its banks, and changing its channel. There is evidence sufficient to support this finding. But the court also finds that the left bank of the river, as it existed in 1861, cannot now be found or traced, and it therefore assumes to adopt the courses and distances given in the patent as establishing the boundary line, upon the theory that this is the next best evidence that is attainable for the purpose. The theory is correct, if the facts warrant its adoption; but we do not think that the evidence supports the finding that the left bank of this river, as it existed in 1861, cannot now be found or traced. While the testimony given on the part of plaintiffs shows that there has been a marked change in the course and banks of the river, and there is some evidence tending to show that at certain points the old banks have been washed away, it does not appear, even from this testimony, that there is not left sufficient evidence of the location and general course of that old bank so that it may be traced with reasonable certainty and accuracy. It does appear affirmatively that the surveys made on the part of the plaintiffs for the purposes of this trial were not made, or attempted to be made, on or along either bank, and that the surveyors were not instructed so to make them. Their instructions were to survey and plat the courses and distances, as given in the patent; and they were not instructed to find, or to attempt to find, the old bank of the river. And they did not even follow these instructions, but instead, they surveyed and ran the courses and distances along the river bank as given in the patent of the Rancho Moro Cojo, and platted the same, and then, for the purpose of estab-

lishing the line of the Rancho Rincon de las Salinas, they laid it off upon the map by a line parallel to the line of the Moro Cojo so surveyed, and a uniform distance of seven chains therefrom, allowing that to be the width of the river running between the two ranchos; and this, even though the witnesses testified that the river, now and of old, varied in width at different points. We do not think that such testimony as this will support a finding either that the left bank of the river cannot be found and traced or that the survey adopted as and for that boundary is correct. The engineer who made this survey and map himself says that he would not have made it as he did if he had been instructed to find and survey the river bank. On the other hand, another engineer, who seems to be equally competent and disinterested, testifies that he has examined the banks and course of that river, and that, in his opinion, the old bank can be found and traced. He has made a plat, showing the present bank, and points out diverse places where the line of the old bank is distinctly traceable. His evidence is, perhaps, not sufficiently full, and his work not sufficiently complete, to furnish the basis of a finding for a final settlement of the case; but to our minds it confirms a conclusion already reached from the testimony given on the part of plaintiff, upon whom the burden rested, that the evidence is insufficient to support the findings, either that the survey of courses and distances adopted is accurate or that circumstances existed which authorized the adoption of courses and distances in place of the natural monument. The judgment and order must therefore be reversed, and it is so ordered.

WE CONCUR: THORNTON, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment, but I do not concur in the main reason given for it in the leading opinion. Upon this present record I think that the court below was justified in finding that the bank of the Salinas river, as it existed in 1861, cannot now be found or traced; and that, in the absence of that monument, it was proper to adopt the courses and distances given in the patent as establishing the boundary line. The evidence was not only conflicting on the point, but the weight of it was, in my opinion, with the finding. I think, however, that the evidence (although I am not without doubt on the subject) was not sufficient to support the conclusion that the true line of the Salinas rancho, run by courses and distances, is where the judgment establishes it to be. That line was never actually run by the surveyors who testified to it, but it was calculated and assumed from other data which I do not think sufficient to support the conclusion. They seem to have fixed a new line rather than to have found an old one. The case is a difficult one; and I doubt if a judgment will ever be obtained more favorable to appellants than this one from which they appeal. It is evidently a proper case for a compromise; but neither the court nor the surveyors can make a compromise for

the parties which they will not make for themselves.

BEATTY, C. J. I dissent. The evidence in my opinion fully sustains the conclusion that neither bank of the Salinas river, as it existed in the years 1858-61, could be traced on the ground at the time this controversy arose. The course of the river had very greatly changed. At some points it had cut off portions of the Moro Cojo ranch; at others it had cut off portions of the Rincon de las Salinas; and these changes had been suddenly wrought during high floods or freshets. At the places where the current had left the old channel, the space between the banks had been filled with sediment, and overgrown with willows. The existing banks of the river no longer constituted the true boundaries of the respective tracts, and the old banks were no longer to be found. If the owners of the Moro Cojo, the appellants, extended their possession to the right bank of the river, they would take land of the respondents, owners of the Rincon de las Salinas, and *vice versa*. Such being the case, I know of no means of determining the rights of the parties except to retrace the patent lines of the two ranches by following courses and distances according to the field-notes between such natural or other monuments on the ground, and called for in the field-notes, as are still capable of identification. This is what the parties attempted to do. Each employed a competent surveyor to trace out and re-establish the lines. The surveyors went on the ground, and, by actual survey from a known monument, established the original south-eastern corner of the Rincon de las Salinas ranch. At the time of the patent survey, this corner was on the left bank of the Salinas river, but was found at the time of the last survey to be a considerable distance beyond the opposite or right bank. An attempt was then made to run out the north-eastern boundary of the Rincon de las Salinas by following the courses and distances called for in the field-notes of the patent, but for some reason the attempt was abandoned as impracticable. The two surveyors then located by survey from natural monuments the north-west and south-west corners of the Moro Cojo ranch, and retraced the line between them; that is to say, they meandered a line which started from the north-west corner and closed upon the south-west corner, but in running this line they were compelled to depart from the courses called for in the field-notes of the patent by 1 deg. 47 min. It is contended that they failed to correctly trace the south-west boundary of the Moro Cojo by reason of this departure from the course called for in the patent. But since it is conceded that the fixed and ascertained corners must govern, and as they could not be connected without departing from the courses given in the field-notes, this contention seems to fail. In my opinion all the testimony goes to confirm the correctness of the survey of the south-west boundary of the Moro Cojo. But it is said this does not afford any certain or reliable means of fixing the north-

east boundary of the Rincon de las Salinas, because the two tracts of land being on opposite sides of the river, not coterminous, and neither being described by reference to the other, the location of the Moro Cojo does not fix the location of the Rincon de las Salinas. The force of this objection must be conceded, but it is much diminished by the facts that the field-notes of the river boundaries of the two ranches are connected by a call for a common object,—a township line; that the river is shown to be seven chains in width; that it is not shown to have undergone any changes between the dates of the respective patent surveys; and that there is so close a correspondence between the calls of the meandered lines of the two tracts along the river that their relative position as surveyed is perfectly demonstrated. There can be little doubt, therefore, that a line projected parallel to the river boundary of the Moro Cojo, and distant seven chains to the south-west, is, with reasonable exactness, the original river boundary of the Rincon de las Salinas, and cannot include any land to which the defendants have shown title, or any appreciable quantity of land to which the plaintiffs have not shown title. Besides, the south-eastern corner of the Rincon de las Salinas was, as above stated, established on the ground by actual survey, and connected by actual survey with the south-western boundary of the Moro Cojo, as surveyed; and, although no attempt was made to survey the north-eastern boundary of the Rincon de las Salinas on the ground, the line of said boundary, as platted on the map of the line surveyed, shows very clearly that it would include a very considerable amount of land that the decree excludes, and would exclude a very trifling quantity that the decree includes, so that the error in the method resorted to for establishing respondents' line, conceding it to have been erroneous, is shown to have been without prejudice, inasmuch as it gives the appellants more land than a correct survey would give them. It is for this reason, that the error in the method pursued was harmless to appellants, that I think the judgment and order should be affirmed.

SHARPSTEIN, J. I concur in the dissenting opinion of Chief Justice BEATTY.

(87 Cal. 88)

WIDMER v. MARTIN. (No. 14,018.)

(Supreme Court of California. Dec. 13, 1890.)

VENDOR AND VENDEE—RECOVERY OF PRICE—JUDGMENT ON PLEADINGS.

Plaintiff made a payment under a contract with defendant wherein the latter obligated himself, as soon as he procured the legal title to certain land, to convey it to plaintiff, and in case of a defect in the title to return the payment. In an action to recover such payment, the complaint alleged that plaintiff had demanded a conveyance of the land, and that defendant had refused on the ground that the title was defective, and that the title was and is defective. The answer denied each of these allegations, and stated that he expected soon to obtain the legal title. *Held*, that these pleadings raised material issues which defendant was entitled to have tried, and that it was error to give judgment for plaintiff on the pleadings.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

*Church & Cory*, for appellant. *Firman Church*, for respondent.

MCFARLAND, J. Defendant demurred to the complaint, and his demurrer was overruled. He then duly served and filed a verified answer; whereupon plaintiff moved for judgment upon the pleadings, and judgment was accordingly given for plaintiff upon the pleadings alone. From this judgment defendant appeals. The practice of moving for judgment upon the pleadings in proper cases has been sanctioned by this court; but we think that in the case at bar the answer contained denials of material averments of the complaint, waiving the question of the sufficiency of the complaint itself. The action is to compel defendant to return to plaintiff the \$484 which constituted the first payment made by plaintiff to defendant on the following contract: "Fresno, January 19, 1888. Received of H. Widmer the sum of \$484 as a deposit on lots 1, 2, 3, 4, 5, 6, 7, and 8, in block 3, of the Donahou addition to the town of Fresno; the purchase price of said lots to be \$1,450, payable as follows: \$484 cash; \$483 six months from date, and \$483 twelve months from date, deferred payments to bear interest at the rate of ten per cent. per annum from date until paid. This receipt is to be taken up and deed given, and mortgage and notes received, as soon as the undersigned shall receive deed to said addition. In case of defective title from any cause, I agree to return said deposit. [Signed] J. M. MARTIN." The complaint contains a number of averments about what plaintiff did in performing his part of said contract, which are denied in the answer, and which are now claimed by plaintiff to have been immaterial; but, waiving the questions thus presented, it is clear that there is a denial of matter in the complaint that is material. It is apparent that the "defective title" mentioned in the contract did not refer to any title which defendant had, or professed to have, at the time the contract was made. The contract is based upon the mutual understanding that defendant then had no title, but was to get one through a certain "deed," which he was to receive in the future, and that he was to convey the property to plaintiff, and the latter was to give notes and a mortgage, "as soon as the undersigned shall receive deed to said addition." No one would seriously contend that plaintiff could have maintained an action for the return of the first payment on the very next day after the date of the contract on the ground that defendants' title was defective. Now, the complaint nowhere avers that the title which would come through said deed is defective, or that defendant cannot, or does not, intend to procure said deed, or had not exercised due diligence in trying to procure it, or that defendant had been guilty of unreasonable delay or neglect in the premises. The only averment in the complaint upon the subject, is that on a certain day plaintiff demanded of defendant

a deed to said lots, and that defendant "then and there failed and refused to make and deliver said deed to said lots of land, alleging that the title to said land was in dispute, and defective, and the plaintiff says the title was and is defective." But these averments are specifically denied. The defendant in his answer "denies that plaintiff demanded of said defendant a deed to the lots of land, in said receipt described, at said time, or at any time; denies that he (defendant) said at that time, or at any time, that the title to said land was defective; denies that the title to said land is defective." The answer, in addition, states how defendant expects and will be able soon to obtain the legal title. The parts of the pleadings above referred to—waiving the other points made by appellant—clearly raise material issues, which defendant is entitled to have tried. A single material issue precludes a judgment on the pleadings. The judgment is reversed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(87 Cal. 104)

DUFF v. DUFF. (No. 13,078.)

(Supreme Court of California. Dec. 13, 1890.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

There being a conflict of evidence, the findings of the court will not be disturbed on appeal.

On rehearing. For former reports, see 23 Pac. Rep. 874, 12 Pac. Rep. 570.

*S. M. Buck, H. L. Smith, John A. McQuaid*, and *W. C. Belcher*, for appellant. *Wilson & Wilson, S. M. Wilson, J. D. H. Chamberlin, G. W. Gunter*, and *W. L. Duff*, for respondent.

WORKS, J. This case was heard in bank, and decided after being twice orally argued, and thoroughly and exhaustively briefed. 23 Pac. Rep. 874. A rehearing was granted mainly because it was thought that the court below, and this court, had not given sufficient weight to a certain letter written by the respondent's intestate containing certain admissions against his interest. This may have been so as to the court below, but it was not so as to the writer of this opinion, who wrote the opinion upon which the case was decided. In opposition to this admission, which was not by any means conclusive against the author of the letter, was the sworn admission of one of the defendants, at least, as a witness in a former case, to the effect that his brother, the deceased, was the owner of the property. It is true that in the litigation referred to it was to the interest of the defendant mentioned to establish the fact that the property was the property of the deceased, and that he may have testified falsely in that case in order to shield the same from the claims of other parties against him and his father, but the court below had the deposition containing these admissions before it, and, in connection therewith, heard the testimony of the defendant to the contrary in this case, and must have known better than we can know how much weight to give to



the testimony of the defendant on both of these occasions, and to the admission contained in the letter above referred to in the light of such admissions and testimony. Here were opposing admissions by the parties adversely interested. Why should one be considered absolutely conclusive and the other disregarded? We can see no reason. Nothing more can be said, even if these admissions were the only evidence on the point, than that there was a substantial conflict in the evidence, and this court cannot, under the well-established rule, disturb the finding of the court below. For the reasons here given, and those contained in the former opinion, the judgment and orders appealed from are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

Fox, J., (*dissenting*.) Upon a careful examination of the record in this case upon rehearing, it does not appear to me that the deposition referred to in the foregoing opinion contains a contradiction of the admission made in the letter referred to. I am also satisfied that there was no proper foundation laid for the introduction of said deposition, and that its admission was in violation of the law of the case, as established on the former appeal. 71 Cal. 513, 12 Pac. Rep. 570. It may be that a different judgment would never be reached in the cause, but for the reason stated, and under the rule established in this particular case on the first appeal, I cannot concur in the foregoing conclusion.

BEATTY, C. J. I concur in the dissenting opinion of Justice Fox.

(87 Cal. 115)

MCPHAIL v. BUELL. (No. 13,784.)  
(*Supreme Court of California*. Dec. 15, 1890.)

REAL-ESTATE AGENT—CONTRACT—COMMISSIONS.

Defendant agreed to pay plaintiff a commission for selling land when the vendees paid defendant a certain sum, and gave their notes and mortgage for the balance. The vendees executed their notes, but never paid the money. Held, that plaintiff could not recover.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Cope & Boyce, for appellant. B. F. Thomas, for respondent.

WORKS, J. The appellant brought this action to recover for commissions alleged to have been due him for making sale of certain real estate for the respondent. The complaint is in different counts, one upon a special contract agreeing to pay the commissions, and the others relying upon a verbal contract, and upon the *quantum meruit*. There could be no recovery on either of the last two counts because the Code of this state requires that to entitle a broker to recover commissions in this class of cases his contract therefor must be in writing. Civil Code, § 1624; McCarthy v. Loup, 62 Cal. 302. It is equally clear to our minds that the appellant was not entitled to recover on the written con-

tract. The agreement was that the defendant would pay the plaintiff when the vendees paid to him (the defendant) the sum of \$20,000 on account of the price of said sale, and executed to him their notes and mortgage for the balance of the purchase money. The purchasers executed their notes and mortgage, but failed to pay the sum of \$20,000, either at the time of making the deed, or upon the notes given afterwards. Although the defendant extended the time of payment, and used all reasonable means to procure the money, he was finally compelled to take back the property. Their failure to pay the money was a complete bar to any claim of the appellant to commissions. The appellant contends that certain errors were committed by the court below in its rulings upon the admission of evidence, and in its instructions; but, conceding this to be so, the case could not be reversed on account of such rulings, as, for the reasons given, the appellant could not recover in any event. Judgment and order affirmed.

We concur: Fox, J.; PATERSON, J.

(87 Cal. 117)

PEOPLE v. BEMMERLY (No. 20,707.)

(*Supreme Court of California*. Dec. 15, 1890.)

HOMICIDE—DYING DECLARATIONS—SENSE OF IMPENDING DEATH—REASONABLE DOUBT—INSTRUCTIONS.

1. It may be shown by evidence *altunde* that a document offered as a dying declaration was made under a sense of impending death.

2. The fact that the attending physician told declarant that he was going to die, and that the declarant himself, on another occasion, said he knew he was going to die, and wanted to talk privately with his cousin, was sufficient proof that a dying statement was made under a sense of impending death.

3. Where an attending physician took notes of the declarant's statements as he made them, and then retired to another room and wrote them out, after which he read the writing, sentence by sentence, to declarant, who affirmed it as being what he wished to say, the writing is shown to be the declarant's declaration, although the words used are not in all cases the same as those employed in the oral relation.

4. It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself."

5. Under Pen. Code Cal. § 1170, no exception can be taken to the disallowance of a challenge to a juror for actual bias.

6. A written instruction will not be reviewed when it bears no indorsement showing that it was given.

Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Clark & Aram, Craig & Hawkins, and J. E. Strong, for appellant. Geo. A. Johnson, Atty. Gen., and C. W. Thomas, for the People.

SHARPSTEIN, J. Upon the trial of the defendant, upon an information in which he was charged with murder, a document purporting to be the dying declaration of the deceased was offered in evidence by the prosecution. The defendant objected to its introduction. The objection was overruled and defendant excepted. The

grounds of objection appear to be: (1) The declaration does not show that it was made under a sense of impending death. It commences as follows: "I, Mat Faigle, aged 43, and a native of Germany, believing my life to be in great danger, being shot in the left side above the heart by a ball from the pistol in the hands of one John Wahlfrom, do now, before my God and the undersigned witnesses, make the following true statement, believing it to be my last." Whether the statement alone would be sufficient to satisfy the rule that the declaration must be made under a sense of impending death need not be decided in this case, as there was other evidence that it was so made. Prof. Greenleaf says: "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind." 1 Greenl. Ev. § 158. *Allunde* the written declaration there is sufficient evidence that it was made under a sense of impending death. Three or four hours after declarant had received the fatal wound, he was told by his attending physician that he was going to die. And on one occasion decedent told those who were present at his bedside that he knew that he would die, and he wanted to talk privately with his cousin, who was also present. There is much more evidence of similar import.

Another ground of objection is that the declaration introduced in evidence is not the one made by the dying man. The manner of taking the declaration, as detailed by Dr. Dillon, by whom it was taken, is as follows: He sat on the side of declarant's bed and took notes of what declarant said. After taking said notes witness withdrew to an adjoining room, and from such notes wrote out the statement introduced as a dying declaration. After that was prepared he returned to the bedside of declarant and read him each sentence as he went along, and asked him if that was just what he meant, and he said "Yes;" and in that way the whole paper was read to declarant before he signed it. All this occurred in the presence of eight persons, who signed the declaration as witnesses. That this document was not literally copied from the notes taken by Dr. Dillon he admits. Nor is the language precisely that employed by the declarant in his oral statement to Dr. Dillon. But the doctor testified that he endeavored to give the substance of the statement made to him by the declarant, and he thinks he succeeded, although the written declaration contains some words that were not used by the declarant in his oral statement. However that may be, the declara-

tion introduced in evidence is nevertheless the dying declaration of the declarant. It was read to him sentence by sentence, and the accuracy of each sentence was assented to by him; and, after hearing it all read in that manner, he signed it in the presence of witnesses. It then became his dying declaration. If he made another declaration inconsistent with or contradictory of this, it did not render this inadmissible, but might be urged to the jury as affecting his credibility. Upon the facts disclosed by the record, we think the document which purported to be the dying declaration of Mat Faigle was properly admitted in evidence.

Under repeated decisions of this court, the ruling of the court upon the challenge of the juror, H. H. Smith, for actual bias, cannot be remedied here. *People v. Riley*, 65 Cal. 107, 3 Pac. Rep. 413; *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, Id. 560; *People v. Taing*, 53 Cal. 802. No exception can be taken to the disallowance of a challenge to a juror for actual bias. Pen. Code, § 1170. It was not error to permit the prosecution to peremptorily challenge the juror Hall after he had been sworn, good reasons being shown therefor. Pen. Code, § 1068; *People v. Montgomery*, 53 Cal. 576.

Instruction No. 10, given at the request of the prosecution, gives a lengthy definition of "a reasonable doubt," and contains this clause: "It must not be one that is merely fanciful, created ingeniously in your minds to escape the consequences of an unpleasant verdict. It must be an honest doubt; such a doubt as strikes the conscientious mind, and one that clouds the understanding of those who are honestly seeking to arrive at the truth; *such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself.*" In *People v. Brannan*, 47 Cal. 97, "the jury were told that it was their duty to convict if they should be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of a jury in the important affairs of life." This was held to be error. The court said: "The judgment of reasonable men in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of criminal cases, involving life or liberty, something further is required. There must be more than a preponderance of evidence. There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused." In *People v. Ah Sing*, 51 Cal. 372: "The court below, after instructing the jury that the defendants on trial upon an indictment for murder are presumed to be innocent until proven guilty beyond a reasonable doubt, proceeded as follows: 'A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves

the minds of the jurors in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge. The doubt must not be vague and shadowy. Absolute certainty is rarely attainable, and is never required. *If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law.* The defendants excepted to so much of the instruction as is italicized." The court said it is certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such "that a man of prudence would act upon it in his own affairs of the greatest importance." Upon the authority of these cases we are bound to hold that so much of the instruction in this case as we have italicized is erroneous.

Instruction No. 4 is not erroneous. There is no indorsement showing whether instruction No. 24 was given, and in the absence of such indorsement we cannot review it. We fail to discover anything in the other points discussed by counsel that requires consideration here. But the errors which we have pointed out require that the judgment and order be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; McFARLAND, J.

(87 Cal. 126)

FLICKINGER v. SHAW. (No. 12,609.)

(Supreme Court of California. Dec. 15, 1890.)

EXECUTED LICENSE—REVOCATION—INJUNCTION.

There was a parol agreement between plaintiff and defendant by which defendant gave plaintiff a right of way for a ditch over his land, plaintiff to survey, excavate, and keep in repair the ditch, which should be used by both plaintiff and defendant in irrigating their lands. *Held*, that plaintiff having constructed and kept in repair the ditch, and it having been used by both parties, the agreement became an executed license, which defendant would be restrained from revoking.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

T. H. Lalne, for appellant. J. C. Black, for respondent.

THORNTON, J. That the object to be attained by the agreement between Flickinger and Smith on the one hand, and the defendant (Shaw) on the other, was to acquire by purchase a right of way over the land of the latter for the ditch constructed by the first-named parties, is, in our judgment, a fair, legal deduction from the facts disclosed in this case. Flickinger and Smith were seeking to acquire something more than a mere license or authority to do a particular act or series of acts on another's land, without possessing any estate therein, (*Potter v. Mercer*, 53 Cal. 673,) and which right might at any time be revoked by the licensor. In this case, the agreement between the parties is, in substance, that Shaw gives the right of way for a ditch over his land; that Flickinger and Smith survey and excavate the ditch and keep it in repair,

the ditch, when completed, to be used for the benefit of all the contracting parties in irrigating their respective tracts of land. Let it be observed (and it is so found) that Shaw agreed that Flickinger and Smith should have a conveyance of and give a right of way over his land for the ditch, and one-half of the water to be diverted thereby. The above facts clothe the transaction with the character of a purchase by one party and sale by the other of a right of way for a ditch. The license under which Flickinger and Smith entered was vested in them by a contract of purchase for a valuable consideration. Under this agreement Flickinger and Smith did survey and construct the ditch, and kept it in repair, and both parties made use of it for the purpose for which it was constructed, viz., the irrigation of their lands. Thus the agreement between the parties was executed. The license here given to Flickinger and Smith was one for the acquisition of an interest in land by purchase of Shaw, for which they paid by doing what they had agreed to do. After the ditch was constructed, it was used by all parties under the agreement for four or five years. Now, it would be highly inequitable, after the work has been done and money expended by Flickinger and Smith, to allow Shaw to recall his consent, fill the ditch, and cut Flickinger, who has succeeded to all the rights of Smith under the agreement above stated, off from the use of the ditch and the water flowing therein; nor should any such proceeding, in our view, be upheld by a court of justice. In *Rerick v. Kern*, 14 Serg. & R. 271, a case in some respects similar to the one under consideration, came before the supreme court of Pennsylvania. The case was one concerning the legal effect of an executed license. It was an action on the case to recover damages for diverting a water-course by which the plaintiff lost the use of his saw-mill. The facts were as follows: Kern, the plaintiff below, being about to erect a saw-mill on a stream designated as the "right-hand stream," a better seat for the mill was found by his mill-wright on what was termed the "left-hand stream." Kern thereupon applied to Rerick for permission to turn the water of the other stream into the left-hand stream, which was granted. In consequence of this permission, Kern built the mill on the left-hand stream. The mill was rendered a third more valuable by the union of the two streams than it would have been with the right-hand stream alone. No deed was executed, nor was any consideration given, but Kern, in consequence of the permission given by Rerick, built a very good mill, which did a great deal of business, and which he would not have built on the left-hand stream, if the permission had not been given. In this case, as will be observed, there was no element of purchase. The defense set up was that the permission to Kern was a mere license, which was revocable under all circumstances, and at any time. To this, it was said, in the unanimous opinion of the court, by GIBSON, J.: "But a license may become an agreement on valuable consideration, as, where

the employment of it must necessarily be preceded by the expenditure of money; and, when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed *in specie*? That a party should be let off from his contract on payment of a compensation in damages is consistent with no system of morals, but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence, the judgment of a court of law operated on the right of a party and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy." The same rule has been applied in case of an executed license, in *Pope v. Henry*, 24 Vt. 565, and also in *Swartz v. Swartz*, 4 Pa. St. 358. The principle on which these cases proceed is, as was said in *Swartz v. Swartz*, supra, "that the revocation would be a fraud, and that to prevent it a chancellor would turn the owner of the soil into a trustee *ex maleficio*." The case under consideration presents a stronger ground of relief than either of these above cited. Principle and authority in our judgment show that the plaintiff has rights here which should be protected by injunction. The facts show plaintiff's right to a specific performance. The statute of frauds is not in the way. There has been part performance and possession under the agreement, as far as the plaintiff could obtain possession, and though the agreement rests in parol, under the circumstances above mentioned, a party is entitled to a specific performance. *Rerick v. Kern*, 14 Serg. & R. 272. To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of frauds to become the means of accomplishing a fraud. To complete the purchase, nothing remains to be done but the execution of a conveyance of the right of way, and a proper proportion of the water to Flickinger. His equity to a deed is perfect, (*Morrison v. Wilson*, 13 Cal. 495,) and, when such is the case, a court of equity, in accordance with its familiar rules considering that as done which ought to be done, will protect it as readily and as fully as a legal title. If the legal title would be protected by an injunction, a perfect equitable title should also. In conformity with these views, in our opinion, the judgment should be affirmed.

We concur: BEATTY, C. J.; Fox, J.; PATERSON, J.

I dissent: MCFARLAND, J.

# MCGIVNEY v. PIERCE. (No. 12,271.)

(Supreme Court of California. Dec. 15, 1890.)

## MUNICIPAL ELECTIONS—COMMON COUNCIL—CONTEST.

The provision of the city charter of Oakland, granted in 1854, giving the common council exclusive jurisdiction to determine an election contest for the office of councilman, was impliedly repealed by Code Civil Proc. Cal. § 1111 et seq., providing that any elector of a county or city, or of any political subdivision of either, may contest for causes therein stated, and that such contest must be determined by a special session of the superior court.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

*Clunie & Young*, for appellant. *Metcalf & Metcalf*, for respondent.

MCFARLAND, J. The appellant inaugurated a contest in the superior court of Alameda county for the office of councilman of the city council of Oakland, under section 1111 et seq. of the Code of Civil Procedure. The respondent demurred upon the ground of want of jurisdiction, and the court sustained the demurrer, and entered judgment dismissing the contest. From said judgment this appeal is taken. The judgment was rendered upon the ground that the act reincorporating the city of Oakland, which was enacted in March, 1854, gave to the common council of Oakland exclusive jurisdiction to hear and determine an election contest such as is involved in this proceeding. Waiving the question whether the language of the charter is broad enough to include the subject-matter of the present litigation, and waiving the constitutional question as to the authority of the legislature to grant such judicial power to the common council, it is clear to our minds that the sections of the Code above referred to, which were enacted long after the charter, necessarily repeal the provision of the charter here invoked. Section 1111 provides that "any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein for any of the following causes." Then follows an enumeration of various grounds of contest, including those set up in the complaint or statement in this case. The succeeding sections provide that an elector wishing to institute such a contest must file with the county clerk a written statement setting forth certain specifications of grounds of contest; that the clerk must inform the superior court of the filing of such statement; that the court must call a special session at a certain time at the courthouse to hear the contest; that a citation must be issued, etc.; and that "the court must meet at the time and place designated to determine such contested election, and shall have all the powers necessary to the determination thereof." It is further provided that "the court must pronounce judgment in the premises either confirming or annulling and setting aside such election." Of course a general statute does not always, by implication, repeal a special one. It is always a question of intention, to be gathered from the language

used, and from the subject-matter of the legislation. With respect to the matter before us we think that the legislature, when enacting the sections of the Code above mentioned, clearly intended to adopt a uniform rule for all election contests about the officers named in section 1111, and necessarily repealed all former statutes inconsistent with that intention. The judgment appealed from is reversed, with instructions to the trial court to overrule the demurrer.

We concur: BEATTY, C. J.; THORNTON, J.; FOX, J.; PATERSON, J.

(87 Cal. 151)

WHITE v. PATTON *et al.* (No. 12,876.)

(Supreme Court of California. Dec. 16, 1890.)

FORECLOSURE PROCEEDINGS — CROSS-COMPLAINT — JUNIOR MORTGAGE — NOTICE.

A junior mortgagee, who becomes a party defendant to a foreclosure proceeding, and prays a foreclosure of his mortgage, must serve the mortgagors with a copy of his cross-complaint, under Code Civil Proc. Cal. § 442; and, in the absence of such service, a foreclosure by default is erroneous, although the mortgagors, after proper service of summons in the original complaint, failed to appear at all in the case.

In bank. Appeal from superior court, Mendocino county; JOHN G. PRESSLEY, Judge.

T. L. Carothers, for appellants. J. A. Cooper, J. K. Chambers, and C. W. Rohrbough, for respondent.

FOX, J. Proceeding for foreclosure of mortgage. Defendants Patton, the mortgagors, made default, but the defendant Thomson, who was alleged to make some claim as a subsequent mortgagee, answered, setting up a junior mortgage made by the same mortgagors, and prayed that, after the satisfaction of plaintiff's mortgage, the proceeds of sale should be applied to the payment of the amount due upon such junior mortgage, and for judgment for deficiency, if any there should be, against the Pattons. The court rendered judgment accordingly, and the Pattons appeal.

Appellants claim that the answer of Thomson was really a cross-complaint. Such really was its effect, and for the purposes of this appeal we shall treat it as such. It prayed for, and under it there was granted to him, affirmative relief against his co-defendants Patton; and the question is whether the proceedings were such as gave the court jurisdiction to grant that affirmative relief. It is not pretended that the allegations of the pleading were not sufficient to support such a judgment; but the claim is that the court never acquired jurisdiction to render the judgment and decree of foreclosure of this second mortgage, for want of proper service, or of any service, upon the defendants against whom the judgment ran. In this contention we think appellants are correct.

By the service of the summons issued upon the complaint of plaintiff, the court acquired jurisdiction of the parties, and control of all the subsequent proceedings. Code Civil Proc. § 416. But what is meant

by those words, "all the subsequent proceedings?" Manifestly it means proceedings upon that complaint, and for that cause of action. It had jurisdiction to hear and determine the rights of all the parties as to the questions involved in the cause of action stated in that complaint. It could ascertain and determine the amount due to plaintiff, and enter a decree foreclosing his mortgage, as against the claims of all the defendants; or if it had found the mortgage of defendant Thomson to be a prior mortgage, instead of a subsequent one, it could have granted him proper relief as against the plaintiff, provided the plaintiff had been properly served with the cross-complaint. But *quoad* the plaintiff's cause of action, defendants Patton, the mortgagors, who alone were personally liable in the action, had a perfect right to make default, and let the plaintiff have the relief he prayed against them without contest. It did not follow that their default upon the plaintiff's summons would give the court jurisdiction to enter another, further, and different judgment against them, in favor of another and different party, upon another and different cause of action, and of which they were in no manner put upon notice, against which they had no "day in court." Such a proceeding, even if authorized by statute, would be in direct violation of a right guarantied by the constitution, and one depriving the parties of their property "without due process of law." But such a proceeding is not authorized by the statute. Thomson was a proper party defendant. He might have made default, like his co-defendants, and like the defendant Marks, who was also sued as a junior mortgagee, allowed his right to be foreclosed at the same time that the right of the mortgagors was; but he elected to come in. In coming in, he might have set up his mortgage, by way of showing his right, and then contented himself with contesting simply the right, or the priority of the right, of plaintiff. But he attempted to go further, and seek to foreclose, in the same action, and against, not the plaintiff, but all his co-defendants, his mortgage, and to secure a deficiency judgment against the defendants Patton. This, too, the statute gives him the right to do, but not without giving notice to the persons against whom he sought affirmative relief. Even if those persons had been present in court, actively contesting the claim of plaintiff, they would have been entitled to actual and full notice of the claim set up by defendant Thomson, and of the affirmative relief which he demanded, and to an opportunity to defend against it. They were entitled to service of the cross-complaint, and to demur or answer thereto. Such is the express provision of the statute. *Id.* § 442.

The statute does not, in express terms, require that a summons should be issued upon the cross-complaint, and we are not disposed to hold that one should have been so issued in this case; but there should be at least the notice required by the statute,—service of the cross-complaint. This presented a new cause of action, in favor of a new party, and until the party

to be affected by that cause of action was brought in by such notice as the statute prescribed, the court failed to acquire jurisdiction to adjudicate upon or determine the same. The record fails to furnish proof of any such service. There is no appearance upon or response to this cross-complaint, nor any default for want of appearance; and the court has not found, nor certified in its decree, that any such service was ever made, although it has, with great particularity, recited the fact of service of summons "issued upon the complaint," and "of default in that behalf." This cross-complaint is as clearly a complaint against the Pattons as was the original complaint filed by plaintiff. It has not been answered, and is therefore one of the papers which must constitute a part of the judgment roll, under the first subdivision of section 670, Code Civil Proc. And although, for the reasons already shown, there was no summons issued upon it, the law requires that it must be served upon the party affected thereby. This being the law, the same subdivision requires that the judgment roll must contain the affidavit or proof of service, with a memorandum indorsed thereon, of the default of the defendant thereto, for want of answer. Nothing of the kind appears in this case. The court was, therefore, without jurisdiction to enter the judgment which was entered in favor of said defendant Thomson for affirmative relief against the defendants Pattons. The Pattons possibly might have moved the court below to set aside this portion of the judgment, on the ground of surprise, but this could only be done within six months from the date thereof. Section 473, Id. But it does not appear that they had any notice of the judgment within six months. The error was one against which they also had a right of appeal at any time within one year. That remedy they have taken, and on the appeal we are satisfied that they are entitled to have the error corrected. It is therefore ordered that so much of the judgment and decree entered in this cause as directs the foreclosure of the mortgage in favor of David Thomson against the defendants Milo and J. H. Patton, and directing judgment for deficiency against them in favor of said Thomson for any deficiency that may remain after the sale of the mortgaged premises, and the application of the proceeds thereof, be reversed, and the case remanded.

We concur: BEATTY, C. J.; THORNTON, J.; PATERSON, J.

(87 Cal. 155)

*In re* MAN WO CHAN'S ESTATE. (No. 14, 019.)

(Supreme Court of California. Dec. 17, 1890.)

APPEAL—REVIEW.

In a contest over the probate of a will there was judgment for contestant. On motion for a new trial, petitioner for the probate of the will presented a statement containing the evidence and proceedings on the trial. Then, over objections of petitioner, facts which had previously been shown in a contest over the estate between petitioner and the public administrator, and which were adverted to on the argument in

the will contest, were made a part of the statement. *Held* that, though the judgment would have been sustained had only the evidence at the trial been considered, still the matters improperly made part of the statement by the court being such as may have had weight with the court in coming to its conclusion, the judgment would be reversed.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

*Nourse & Short, Goucher & Jones, Theodore H. Hittell, and Edw. J. Pringle*, for appellant. *Hinds & Merriam*, for respondent.

McFARLAND, J. This is an appeal by W. W. Gray, petitioner for the probate of a proposed will of Man Wo Chan, deceased, from a judgment denying the admission of said will to probate, and from an order denying a new trial. The only evidence in the case was that introduced by the appellant. Two persons testified that they were subscribing witnesses; and their testimony (if they were credible witnesses) might be sufficient to establish the due execution of the proposed will. Another witness also testified with some degree of positiveness that the signature to the will was that of the deceased. The contestant, E. H. Cox, who had been appointed and was administrator, did not introduce any evidence. Still, the court must have believed that the will was a forgery, for the only finding of fact is "that the will propounded by said Gray is not genuine, and was not executed by said Man Wo Chan, deceased, in his life-time." Of course, the court below, sitting as a jury, was the judge of the credibility of the witnesses; and if the court had decided the issue upon the evidence before it, and had based its judgment upon a disbelief of the witnesses, we would not disturb it. It is evident, however, that the court considered matters not before it at all. Appellant presented a statement on motion for new trial which included the evidence and proceedings introduced and occurring on the trial of this contest between the appellant and the contestant Cox. The statement then contains the following: "On motion of counsel for contestant, Cox, and against the objection of counsel for respondent, Gray, the following amendments and facts that had been previously shown in the case, viz., the estate of Man Wo Chan, and were adverted to on the argument of the will contest, were made a part of this statement, to the allowance of which amendments counsel for respondent duly excepted. The amendments are as follows." Then follow statements that Ah Qui, a brother of the deceased, had on a former occasion signed a request that Cox be appointed administrator; that there had once been a contest between Cox and the public administrator in which it had been shown by testimony that Mr. Hinds, attorney for Cox, had made particular search among the effects of the deceased for a will, and had made inquiry about it of said brother Ah Qui and others, and that this will in contest was not produced, but that a certain other document was produced which was not attested; and

that the widow of deceased also requested the appointment of Cox as administrator, but died before the said contest between Cox and the public administrator had been heard. Of course these amendments should not have gone into the statement; for they confessedly contain things which did not occur at the trial. If contestant considered these things relevant and material he should have offered to prove them, and appellant would have had the opportunity to object, or to disprove or explain them. The fact, for instance, that Ah Qui, who was a brother of deceased and interested in the estate and named in the proposed will, and who, according to the subscribing witnesses, was present when the will was made, and took possession of it, made no mention afterwards of said will, and requested that Cox be appointed administrator upon the theory that there was no will, may have had, and possibly did have, great weight with the court. And, as the court put these amendments into the statement, it must be presumed that the court, in coming to its conclusion, considered the things which the amendments contained. It is apparent, therefore, that there was not a fair trial of the case. The appellant is entitled to have the issue as to the validity of the proposed will determined upon evidence introduced at the trial of such issue, and upon such evidence alone. For this reason the judgment and order must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(87 Cal. 158)

FIRST NAT. BANK OF RIVERSIDE V. HOLT  
et al. (No. 13,686.)

(Supreme Court of California. Dec. 17, 1890.)

MORTGAGE FORECLOSURE—COMPLAINT—DEMURRER  
—UNCERTAINTY—APPEAL—OBJECTION NOT  
RAISED BELOW.

1. A complaint to foreclose a mortgage alleged that defendants executed their promissory note to plaintiff on December 24, 1888, payable three months after date, "which note is in the words and figures following, to-wit," following which was a copy of the note, and after the signature the following words and figures:

"Due March 24, 1889. Indorsed:  
"January 19, 1889, on B. note, \$107.30  
"March 26, 1889, on G. note, 216.00  
"May 22, 1889, paid 268.44."

The complaint alleged that \$591.74 had been paid on the note. *Held*, on special demurrer, that there was no uncertainty in the averments of the complaint as to whether the indorsements following the signature were part of the note at the time of its execution, or afterwards written thereon, or whether the note set forth was a copy of the one executed.

2. The mortgage provided that in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to the plaintiff." *Held*, that an averment that \$300 is a reasonable attorney's fee, "for the collection of said promissory note, and for the foreclosure of the said mortgage," was simply an averment that said sum was a reasonable attorney's fee in said foreclosure suit.

3. Even if the allegation as to attorney's fees were uncertain, it would not render the complaint demurrable, as the allegation is not necessary.

4. Even if from the finding of the court that

there was due plaintiff from defendants a certain sum for "costs, percentage, and necessary disbursements," and the fact that this sum was included in the judgment, it appeared that any part of the sum allowed was for percentage, still, want of authority in the court to allow percentage cannot be raised for the first time on appeal.

Commissioners' decision. Department 2. Appeal from superior court; San Bernardino county; JOHN L. CAMPBELL, Judge. *W. J. McIntyre and H. Goodcell, Jr.*, for appellants. *E. B. Stanton*, for respondent.

BELCHER, C. C. This is an action to foreclose a mortgage. The defendants demurred to the complaint and their demurrer was overruled. They failed to answer within the time allowed, and thereupon judgment was entered against them, from which they appeal. The demurrer was upon the grounds of ambiguity and uncertainty, and it specified three particulars wherein it was claimed that the complaint was defective.

The first specification is that it does not appear whether the indorsements on the promissory note, set forth in the complaint, were part of the note at the time of its execution, or afterwards written thereon, or whether the said note is a copy of the note executed by the defendants. The complaint alleges that the defendants executed their promissory note to the plaintiff on December 24, 1888, payable three months after date, "which note is in the words and figures following, to-wit," and then sets forth a copy of the note, with the following words and figures after the signatures:

"Due March 24, 1889. Indorsed:  
"January 19, 1889, on Boyd note..... \$107 30  
"March 26, 1889, on M. D. Godfrey note.... 216 00  
"May 22, 1889, paid..... 268 44"

It is argued for appellants that the words and figures following the signatures appear, according to the averment, to have been a component part of the note, and yet that they show three dates, all later than the date, and two of them later than the maturity, of the note, which, without explanation, convey the idea that the indorsements were not part of the note as originally made, but were added subsequently; and it is said that this idea, being contrary to the apparent averment, and there being no explanation, makes the complaint uncertain in this respect. It is also argued that it does not appear whether or not the note set forth, with or without the indorsements, is a copy of the note executed by the defendants, because, from the averment that the "note is in the words and figures following," it is only a matter of inference that it was in the same words and figures at the date of its execution; and it is said that an averment which has to be helped out by inference is insufficient as against a special demurrer. We see no real uncertainty in the averments complained of. The indorsements were evidently intended to represent payments made and credited upon the note at the dates shown thereon. These payments aggregate the sum of \$591.74, and the complaint alleges "that the said defendants have paid up-



on the note hereinbefore set forth \* \* \* the sum of five hundred and ninety-one and 74-100 dollars, and there is now due and unpaid upon the said promissory note, from the said defendants to the said plaintiff, the sum of sixteen hundred and sixteen and 63-100 dollars, together with interest," etc. The last-mentioned sum is just the amount of the principal of the note, less the amount of the payments indorsed thereon. Looking, then, at the whole complaint, it is clear that there was no such uncertainty in its averments as could create or leave in the minds of the defendants any reasonable doubt as to their meaning; and, this being so, the complaint must be held sufficiently certain to meet the requirements of the law. The objection that it does not appear that the note set forth in the complaint is a copy of the note executed by the defendants is not even plausible. The complaint alleges that, on the 24th day of December, 1888, the defendants "made, executed, and delivered to the plaintiff their promissory note, bearing date on that day, which note is in the words and figures following." This certainly leaves no room for doubt or cavil that the note set forth is a copy of the note executed.

The second specification is that "it does not appear at what time the \$591.74 credited upon the note was paid, and it therefore does not appear upon what amount, or from what time, interest should be computed thereon." This objection is sufficiently answered by what has already been said; and, besides, the payments were credited upon the principal of the note, and there was therefore no uncertainty as to how the interest on the balance should be computed.

The third specification is that "it does not appear what would be a reasonable attorney's fee for the plaintiff in this action." The mortgage, as shown by the complaint, provides that, in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to the plaintiff," and it is alleged "that two hundred dollars is a reasonable attorney's fee to be allowed to the plaintiff for the collection of the said promissory note, and for the foreclosure of the said mortgage." In this state there can be but one action for the recovery of any debt secured by mortgage. Code Civil Proc. § 728. The obvious purpose of this action was to recover the amount due on the note set out by a foreclosure of the mortgage, and the sale of the mortgaged property; and it was only to aid the plaintiff in accomplishing these ends that the allowance of an attorney's fee was authorized by the mortgage, and was asked for in the complaint. The averment that the sum claimed was a reasonable fee for the collection of the note and foreclosure of the mortgage was limited to the action in hand, and was therefore neither ambiguous nor uncertain. Besides, if the averment were uncertain, as claimed, still that fact would not aid the appellants here, for the reason that no averment as to what would be a reasonable fee was necessary. *Carriere v. Min-turn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 571, 14 Pac. Rep. 514.

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The court found that there was due to the plaintiff from the defendants the sum of \$162.15, for "costs, percentage, and necessary disbursements, including attorney's fees," and this sum was included in the judgment. It is objected that there was no provision of law authorizing the court to add a percentage to the costs and disbursements, and that the judgment is therefore, in this particular, clearly erroneous. But it does not appear that any portion of the sum allowed was for percentage; and, if such was the fact, the defendants should have raised the point in the court below, where the error, if any, might readily have been corrected. We see no error in the record, and therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(87 Cal. 23)

NORTHERN RY. CO. *et al.* v. JORDAN *et al.*  
(No. 12,768.)

(*Supreme Court of California.* Dec. 12, 1890.)

EJECTMENT—VERDICT—NEW PARTIES—EVIDENCE.

1. In ejectment, the verdict was that plaintiff was "entitled to the possession of the land described within the following boundaries," etc.; but there was nothing to show that the verdict referred to the land described in the complaint or answer or the patents and deeds introduced in evidence, and no natural monuments were mentioned in the boundaries given. *Held*, that the verdict and judgment based on it were insufficient.

2. A new plaintiff was substituted for the original plaintiff, who had conveyed to him pending the suit, by an order which declared that all the allegations and denials of the pleadings should apply to such new plaintiff. Among the allegations of the complaint to which the new plaintiff was thus committed was one that plaintiff at the time the action was brought was entitled to the possession of the land in dispute. *Held*, that it was error to admit in evidence the deed from the original plaintiff to the new one, as it was irrelevant to any issue made by the pleadings.

3. Evidence of the location of a house on the land which was one of the calls in the patent was admissible.

Department 1. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

*J. B. Relustein, J. M. Seawell, and Reinstein & Eisner*, for appellants. *L. B. & L. Mizner* and *E. R. Chase*, for respondent.

Fox, J. Action in ejectment. Judgment for plaintiffs; motion for new trial denied, and defendants appeal from both the judgment and order. Plaintiffs deraign title under a certificate of purchase of tide-lands from the state, issued November 9, 1871, to L. B. Mizner, followed by patent issued June 14, 1877. Defendants deraign title under a United States patent for the Rancho Canada del Hambre de Bolsas, and a deed conveying the land in Little Bull valley down to the shore of the straits of Carquinez, in Contra Costa county. There is no question but that the patents are coterminous—the lands

described in the one being bounded by the lands described in the other—at and along the point under investigation in this case; but the point is, where is that coterminous line? Both patents give as a general description “the shore of the straits of Carquinez,” and in both patents this general description is followed by a specific one of courses and distances, and each corresponding to the other in such courses and distances. As matter of law,—and that seems to be conceded as law in this case,—if there is a conflict between the natural boundary, or shore line, and the line as given by courses and distances, the latter must yield to the former. The correct location of the shore line is therefore the matter to be ultimately determined in this case, but it will have to be determined upon another trial; for the verdict rendered upon this trial, in our judgment, determines nothing, and cannot stand. As the case will have to go back for a new trial, we suggest, preliminarily, that either the verdict or the complaint is all awry as to the points of the compass at the place under consideration. The exhibits which are brought up to us indicate that the first fault is in the complaint. If so, the new proceedings in the court below ought to commence with an amendment of that complaint, for it can hardly be expected that a judgment can ever be reached which will settle rights between litigants, unless the pleadings are framed to support it. It may also be found advisable to amend it for another reason, which will hereafter become apparent.

1. The first point made by appellants is that the verdict and judgment are erroneous for uncertainty of description. The verdict reads as follows: “We, the jury, find that the plaintiff is entitled to the possession of the land described within the following boundaries: Commencing at point (A) on the west line of railroad right of way, running west at right angles with the right-of-way line (70) seventy feet, thence a south-easterly direction to a point on the west line of right of way, thence northerly along said right-of-way line (180) one hundred and eighty feet to the point of beginning.” That is all there is of the verdict, save the signature of the foreman. There is nothing in the complaint, or in any part of the judgment roll, which corresponds in any particular with this verdict, or from which it could be determined that the verdict referred to the whole or any part of the land described in the complaint, or in the answer, or even to any lands described in either of the patents, or any of the deeds offered in evidence. Place the description given in any of the pleadings, or of the title papers offered in evidence, side by side with this verdict, and it would be impossible to tell even that the lands were located in the same state, much less that they or any part of them were the same. Point A is not a monument, and there is nothing of record anywhere by which it can be located. The judgment conforms to the verdict, and does not improve upon it, in this regard. This verdict, and the judgment based on it, is clearly insufficient under the rule laid down in *Crosby v. Dowd*, 61

Cal. 602, affirmed in *Emeric v. Alvarado*, 64 Cal. 621,<sup>1</sup> and in *Hill v. Wall*, 66 Cal. 132, 4 Pac. Rep. 1139. But it is claimed that *Crosby v. Dowd* was overruled in *De Sepulveda v. Baugh*, 74 Cal. 470, 16 Pac. Rep. 223. In the latter case it was held, modifying *Crosby v. Dowd*, that a judgment is not void for uncertainty because of the fact that it refers to some other paper for description. But it was still held that such a judgment may be erroneous, and subject to correction on appeal, even though it could not be held void on collateral attack, so long as there was some other paper, matter of record, to which reference might be had for description. But even under that decision this verdict is not good, for it refers to nothing of record or elsewhere, to which resort may be had for the purpose of locating the lands here attempted to be described. Respondent says the jury had before them during the entire trial, and in their jury-room, a diagram, upon which point A was distinctly marked. Suppose they had. They have not referred us to that diagram, and, if they had, the diagram is not a part of the record; it may be found to-day, it may be impossible to find it to-morrow, and when found it would be impossible to apply it with absolute certainty to any particular tract of land.

2. The action was commenced by the Northern Railway Company and A. J. Bryant as plaintiffs. Some time afterwards, upon the request of Bryant and of Floyd-Jones, the latter was substituted in the place of Bryant as plaintiff, and it was ordered that the name of Bryant be stricken from the complaint, and the action continued in the name of Floyd-Jones as plaintiff, “and that all the allegations and denials of the pleadings apply to said Floyd-Jones, and not to said Bryant, and that the said complaint be amended by striking out the name of said Bryant and inserting in the place thereof the name of said Floyd-Jones.” Floyd-Jones having succeeded by transfer to the interest of Bryant, he had a right to be substituted as plaintiff if he desired to do so, (Code Civil Proc. § 385,) but the method of doing it was a singular and unfortunate one. It left him to stand upon an allegation, and bound to prove, that he was the owner, or at least entitled to the possession, at the time the complaint was filed, neither of which was true. The court did err, therefore, in admitting in evidence, under the pleadings as they stood, the deed from Bryant to Floyd-Jones. It was incompetent, irrelevant, and inadmissible for the purpose of proving any issue in the cause. The difficulty would have been obviated by a proper supplemental complaint.

3. It was not error for the court to admit evidence tending to show the location of the John Travers house. That was one of the calls of the United States patent, and the parties were entitled to show where it was if they could. Whether the evidence was sufficient to prove the fact was for the jury to determine.

4. We do not think the point that the verdict is against law, because in disobedience

<sup>1</sup>2 Pac. Rep. 418

ence of the instructions of the court, is sustained. The jury are of course bound to take the law from the court, but it does not appear that they did not do so in this case. Under the instructions, the real question was one of fact,—where was the high-water mark? It does not follow, because the jury and the counsel do not agree upon that question of fact, that the jury disregarded the instructions of the court.

5. The point is also made that the evidence is insufficient to justify the verdict. As the case must be tried anew, we deem it improper for us at this time to discuss that question.

6. It is also claimed that the certificate of purchase and state patent to Mizner are void. We regard this contention as settled adversely to appellant by the decision in *Upham v. Hosking*, 62 Cal. 250, a case which seems to be directly in point.

Judgment and order reversed.

We concur: PATERSON, J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

I concur in the judgment: WORKS, J.

(3 Cal. Unrep. 336)

INGERMAN v. MOORE *et al.* (No. 12,733.)

(*Supreme Court of California*. Dec. 16, 1890.)

NEGLECT OF MASTER—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an adult, had worked about defendant's saw-mill for about four years, and for nearly a year as helper to the sawyer at an "edger," consisting of eight circular saws arranged upon a table four feet high. Under the table, six inches below the saws was a revolving shaft, with a collar upon it fastened by a projecting set-screw. Plaintiff testified that on several occasions he had run the edger himself, by direction of his employer, after telling him that he did not understand machinery; that the saws were stopped and started at will by pulling, respectively, two ropes which hung near; that the morning of the accident was quite dark, but there were no lights; that he had been directed to run the machine, and, while doing so, a sliver dropped upon the shaft, which he attempted to remove, as he had seen the sawyer do, without stopping the saws, and while doing so his sleeve was caught by the set-screw, of whose existence he was ignorant, and his hand cut off. *Held*, that there was no evidence of negligence, and that he was guilty of contributory negligence. BEATTY, C. J., and McFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

*Jarboe, Harrison & Goodfellow* and *Wm. F. Herrin*, for appellants. *Pillsbury & Blanding*, for respondent.

WORKS, J. This is an action for damages for personal injuries brought by an employe against his employers. The defendants moved for a nonsuit, which was denied. There was a verdict and judgment for plaintiff for \$12,500, a motion for a new trial, which was denied, and the defendants appeal. The facts are stated in the appellants' brief as follows: "In the month of January, 1884, the defendants were the owners of a saw-mill at Port Discovery, Washington Territory, and the plaintiff was one of their employes, engaged in

their saw-mill in running an edger, or scantling machine, which was used for shaping lumber, and cutting it in various widths and thicknesses. The edger was about seven or eight feet in width, and from three to four feet in length, and had arranged upon it, at intervals upon its longest dimension, eight circular saws. These saws were moved by means of an engine, belt, and pulley, and made 860 revolutions a minute. The plaintiff stood in front of this machine, and, with the aid of a helper, who stood a few feet in the rear of him, ran the lumber through this edger to the rear thereof, where it was removed by others from the mill. About six feet to his rear, and close by his helper, was a rope, by pulling which, whenever it was necessary to stop the machine, the belt connected with it could be thrown off the pulley, and the movement of the saws stopped. The plaintiff commenced working at the mill in the year 1880, and from that time was continually employed there until the 14th of February, 1884. He had been at work on the inside of the mill, in connection with different saws, from the latter part of the year 1880. His special function from March, 1883, was that of an assistant to one Libben, who had charge of this edger or machine, and it was customary, when Libben was absent, for the plaintiff to take charge of the machine, with the aid of an assistant, who was detailed to help him. From the time he commenced his position as assistant to Libben, in March, 1883, he had at various times taken charge of and run the machine, at one time for several weeks in succession, and had been running it for several days prior to the accident. On the 14th of February, 1884, and for four days prior thereto, he was in charge of the machine, Libben being sick and absent, and, with the aid of his helper, one Hansen, was running the machine himself. On the morning of that day, at about half-past seven o'clock, a sliver had become detached from one of the planks that he was running through the saws and fell beneath the saws into an open box or frame upon which the saws were supported, and interfered with the free working of the machine. Beneath the saws, and six and a half inches below them, was a parallel shaft, revolving eighty-four times a minute, upon which this sliver rested. The floor underneath was open, for the purpose of allowing the chips and sawdust to fall through into the lower part of the mill. At the left-hand end of this parallel shaft, as you face it from the front, was a set-screw, which held a collar to it, and was placed there for the purpose of preventing its vibration. This screw projected about half an inch from the surface of the shaft, and was itself about half an inch square. When the plaintiff observed that the sliver had fallen into the box of the machine, instead of signaling his helper to stop the machine, he went around to the rear of it, while it was still moving at its usual velocity, and attempted to move the sliver with his hand. Instead of attempting to take it out with his right hand, he rested his right hand upon the frame of the box in which the machine was inclosed, and, with his left

hand, reached across his body to the right-hand end of the machine, for the purpose of removing the sliver, when suddenly his hand was taken off, and his arm broken so that amputation became necessary. His hand was cut directly across at the wrist without any scratch or mutilation of any character, and, with some scraps of his clothing, fell down into the chute below the machine, where it was several hours afterwards found."

The plaintiff testified with reference to his employment in running the machine and the way in which the accident occurred, as follows: "I am 29 years old. I commenced to work at the mill of the defendants on the 24th of May, 1880. The mill was then owned by Mr. Mastick. The defendants took charge of it in 1881 or 1882. When I first went there I worked on the lumber pile. Then I commenced to work on the rollers inside, taking the lumber from the big saw. I did this kind of work about two years and a half. Then I went to work with John Libben on this scantling machine, where I got hurt. I had been at work on that machine about nine months before I was hurt. This machine was about seven or eight feet wide, and three or four feet long. Question. How was that machine worked? What kind of power? Answer. Steam power. Q. By a belt? A. Yes, sir; by a belt. Q. With a brake or wheel? A. We had a rope to pull. Six feet away from me was a rope to pull, and generally the man who was helping had to pull that rope when they wanted to stop the machine. Q. What did you do when you started it? A. Well, there were two ropes, one to start, and one to stop. Q. So you pulled one to start, and one to stop? A. Yes, sir. Q. Did you ever run that machine? A. Yes, sir, I did. Q. When was the first time you ran it, about as near as you can recollect? I will ask you first how many times do you remember running it before the time you got hurt? A. I ran it three times. Q. As near as you can remember, tell me the first time you ran it. A. The first time I ran it about four days. Q. How long before you got hurt, as near as you can tell? A. About five months before I was hurt. Q. How long did you run it that time? A. About four days. Q. How did you come to run it at that time? A. Mr. Libben was sick and absent. Q. I want to get at who, if anybody, asked you to run it, or directed you to. A. Well, Mr. McCann told me to go there. Q. Tell the jury how, just exactly how, it happened. A. Mr. McCann told me to go and run the machine; that is all. I did not know much about machinery. He thought I could do it. I said: 'I will do my best.' He said: 'Go ahead; I think you can run it.' Q. What else, if anything, was said? A. Nothing more said at that time. He told me to go there, and I had to go there. Q. Did he give you any further instructions or directions? A. No. He gave me no instructions whatever. Q. How long did you say you ran it at that time? A. I ran it about four days. Q. How soon was that after the first time? A. About a month or six weeks after. Q. You say you ran it two days. How

did you come to run it then? A. Well, Mr. McCann came and told me to run it. Q. What was said? Tell the jury all that was said about it. A. Well, I always told Mr. McCann I was no machinist, and didn't know much about machinery, so he had to take somebody else, and he always told me he thought I was able to run it, and I had to go there. Q. I am getting at the second time. You have told about the first time. Now I want to get at the other, as near as you can remember. A. Well, that is as near as I can remember. I always told Mr. McCann I did not know much about machinery. Q. Well, then, you went for about two days, you say? A. Yes, sir. Q. Then when did you run it again before you were hurt, if you did? A. I think I ran it some time in November. What time, I could not exactly say. Q. In November, before you were hurt? A. Yes, sir. Q. How long did you run it then? A. About nine days. Q. Where was Libben at that time? A. He was sick. \* \* \* Q. Now, tell the jury what you were doing when you got hurt. A. I was trying to take the sliver out of the machine, and my hand got caught by the set-screw, and tore off. Q. Where was this sliver? A. Right underneath the machine,—right underneath the saw. It prevented me. I could not lift the rollers up to put the lumber into the machine. Q. How did you come to pull the sliver out, or be pulling the sliver out? A. I could not lift the rollers, so I had to get behind the machine, and try to get the sliver out; and it was a dark morning, the lights were out, so I tried to get the sliver out, and got my hand in the machine, and caught in the set-screw. I could not see the set-screw. I didn't know the set-screw was there. Q. What did the set-screw catch on, if anything? A. It caught my jumper, my outside shirt. Q. One of those strong jackets you wear outside to keep off the dust, was it? A. Yes, sir, and that caught inside, and pulled my arm around the shaft, and tore my hand off and broke my arm, and then I got out again. Q. Had you ever pulled a sliver out of there before? A. Not in that place, a good many other places. I done just exactly as I saw Mr. Libben do. I saw him pull slivers out of the same place."

It is contended by the appellants that the nonsuit should have been granted for two reasons, viz., that the evidence failed to show negligence on the part of the defendants, and that it did show contributory negligence on the part of the plaintiff. We feel constrained by the evidence, as it appears in the transcript, to agree with the appellants in this contention. We think the evidence fails to show negligence on the part of the appellants; but if there is any question as to this, there can be none as to the contributory negligence of the respondent. By counsel for respondent much stress is laid upon the fact that he was not regularly employed to run the machine which caused the injury, and was not competent to run and manage it; but his own testimony shows that he had been a helper on the machine for several months, and had himself run it a number

of times for several days on each occasion. Besides, the accident did not occur, in this instance, because of any mismanagement of the machine, but was the result solely of carelessness on the part of the plaintiff in attempting to remove the sliver from the machine by placing his hand in close and dangerous proximity to the running saws. It was wholly unnecessary for him to run this risk. He testifies that his machine could be stopped by pulling a rope, and started by pulling another. He was a man of mature years, and was bound to know the risk and danger of taking the course he did, and as it was unnecessary for him to do so he was guilty of negligence which must prevent a recovery in this case.

It is contended that there was negligence on the part of the appellants in not having the room in which the machine was operated sufficiently lighted, but, if this be conceded, the act of the respondent in putting his hand near the saws in the dark only proves his negligence more clearly. Again, it is contended that there was negligence on the part of the defendants in having a set-screw on the shaft connected with or near the machine. But it appears from the evidence that the set-screw was necessary for the proper running of the machinery, or a part of it, and, besides, the accident, which it is claimed occurred on account of the set-screw being there, could not have occurred but for the negligent act of the plaintiff above mentioned. For these reasons the court below erred in overruling the motion for a nonsuit, and in denying the defendants a new trial. Judgment and order reversed, and cause remanded.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

I dissent: MCFARLAND, J.

BEATTY, C. J. I dissent. There was, in my opinion, sufficient evidence of negligence on the part of defendants to go to the jury, and not sufficient evidence of contributory negligence on the part of the plaintiff to justify the court in granting a nonsuit on that ground. It is clear that the machine was dangerous to a man unfamiliar with its construction, and ignorant of the proper method of keeping it in order. If the plaintiff had expressly represented himself as competent to run and manage it, or had impliedly done so by seeking the employment, there might have been no duty resting upon the defendants to instruct or warn him as to the dangers involved in its operation. But the plaintiff's evidence showed that, so far from seeking the employment, or leading the defendants by any express or implied representations to suppose that he was competent to operate the machine, he accepted the employment unwillingly, protesting that he did not understand machinery, and that some one else should be put in charge. When a man is set to work upon a dangerous machine, under such circumstances, I think the employer is guilty of negligence if he fails to give proper instructions as to the method of operating

the machine safely, and he is more specially guilty of negligence if he instructs the employe to operate it in a manner that is dangerous. Now, in this case, the only instruction ever given to the plaintiff, according to his evidence, was to do as he had seen Libben do, and in following this instruction he incurred the injury complained of. In this view of the case, a nonsuit would certainly have been improper, and the verdict of the jury is sustained by the evidence.

(87 Cal. 162.)

*Ex parte* HODGES. (No. 20,739.)

(Supreme Court of California. Dec. 17, 1890.)

CONSTITUTIONAL LAW—EXTERMINATION OF SQUIRRELS—ORDINANCE.

1. Under County Government Act Cal. § 25, subd. 28, giving boards of supervisors power to provide for the destruction of squirrels or other wild animals, such boards have no authority to require land-owners, under a penalty, to exterminate within 90 days the ground-squirrels on their respective lands, and thereafter to keep the lands clear thereof.

2. Neither does Const. Cal. art. 11, § 11, providing that any county may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws, authorize such a regulation, as it is not a police, sanitary, or kindred regulation.

In bank.

*Latimer & Brown*, for petitioner. *W. S. Tinning*, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The board of supervisors of Contra Costa county enacted the following ordinance: "An ordinance to provide for the extermination and destruction of ground-squirrels in the county of Contra Costa. The board of supervisors of the county of Contra Costa do ordain as follows: Section 1. Ground-squirrels infesting lands in the county of Contra Costa are hereby declared to be a public nuisance. Sec. 2. All owners and occupants of lands within the county of Contra Costa are hereby required, within ninety days after the taking effect of this ordinance, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom. Sec. 3. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor. Sec. 4. This ordinance shall take effect and be in force on the 30th day of November, 1889." The petitioner was convicted of a violation of this ordinance, sentenced to pay a fine, and, in default of payment, was committed to the county jail. He now prosecutes this proceeding, and asks that he be discharged.

The question as to the constitutionality of the ordinance is gravely and learnedly discussed by counsel on both sides, and Cooley's Constitutional Limitations, Potter & Dwarrie on Constitution, Sedgwick on Constitutional Law, and other constitutional authorities and decided cases innumerable, are cited in aid of and against its validity. It is certainly a most effective means of abating a nuisance, viz., the squirrels, and bringing about a very desirable end. We regret exceedingly that

we cannot see our way clear to uphold and enforce such an important and original piece of legislation. Indeed, it would give us great pleasure to see the power here assumed applied to snakes, tarantulas, ants, flies, fleas, and other reptiles, insects, and pests, which tend to make man's life a burden, and to have it exercised and enforced in every county in the state. But we are unable to see by what right or authority of law a board of supervisors can impose upon a land-owner the burden and expense of exterminating animals *feræ naturæ* on his own land or elsewhere. It is true the county government act (section 25, subd. 28) gives boards of supervisors power to "provide for the destruction of gophers, squirrels, other wild animals, noxious weeds, and insects injurious to fruit-trees, or vines, or vegetable or plant life;" and this is a power that should be upheld in all cases where the means employed are reasonable, and not otherwise objectionable. But certainly this authority cannot be so far extended as to require a land-owner, under a penalty, to exterminate wild animals, of which he is not the owner, and over which he cannot, in the nature of things, have any control or dominion. From our limited knowledge of the nature of the squirrel tribe in this state, such a task would seem to us to be almost, if not quite, impossible. The ordinance requires that all occupants of lands, "within ninety days," exterminate and destroy the ground-squirrels on their respective lands, and "thereafter to keep said lands free and clear therefrom." This might be successfully done by the free and judicious use of poison, and perhaps by some other means, on very small tracts of land, but on large tracts it would certainly require eternal vigilance, if it could be accomplished at all; and if, after the extermination of the intruders on his own land, one, only one, should come over from the land of his neighbor, the ordinance would be violated. The occupant of lands bordering on another county, where no such regulation prevailed, and the pesky squirrel was allowed to propagate and grow unmolested, would be in a most unfortunate condition. Such an ordinance differs materially from laws requiring an occupant of lands to keep it free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them in order to prevent the spread of the disease. These are matters over which the property owner has control, and the requirements are reasonable and just.

The respondent attempts to sustain the ordinance by and under section 11 of article 11 of the constitution of this state, which provides that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with the general laws." But the ordinance is not intended to preserve the peace and quiet of the county, or to prevent the use of one's property to the injury of another, or for the protection of the lives, limbs, or comfort of all persons, or to prevent the propagation or spread of disease, nor is it, in any proper sense, a po-

lice or sanitary regulation. What is meant by "other regulations" in the section cited may be a question, but it must certainly be limited to objects similar to those denominated "police" and "sanitary." If the board of supervisors had no authority to pass such an ordinance, then no offense was committed by the petitioner; the act or omission on his part was not a crime; the court had no jurisdiction to try or convict him; and he is entitled to his discharge. We know of no law which can be held to authorize a board of supervisors to enact such an ordinance, and we are quite clear that it cannot be enforced for the reason that it is unreasonable and burdensome in the extreme. Let the petitioner be discharged.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

We concur in the judgment: PATERSON, J.; MCFARLAND, J.

(10 Mont. 24)

WALLACE V. HELENA EL. RY. CO.

(Supreme Court of Montana. Dec. 8, 1890.)

JUDGE—POWERS IN ANOTHER DISTRICT—INJUNCTION IN CHAMBERS.

1. Const. Mont. art. 8, § 12, provides that "the state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court. \* \* \* Any judge of the district court may hold court for any other district judge, and shall do so when required by law." *Held*, that this section does not of itself confer authority to grant an injunction in chambers on a judge who is holding court in a district other than his own.

2. Where a district judge is holding court for another, as allowed by Const. Mont. art. 8, § 12, and adjourns the trial of a cause from Saturday until Monday, when he proceeds with it, he is not in the mean time a judge of the court in that district, within the meaning of Code Civil Proc. Mont. § 172, which provides that an injunction may be granted "by the court in which the action is brought or by the judge thereof," and hence he cannot grant an injunction in chambers.

DE WITT, J., dissenting.

McCutcheon & McIntire, for appellant.  
McConnell & Clayberg, for respondent.

HARWOOD, J. The application for writ of *certiorari* in this case was heard and determined at the July term of this court. See 24 Pac. Rep. 626. Petition for rehearing was filed and granted. The jurisdictional question upon which the case was determined is worthy of the careful and extensive consideration which it has received; and in finally announcing our conclusions, some observations will be made upon the authorities cited and the reasons urged by plaintiff's counsel for a different construction of the constitutional provision governing the question than that announced in the original determination of the case. The authorities cited in support of plaintiff's position are so far distinguished, and rest upon constitutional or statutory provisions so radically different and so ample in scope, that such authorities tend strongly to support the conclusions originally announced in this case.

In the case of *Clark v. Rugg*, 20 Fla. 861, the provision of the constitution of Florida which controlled the decision reads as

follows: "There shall be seven circuit judges appointed by the governor and confirmed by the senate, who shall hold office for eight years. The state shall be divided into seven judicial circuits, the limits of which are defined in this constitution, and one judge shall be assigned to each circuit. Such judge shall hold two terms of his court in each county within his circuit each year, at such times and places as shall be prescribed by law. The chief justice may, in his discretion, order a temporary exchange of circuits by the respective judges, or any judge to hold one or more terms in any other circuit than that to which he is assigned. The judge shall reside in the circuit to which he is assigned." The system there provided for bears a very close resemblance to the provisions controlling the appointment of our judges for the territorial government, which so lately prevailed here, and which our statute laws and our practice were adapted to; but that system bears no resemblance to that provided by our state constitution for the establishment of our district courts and the election of judges thereof. In Florida, the judges were appointed by the governor, with the concurrence of the senate. This appointing power acted for the state at large, and the judge was appointed for the state, but assigned, of course, to one circuit, with power given to the chief justice to direct exchange of circuits, or to direct a judge assigned to one circuit to go into another and hold a term or terms of court. The likeness to our territorial system is so striking that no comment is needed to show the similarity. This suggestion is made because counsel for plaintiff insists that the practice they contend for has always been the practice "under our statutes." It may also be observed that the differences between the establishment of our territorial district courts and the state district courts are so striking as to need no comment; and for that reason, to cite the practice under our former territorial system, or the Florida authority, lends no aid in determining the question before us. Our state constitution defines the boundaries of eight judicial districts. Section 13, art. 8. The judges of the district courts are not chosen by the electors of the state at large, or appointed by the governor and senate, acting for the state at large, and assigned to one district; but our district court judges are elected for each district defined by the constitution, by the electors of such district. Section 12, art. 8. The only authority of law now in force by which one district judge may exercise his office in and for a district other than that for which he is elected is the clause in section 12, art. 8, that "any judge of the district court may hold court for any other district judge, and shall do so when required by law." The jurisdictional question involved in *Clark v. Rugg*, supra, arose in this way: Judge WALKER was the regular judge assigned to and resident in the second circuit, in which was Leon county. Judge VANN, of the third circuit, was assigned to hold the spring term in Leon county. During said term, while Judge VANN was presiding in Leon coun-

ty, Judge WALKER, the resident judge in said second circuit, made an order at chambers appointing a receiver in an action pending in Leon county. The point raised was that Judge WALKER was not the circuit judge for that county during said spring term, and hence that the appointment of a receiver, in an action pending in said county, by Judge WALKER at chambers, was void for want of jurisdiction. This was held to be so. In passing upon the point, the court say: "The decision of a case in North Carolina, in respect to the *status* and jurisdiction of the judge where one is assigned to hold a term in the place of another, seems to meet the first question in this case. It is there decided by the court that when the governor requires a judge to hold a term of court, regular or special, for some county outside of his own district, the authority of the judge is special; the jurisdiction of the proper judge is superseded by the substituted judge in that county during the specified term, in respect to all cases pending in the specified county. *Bear v. Cohen*, 65 N. C. 511. This concise statement of the law is so appropriate to the circumstances and the constitutional provision of our own state, [Florida,] we adopt it as expressing the view of this court. Judge VANN, having been designated, agreeably to the terms of the constitution, to hold the specified term in Leon county, became, *pro hac vice*, the judge of the circuit for Leon county during the continuance of the term, as to all cases pending in that county in the circuit court, and the authority of the resident judge as to such causes was in the mean time superseded."

In the case of *Bear v. Cohen*, supra, it appears that the governor, under authority of a provision of the constitution of North Carolina, had directed Judge WATTS, of the sixth judicial district, to hold the spring terms of court in Wilson and Craven counties, which were in the third district. While so holding court, he made an order in a case pending in Wayne county in the third district, but in a county where he had not been directed to act. It was held that Judge WATTS had no jurisdiction to make said order affecting a case pending in Wayne county, and that the order was therefore void; and it was further held that Judge WATTS superseded the resident judge in the counties where he was directed to hold court, while he presided there.

We have quoted from said cases to show how far the same are distinguished from the case at bar by reason of the different constitutional provisions controlling the decisions, and also to show that following those cases would lead directly to the conclusion that Judge HUNT was superseded and his judicial powers suspended, so far as his own district was concerned, while Judge GALBRAITH was temporarily holding court in Lewis and Clarke county, which is the first judicial district. It would also follow that Judge HUNT's judicial acts, while Judge GALBRAITH was there holding court, were of course null and void. This, we think, would be a violent construction of our constitution, not contemplated or intend-



ed by the framers thereof. The record shows that Judge HUNT also presided in his court, to dispose of general matters pending, on the 23d day of June, and Judge GALBRAITH on the same day proceeded with the trial of the cause which had been on trial before him on the Saturday preceding.

We are cited to the case of *Morriess v. Insurance Co.*, 8 S. E. Rep. 383. In that case the judge whose jurisdiction was questioned was the judge of the hustings court of the city of Richmond, acting as the judge of the chancery court of Richmond. He acted as such, however, under the following statute: "During the absence of the judge of said chancery court, or the inability of said judge from any cause to hold a term of his court, or to sit in any particular case, or discharge any duty required by law, the said term may be held, or said cause may be tried, or said duty may be performed, by any circuit judge, or by the judge of the hustings court of the city of Richmond." It is difficult to see where the room is left in which to thrust an objection to the jurisdiction of the judge of the hustings court to lawfully perform any duty or function of the judge of said chancery court, under said statutes, whenever the event happened which made it lawful for the judge of the hustings court to act as judge of the chancery court. But an objection was made, and the supreme court of appeals, in passing upon such objection, said: "The answer is that, when the judge of the hustings court was, by authority of law, sitting as the judge of the chancery court, and holding a term of that court, or trying a case therein, he was the judge of that court. He became such by authority of the law by which he lawfully ascended the bench. And any law which referred to the judge of that court, and granted any powers, granted such powers to him. Any other construction of the law would be unreasonable." The court here referred to the law which has just been quoted, which provided that when the regular judge of the chancery court was absent, or unable from any cause to hold a term, or to sit in any particular case, or discharge any duty required by law, the said term may be held, or said cause tried, or said duty performed, by the substituted judge. The objection that the substituted judge acting under such law did not have power to exercise all the judicial functions and perform all the duties of judge of the chancery court of Richmond might justly be characterized as unreasonable. If we had a statute or constitutional provision of such amplitude before us there could be no difficulty in settling the question of jurisdiction involved in the case at bar. The case has no bearing in support of plaintiff's position. The only inference we can draw from it bearing upon the case at bar is that, if such a provision of law was necessary to authorize the substituted judge to perform all the duties of the regular judge in vacation as well as in holding court in that case, then is not such a provision of law necessary in this case to sustain the jurisdiction of a judge of the district court in performing all the

duties of another district judge, both in holding court and in vacation?

Plaintiff's counsel cite the case *Ex parte Angus*, 28 Tex. App. 293, 12 S. W. Rep. 1099, a case arising in Texas, where one district judge heard a writ of *habeas corpus* at chambers for another district judge. The jurisdiction of the judge who heard the writ being questioned, the court of appeals said: "It may be contended that, BURKE being absent, TUCKER, to obtain jurisdiction, must issue the writ himself, and make it returnable before him. (TUCKER.) We answer this by this proposition: BURKE being absent, if TUCKER could issue and hear the writ, he evidently could hear a writ which had been legally issued by BURKE. In support of this proposition we refer to article 1124, Rev. St.: 'Any judge of the district court may hold court for or with any other district judge, and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so.' If these judges could lawfully exchange districts, then in that way the judge of one district could become the judge of another district throughout the whole extent thereof, for all the courts thereof, and for all judicial and ministerial purposes devolving upon the judicial office. This of course would include any duties to be performed at chambers. In addition to that, any district judge was authorized to hold court for or with another district judge. The law controlling the decision in this case renders it inapplicable to the case at bar. The case of *Land, etc., Co. v. Engley*, (Colo.) 23 Pac. Rep. 452, and the case of *Wyers v. State*, 21 Tex. App. 448, 2 S. W. Rep. 816, shed no light on the question involved in the case before us. In the former case the sole question raised was as to which judge should settle and authenticate the bill of exceptions. It was held that the same should be done by the judge who presided at the trial and made the rulings excepted to. In the latter case it appears that the only question was as to whether it appeared by the record that the judge who presided was authorized to preside at the trial. The court answered that question by observing that the record showed that the judge who tried the cause was presiding in exchange with the regular judge of the district. This was held a sufficient showing.

A case more nearly in point than any other brought to our attention is the case of *People v. O'Neil*, 47 Cal. 109, cited by respondent's counsel. In that case the court say: "The order recites that the writ was returnable before the undersigned district judge of the fourteenth judicial district, presiding in the sixth judicial district court; but it appears from the order of Justice SPRAGUE, ordering the writ to be returned before Judge REARDON, that it directs the return to be made before the Honorable T. B. REARDON, at the district court room, in the city of Sacramento, and omits any reference to the fact that he was then presiding in the sixth judicial district court. But it further appears that at the time when the *habeas corpus* case was being heard before Judge REARDON the district court for the sixth judicial

district for Sacramento county was in session, presided over by Judge RUMAGE, the judge of that court." Under that state of facts the court observed: "It is legally impossible that Judge REARDON, when he made the order, was presiding judge of the sixth judicial district court, which was at the time in actual session, presided over by its own judge, and the order was improperly placed among the files of the court." The contempt proceedings for the violation of the order were declared null and void for want of jurisdiction. It is proper to observe that a question of practice decided in that case is decided otherwise in a later California case, (*Tyler v. Connolly*, 65 Cal. 23, 2 Pac. Rep. 414,) but the soundness of the reasoning and the conclusion reached upon the point under consideration has never been questioned by any court to our knowledge, and had the case been brought up by *certiorari*, the same result would have been reached, and no question of practice involved.

The case of *Gale v. Michie*, 47 Mo. 326, involving a question of jurisdiction, which was determined by construing a provision of the Missouri constitution, we think has a strong bearing by analogy upon the case at bar. The point in controversy, as well as the conclusion reached by the supreme court of that state, is stated by Judge PHILEMON BLISS as follows: "The question then arises, whether the judge of the Gasconade circuit court, being himself interested in the cause, had a right to call upon a judge of a neighboring circuit, who was present, to sit and determine said cause. If he had such right, he must have obtained it from the constitution of the state, for it will not be pretended that considerations of convenience or of fairness merely will control the jurisdiction of a court, or point out the judge who is entitled to hold it. Relliance, doubtless, was had upon section 17, art. 6, of the constitution, which reads as follows: 'If there be a vacancy in the office of judge of any circuit, or if he be sick, absent, or from any cause unable to hold any term of court of any county of his circuit, such term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court in his circuit may be held by the judge of any other circuit.' In this case both judges evidently construed the authority given a judge of another circuit to hold one of the terms of the Gasconade circuit court, at the request of its judge, as also giving authority to sit in a particular cause at his request, the term being held by himself. But no such authority is contained in the section, either directly or by implication." If, then, the power to call in another circuit judge to hold a term of court gives no authority, expressly or by implication, to call in such judge to hold part of a term, or try one cause, *a fortiori* it must be said that the authority to call in another district judge "to hold court" does not confer authority on the substituted judge to exercise powers and discharge duties not involved in holding court; that is, to exercise the powers of the resident judge of the district at chambers in vacation. Under our system, any district judge has

power to go into another judicial district and hold court for another district judge. But we are confident that the framers of our state constitution did not contemplate that the judges of the district court should exercise concurrent jurisdiction in one district until the authority so to do was given by legislation—*First*, because the constitution provides (section 12, art. 8) that one judge shall be chosen in each district by the electors thereof; *secondly*, because the constitution provides that the legislative assembly may increase the number of judges in any district, (section 14, art. 8.) If this view is correct, there could have been only one district judge of the first district when the order in question was made; and if Judge GALBRAITH was the judge of said district to all intents and purposes, not only to hold court, but to exercise the judicial functions out of court in vacations, between adjournments of court, until the completion of the trial or trials which were progressing before him, it follows that Judge HUNT was superseded during that time. The record shows that when Judge GALBRAITH issued said order of injunction at chambers, Judge HUNT was in his district in the city of Helena, where the district court for the first district was held; and, further, that while Judge GALBRAITH was there after the trial of the cause before him had commenced, Judge HUNT presided in his own court to dispose of general matters pending when Judge GALBRAITH was not actually occupying the bench, and when Judge HUNT left the bench Judge GALBRAITH proceeded with said trial.

It is contended by counsel for plaintiff that the statute authorized Judge GALBRAITH to issue said order at chambers, and the following provision is cited: "An injunction is a writ or order requiring a person to refrain from a particular act. The order or writ may be granted by the court in which the action is brought, or by a judge thereof; and when made by a judge may be enforced as the order of the court." Section 172, Code Civil Proc. To support the position of plaintiff's counsel, it is contended that, because Judge GALBRAITH held court in the first district on Saturday, and court having adjourned until Monday, and Judge GALBRAITH not having finished the trial of the cause on trial before him, and presided again on the following Monday, thereby he was judge of the said court during the interim from the adjournment, on Saturday, until court convened, on Monday; or, in the language of the statute, he was "a judge thereof,"—that is, judge of the court wherein the action was pending in which injunction was sought,—and therefore the statute referred to him. We will dwell upon this proposition a moment, although the record shows, as before observed, that Judge HUNT was in his district, at the place where the first judicial district court is held, at the time the order of injunction was issued, and that Judge HUNT convened his court on the following Monday morning, passed upon motions and demurrers, and thereafter Judge GALBRAITH held court and proceeded with the trial which had been progressing before him on the pre-

ceding Saturday. If the trial proceeding before Judge GALBRAITH in the first district had been finished on Saturday, and he had no further engagement to hold court in the first district at that time, it would hardly be contended that when he descended from the bench, having finished his engagement there, he would still have held judicial authority in the first district, although he may have remained in the city of Helena some time. But because he had not finished the trial of said cause,—that is, because he proposed to hold court for the judge of the first district at a future time,—he still held the judicial power in and for the first district during the interim, and could issue orders in vacation, in other cases pending there, until that intention was fulfilled. But how would it be if that intention to hold court at a future time never was fulfilled by that judge? Suppose the parties during the interim should settle the controversy and dismiss the action, independently of such judge, by causing the clerk of the court to enter an order of dismissal in the register, as could be done under section 242, Code Civil Proc.; or suppose that from sickness of the judge or his family, or of some of the litigants, counsel, jurors, or from other cause, the further progress of the trial had been postponed for say 10 days; or suppose again that at the close of such trial a motion was made to arrest judgment, or a motion of some other character, which the judge reserved under advisement for a fortnight, and under some such conditions Judge GALBRAITH left off holding court, and Judge HUNT proceeded with the regular business of his court, which is, under the constitution, "always open for the transaction of business except on legal holidays and non-judicial days," (section 17, art. 8.)—would Judge GALBRAITH still have been judge of the first judicial district court during the interim? He would according to the theory of plaintiff's counsel, and would be authorized to issue orders at chambers in cases pending in the first judicial district court. But suppose again that while the judge was presuming to hold such ephemeral jurisdiction by virtue of a precarious link of unfinished business which connected his judicial power with such other district the parties should, without his knowledge, settle the controversy and dismiss the action, such judge would have no unfinished matter requiring him to return to that bench; thereby would be broken the uncertain tenure, whereby such judge was presuming to hold a jurisdiction and was acting at chambers upon other matters pending in such district; and such judge would be thereby divested of all judicial power in such foreign district. We do not think that, after careful consideration of the subject, it will be seriously argued that under such convertible, capricious, and uncertain conditions and contingencies the judge of one district can retain his jurisdiction as judge of a court in another district in vacation, when he is not holding such court. We are irresistibly drawn to the conclusion that such a theory is untenable, and that the proper construction of the constitutional provision

in question is that, when a judge of one district goes into another to hold court, he is judge of the latter court while he presides; and, further, that it requires legislation to enable the district judges to go into districts other than their own, and become the judges of such other districts to all intents and purposes for temporary occasions.

Many suggestions are made in the petition for rehearing which rest wholly upon considerations of convenience. We do not regard these suggestions as entirely out of place in illustrating the effect, where two reasonable constructions are possible. 1 Bl. Comm. 68, and notes. This court was not unmindful of those considerations when this case was originally determined. We fail to see, however, that the conditions or circumstances surrounding the litigants in question were inconvenient at the time said order was made. Judge HUNT, of the first district, was in his district at the time, empowered by law to issue the order in vacation at chambers, while another district judge was presiding over the court of that district the same day on which the order was issued, and such order could have been issued as a court order. The suggestion addressed to this court that "there might be a suspension of the writ of injunction indefinitely," or that the writ would be unavailable as a safeguard to protect the rights of property, by reason of the jurisdiction of the district judges, as we regard the constitutional provisions on that subject, is equally specious. When we consider that the constitution provides for eight judicial districts in the state, and a district judge resident in each district, with provision that in case of vacancy the governor may fill the same by appointment, with the provision that in districts comprising only one county the district court shall always be open for the transaction of business except on holidays and non-judicial days, and in districts composed of more than one county the judges may fix the terms of court, which shall not be less than four per annum, with the provision that any judge of the district court may hold court for any other district judge, and the statute providing that the resident district judges are empowered to issue the order of injunction at chambers as well as by way of a court order, and that said order may be issued by a non-resident district judge as a court order when holding court in another district,—under such conditions as these the criticism is without force or justification. If the framers of our constitution had intended to provide that the district judges might exchange districts *ad libitum*, and thereby the district judge of one district become invested with all the judicial power in and for another district, of course they would have so provided. It is fair to presume that they had before them the constitutions of other states, framed on the theory of establishment of district courts and the jurisdiction of such courts and the judges thereof, as well as knowledge of the construction of such provisions by the courts; but they adopted no such language. It will be observed that authority to "exchange districts" involves infinitely

more than authority to "hold court for any other district judge." Under authority "to exchange districts," Judge HUNT, whose district comprises only one county, might exchange districts with Judge GALBRAITH, and thereby become immediately invested with all the judicial power of district judge of a district comprising three counties, not only to hold all courts of such counties, he could exercise all judicial power devolving upon the office of district judge of the latter district in holding court and in vacation; whereas, if he was called upon to "hold court" for Judge GALBRAITH, it might be for a day, or for the trial of one cause, in Jefferson county only, and Judge GALBRAITH might proceed to hold court in another county of his own district and exercise his judicial power in vacation throughout his own district. Is it to be presumed that the framers of our constitution adopted language without duly weighing its import and scope of meaning, as distinguished from other forms, especially where other forms have been construed? Mr. Cooley, upon this subject, says: "In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As MARSHALL, C. J., says, the framers of the constitution and the people who adopted it 'must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language, and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the court to force from these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim." Cooley, Const. Lim. (5th Ed.) 71. Again, the same author observes: "Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparisons with other clauses or portions of the same law." Id. 70. Although the framers of our constitution went far in providing for the convenient administration of justice in our state, a study of that instrument plainly shows that they left to the legislative assembly the further enactment of provisions to render the administration of justice still more convenient and speedy, by providing in detail for supplying temporary vacancies or absence or disabilities occurring in respect to the office of district judge, (sections 12-14, 17;) and we cannot supply all that may be needed by construction. Indeed the clause in question is so direct, plain, and concise there is no room for interpretation between two or more possible constructions. Nor is the position plaintiff's counsel contend for supported by any implication to be found in said clause by any authorized rule of interpretation. We think the construction or implication contended for by plaintiff's counsel would involve greater inconvenience, uncertainty, and derangement in the working of our

judicial system than is involved in following the plain meaning expressed in the clause in question. We leave the clause to be given its fullest scope and import in the investiture of any district judge with power to hold court in another district, and with every implication necessary to clothe such judge with every power and attribute which can be exercised in fulfilling the office of presiding over or holding court in another district.

The exercise of no such power is questioned in this case. After much careful study of the constitution and authorities in reference to this subject, we see no reason why an enactment similar to the Virginia law referred to supra may not be put in force in this state, with some further provisions to authorize a state officer by requisition to call upon a district judge to hold court and perform all other duties of district judge of another district when the judge of such district is unable from any cause to discharge the same. In order to give weight to the argument of counsel for plaintiff, it has been questioned that if the jurisdiction contended for has not been given by the constitution the legislature has no power to pass such an act as suggested. If the legislature cannot so provide, it is because the constitution prohibits it. The legislature is the supreme law-making power for the state on all rightful subjects of legislation, except as restricted by the constitution. Cooley, Const. Lim. (5th Ed.) 105-109. There is no such prohibition in that instrument. There is express authority given to the legislature to change the boundaries of judicial districts. Thereunder a county may be taken from the jurisdiction of one judge and placed permanently under the jurisdiction of another judge, for all judicial purposes. Cannot that which may be done permanently be also done temporarily? Moreover, it may be said, upon authority, that the legislature is competent to add statutory jurisdiction to constitutional jurisdiction, provided that the statutory jurisdiction is in harmony with and does not infringe or curtail the constitutional jurisdiction. *Harris v. Vanderveer's Ex'r*, 21 N. J. Eq. 424; *Supervisors v. Arrighi*, 54 Miss. 668; *Martin v. Harvey*, Id. 685; *Bank v. Duncan*, 52 Miss. 740; *People v. Hurst*, 41 Mich. 323, 1 N. W. Rep. 1027; *Wells, Jur.* 54.

Some suggestions herein may be subject to the criticism of being mere *dicta*; but this subject has been argued with such zeal and ability by the learned counsel, and engages such interest on the part of the judiciary and bar of the state as well as able gentlemen who aided in framing the constitution so lately adopted, that we have felt justified in giving the subject a broad and extended discussion. From all the points of view from which the subject has been examined, following authority, sound rules of interpretation and reasoning, we must adhere to the conclusions originally reached in this case.

BLAKE, C. J., concurs.

DE WITT, J., (*dissenting*.) The facts of the case are fully stated in the opinion of

the court upon the original hearing, July term, 1890. Upon the rehearing the respondent has more fully presented the question of jurisdiction, upon which point the case was originally decided, and cited authorities which have led me to reform my views by virtue of which I concurred in that decision. In the learned opinion of the majority of the court just read, the original conclusion is affirmed. I regret that I cannot agree with my associates in that result, and will state the grounds of my dissent. Against the views of the majority of the court a serious argument *ab inconvenienti* may be made. Some suggestions in that direction are as follows: Under article 8, § 37, Const., a judge may, if he be not otherwise prohibited, legally absent himself from the state for a limited period. If a judge avail himself of this permission, or if he be temporarily disqualified, by illness or otherwise, the important writ of injunction cannot at all times be set in motion. If a judge be holding court for another, under the provision of section 12, art. 8, Const., a premium is held out to the evil minded to commit outrages, during the periods between the sessions of the court, which the judge is powerless to prevent. In the temporary disqualification or absence of the judge, or a vacancy in his office, a vast amount of formal work done at chambers would be suspended. The argument *ab inconvenienti* cannot prevail, nor is it of weight in the face of positive law; but in doubtful cases, and where two constructions are possible, it avails much. *People v. McCauley*, 1 Cal. 379; *Bear v. Cohen*, 65 N. C. 513. If the constitution and laws can be so construed as to save the ever-present invocation of the great remedy of injunction, I am of opinion that it is the duty of the court to follow such construction. I feel that I must be amply satisfied that the framers of the constitution so intended before I can consent, that at any time the people shall be deprived of the beneficent operation of this writ. With these views, I seek a construction of the constitution that will protect the rights of property and not leave them to wanton destruction. The constitution, § 20, Schedule, § 1, is as follows: "All laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted to the Union, and not inconsistent with this constitution or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state until altered or repealed, or until they expire by their own limitation." At the time the state was admitted to the Union there was in force the following law of the territory: "An injunction is a writ or order requiring a person to refrain from a particular act. The order or writ may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge may be enforced as the order of the court." Section 172, Code Civil Proc. This provision of the law seems to me to be devoid of ambiguity. When it says that the writ or order may be granted by the court in which the action is brought, or by a judge thereof, it

may not mean that it may be granted at chambers by any judge of any district court in the state, whether he be the regular judge of the particular court or not, (as to this I express no opinion;) but it does certainly mean that it may be granted by a judge of the court in which the action is brought.

Two inquiries present themselves: (1) Was Judge GALBRAITH, when he issued the order, a judge of the first judicial district court? If he were, it must follow, under section 172, Code Civil Proc., cited above, that he had jurisdiction to issue the order, provided (2) that said section 172 is not inconsistent with the provisions of the constitution in reference to the jurisdiction and organization of the district courts and the powers of the judges thereof. My associates are of the opinion that Judge GALBRAITH was not a judge of the first judicial district court, in the full sense of that term, but that his authority was limited to simply presiding over an open session of that court. I believe that a broader view must obtain. In discussing the cases where my learned brother writing the opinion of the majority has quoted the text, I will not repeat that which is cited by him, but will comment upon his conclusions. Section 12, art. 8, Const., provides, among other things, as follows: "Any judge of the district court may hold court for any other district judge, and shall do so when required by law." The action in which the injunction order was granted was commenced in the first district court June 21, 1890. Judge GALBRAITH, of the fifth district, pursuant to the provision of the constitution above cited, held court in the first district, for Judge HUNT, during the court hours of that day, which was Saturday. All that appears in reference to Judge HUNT on that day is that he was present in the city of Helena, where said court was held. He did not hold any court that day, nor exercise any judicial functions. Judge GALBRAITH continued to hold court on the Monday following, June 23d. Between the adjournment of Saturday and the convening of Monday he was of course not on the bench, or doing the work which is done in court. During this period, and on Saturday afternoon, at chambers, he issued the injunction order complained of. During the whole of this period—this Saturday, Sunday, and Monday—he was doing all that is understood as "holding court." He left the bench for the night, and for a non-judicial day; but on these days he was "holding court" in the full sense of the term. He could have done nothing further which would have rendered a fulfillment of the definition of the term "holding court" any more complete. What was the character, official or otherwise, of the individual Thomas J. Galbraith, when he was thus "holding court," as described? Was he a referee? Was he a trier of a single cause, by stipulation or otherwise? Were his functions limited by any order assigning him to this court, or was he a judge of the court? And let it be remembered that the statute (section 172) says that the writ or order may be granted by "a judge," "a judge of the court." The

words "a judge" occur twice in the statute, and give the air of deliberation to the expression. It need not be "the judge" of the court. The article "a" seems to me to be suggestive. If the law read "the judge," there would be more reason in contending that it meant the regularly elected or appointed judge of the particular court. But the article "a," in itself, carries the idea of more than one judge. It is equivalent to "any," and seems to exclude the application of the statute to the one judge of the court. I cannot but conclude that Judge GALBRAITH, "holding court," as he was, when he issued the order, was a judge of the court, whether I regard the common understanding of language or the history of legal proceedings.

I am not without support in my views in the decisions of the highest courts of sister states, if I interpret correctly the letter and spirit of these decisions. The difference between the members of this court in their views of those cases has largely led to the divergence in this decision. I will treat those cases in the same order pursued by my associate.

First, as to the Florida case, (*Clark v. Rugg*, 20 Fla. 861.) My associates seem to hold that the only force of this case as an authority is its application to our late territorial judicial system; and they note that counsel have urged upon our consideration what has always been the practice in the territory. I in no way rely upon the territorial practice, but look only to the state constitution, and the laws adopted thereby, and apply the reasoning of the Florida case to such constitution and laws. The applicability of the Florida case to the case before this court is disposed of by the majority opinion in this argument: that in Florida the circuit judges are appointed by the governor for the state at large, but assigned to a circuit, whereas with us the district court judges are not chosen by the electors of the state at large, or appointed by the governor for the state, but are elected for a district by the electors of that district. In the view of the court, there would seem to be something sacred in this election of a judge by the people of his district, something by virtue of which the people of the district, by such vote for their judge, excluded a judge of a foreign district from coming among them with any powers except those granted by the constitution. This of course we grant, without regard to the manner of the selection of the judge. The judge, whether in a foreign district or his own, has no powers but those granted by the constitution, either expressly or by necessary implication. But the sovereign people who elect the judge of the district are the same sovereign people who made the constitution. The people of a district who declare their wishes in the election of a judge have also, in a more solemn manner, declared themselves in the constitution. Therefore, the people of the first district, who elected Judge HUNT, also, at the same election, as it happens in this instance, expressed their permission that Judge GALBRAITH should "hold court" (Const. art. 8, § 12) for Judge HUNT; and we have only to arrive at what the

people intended in their constitution by the words "hold court." In this view, the Florida case applies as forcibly to our situation as to the Florida system. And let it go even to the extent of the temporary suspension of Judge HUNT's judicial functions. It establishes Judge GALBRAITH's power to issue the order. The condition of affairs is better if Judge GALBRAITH be the judge, and the whole judge, and Judge HUNT be in temporary suspension, than if jurisdiction be temporarily divided between the two officers, and litigants be uncertain as to which department of the court their business is properly classified in. In the Florida case the judge was assigned to "hold a term" for another. There was not an order for him to "exchange circuits" under the constitution of that state, which, perhaps, might imply more power than "holding a term." The expression of our constitution, "hold court," seems to have as great a significance as "hold a term." The North Carolina case of *Bear v. Cohen*, 65 N. C. 513, is to the same effect, and need not be reviewed. I am of opinion that each of these cases holding that the substituted judge had jurisdiction sustains my view,—that Judge GALBRAITH had power to issue the order in question.

In order to make clear my views of the Virginia case, it will be necessary to cite a little more fully from the opinion of the court, as follows: "The first error assigned is that the vacation decree rendered by A. B. GUNON, judge of the hustings court of Richmond, acting as a judge of the chancery court of Richmond, was a nullity, and all acts under it void, because there was no authority found in the law for a judge to render a decree in vacation, which power is not given by the authority to render such decree in term. \* \* \* Section 53, c. 167, Code Va. 1873, provides: 'Chancery causes may hereafter, by consent of parties given in open court, and entered of record, be submitted to the judge of the court in which such cause is pending for decision or decree to be made therein in vacation, and all decrees so made hereafter and entered by the clerk in vacation shall be deemed and taken to be as valid as though they had been made and entered in open court.' This act was passed in January, 1873; but it is contended that this act only gave such authority to the judge of the court in which the cause is pending, and that the judge of another court, sitting in such court, could not thus acquire the needed authority. It is provided by the act of assembly of July 11, 1870: 'During the absence of the judge of said chancery court, or the inability of the said judge, from any cause, to hold a term of his court, or to sit in any particular case, or discharge any duty required by law, the said term may be held, or said cause be tried, or said duty may be performed, by any circuit judge, or the judge of the hustings court of the city of Richmond.' But the argument is still further pressed that if the judge of the hustings court was thus authorized to sit as judge, under the act of July 11, 1870, the act of January 14, 1873, which authorized the judge of that court to render decree in

vacation when the parties consented, did not apply to the substituted judge, because the terms of the act did not include them; that the authority is given to the judge of that court, and none other. The answer is that, when the judge of the hustings court was, by lawful authority, sitting as judge of the chancery court, and holding a term of that court, or trying a case therein, he was the judge of that court. He became such by authority of the law by which he lawfully ascended that bench. And any law which referred to the judge of that court, and granted any powers, granted such powers to him. Any other construction of the law would be unreasonable." *Morris v. Insurance Co.*, 8 S. E. Rep. 386. It will be observed that, by the Virginia statute, if the chancery judge was disabled (1) to hold a term, (2) to sit in a particular case, (3) to discharge any duty, then the judge of the hustings court might (1) hold that term, (2) sit in the particular case, (3) discharge any other duty. The rendering of the decree, in question in the case by the hustings judge would come under the third classification of powers. If it appeared that the chancery judge was from any cause unable to render this decree, the judge of the hustings court might do so. It does not appear in the case that the chancery judge was unable to render the decree, or that the hustings judge rendered it for that reason; but it does appear that the judge of the hustings court had been holding a term. The decision of the supreme court does not proceed upon the ground that the hustings judge could render the decree by reason of the inability of the chancery judge, as permitted in classification 3, *supra*; but the decision is placed upon the ground that the hustings judge had power to render the decree because he had held the term and was judge of the court, and that laws referring to the judge of the court referred to him. Although the Virginia statute is infinitely broader than our constitutional provision, the decision of that case does not rest upon that additional breadth, but rather upon reasons above remarked, and reasons entirely applicable to the case now before this court. I therefore refer to the case with approval, as sustaining my position in the case at bar. And, returning to that case, it is not questioned that Judge GALBRAITH was lawfully upon the bench of the first district court on those days in June. Consequently, under the Virginia case, any law or constitutional provision which granted powers to the judge of that court granted those powers to him.

Article 1124, Rev. St. Tex., provides: "Any judge of the district courts may hold courts for or with any other district judge, and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so." The court of appeals in *Re Angus*, 12 S. W. Rep. 1100, in construing that provision, said: "If a district judge may hold court for another judge, has he not the authority to hear a *habeas corpus* case for him at his request, the other judge being absent from the district? We will not discuss this proposition, deeming it too plain for discussion."

It may be observed that in this case the writ was made returnable at chambers and not before the court, and that the supreme court base the decision, not upon the ground of an exchange of districts, which perhaps would in itself mean an exchange of all judicial functions, but upon the ground that the substituted judge was "holding court," and, so "holding court," had the authority in question at chambers.

Section 12, art. 6, Const. Colo., substantially the same as ours, is as follows: "The judges of the district courts may hold courts for each other, and shall do so when required by law." The supreme court of that state (*Land, etc., Co. v. Engley*, 23 Pac. Rep. 452) held that a judge so holding court for another was the proper judge to settle a bill of exceptions in a case so tried by him. It does not appear whether such bill of exceptions was settled in chambers or in court; but if the former, it would not seem to be correct, if the view of the majority of the court in the matter before us obtains.

The case of *People v. O'Neill*, 47 Cal. 109, is in no way adverse to the view which I hold. In that case Judge REARDON, of the fourteenth district, was temporarily in the city of Sacramento, in the sixth district. While so there he heard and determined a matter in chambers, and made an order thereon. The opinion says: "The order recites that the writ was 'returnable before the undersigned district judge of the fourteenth judicial district, presiding in said sixth judicial district court.' But it appears from the order of Justice SPRAGUE, ordering the writ to be returned before Judge REARDON, that it directs the return to be made 'before Hon. T. B. REARDON, at the district court room in the city of Sacramento,' and omits any reference to the fact that he was then presiding in the sixth judicial district court." The fact was, as appears by the decision, that Judge REARDON was not holding court, or presiding in the foreign district. In that vitally material fact the case is wholly distinguished from that now under consideration. But Judge GALBRAITH was holding court in the first district, and upon that fact I find sufficient foundation upon which to lay the structure of my conclusions herein.

The application made in the opinion of the majority of the court herein of *Gale v. Michie*, 47 Mo. 326, meets neither my assent nor my understanding. The opinion of the Missouri court is sufficiently cited for my purposes, and I will not requote it. The authority conferred by the Missouri constitution is wholly different from that by the Virginia statute considered above. The latter gives the substituted judge the power to hold a term, and separately and independently, and when not holding a term the power to try a particular cause and perform particular acts. The Missouri constitutional provision gives the judge power only to hold the term, and, in holding the term, to hold the whole term; that is to say, he may try the particular case and do the special act when he is holding the term, but cannot try the particular case or do the specific act when he is not holding the



term, or as segregated from the holding of the term. The supreme court, in the case being reviewed, as a matter of course, held that, the judge not holding the term, he could not perform the partial and segregated act of a term,—to-wit, try one particular case. He might do the whole under the authority of the constitution, and, doing the whole, he may do all the parts. The whole includes the parts. But, not doing the whole, or called upon or assigned so to do, and exercising no power over the whole, he had no power over the part. If he were exercising the power over the whole, that power would go to the part; that is, the particular case. These are very elementary principles of logic. Applying the Missouri decision to our constitutional situation, the opinion of the majority of the court makes this argument: "A *fortiori* it must be said that the authority to call in another district judge 'to hold court' does not confer authority on the substituted judge to exercise powers and discharge duties not involved in holding court; that is, to exercise the powers of the resident judge of the district at chambers in vacation." The statement of this argument is in the nature of a begging of the question. The point at issue and to be proved is that the person "holding court" was the judge of the court, and as judge of the court had power to issue the injunction order under discussion. The argument of my learned brother assumes the non-existence of the ultimate fact to be arrived at, and from that assumption argues the conclusion which he has already assumed. But, granted that the authority to call in another judge to "hold court" does not itself confer upon that judge authority to do acts of which the act in controversy is one. But the exercise of that authority, the calling in of the foreign judge, the *fait accompli* of his "holding court," confers upon him the power to be, and make him, a judge of the court; and as judge of the court he has the powers of a judge, one of which was to issue the order, the subject of the controversy.

The cases of *Klause v. State*, 27 Wis. 463, *Owens v. State*, Id. 456, and *American L. & T. Co. v. East & West Ry. Co.*, 40 Fed. Rep. 182, have been cited against the view I endeavor to express; but their inapplicability is too apparent to require discussion.

As a result of this review of the cases, and the reason of the matter as it addresses itself to my mind, I am of opinion that section 172, Code Civil Proc., cited above, must be construed to the effect that Judge GALBRAITH was a judge of the first judicial district court on June 21, 1890, and as such judge had jurisdiction to issue the order under discussion, unless said section 172 is inconsistent with the constitution of the state. Into that inquiry I will now proceed. Enough has been already said to open a short road to the conclusion which I hold.

The portions of the constitution applicable to this discussion are that part of section 11, art. 8, as follows: "Said courts, [the district courts] and the judges thereof shall have power, also, to issue, hear and determine, writs of *man-*

*damus, quo warranto, certiorari*, prohibition, injunction and other original and remedial writs, and also all writs of *habeas corpus* on petition by, or on behalf of, any person held in actual custody in their respective districts." I take occasion to say that the punctuation in the above citation is correct, as it appears on the original constitution on file in the office of the secretary of state, which is not the case in the published copies, with which the printer, as is usual, has taken liberties to suit his own taste. I cite also section 12, art. 8: "The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court, whose term of office shall be four years, \* \* \* and until their successors are elected and qualified. Any judge of the district court may hold court for any other district judge, and shall do so when required by law."

It is not necessary here to determine whether the judge of the fifth district at chambers, when he is not holding court in the first district, has power to issue an order of injunction in a case pending in the first district court. As we have above seen, the judge of the fifth district was, in the case before us, holding court in the first district. Sections 11 and 12, *supra*, give the judge of a district court at chambers power at least to issue an order of injunction in a case brought in the court of which he is judge. Following this proposition, I find that the last paragraph of section 12 gives the judge of the fifth district court power to hold court in the first district, which he was doing when he granted the order.

Taking the next step in the argument, it is seen from the construction of similar constitutional and statutory provisions in other states, in cases above quoted from, when a judge of a district "holds a term," or "holds court," in a district other than his own, he is judge of the court of that district. I therefore conclude that on June 21, 1890, Judge GALBRAITH was a judge of the first judicial district court. Then apply to him the provisions of section 172, and he, as a judge of that district court, had power to issue the order which he did. It is not within my understanding to consent that section 172, Code Civil Proc., is inconsistent with the constitution in this particular. I believe that the law and the constitution are in harmony, and may stand together for the preservation of the writ of injunction.

My learned associate suggests that inconveniences and derangements of the judicial system would be greater under the application of the doctrine that I venture to hold than under that promulgated by the majority of the court. I am willing to go to the whole length of the cases reviewed and hold that Judge HUNT's judicial functions were temporarily suspended in the first district; and even then I am of opinion that the judicial system would be a more smoothly working machine if the substituted judge were a whole judge than it would were he a fractional part thereof.

Another objection that I have to the position of the majority of the court is that

it suggests a doubt whether the difficulty is remediable without a constitutional amendment. The constitution says that a foreign judge may hold court for another. It further says that he shall do so when required by law; that is to say, he must do so when the legislature passes an act so requiring him. At present, he simply may hold court, perhaps as a courtesy to a brother judge. If the construction of the majority of this court of the words "holding court" is to obtain, then may the legislature, in addition to requiring a district judge to hold court for another, also extend the signification of the words "holding court" so that they shall include what the majority of this court now say they do not include? This is an interesting inquiry. It occurs to me that the present disagreement between my associates and myself in this case is the old difference in the doctrines of construction that has employed the thought of constitutional writers from the foundation of the American government, the history of which is luminously written through the reports of the supreme court of the United States. It is a rule of construction of the constitution of the United States, evolved through the broad views and comprehensive genius of America's greatest American, Chief Justice MARSHALL, that if the court will closely scrutinize the grant of a power to ascertain whether it exists, then, when it is determined that the power is granted, the court will liberally and broadly construe the means of carrying that power into effect. The power being found to exist, there must be with that power the habiliments wherewith to clothe it in perfect symmetry, and the weapons with which to arm it in invincibility. The constitution of the United States may be read in a half hour. A perusal of the literature of its construction is a life work. And that construction, triumphing over constant and vigilant enemies, has evolved the national doctrine that the power once granted to exist, there spring into being all the necessities of the life, health, and strength of the power. Any other doctrine would have left the constitution of the United States a shivering, unclothed foundling on the highway of time, instead of developing the robust, magnificent manhood which now holds its head above the nations of the earth. I do not for a moment lose sight of the fundamental distinction between the constitution of the United States and that of a state. I speak of the doctrine of the construction of the constitution of the United States simply as a forceful illustration of my view of the section of our constitution, (section 12, art. 8,) which is a section conferring power upon the district court judges. My learned associates take the most restricted view of the section. It is my opinion that the principles of our government demand a broader construction; that when we find in the district court judge the power to hold court, we should discover him clothed in the full panoply and attributes of a judge of the court, and that it should not be left to the circumstances of each instance to ascertain, perhaps from doubt-

ful evidence, what were his particular functions at a particular time.

With these views forced upon my mind as they are, seriously impressed as I am that my opinion is in accord with the established doctrines of American government and republican institutions, I cannot refrain from expressing an earnest dissent from the conclusion of the court.

(10 Mont. 210)

#### STATE V. GIBBS.

(*Supreme Court of Montana.* Nov. 10, 1890.)

#### CRIMINAL LAW—NOTICE OF APPEAL.

No appeal in a criminal case can be perfected where the notice served upon the prosecuting attorney recites that defendant appeals from the "verdict." An appeal from a verdict is unknown to the criminal law.

At the May term, 1890, of the eighth judicial district court in and for Cascade county, the defendant was convicted of the crime of perjury. He comes to this court with an appeal, evidenced by the following papers, which are found in the transcript:

"To William M. Cockrill, clerk of the court in and for the county aforesaid: You are hereby notified that the defendant appeals to the supreme court of the state of Montana from the verdict and judgment rendered against him upon the indictment for perjury, May term, 1890, in the district court of Cascade county."

"I accept service of this notice. June 27, 1890. W. M. COCKRILL, Clerk District Court, Cascade County, Mont."

Also:

"To Douglas Martin, county attorney in and for county and state aforesaid: You are hereby notified that the defendant appeals to the supreme court of the state of Montana from the verdict rendered against him upon the indictment for perjury, May term, 1890, of the district court of Cascade county."

"Service of above notice hereby acknowledged, this 27th day June, 1890. DOUGLAS MARTIN, County Attorney."

The statute of this state in reference to criminal appeals is section 398, p. 477, Comp. Laws, as follows: "An appeal is taken by the service of a notice upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the attorney prosecuting." The state now moves that the appeal be dismissed.

*Hoffman & Donovan*, for appellant.  
*Henri J. Haskell*, Atty. Gen., for the State.

DE WITT, J., (after stating the facts as above.) "Appeals are matters of statutory regulation. There must be a substantial compliance with the statute in order to confer jurisdiction upon the appellate court. The appellant is charged with duty of perfecting his appeal in the manner provided by law, and error in this regard affects the jurisdiction of the appellate court." *Territory v. Hanna*, 5 Mont. 246, 5 Pac. Rep. 250. The defendant in the case at bar served his notice of appeal upon the clerk of the court. He served upon the attorney prosecuting a notice of appeal

from the verdict, nothing more. An appeal from a verdict is unknown in the criminal law of this state, and such notice of appeal is a nullity. There does not appear any appeal, nor notice thereof to the attorney prosecuting, from the judgment, or any appealable order. We refer to *Territory v. Hanna*, above, and *Territory v. Harris*, 7 Mont. 384 and 429, 17 Pac. Rep. 557. The appeal is dismissed, but without prejudice to the taking of another appeal.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 212)

# STATE v. GIBBS.

(Supreme Court of Montana. Nov. 10, 1890.)

## CRIMINAL LAW—APPEAL—AMENDING TRANSCRIPT.

Where an appeal has been dismissed because the notice served upon the prosecuting attorney was of an appeal from the "verdict," and it is afterwards shown that the defect was due to a mistake in copying the transcript, such mistake cannot be amended in the appellate court, but the transcript may be withdrawn and corrected below.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

*Hoffman & Donovan*, for appellant.  
*Henri J. Haskell*, Atty. Gen., for the State.

PER CURIAM. The appeal in this case was dismissed, because the record did not show that there had been served on the attorney prosecuting any notice of appeal from the judgment, or an appealable order; the notice being of an appeal from the verdict. Ante, 288. Appellant moves for a reinstatement, and shows that the alleged notice of appeal contained in the transcript was an error of the compiler of the record. He now shows, by the affidavits of the attorney prosecuting, that a notice of appeal from the judgment was served as required by the statute. It is clear that a record of the district court cannot be amended or changed in this court, but steps may be taken by which this court may obtain the true record. It is therefore ordered that appellant have leave to withdraw the transcript from this court, and refile it, so that it may show the notice of appeal which was actually served upon the attorney prosecuting. Counsel should have known the condition of this record, and have suggested the error of the compiler before they submitted the case on the hearing. Their attention was called to the condition of affairs upon the motion to dismiss.

(10 Mont. 212)

# STATE v. GIBBS.

(Supreme Court of Montana. Nov. 10, 1890.)

## PERJURY—EVIDENCE—REASONABLE DOUBT—IMPEACHMENT OF WITNESS.

1. Where, in order to avoid a continuance for the purpose of taking depositions, a party admits that the witnesses would testify to the facts desired to be proved by them, he may reserve the right to impeach their testimony.

2. On a trial for perjury committed while giving testimony in open court parol evidence as to what was then said by the witnesses is admissible.

3. On a trial for an offense, false testimony tending to prove an *alibi* is upon a material point, and will support a conviction for perjury.

4. Perjury may be proved by one witness, corroborated by circumstances proved at the trial, notwithstanding the declaration of Code Civil Proc. Mont. § 616, that "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

5. A charge that "by 'reasonable doubt' is meant 'actual, substantial doubt.'" It is that state of the case which, after a comparison and consideration of the evidence, leaves the mind of the jurors in that condition that they cannot feel an abiding conviction of the defendant's guilt, and are fully satisfied of the truth of the charge. It is such a doubt as would cause a reasonable, prudent, and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matter charged,—"is not prejudicial, when connected with an instruction that the jury must acquit if they entertain 'any reasonable doubt upon any single fact or element necessary to constitute the crime.'"

6. Where counsel for the state, addressing the jury, said that the accused had threatened to assault him, but, upon objection, immediately withdrew the statement, "and was willing to admit that" it "was not a part of the evidence, and was not true," defendant was not prejudiced.

Appeal from district court, Cascade county; CHARLES H. BENTON, Judge.

*Hoffman & Donovan*, for appellants.  
*Henry J. Haskell*, Atty. Gen., for the State.

BLAKE, C. J. The grand jury of Cascade county in this state returned, January 24, 1890, an indictment charging the appellant with the commission of the crime of perjury. At that time he entered a plea of not guilty, and was tried by a jury in the following May term of the district court. The transcript has not been carefully prepared by the appellant, and we have been compelled to dismiss this appeal, and also reinstate the case for hearing. *Ubi supra*. While we cannot notice all the matters which have been urged in the brief of counsel, we will try to review the rulings of the court below which are properly before us.

It is alleged in the indictment that Frank Gray was tried August 26, 1889, in the justice's court of Cascade county before W. H. RACE, a justice of the peace, for the offense of maliciously and unlawfully shooting, August 22, 1889, "four domestic geese," the property of another; that Gibbs testified as a witness for said Gray that he was in the city of Great Falls during the afternoon of the last-named day and saw Gray at different places therein; and that the said Gray and Gibbs were together in a boat upon the Missouri river at the times specified. The testimony which was offered by the respondent upon the trial tended to prove that the crime that was charged against Gray was perpetrated in the afternoon of August 22, 1889, when Gray and Gibbs and two women were in a boat upon the Missouri river, about three miles above Great Falls. Some exhibits concerning the official character of RACE, the justice of the peace, and the complaint against Gray, and the record of the proceedings before the magistrate, were offered in evidence, but are not embodied in the transcript. These documents form the foundation of a number of

alleged errors, and it was the duty of the appellant to have had them incorporated in the bill of exceptions. The censure, which appears in the brief of the appellant, relating to the stenographer, is undeserved. In the absence of this evidence, we cannot determine the validity of the objections that were made to their introduction. The appellant maintains that he was not allowed the time to prepare for his trial which is provided by the statute, as follows: "If the defendant, however, desire, he shall have two days after he makes his plea in which to prepare for trial." Comp. St. div. 3, § 275. The plea was entered January 24, 1890, and the trial commenced May 8, 1890; and the position is groundless.

The appellant filed, May 7, 1890, a motion for a continuance of the action, to enable him to procure the depositions of three persons. The following proceedings were then had, according to the transcript: "Thereupon counsel for the state announced to the court that they would admit that the witnesses named in said affidavit would testify to the facts therein stated if they were present, but reserved the right to impeach the testimony of said witnesses in case they deemed it advisable to do so, and thereupon the court overruled the motion." This action is controlled by the cases of *Territory v. Perkins*, 2 Mont. 467, and *Territory v. Harding*, 6 Mont. 323, 12 Pac. Rep. 750. We are asked by the counsel for the appellant to reconsider the interpretation of the statutes which govern the postponement of trials and have received the thoughtful scrutiny of the supreme court of the territory. No opinions to the contrary are cited, and no new argument is submitted upon this question. Upwards of 14 years have elapsed since the decision was made in *Territory v. Perkins*, supra, and the legislative assembly had the power to change the construction of this law if it had been deemed erroneous. But no legislation of this nature has been enacted. We therefore reaffirm the cases of *Territory v. Perkins*, supra, and *Territory v. Harding*, supra, upon this proposition.

It is contended that the court had no authority to prescribe the condition that the state should have the right to impeach the testimony of the witnesses who are referred to in the affidavit for the continuance. We do not so understand the ruling. The counsel for the state announced what they intended to do under certain circumstances, and the court did not assent thereto, and could not be bound thereby. But, if we take the same view as the appellant, we assert that the respondent declared correctly the law, which allows this privilege without any order of the court.

N. P. Loberg and Hattie Loberg testified in behalf of the state that they were present as witnesses at the trial of said Gray for the offense of shooting the aforesaid geese, before the said RACK, as justice of the peace of Cascade county. They also testified regarding the evidence which was then given by both Gray and Gibbs, as well as themselves. This testimony was admitted after the objections of the appel-

lant that it was immaterial and incompetent had been overruled by the court. The language of the brief is that "parol evidence of what a witness said before an examining magistrate is inadmissible," and authorities are cited in support of the contention. The testimony in regard to the proceedings in the justice's court does not appear in the record, but the officer entered a final judgment in the action. There is no statute which requires the testimony of witnesses given under the conditions set forth in the transcript to be reduced to writing, and the ruling in this respect was correct. An examination of the issues shows that the evidence was material. In *Wood v. People*, 59 N. Y. 117, Mr. Justice ANDREWS, in the opinion, says: "It must appear, either from the facts set forth in an indictment for perjury that the matter sworn to and upon which the perjury is assigned was material, or it must be expressly averred that it was material, and the materiality must be proved on the trial, or there can be no conviction. A false oath upon an immaterial matter will not support a conviction for perjury." Says Prof. Greenleaf in his work on Evidence: "In proving what the prisoner orally testified, it is not necessary that it be proved *ipsissimis verbis*, nor that the witness took any note of his testimony; it being deemed sufficient to prove substantially what he said, and all that he said, on the point in hand." Vol. 3, (13th Ed.) § 194. See also, *Com. v. Grant*, 116 Mass. 17; 2 Bish. Crim. Proc. § 854. The effect of the evidence was to prove the circumstances attending the crime which has been charged against Gray, and the nature of his defense, an *alibi*. In this way the materiality of the testimony upon the trial of Gray is demonstrated.

It is argued that the following instruction is erroneous: "The matters necessary for the state to prove to the satisfaction of the jury, beyond a reasonable doubt, to authorize you to convict, are: \* \* \* *Seventh*. That such act of perjury has been established to your satisfaction, beyond a reasonable doubt, by more than one witness, or that the testimony of such witness has been corroborated upon that point by other facts and circumstances proved on the trial. In other words, the direct evidence of one witness alone is not sufficient to convict of the crime of perjury, unless corroborated by other facts and circumstances proved on the trial." The appellant claims that the court ignored the following statute: "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." Code Civil Proc. § 616. The instruction seems to be in accord with the modern authorities. In *Com. v. Butland*, 119 Mass. 317, Mr. Justice MORTON, as the organ of the court, said: "It is not necessary that there should be two living witnesses in contradiction of the statement of the defendant to justify a conviction of perjury. It is sufficient if, in addition to one directly opposing witness, corroborating circumstances sufficient to turn the scale, and overcome the oath of the defendant, and the legal presumption of his innocence,

are proved. *Com. v. Parker*, 2 Cush. 212. And where the defendant's statement is contradicted by a witness who is supported by corroborating circumstances, the evidence must ordinarily be submitted, under proper instructions, to the jury, whose province it is to judge of the weight of such corroborating circumstances." See, also, 1 Greenl. Ev. (13th Ed.) § 257, and cases cited; *U. S. v. Wood*, 14 Pet. 430, (Lawy. Co-op. Pub. Co. Ed.) notes. A review of the testimony which is conflicting would not be instructive.

The appellant insists that the following instruction is erroneous: "By 'reasonable doubt' is meant 'actual, substantial doubt.' It is that state of the case, which, after a comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the defendant's guilt, and are fully satisfied of the truth of the charge. It is such a doubt as would cause a reasonable, prudent, and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matter charged." This language should be considered in connection with the instruction which was previously given: "In this case the law raises no presumption against the prisoner, but every presumption of the law is in favor of his innocence, and, in order to convict him of the crime alleged in the indictment, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and, if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the prisoner the benefit of such doubt and acquit him." It is urged for the appellant that the instruction complained of is inconsistent with the rules which have been laid down in *Territory v. McAndrews*, 3 Mont. 158, and *Territory v. Owings*, Id. 137. We may remark at this stage our surprise that the learned judge of the court below should seek any other instructions upon this subject than these which have received the careful examination and approval of the supreme court of the territory. This is the most serious question which arises in the case at bar. It is needless to quote at length from the cases supra the law which has been held to be applicable. The appellant did not ask for any instruction upon this branch of the action. The definition of the term "reasonable doubt" which is embraced in the foregoing instruction has been upheld by the supreme court of the state of Illinois in many criminal cases. *Miller v. People*, 39 Ill. 457; *Kennedy v. People*, 40 Ill. 488; *May v. People*, 60 Ill. 119; *Earl v. People*, 73 Ill. 329; *Connaghan v. People*, 88 Ill. 460. In *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. Rep. 614, may be found an instruction which embodies expressions like that under consideration, and Mr. Justice FIELD comments thereon, and refers to the case of *Com. v. Costley*, 118 Mass. 1. It was there also said that "an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt had often been held sufficient, without further ex-

planation. In many cases it may undoubtedly be sufficient. It is simple, and, as a rule to guide the jury, is as intelligible to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. \* \* \* But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion, when an attempted definition might fail." Without any further discussion, we conclude that the appellant has not been prejudiced by the instructions.

It is shown by the record that, during the argument of the cause to the jury, the counsel for the state asserted that said Gray had threatened to assault him. When the attorney for the appellant made an objection to this statement, the counsel for the state withdrew the same, "and was willing to admit that" it "was not a part of the evidence, and that it was not true." The appellant relies upon this conduct of the prosecuting attorney as a ground of error. The action of the officer was improper, but the obnoxious comment was promptly retracted. The courts view with a jealous eye every remark of this nature which is outside of the evidence, and will weigh its possible effect upon the rights of the accused with the jury. "The conduct of the argument," say the court, in *Combs v. State*, 75 Ind. 215, "is a matter much within the discretion of the trial court, and it is only where there is an abuse of discretion that appellate courts will interfere." *Norton v. State*, 106 Ind. 163, 6 N. E. Rep. 126; *State v. Wilson*, 90 N. C. 736; *State v. Degonia*, 69 Mo. 485. The reference to Gray by counsel would cease to operate upon an intelligent juror after the proceedings referred to had taken place. The interruption of the counsel for the state by the attorney for the appellant, and the immediate retraction of the offensive observation, would be firmly impressed upon his mind, and remove any prejudice which had been created thereby. We are satisfied that there is no error in the record, and it is therefore ordered that the judgment be affirmed, with costs, and that the same be carried into execution as originally entered in the court below.

HARWOOD and DE WITT, JJ., concur.

(20 Or. 147)

HEIPLE *et al.* v. CLACKAMAS COUNTY.

(Supreme Court of Oregon. Dec. 1, 1890.)

#### JURISDICTION OF COUNTY COURT—ALTERATION OF HIGHWAYS.

1. Under our statute the county court is granted original jurisdiction over the subject of county roads, and in a proper case the circuit court may, upon a writ of review, correct its errors.

2. The county court has the authority to lay out, alter, or vacate a road, and this includes the power to reduce the width of a road to less than 60 feet when the facts would justify it.

8. The term "alter" in such connection gives the right or power to extend or diminish so that the width is not beyond that established by the statute.

(*Syllabus by the Court.*)

Appeal from circuit court, Clackamas county; FRANK J. TAYLOR, Judge.

C. D. & D. C. Latourette, for plaintiffs.

LORD, J. This is an appeal from the judgment of the court below dismissing a writ of review. The original proceeding was an application to the county court to alter or vacate a part of a county road. The facts, in substance, are these: Some two years ago the resident householders of the locality specified herein undertook to locate and establish a road 40 feet in width; that the road was laid out and established, but by some inadvertence the width of the road was not specified in the record, and by operation of law the road became a 60-foot road instead of a 40-foot, as the petitioners had intended; that the public travel to be accommodated by such road was limited, part of it being through woodland, and, in view of the amount of labor required to keep it in order, and the limited means to do it with, it was thought by those interested that a 40-foot road in width would be sufficient for the public use; that after the road was established, the mistake being discovered, the present application was made in due form to the county court to alter or vacate the road as laid out and established by vacating 10 feet on each side, so as to make the road of a uniform width of 40 feet. The county court dismissed the petition on the ground that it had no power or authority to act in the premises. Without further reference, the only question submitted for our determination is whether the county court is invested with the power or jurisdiction to grant the application and reduce the width of the road as prayed for. Our statute provides that "all county roads shall be under the supervision of the county court wherein the said road is located; and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in this state, except by authority of the county court of the proper county." Section 4061, Hill's Code. The succeeding section (4062) further provides that "all applications for laying out, altering, or locating county roads shall be by petition in the county court," etc.; and section 4063 provides that "when any petition shall be presented for the action of the county court for laying out, alteration, or vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given \* \* \* that application will be made to the said county court at their next session for laying out, altering, or vacating such road, as the case may be." By these sections original jurisdiction is granted to the county court over the subject of county roads, and in a proper case the circuit court upon a writ of review may correct its errors, but it has no concurrent jurisdiction over the subject. By force of these provisions it has the power and jurisdiction to lay out, alter, or vacate any county road, as the

case may be, and, if so prayed for, establish a width less than 60 feet. Section 4070. According to the facts, the court refused to act upon the ground that it had no authority under the statute to grant the application.

The only question then to be determined is whether such power or jurisdiction exists in the county court. This must depend on the construction of the words "alter or vacate." "Alter" means to change or modify; to change in form without destroying identity. Where the power conferred upon a municipal corporation authorized it "to open, widen, or alter public wharves," and made provision for exercising this power, it was held that "a power to alter a wharf would seem to mean a power to extend or diminish it." *Tucker v. Railroad Co.*, 54 Mo. 177. And where a like authority to alter a street or road was conferred upon a municipality, it was held in another case that that included the power to change the grade of the street. *Waddell v. Mayor, etc.*, 8 Barb. 95. So in *Ponder v. Shannon*, 54 Ga. 188, it was held that the alteration of an old road involves the discontinuance of that part of it which is altered; that under a citation to alter a road it is competent to discontinue that part of the road which is rendered unnecessary by the alteration. *Brook v. Horton*, 10 Pac. Rep. 204. These decisions indicate the extent to which the word "alter" has been applied in the exercise of a like power, and that as applied to a wharf it conferred the power to extend or diminish it, or to a road, the discontinuance of that part of it which is disused by the alteration, and which as applied to the facts upon this record would authorize or empower the court to reduce the width of the road to 40 feet if in its judgment the public accommodation required it. It results then that we think within the purview of the statute the court has jurisdiction to act, and is not without statutory authority to grant the prayer of the petitioner. We only decide it has such power, but whether the alteration prayed for is or is not of common necessity and convenience is for that court to decide. It results that there was error, and the judgment must be reversed, and the cause remanded for such further proceedings as may be proper in the premises.

(20 Or. 120)

STATE *ex rel.* PATTY V. MCKEE.

(*Supreme Court of Oregon. Nov. 24, 1890.*)

SCHOOL MEETINGS—CHAIRMEN—SECRETARY—POWERS OF MEETING.

1. The words in section 2601, Hill's Code, "oldest in office of the directors present," mean the director who has served the longest time as such under an election, and such director has the authority and it is his duty to preside as chairman at all school meetings of his district.

2. If the clerk of a school-district fail or neglect to be present at a meeting of his district, and to act as secretary thereof, the meeting has power to appoint a secretary *pro tem.*, and the announcement by the chairman that W. was appointed, who accepted the position and acts with the assent of the meeting, is to be regarded as the corporate act of the meeting.

3. If the clerk of a school-district fails to attend a meeting of his district, and to act as sec-

retary thereof, such meeting has the incidental power to appoint any private person a secretary *pro tem.* for the purpose of making an entry of the business of such meeting, and such entries made by authority of the voters then present are evidence of the proceedings of the meeting.

(*Syllabus by the Court.*)

Appeal from circuit court, Yamhill county; R. P. Boise, Judge.

This proceeding was instituted in the name of the state of Oregon *ex rel.* G. M. Patty against the defendant to try the right to the office of director in school-district No. 33 and 46, said district being on the line between Polk and Yamhill counties. The complaint alleges, in substance, that G. M. Patty, G. M. Allen, and A. Sheldon are the legally elected and qualified directors of school-districts Nos. 33 and 46, in Yamhill and Polk counties, in said state, to which said office of director said G. M. Patty was duly elected and qualified on the 3d day of March A. D. 1890; that the defendant J. McKee unlawfully usurped and intruded himself into the said office of director of said district to which the said G. M. Patty was elected and qualified, and to which he was entitled, on the 3d day of March, 1890, and has ever since said date continued to usurp and hold said office, and exercise the functions thereof; that the said J. McKee claims to have been elected to said office at a pretended meeting of said district alleged to have been held on the 3d day of March, 1890, but that the proceedings of said pretended meeting were void. The complaint sets out fully the proceedings of the school meeting at which the relator was elected and of the pretended meeting at which the defendant claimed to have been elected, but such allegations need not be repeated here. The answer denies all the material allegations of the complaint, and further alleges that on the 3d day of March, 1890, the defendant was duly elected director of said district, and now is duly elected, qualified, and acting director of said district. The further and separate answer was denied by the reply. The cause came on for hearing before the court, without the intervention of a jury, and after hearing the facts the court found the following conclusion of facts: (1) That on the 3d day of March, 1890, a school meeting was called in district No. 33 and 46 Yamhill and Polk counties, the same being a district situated partly in each county. (2) That G. M. Allen was a director of said district who had held said office for two years. (3) That J. P. Beeler was a director of said district, who had held said office for less than one year, and had been appointed to fill a vacancy in said office caused by the removal of S. T. Munkers from said district, who was, at the time of his removal, a director of said district, whose term of office would have been three years on said 3d day of March, 1890. (4) That at said meeting a controversy arose as to whether said Allen or said Beeler was the legal chairman and entitled to preside at said meeting. (5) That said Allen called said meeting to order, and asked Fred. S. Smith, the then clerk of said district, to read the minutes of the last meeting, but said Smith refused to recognize said Allen

as the proper chairman of said meeting, and refused to act as clerk thereof. That thereupon said Allen appointed J. F. Wisecarver to act as clerk of said meeting. That said Wisecarver assumed the duties of clerk, and the meeting then proceeded to elect a director, and G. M. Patty; the relator, was declared elected director. That said election was by a ballot, and the votes were collected by tellers appointed by said Allen, and that said Patty received 20 votes, all the votes cast. (6) While these proceedings were in progress said Beeler, claiming that he was the director entitled to preside at said meeting, called the same to order, and said Smith, the clerk of said district, recognized him as the legal chairman of said meeting; also a part of the voters present at said meeting so recognized said Beeler as chairman, and proceeded to elect a director of said district, and J. McKee, the defendant herein, was declared duly elected as such director, he receiving 17 votes, all the votes cast. (7) The two factions were in the same school-house, and acted separately, each recognizing its chairman. And from the facts so found the court found the following conclusions of law: That G. M. Allen was the oldest director and entitled to act as chairman of said meeting; (2) that said Allen had no authority to appoint J. F. Wisecarver clerk of said district or said meeting; (3) that all the proceedings at said meeting by both factions were illegal and void.

G. G. Bingham, Dist. Atty., and James McCain, for appellant. N. L. Butler, John J. Daly, and W. D. Fenton, for respondent.

STRAHAN, C. J., (*after stating the facts as above.*) The main question presented by this record is this: Was G. M. Allen or J. P. Beeler the oldest in office of the directors present at the school meeting mentioned, and therefore had the right to act as chairman of the meeting. The meaning of the language employed in the act must determine the question. The section is as follows: "Sec. 2601. The oldest in office of the directors present shall act as chairman of all meetings; and, in case neither of the directors is present, the qualified voters present shall elect a chairman." The findings show when Mr. Beeler became a director, which is subsequent in time to Allen's accession to office. In other words, it appears from the record that Allen was older in office than Beeler, and, unless the force of this fact is broken in some way, the question is resolved in appellant's favor. Counsel concede this in effect, unless the law means the term for which the director is serving; but this construction is too strained and theoretical. The law was enacted for plain practical people, to be applied to their own affairs in the government of the school-districts in the state, and the plainest and most obvious import of the words used is to be preferred. When the law says "the oldest in office," it means the director who has held office for the longest time under an election. The object of this requirement no doubt was that there might be some one in the chair who would be acquainted



with business affairs of the district, and able to assist in giving to the transactions of the meeting such intelligent direction and assistance as the wants of the district might require. It results from this construction that Allen was the oldest in office of the directors present, and therefore had the authority, as it was his duty, to preside as chairman at that particular meeting.

2. But counsel for the respondent insist that, though Allen may be the director who was authorized to act as chairman of the meeting, still the meeting was illegal for the reason that the regular clerk of the district, whose duty it was to act as secretary of that meeting, declined to do so, but did act as secretary at another meeting over which Mr. Beeler presided. The fifth finding of fact shows that, when Allen called the meeting to order, he requested Fred. S. Smith, the then clerk of said district, to read the minutes of the last meeting. This Smith refused to do, and recognize Allen as the proper chairman of said meeting. That thereupon said Allen appointed J. F. Wisecarver to act as clerk of said meeting. This action, it is claimed by the respondent, rendered the proceeding of said meeting void from the beginning, and the court below seems to have been of the same opinion, because it found as a conclusion of law that neither meeting was legal. In construing the school law, its object must never be lost sight of. The territory of the state is divided into school-districts, which are public corporations having the same dignity in law as the largest and richest municipal corporations in the state, and the government is confided to the residents therein who are qualified electors under the school law. The object of these corporations is in furtherance of the public policy of the state, to build up and maintain within its borders a system of common schools, whereby all the children of the state may enjoy some reasonable educational advantages. No greater or more sacred trust could have been assumed by the state, and it employs these public corporations as instruments to carry this trust into effect. Viewing the school law in this light, we would not like to hold, if it can be avoided, that either the mistake or caprice of one man could destroy, arrest, or nullify the proceedings which the law requires to be taken at a school meeting. If a school clerk may exercise the sovereign power of withholding his recognition in such case, and thereby destroy the legality of a meeting which would otherwise be legal and proper, he may arrest the proceedings of his district for an indefinite time, and, as long as he remains in office, paralyze the corporate powers of his district, and thus defeat the purposes of the law. But no such power can be claimed for him. On the contrary, if he fails or refuses to discharge his duties, other instrumentalities may be employed. The requirements of the statute in relation to who shall be secretary of the meeting are directory merely, and not mandatory. *Higgins v. Reed*, 8 Iowa, 298; *Burgess v. Pue*, 2 Gill, 254; *Bank v. Dandridge*, 12 Wheat, 69. And section 293, Dill. Mun.

Corp., says: "Corporations have the incidental power, if the regular clerk is temporarily absent, to appoint a private person a clerk *pro tem.* for the purpose of making the entries of what is transacted at the corporate meeting. His entries made by the direction of the corporate authorities, or entries made by the regular clerk from memoranda furnished by the clerk *pro tem.*, are competent evidence of the proceedings of the meeting." *Hutchinson v. Pratt*, 11 Vt. 402. But counsel claim that if the meeting when lawfully convened may appoint a secretary *pro tem.*, the chairman has no such power. This is a highly technical objection, and cannot prevail. When the chairman announced the appointment in the presence of the meeting, and the secretary served, without a single objection from any one, the act of the chairman became the act of the meeting. It follows from what has been said that the second and third findings of law by the court were erroneous, as well as the judgment, and must be reversed; but, as no error intervened during the trial up to the findings of law by the court, it is unnecessary to order a new trial, as final judgment may be entered here on the findings of fact. Our conclusions of law are indicated in this opinion. Let judgment of ouster be entered against the defendant, and a further judgment in favor of the relator admitting him into the office of school director named in the pleading.

(2 Idaho [Hasb.] 531)

PEOPLE *ex rel.* GORMAN *v.* HAVIRD.

(Supreme Court of Idaho. March 11, 1889.)

QUO WARRANTO—TITLE TO OFFICE—JURY TRIAL.

1. An action under Act Jan. 30, 1885, to try title to an office to which there are several claimants, is one of legal and not of equitable cognizance. The issues in such action or proceeding are legal ones, and the trial of such issues by a jury is a constitutional right of the parties.

2. That part of section 536 (said act) providing that actions of this nature "shall be tried by the judge of the district court at chambers, and without the intervention of a jury," is held unconstitutional and void.

(Syllabus by the Court.)

Proceedings in the nature of *quo warranto*.

*George Ainslie*, for appellant. *Houston & Gray*, for respondent.

BERRY, J. This action is under an act of the territorial legislature of Idaho, passed January 30, 1885, being sections 534-542, inclusive, of the Code of Civil Procedure, and its purpose is to try the title of the respondent to the office of sheriff of Boise county. It has the usual provisions for obtaining jurisdiction of the parties, the formation of issues by pleading, the trial of the issues, and the rendition of judgment, with the further privilege of appeal to this court. The proceeding is called by the act an "action," and it is so treated by both parties, and it must be so considered for the purposes of this appeal. Its purpose, however, is to attain the end reached by a writ of *quo warranto* at common law, or a writ of right for the king, against him

who improperly claimed or usurped an office. Such a writ is not suited to our form of government, and in America it has fallen into disuse, and statutory proceedings in the nature of a writ of *quo warranto* have, in most of the states, if not all, taken its place. Those statutes vary in the extent of the remedy which they furnish; some, as in Alabama, (St. Ala. Feb. 3, 1840, § 4,) make of the court a mere inquisition to ascertain the regularity of the election. These have been held not to confer judicial power upon the court, as in a suit at common law; hence, that exercise of the right to hear and decide is rather in the character of supervisor of elections, and does not require the intervention of a jury. In other states this statutory proceeding has approximated more nearly in its scope to the writ of *quo warranto*; still retaining the criminal form of that writ, but using it as a civil remedy only. In our own territory our legislature has gone much further, and includes within its act the full scope of an information in the nature of a writ of *quo warranto*, including its criminal features and power to punish. Such information in the nature of a writ of *quo warranto* was properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize the office for the crown. Paine, Elect. 710. This law not only provides for supervision of elections, and the correction of errors, but it goes further, and places in the court unmistakable judicial powers. Section 541 provides "that when a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding, any office, franchise, or privilege, judgment must be rendered that the defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court or the judge may also, in its or his discretion, impose upon the defendant a fine not exceeding two thousand dollars." Here are questions not merely as to regularity of an election, but also as to personal guilt or innocence, followed by pecuniary consequences of no small moment. It aims not only at a civil remedy, but also at a criminal trial, personal punishment, and pecuniary fine and loss. The act of willful intrusion into a public office, to which one has not been elected, is declared to be a misdemeanor. Rev. St. Idaho, § 6388.

The section of the act in question, under which the district judge, at chambers, assumed jurisdiction, and tried this case, is section 536, Act 1885, providing, among other things: "And such action shall be heard and determined by the judge of the district court at chambers, and without the intervention of a jury, after due service of the summons, and the expiration of time allowed by law for answering the complaint in a civil action; but no judgment shall be rendered in such action by default." This is an essential provision of the act, and without which the other provisions are inoperative. If this is unconstitutional, as the respondent claims, the remedy under the act fails. This objection

was taken by the respondent before the answer was filed. His exceptions to the ruling were then and there settled by the judge, and are incorporated as a part of the statement of the case on appeal. The respondent still stands upon such objection and exceptions in this court. It is true that the court, upon the hearing, found for the defendant, and that the defendant does not appeal. Yet it is not easy to see, if the objection was valid when it was taken, how his failure to appeal from a finding in his favor, where he has all along, and on the appeal, insisted on his objection, should be construed as a waiver of his exception. If, indeed, in any case, it might be so waived, it cannot be so in this case; for the objection goes to the jurisdiction of the court, to the validity of the statute, and not merely to an irregularity. That is not subject to such waiver. If that part of the act is void, the objection may be made at any time, even on appeal. The grounds on which it is urged that this provision is unconstitutional are (1) that it denies the right of trial by jury; (2) that it creates a tribunal unknown and unauthorized by the laws. Section 1868 of the Revised Statutes of the United States, as amended April 7, 1874, prescribing and limiting the powers of territorial legislatures, provides that "no party shall be deprived of the right of trial by jury in cases cognizable by the common law." Again, (Const. U. S. art. 3, § 2,) "the trial of all crimes, except in cases of impeachment, shall be by jury." Again, (Id. art. 5, Amendments,) "no person shall be deprived of life, liberty, or property without due process of law." And again, (Id. Amend. 7,) "in suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." There seems to have been a disposition in some states, under their own constitutions, to evade these provisions, whether of the United States or state constitutions, or such of them as clearly affect this case. Some courts have gone so far as to deny squarely that proceedings of this nature are of legal, instead of equitable, cognizance. A Missouri case (State v. Lupton, 64 Mo. 415) so holds. But this case is met by the New York court of appeals in *People v. Railroad Co.*, 57 N. Y. 161, in which case the court holds that an action in the nature of a *quo warranto*, brought by the attorney general, in the name of the people of the state, to try the title to a corporate office, to which there are several claimants, is one of legal and not equitable cognizance; that the issues therein are strictly legal ones; and that the trial of such by a jury is the constitutional right of the parties. The constitutional guaranty of the right of trial by jury in that state goes no further than the provisions of the federal constitution and the act of congress cited, § 1868, as amended, and made especially to apply to our territorial legislature. Nor can the territorial legislature pass any law in contravention of the constitution or the laws of the United States. Rev. St. U. S. § 1851. In other cases, as in the state of Illinois, the statute itself only confers a supervisory power over the regularity of

the election, and does not at all apply to much of the ground covered by the statute of Idaho. A Louisiana court, in *Joseph v. Bidwell*, 28 La. Ann. 382, holds that the federal constitution in that respect can have no application to the state courts. Perhaps, as Louisiana is a sovereign state, that claim may be sustained. Other cases cited by the appellant hold the same. But we are not called upon to discuss that question. Idaho is not a state, but is a territory of the United States, and in all things subject to the constitution of the United States and the laws of congress. Section 1868 of the United States Revised Statutes, as amended, seems to meet this case, and is conclusive. Even were this otherwise, and the question arose under the common law, which is adopted in this territory, (Rev. St. § 18,) the weight of authority is in favor of the construction given by the New York court of appeals in the case in that state above cited, but arising under the state constitution. See, also, *Reynolds v. State*, 61 Ind. 392; *People v. Van Slyck*, 4 Cow. 297; *People v. Ferguson*, 8 Cow. 103. But it is contended by the appellant that, if the issues here are triable by jury, and the objection was or is properly taken, and for that reason the judgment should be reversed, still a new trial should be granted. The answer to this may be that the proceedings in the court below were under the act in question, and, if wrong, it is because that part of the act on which they are based is invalid, and no valid judgment could be had; that, while the action in its present form cannot proceed, amendment changing its nature and purpose is not authorized by law. We are not called on to decide that point. There is no intimation of a purpose to amend or change the proceeding in any way, even if allowable. The term of office of the defendant expired in January, 1889, and we see no purpose which could now be reached by any proceeding of this nature. All that part of section 536 of the act entitled "An act to amend chapter 35 of the Code of Civil Procedure, being sections 534 to 542 inclusive," approved January 30, 1885, beginning at the words "and such action," in the fourth line thereof, to and including the words "in a civil action," in the eighth line thereof, must be declared unconstitutional and void, and the judgment herein must be reversed.

(21 Nev. 75)

STATE v. CENTRAL PAC. R. CO. (No. 1,332.)

(Supreme Court of Nevada. Dec. 13, 1890.)

SCHOOL TAXES—ORGANIZATION OF SCHOOL-DISTRICT—ESTOPPEL.

Where a school-district has been in existence for many years, and during that time has continued to receive money out of the county school fund, and has had several special taxes levied and collected for its benefit, a person on whose property such a tax is levied is precluded from attacking the legality of the organization of the district.

Appeal from district court, Lander county; A. L. FITZGERALD, Judge.

*Baker & Wines*, for appellant. *The Attorney General*, W. D. Jones, Dist. Atty., and *Henry Mayenbaum*, for the State.

BELKNAP, C. J. In an action for the recovery of delinquent taxes, judgment was rendered against defendant for the sum of \$24,209.73 for taxes and penalties, together with the district attorney's fees, and costs of suit. Included in the judgment is the sum of \$1,106.98, with penalties, the amount of a special school tax levied upon the property of the defendant in the Argenta school-district. One of the objections is that this school-district was not organized in conformity with the provisions of the statutes of the state relating to the formation of school-districts, and that the levy of the school tax was therefore illegal. It was shown that the district had been in existence since the year 1871; that, from that time down to the time of trial, it had received from the school fund of the county, for its support, moneys aggregating the sum of \$24,372.90; that three special taxes had been levied and collected for its benefit, and apparently no question of the legality of its organization had ever been made. Upon these facts, defendant is precluded from attacking the legality of the organization of the district. In support of this conclusion we rely upon the principles announced in the case of *Stuart v. School-Dist.*, 30 Mich. 69. In that case, complainants resisted the enforcement of a school-district tax for the reason now urged by defendant. The district had exercised the powers and privileges of a school-district for 13 years, with the acquiescence of the public. The court said: "Whether this particular objection would have been worthy of serious consideration had it been made sooner, we must, after this lapse of time, wholly decline to consider. This district existed *de facto*, and we suppose *de jure* also, for we are not informed to the contrary, when the legislation of 1859 was had, and from that time to the present it has assumed to possess and exercise all the franchises which are now brought in question, and there has since been a steady concurrence of action on the part of its people in the election of officers, in the levy of large taxes, and in the employment of teachers for the support of a high school. The state had acquiesced in this assumption of authority, and it has never, so far as we are advised, been questioned by any one until, after thirteen years' user, three individual tax-payers, out of some thousands, in a suit instituted on their own behalf, and to which the public authorities give no countenance, come forward in this collateral manner, and ask us to annul the franchises. To require a municipal corporation, after so long an acquiescence, to defend, in a merely private suit, the irregularity, not only of its own action, but even of the legislation that permitted such action to be had, could not be justified by the principles of law, much less by those of public policy. We may justly take cognizance in these cases of the notorious fact that municipal action is often exceedingly informal and irregular, when, after all, no wrong or illegality has been intended, and the real purpose of the law has been had in view and been accomplished, so that it may be said the spirit of the law has been kept, while the letter has been

disregarded. We may also find in the statutes many instances of careless legislation, under which municipalities have acted for many years, until important interests have sprung up, which might be crippled or destroyed if then, for the first time, matters of form in legislative action were suffered to be questioned. If every municipality must be subject to be called into court at any time to defend its original organization and its franchises at the will of any dissatisfied citizen who may feel disposed to question them, and subject to dissolution, or to be crippled in authority and powers if defects appear, however complete and formal may have been the recognition of its rights and privileges, on the part alike of the state and its citizens, it may very justly be said that few of our municipalities can be entirely certain of the ground they stand upon, and that any single person, however honestly inclined, if disposed to be litigious or overtechnical and precise, may have it in his power in many cases to cause infinite trouble, embarrassment, and mischief." Pages 72, 73.

The other objection arises out of an alleged overvaluation, and therefore fraudulent valuation, of defendant's railroad in Lander county. The line of railroad was assessed at \$14,000 per mile. The board of equalization reduced the assessment to \$12,000. Defendant introduced evidence tending to show that a similar line of road could be constructed in Lander county at a cost not exceeding \$9,000 per mile. It is contended that the assessment should not exceed this figure, and that the valuation should be reached by considering the road as an isolated piece of property situated in Lander county, without reference to its connections at either end. The statute, however, requires assessors to estimate the value of railroads with reference to their position, connections and use, and "as an integral part of a complete, continuous, and operated line of railroad, and not as so much land covered by the right of way merely, nor as so many miles of track consisting of iron rails, ties, and couplings." St. 1875, p. 106. Tested by this rule, there is no evidence tending to show an overvaluation of the railroad. The judgment and order of the district court are affirmed.

(21 Nev. 72)

LINDSAY *v.* JONES. (No. 1,329.)

(Supreme Court of Nevada. Dec. 13, 1890.)

DEEDS—CONSTRUCTION—FEE IN ALLEY.

Where the owner of an alley and adjoining lots conveys part of them, describing them as fronting on a certain street, and "with a depth of 85 feet to an alley fifteen feet in width," the deed carries title to the middle of the alley, with an easement of way over the other half, the grantor having a like easement over the half conveyed.

Appeal from district court, Washoe county; R. R. BIGELOW, Judge.

Clarke & Jones, for appellant. R. H. Lindsay, respondent, *in pro. per.*

BELKNAP, C. J. This is an action to abate the obstruction of plaintiff's easement in an alley. Defendant was the own-

er of the land upon which the alley is located, and of the adjoining land, and made a deed of conveyance to plaintiff's grantor, describing the premises as follows: "The east 85 feet of lots 4, 5, and 6 in block two in Lake's south addition to said town of Reno, county of Washoe, state of Nevada, as known and designated in the map of said Lake's south addition made from a survey by A. J. Hatch in 1872, each of the lots hereby conveyed fronting fifty feet on the west line of Center street, with a depth of 85 feet to an alley fifteen feet in width."

The only question in the case is as to the construction of this language. The case of *Lewis v. Beattie*, 105 Mass. 410, will serve to show the construction applied by the courts to similar language in conveyances. There the deed described the land conveyed as running to and bounding on a way 40 feet wide. The grantors were the owners of the fee covered by the way. The court said: "Standing by itself, this deed would carry the title to the middle of the strip described as a way, with an easement of way over the other half, and subject to a like easement reserved to the grantors over the half conveyed, as well as to whatever rights of way existed in others at the time." Another principle equally well established and conclusive arises out of the doctrine of estoppel. It is thus stated in *Howe v. Alger*: "A grantor of land describing the same by a boundary on a street or way, if he be the owner of such adjacent land, is estopped from setting up any claim or doing any acts inconsistent with the grantee's use of the street or way; and such estoppel will apply to his heirs, or those claiming under him." 4 Allen, 211. Judgment affirmed.

(1 Wash. St. 461)

HANSON *et al.* *v.* DOHERTY.

(Supreme Court of Washington. Dec. 19, 1890.)

ATTACHMENT—DISCHARGE—AFFIDAVIT—ORAL TESTIMONY.

1. The affidavit stated as grounds for an attachment that defendant was about to convert his property into money with intent to place it beyond reach of his creditors, and that he was about to assign and dispose of his property with intent to delay and defraud his creditors. Defendant's motion to discharge the attachment was supported by affidavit denying that he "was about to convert his property into money for the purpose of placing it beyond the reach of his creditors, or that he was about to assign and dispose of his property with intent to delay and defraud his creditors." Held, that these denials are not sufficient to put in issue the allegations of the affidavit for attachment.

2. Under Laws Wash. T. 1885-86, p. 45, § 32, where defendant has made his motion to discharge an attachment on affidavit, he cannot depart from that mode of proof and support the motion by oral testimony.

Appeal from superior court, Pierce county; FRANK ALLYN, Judge.

Town & Likens, for appellants. A. A. Knight, for appellee.

ANDERS, C. J. This action was brought by appellants against appellee to recover a balance alleged to be due on account of goods, wares, and merchandise sold and delivered by the former to the latter. An

affidavit and bond were duly filed, and a writ of attachment was issued on the following statutory grounds, set forth in the affidavit: "That the defendant is about to convert his property into money for the purpose of placing it beyond the reach of his creditors; that said defendant is about to assign, secrete, and dispose of his property with intent to delay and defraud his creditors." The defendant applied to the court to discharge the attachment, for the alleged reason that the same was improperly issued, and, in support of his motion, filed his own affidavit which contains this allegation: "And says he is not about to convert his property into money for the purpose of placing it beyond the reach of his creditors, neither is he about to assign, secrete, and dispose of his property with intent to delay and defraud his creditors, as alleged in said affidavit of J. B. Hanson." In addition to the above affidavit, the defendant was permitted, over plaintiff's objection, to introduce oral testimony on the hearing of the motion. Having heard the testimony of the witnesses produced on both sides, the court made an order discharging the attachment, whereupon plaintiff filed a motion for a new trial. The motion was overruled and exception duly taken. From the order discharging the attachment, the plaintiff appeals to this court.

Counsel for appellants claim that the truth of the allegations of the affidavit for attachment was not controverted or put in issue by the motion or affidavit of defendant, and that the attachment should therefore have been sustained. In this we think counsel are correct. The denials of the traversing affidavit should be as direct and positive as if the affidavit were an answer to a complaint in an ordinary action, and must be tested by the same rules of pleading. To allege that the defendant is not about to assign, secrete, and dispose of his property with intent to delay and defraud his creditors is, in effect, to admit that he is about to do any one of the acts mentioned, but not all of them conjointly. Such a denial raised no issue, and the attachment should have been sustained on the grounds set forth in that portion of plaintiff's affidavit thus attempted to be traversed. We are of the opinion that no oral testimony should have been admitted on the part of defendant, for the reason that there was no issue to be tried, and for the further reason that defendant, having made his motion to discharge upon affidavit, had no right to depart from that mode of proof. We do not think our statute contemplates that the defendant in attachment may support his motion to discharge both by affidavits and oral testimony. Laws 1885-86, p. 45, § 32. When the motion is made upon affidavits, the hearing should be had upon affidavits and counter-affidavits. And such is the usual practice. But it would seem that the above is not the only course open to the defendant. Should he not desire to use affidavits on the hearing, we see no reason why he may not set forth specifically in his notice and motion the facts showing wherein the attachment was improperly issued, and prove the

same by the testimony of witnesses before the court.<sup>1</sup> The plaintiff would then be at liberty to support his original affidavit in like manner. The order of the court below discharging the attachment is reversed, and the attachment proceedings, remanded for further proceedings in accordance with this opinion.

HOYT, DUNBAR, STILES, and SCOTT, JJ.,  
concur.

(1 Wash. St. 467)

**INSTALLMENT BUILDING & LOAN CO. v.  
WENTWORTH.**

(Supreme Court of Washington. Dec. 19, 1890.)  
**MECHANICS' LIENS—NOTICE—FORECLOSURE—JURY  
TRIAL.**

1. In a notice of a claim of lien for work and materials furnished a corporation, whose name is the "Installment Building & Loan Company," under a contract made with the corporation itself, it is an immaterial variance that the defendant is styled the "Installment Building & Loan Association."

2. As the foreclosure of a mechanic's lien is a proceeding cognizable in a court of equity, the mere fact that defendant in such suit interposes a counter-claim for damages, as he is allowed to do by the laws of Washington, is not sufficient to divest such court of its jurisdiction, and to entitle defendant to demand a trial by jury.

Appeal from superior court, Clark county.

*Green & King*, for appellant. *Coovert & Miller*, for appellee.

HOYT, J. Plaintiff sought to foreclose a lien for material furnished and labor done for defendant in the construction of a dwelling-house on the land of the defendant. Defendant, in its answer, among other things, set up a claim for damages for breach of the contract by the plaintiff. In the notice of claim of lien the defendant corporation was described as "Installment Building & Loan Association," whereas, in fact, its true name was "Installment Building & Loan Company." The notice of claim of lien is attacked on the ground of this variance between it and the pleadings and proofs. We do not think that the variance was material. The corporation itself was making the improvement, and could not have been misled by the slight error in stating its name. The case might be different if the property of the corporation was sought to be charged for an improvement for which it had not contracted.

The defendant demanded a trial by jury upon the issues raised by its answer and the reply thereto. This was refused by the court, and its action in so doing is relied upon as cause of reversal. That the foreclosure of a mechanic's lien is properly cognizable in a court of equity is not denied, but it is contended that as the defendant had a right under our statute to interpose a legal defense, all rights incident to such legal defense, and the issues made thereon, went with it, including that of a trial by jury. With this contention we cannot agree. A court of equity, having once obtained jurisdiction of the cause, will retain it until final determination. 1 Pom. Eq. Jur. §§ 181, 183; *Rathbone v. Warren*, 10 Johns. 587; *Martin v. Tidwell*.

<sup>1</sup> Explained in *Windt v. Banniza*, 26 Pac. Rep. 189.

36 Ga. 332. The circumstance that in the progress of the cause an issue of fact was made that would ordinarily be triable by a jury cannot change this rule. It is true, as claimed by the appellant, that a plaintiff cannot, by joining a legal with an equitable cause of action, deprive a defendant of his right to a jury trial; but that does not aid the appellant in his contention. On the contrary, from like reasoning, it would seem to follow that a defendant, by voluntarily bringing a law question into the case, could not prevent a plaintiff from having his equitable cause proceed to a determination according to the rules applicable to such cases. Defendant in the case at bar could have maintained a separate action for its alleged damages; and if, instead of doing so, it saw fit to plead them in a cause in equity, it could not thereby change the rule of procedure applicable to such cause.

The transcript presents other questions that might be material and worthy of consideration on this appeal, but as they do not go to the jurisdiction of the court, and have not been raised or argued by counsel, we do not feel called upon to discuss them. The judgment and decree of the superior court must be affirmed, and it will be so ordered.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, J. J., concur.

(1 Wash. St. 377)

# McCARTY v. STATE.

(Supreme Court of Washington. Nov. 18, 1890.)

## CONSTITUTIONAL LAW—RETROACTIVE LAWS—INDICTMENT AND INFORMATION.

1. One charged with a larceny in Washington Territory prior to its admission as a state is entitled under the constitution of the United States to a presentment by a grand jury, and cannot be prosecuted by information under the authority of the constitution of Washington and the act of January 29, 1890, in pursuance thereof, since the substitution of prosecution by information for that by indictment was not a mere change of procedure, but affected a substantial right, which could not be taken away by retroactive legislation.

2. An information for the stealing of "93 railroad passenger tickets of the aggregate value of \$120, \* \* \* a more particular description of which \* \* \* is unknown," does not state facts sufficient to constitute the crime of larceny. The separate value of the tickets should be stated so as to enable the degree of the crime to be determined in case a less number of tickets were taken, and should show that they were stamped, dated, and signed, as otherwise they would be worthless, and not the subject of larceny.

Appeal from superior court, Pierce county.

*Town & Likens*, for appellant. *W. H. Snell*, Pros. Atty., *Charles Bedford*, and *C. E. Claypool*, for the State.

DUNBAR, J. This is a proceeding by information, on a charge of grand larceny for the stealing of 93 alleged railroad passenger tickets. The information alleged that "the said J. C. McCarty, on the 15th day of October, eighteen eighty-nine, at the county of Pierce, and state of Washington, and within three years prior to the filing of this information, ninety-three railroad passenger tickets, of the aggregate

gate value of one hundred and twenty dollars, of the chattels and property of the Northern Pacific Railroad Company, a company organized and existing under the laws of the state of New York, and doing business in the state of Washington, under and by virtue of the laws of the said state of Washington, a more particular description of which said railroad passenger tickets is to the said prosecuting attorney unknown, feloniously did steal, take, and carry away, contrary to the form of the statute," etc. To this information the defendant interposed a demurrer that "the information did not state facts sufficient to constitute any offense, and that there was no authority for proceeding by information." This crime is alleged to have been committed on the 15th day of October, 1889. Article 1, § 25, of the constitution of the state of Washington provides for proceedings by information. The act of the legislature authorizing proceedings by information was passed January 29, 1890. The constitution, by act of congress as well as by its own terms, did not become operative until the president's proclamation, which was not made until November 11, 1889, so that the date of the alleged commission of the crime antedates not only the enactment of legislature, but also the vivifying of the constitution by the presidential proclamation. The defendant would have been entitled to the United States constitutional guaranty of presentment by a grand jury on the 15th day of October, 1889. Having the right at that time, it could not be taken from him by any retroactive enactment of the state, even had it been the intention of the legislature to make the act retroactive in its operations. When a statute requiring an indictment is repealed, an information will not lie for an offense committed before the repeal. *People v. Tisdale*, 57 Cal. 104; *Bish. St. Crimes*, § 194. As tersely stated by Mr. Bishop: "The rule for the construction of penal statutes is that they are to reach no further than their words,—no person can be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused." The effect of the adoption of the constitution, and admission into the union of states under that constitution, and the legislative enactment of January 29, 1890, was to repeal the law which guaranteed prosecution for criminal offenses exclusively by indictment. The right to be presented by a grand jury is not a mere change in the proceedings of the court, which does not affect the substantial rights of the accused, and to which he cannot object. It is a constitutional guaranty which rests upon a basis more secure than acts of the legislature which relate to mere matters of procedure. We do not think the defendant can be held to answer this charge, unless on presentment of a grand jury.

We are also of the opinion that the information failed to state facts sufficient to constitute the crime of larceny. It is not sufficient to charge the taking of "ninety-three railroad tickets," of an aggregate value. Especially is this true when the

degree of crime, and the degree of punishment, are determined by the value of the property stolen. In this instance if the proof should show that only a portion of the number of tickets alleged to have been stolen were actually stolen, it would be impossible for the court or jury to determine what degree of larceny the defendant was guilty of. The value of each ticket should have been alleged, and the information should have shown that they were genuine effective railroad tickets, as an unstamped, undated, and unsigned railroad ticket is not the subject of larceny. 1 Whart. Crim. Law, § 879; *People v. Loomis*, 4 Denio, 380. Without these qualifications the so-called railroad tickets had no more value than the intrinsic value of the paper on which they are printed, with the cost of preparing them. As this information did not charge the value of the paper, it could not be proven. It follows that the judgment must be reversed, and the case remanded to the lower court, with instructions to sustain the demurrer, and it is so ordered.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

#### ON REHEARING.

DUNBAR, J. The petition for rehearing in this case is not allowed; but the court desires to say that, in view of the public importance of some of the questions raised, and in view of the fact that the case was submitted without oral argument on the part of the state, in cases arising hereafter it will not be bound by the opinion rendered in this case on the constitutional questions involved.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

(15 Colo. 295)

#### ZIEGLER *et al.* v. COLE.

(*Supreme Court of Colorado*. Nov. 19, 1890.)

#### APPEAL—REVIEW OF EVIDENCE.

A judgment by a trial judge which is neither unsupported by the testimony nor manifestly against its weight will not be disturbed on appeal.

Commissioners' decision. Error to superior court of Denver.

*Patterson & Thomas*, for plaintiffs in error. *Joseph N. Baxter*, for defendant in error.

BISSELL, C. This is an action in trover brought by George W. Cole against Ziegler Bros. and William Brandon, to recover the value of certain property, consisting of sleds and a threshing machine, which Cole averred they had wrongfully seized and converted. The answer contained a denial of the various allegations of the complaint, and an affirmative defense in justification of the seizure. This defense contained all the requisite allegations to show a recovery of judgment by Ziegler Bros. against William Cole, and the issuance of process upon the judgment, under which Brandon, the officer, seized the property in dispute as the property of the defendant in the execution. There was

no controversy concerning the regularity and sufficiency of the proceedings under the judgment; the only dispute being that which grew out of the evidence concerning the title of the plaintiff, and his brother William. The case was tried to the court without a jury, and, upon these issues, the court found that the title to the threshing and horse-power was in the plaintiff, George W. Cole, at the time of the levy of the writ, and gave a judgment in his favor for the value thereof, which was found to be \$100. As to the balance of the property seized, the court held that the plaintiff could not recover because he had failed to show any such title and possession as warranted a judgment in his favor. Evidence was given which tended to show that the title to the threshing and power had been in the plaintiff for some years, and that for a large portion of that time it had been in his possession, having been sent to William, just prior to the levy, simply for the purposes of sale. As to the other property, there was evidence showing that originally it was the property of William, but had been transferred by him to George, in liquidation of an antecedent debt; and, likewise, that the transfer was unaccompanied by such a change of possession as would make the sale effectual as against creditors. The reversal of the case is insisted upon on the ground that the judgment is against the weight of the testimony, and that the court erred in rendering judgment thereon against the plaintiff in error. Other errors are assigned, but this is the only one on which counsel rely. The judgment cannot be reversed upon this ground. The judgment of the court below upon the subject-matter of the controversy finds ample support in the testimony which is contained in the record. The judgment is neither unsupported by the testimony, nor is it manifestly against its weight; on the contrary on the record, as it stands, the judgment of this court would be in harmony with the findings of the judge who tried the case. Under these circumstances, according to the rules which this court has established, and which are held to govern in such cases, it is impossible to disturb the judgment. *Kinney v. Wood*, 10 Colo. 270, 15 Pac. Rep. 402; *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423. The judgment should be affirmed.

RICHMOND and REED, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

(15 Colo. 299)

#### UNION PAC. RY. CO. v. GIBSON.

(*Supreme Court of Colorado*. Nov. 19, 1890.)

#### GARNISHMENT—EVIDENCE OF INDEBTEDNESS.

In garnishee proceedings to collect from a railroad company money claimed to be due from it to an employee, it appeared that the company was running a quarry in a remote place; that it had established a boarding-house and store for its employees, the company being answerable for their bills, and deducting them from their wages; that at the time of the garnishment the debtor had worked for the company 15 days, and that his bill for board and supplies exceeded the amount



which he had earned. *Held*, that the creditor had failed to show affirmatively, as required by law, that the company was indebted, and that a judgment in his favor would be set aside.

Commissioners' decision. Appeal from Larimer county court.

*Teller & Oranhood*, for appellant. *John C. Hanna* and *George W. Bailey*, for appellee.

**BISSELL, C.** This was a proceeding in garnishment, instituted by Bailey, as a judgment creditor of Gibson, to collect from the railway company the money claimed to be due from it to Gibson. In the county court, from which, by appeal, the case comes here, judgment was rendered against the railway company for \$30, and costs. Under the law which determines and limits the liability of garnishees, the judgment against the company cannot be maintained. According to the settled rule governing such cases, the liability of the garnishee must be made affirmatively to appear in order to justify a judgment against him. *Richards v. Stephenson*, 99 Mass. 311; *Drake*, *Attachm.* § 452 et seq. The obligation to establish that liability by proof is with the creditor who seeks to obtain the judgment. It is immaterial as to the precise method by which the liability is established. It may appear from the answer of the garnishee, or it may be established by collateral proof, where issue is taken on the denials of the answer. In either event, the duty is precisely the same, and always exists. In this case it did not appear from the answer of the garnishee that it was indebted to Gibson. On the contrary, the answer denied all indebtedness. The only testimony which was introduced to overcome this denial came out of the cross-examination of the agent of the company, who answered as to the indebtedness claimed to exist in favor of Gibson. By agreement of the parties, the answer was taken orally. Upon the direct testimony, the witness answered *nondebit*. On cross-examination, however, it transpired that the garnishee was engaged in running a quarry at Stout, in Larimer county, which was a place remote from any town, and without other inhabitants than those in the immediate employ of the railroad company. There the company had established a boarding-house, and placed a man in charge. The same person kept a store, and furnished supplies to the men employed. The arrangement under which Clinton ran the place substantially provided that he should board the men at a fixed rate per week, and furnish them with whatever they wanted, and the company would be answerable for the bills thus contracted. From month to month, as the men worked, they were paid their wages, less the board and store bills contracted with Clinton, who was paid directly by the company. Gibson, the debtor, had been in the employ of the company for a couple of years, and this course had been pursued with him ever since his original employment. There was no direct testimony as to the making of a contract with Gibson, but this is of little con-

sequence in the determination of the rights of the parties. In the absence of proof showing the contrary, the contract will be presumed to be in accordance with this usage and habit. It likewise appeared that at the time of the service of the process of garnishment, Gibson had worked the preceding 15 days, and that the amount of his board, and the bills contracted with Clinton, exceeded the amount which he had earned during that period. There was no evidence whatever to show that Gibson worked beyond that time, nor that the company was in any wise indebted to him, unless he was entitled to his wages, notwithstanding his indebtedness to the store-keeper. The denial of indebtedness contained in the answer was not overcome by proof that the wages earned during the 15 days of labor remained unpaid, nor by a showing that the debts contracted with Clinton remained unliquidated, or that the company's liability thereon had been released or discharged. In the absence of satisfactory proof upon these questions, it cannot be said that the attaching creditor has complied with the law in showing affirmatively that the person garnished is indebted. Whatever the presumption may be, it will not uphold the judgment, which must rest upon sufficient proof. In any event, the arrangement between the company, its employe, and the store-keeper is an ample response, under the facts as proven, to the claim made against them. It was entirely competent for the parties interested to make an arrangement of this description, and when made it would be binding upon them. It was clearly established by the testimony that the charges for what was furnished to the men were made directly against the company, with the knowledge and presumed assent of the employes. The material having been furnished and accepted, there was an ample, executed consideration to uphold the original agreement, and render it enforceable as against the persons directly concerned. These considerations make it apparent that Gibson himself could not have maintained a suit against the company for the wages which the creditor is seeking to reach by this process. Proof of indebtedness to the store-keeper equaling the amount of his claim, followed by evidence establishing a contract with the company, binding upon him, which would be operative as an equitable assignment of his rights in favor of his creditor, would constitute a perfect defense to any action which he might commence against the company. *Doyle v. Gray*, 110 Mass. 206; *Taylor v. Railroad Co.*, 5 Iowa, 115. Since the creditor recovers, if at all, by virtue of the right existing in the debtor to establish and maintain the enforced obligation, it necessarily follows that, if the debtor is barred from recovery, the creditor is without right in the premises. The judgment should be reversed.

**RICHMOND and REED, CC.**, concur.

**PER CURIAM.** For the reasons stated in the foregoing opinion, the judgment is reversed.

(15 Colo. 155)

PEOPLE, to Use of TRITCH, v. CRAMER *et al.*

(Supreme Court of Colorado. Nov. 7, 1890.)

LIMITATION OF ACTIONS—LIABILITY OF SHERIFF—  
NEGLECT.

1. Under Gen. St. Colo. § 2166, providing that all actions against sheriffs upon any liability for the omission of any official duty, except for escapes, shall be brought within one year "after the cause of action shall have accrued, and not after that period," a cause of action against a sheriff for negligence in levying an attachment accrues when the alleged consequential injury was suffered, and not when the alleged non-feasance occurred.

2. The complaint in an action against a sheriff for negligence in levying an attachment alleged that the attachment was placed in the sheriff's hands with instructions to levy at once on certain real estate of the debtor; that the sheriff negligently failed to make such levy, until after several judgments had been obtained against the debtor; that executions were issued on these judgments, and levied upon said real estate, which was sold and bid in by the judgment creditors; and that it was necessary for plaintiff to buy the certificates of purchase issued to the judgment creditors, which he did for their face value. *Held*, that it stated a cause of action.

Error to district court, Arapahoe county.

The complaint averred, among other matters, the following: "That in June, 1886, Tritch commenced his action upon a promissory note against the Bailey Reduction Company to recover the sum of \$18,461.27; that at the same time a writ of attachment was at his instance duly issued and placed in the hands of defendant Cramer, the sheriff, for levy; that the sheriff was instructed to attach thereunder all the estate of the company within the county of Arapahoe; that on the same day, or the next, by direction of Tritch, a description of certain specified real estate of the company, which was then wholly unincumbered, was procured from the office of the clerk and recorder and placed in the hands of the sheriff with instructions to levy the attachment thereon at once; that the company possessed no other realty; that the sheriff negligently failed to make said levy upon the real estate mentioned, or upon anything else save some personal property, until the month of September following, at which time, Tritch having procured his judgment, his execution and attachment were together levied upon the premises referred to; that in the mean time, on the 3d day of August, thirty-four days after the attachment had been placed in the sheriff's hands, certain other judgments, aggregating the sum of \$7,491, were obtained against the defendant company by one Atterbury and others, and transcripts thereof were at once recorded in pursuance of the statute; that these judgments therefore created prior, and hence superior, liens upon the land in question; that in December, 1886, the property having been duly advertised was sold under Tritch's execution, and purchased by him for the sum of \$18,000; that this amount was more than its real value, but was bid by Tritch in order to secure the payment of his entire judgment through the anticipated redemption by other creditors; that on the 7th of February, 1887, executions under the judgments of Atterbury *et al.* were levied upon the property, and it was sold, being purchased by the

judgment creditors, for the amount of their claims with interest; that in September, 1887, Tritch received his sheriff's deed in accordance with his certificate of purchase, and thus became the sole owner of the premises clear of all incumbrances, except the liens created by the said judgments of August 3d, and sales thereunder; and that "it was necessary for Tritch to purchase and acquire the certificates of purchase issued by the coroner to the other said judgment creditors, which he did on the said 2d of September, at and for the face value thereof, to-wit, \$7,865.55." The action is against the sheriff and his bondsmen, upon his official bond, to recover the amount which Tritch was required to pay through the negligence, as it is alleged, of this official in failing to levy the writ of attachment until after liens had been acquired by other creditors as aforesaid. To the complaint, a demurrer was duly interposed, upon two grounds: *First*, the failure to plead a cause of action; and, *second*, a bar by the statute of limitations. This demurrer was sustained, and final judgment rendered dismissing the action. To review that judgment, the present writ of error was sued out.

*Patterson & Thomas*, for plaintiffs in error. *L. B. France*, for defendants in error.

HELM, J., (*after stating the facts as above*.) Both parties agree that the court below sustained the demurrer in this case upon the ground that the action was barred by the statute of limitations. This is the sole question argued by counsel for plaintiff in error, and the principal subject discussed by opposing counsel. Its determination rests upon a construction of the following statute: "All actions against sheriffs and coroners, upon any liability incurred by them, by the doing of any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within one year after the cause of action shall have accrued, and not after that period." Section 2166, Gen. St. The precise force and effect to be given this statute is, as we shall presently see, a question of no little difficulty. The provision is evidently framed in the interest of the officers mentioned, and their official bondsmen. Its purpose is to prevent annoyance and injustice through the prosecution against them of stale demands predicated upon official neglect or other misconduct. This purpose is eminently wise; but, in our judgment, the statute should, if possible, be so construed as that, while the persons designated are fairly protected, litigants may not be made thereby to suffer grievous and remediless wrong. Our determination of the present controversy obviously depends upon the view we shall adopt as to the precise point of time when Tritch's cause of action accrued. Was it when the alleged official non-feasance occurred, or was it when the consequential injury complained of had followed? When a contract, express or implied, is violated, actual injury is in law an immediate sequence, and suit may at once be institut-

ed. The damages may be much or little, but the cause of action is complete. If the precise extent of the injury be not immediately apparent, it may nevertheless be approximately computed. So also a tort, if of such a nature as that *assumpsit* might have been maintained at common law, gives rise to an immediate cause of action, for such torts are always at least *quasi ex contractu*; as, for instance, where an attorney, by gross negligence or intentional misconduct, violates his implied promise to diligently and faithfully attend to his client's business, and the latter suffers loss. To this class of cases belong that of *Wilcox v. Executors of Plummer*, 4 Pet. 172, and several others relied on by counsel for defendant in error. See, also, *Ang. Lim.*, (6th Ed.) 123. In all torts, likewise, which constitute a trespass upon person or property, there is at once actual damage of which the law takes notice; for example, an assault upon plaintiff's person, or a physical invasion of his freehold. In such cases, a complete right of action springs into existence upon the commission of the trespass. Where, however, persons are charged by law with certain functions or duties which are primarily of a public nature, though, incidentally, in a special manner affecting private individuals, the doctrine above announced is not always adhered to. Contrariety of judicial opinion appears in the decisions, but the better view, we think, is that in such cases no contractual relation, express or implied, exists between the party thus charged and the individual for whom he incidentally acts. The violation of the duty is undoubtedly unlawful; and, as has been well said, "when its consequences are the invasion of an individual right, (and then only,) it becomes a proper subject of redress by him," (the individual.) We quote further from the same opinion: "The duties imposed upon public officers are analogous to those of moral obligation. Their violation is not necessarily a legal injury to those in whose favor they exist. They must affect some right such as the law is wont to redress before they can be made the subject of a suit. It is the duty of a municipal corporation to keep certain highways free from obstruction. The duty is to the public for the benefit of every individual in the community. If an obstruction is negligently permitted to exist, it may be said that, in a sense, a duty to each individual is violated. But it is not competent for every inhabitant of the vicinage thereupon to bring his action for the breach of duty to himself; not even if he is put to some trivial inconvenience by the obstruction. \* \* \* The mere violation of the public duty, although the duty is to him indirectly, involves no correlative legal right on his part to sue for such violation. It is said familiarly that rights and duties are reciprocal. This is, in a moral sense, and in a properly understood legal sense, true. But it is evident from the illustration just employed that there is no such legal reciprocity between the general duties of public officers and the rights of parties in whose behalf the duties are to be performed, that the right is always ac-

tionable when the duty is violated. \* \* \* A suitor's right is not then a right to literal forms of procedure, but to enforce his judgment, and collect his debt by law. Until this right is injured, no right is injured. Until the officer fails to bring the property of the debtor within the power of the law's final process, founded upon a creditor's valid judgment, he has been guilty of no violation of duty in a legal view. So that, if we suppose a direct relation between the plaintiff and the officer, — a legal reciprocity of right and duty between them, — and concede that damages are to be presumed where the former is invaded or the latter violated, it is clear that neither of these incidents occurs until something more than a neglect to attach, or an incorrect return, is imputable to the officer." *Bank v. Waterman*, 26 Conn. 324. "When the action is founded upon a neglect of official duty, the gist of the action is the injury suffered; and no action can be maintained but one in form, as well as in substance, founded on that injury, unless it be otherwise provided by statute. The relation between an officer and the person for whom he performs an official act is not that arising out of a contract, express or implied." Dissenting opinion of Mr. Justice SHEPLEY in *Betts v. Norris*, 21 Me. 324. It is hardly necessary to say that the sheriff belongs to the class of public servants last above designated. He is elected by the people, and occupies his office during a term specified by statute. His functions and fees are prescribed by law, and do not depend upon contract with the persons whom he incidentally serves. He is a public officer, and his duties are primarily of a public nature. In the discharge of these duties, he sometimes acts for private suitors, whose right, as above defined, is the judicial collection of their debts, or enforcement of such other legal redress as the law may authorize. If the negligence or misconduct of the officer in no way prevents or retards the vindication of this right, no legal injury results, and, in our judgment, no right of action accrues; as, for instance, — to employ a couple of familiar illustrations, — the sheriff negligently fails to serve a subpoena placed in his hands, but the witness voluntarily, and without any further effort of the suitor, appears at the appointed time and place, and gives the desired testimony, or the official carelessly omits to levy a writ of attachment as directed, but the judgment ultimately recovered is nevertheless promptly paid. Were we to hold that in these and all similar instances a right of action exists in favor of the suitor, and therefore that he may recover from the sheriff or his bondsmen at least nominal damages, the responsibilities of that official would be rendered more onerous, and his position more hazardous, than it is already. Every suitor who could truthfully complain of negligence on the part of the officer, though he be in no wise injured, might harass the official with a judicial proceeding, and mulct him in costs, besides his attorney's fees. We do not think the law contemplates or requires the imposition of this burden, and shall hold accordingly. The majority

opinion in *Betts v. Norris*, supra, has been carefully studied and weighed. It is probably as able a presentation of the subject as can be made upon the side of the question espoused; but, with all due respect to the learned court pronouncing it, we feel that the contrary view taken by Mr. Justice SHEPLEY in his dissenting opinion, and by the majority of the court in *Bank v. Waterman*, supra, is predicated upon sounder logic, and in harmony with higher considerations of justice. We make no attempt to argue the question at length. For thorough and exhaustive discussion of it, counsel are referred to the opinion just mentioned. Tritch brought the present suit within a year from the time he suffered the alleged consequential injury; and it follows from the foregoing conclusion that the objection predicated upon the bar of the statute of limitations must be overruled.

As to the remaining ground of demurrer but little need be said. Counsel for defendant in error relies, in his printed argument, upon the proposition that Tritch's redemption from the sale under the prior judgments was entirely voluntary, and that therefore he cannot recover in this action. The averments of the complaint are, for present purposes, admitted by the demurrer to be true, and these averments, in our judgment, make a *prima facie* case in this regard. Under the circumstances, it appears to have been legally necessary for Tritch to exercise his right of redemption before a sheriff's deed to Atterbury et al. undermined his levy and sale, and rendered it impossible for him to realize any portion of his debt from the land in question. Counsel being silent, we express no opinion as to the legal effect of Tritch's bid of \$18,000 for the property, knowing that it was subject to liens aggregating nearly \$8,000. A portion of his claim remained, in any event, unsatisfied. Upon no view presented in this court can the ruling on the demurrer be sustained.

The judgment is therefore reversed.

(15 Colo. 236)

#### ANNIS v. WILSON.

(Supreme Court of Colorado. Nov. 7, 1890.)

DEED—CONVEYANCE TO INFANT DAUGHTER—RESULTING TRUST—EVIDENCE.

1. A father conveyed land to his infant daughter, her heirs and assigns forever, by deed reciting that the same was to be held in trust by her grandfather until she became of age. *Held*, that title vested directly in the daughter upon delivery of the deed for record.

2. The grantor could not prove by parol that he intended a resulting trust to himself in case of his daughter dying before attaining her majority.

3. A father can by deed direct make a legal conveyance to an infant child.

Commissioners' decision. Appeal from district court, Weld county.

Appellant brought suit against appellee, who had formerly been his wife, and was the mother of his infant child, and who was afterwards divorced and remarried, and complained as follows: "(1) That on or about the 21st day of July, A. D. 1881, and long prior thereto, plaintiff was the owner in fee-simple of the following real

property, situated in the county of Weld, and state of Colorado, to-wit: Lot eleven of the north-east quarter of the south-east quarter of section eight, township five north, of range sixty-five west, containing, according to the subdivisions of lands made by the Union Colony of Colorado, five acres; also, lot two in block seventy-two in the town of Greeley, according to the original plat of said town. (2) That on or about the 21st day of July, 1881, in the county of Arapahoe, in the state of Colorado, in consideration of love and affection, and without any valuable consideration whatever, plaintiff made, signed, sealed, and duly acknowledged and delivered to one Eli Annis, his father, his certain deed, in words and figures as follows: 'This deed made this first day of July, in the year of our Lord one thousand eight hundred and eighty-one, between E. B. Annis, of the county of Arapahoe, and state of Colorado, of the first part, and Erma E. Annis, of the county of Arapahoe, and state of Colorado, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one thousand dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm unto the said party of the second part, her heirs and assigns forever, all the following described lots, parcels of land, situated, lying, and being in the county of Weld, and state of Colorado, to-wit: Lot eleven (11) of N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section eight, (8,) township five (5) north, range sixty-five (65) west, according to the town plat of the town of Greeley; also lot No. two (2) in block No. seventy-two (72) of the town of Greeley, in said county and state, according to the original plat of said town of Greeley, (the above-described property to be held in trust by Eli Annis, of the county of Weld, state of Colorado, until the said Erma E. Annis becomes of age; the said Eli Annis to have full control and use of said property by paying taxes and other expenses attending;) together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity; of, in, and to the above-bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, her heirs and assigns forever. And the said party of the first part, for his heirs, executors, administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, her heirs and assigns, that at the time of the enrolling and delivery of these presents he is well seised of the premises above conveyed, as of good, sure, perfect, absolute, and indefeasible estate of inheritance, in law, in fee-

simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever; and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend. In witness whereof the said party of the first part has hereunto set his hand and seal the day and year above written. [Signed] E. B. ANNIS. For which deed an ordinary printed blank form was used, and the clause therein following the description of the premises, and relative to the interest of said Eli Annis, was written. And said deed was by the said Eli Annis, on the 25th day of July, 1881, filed for record in the office of the county clerk and recorder of Weld county, and duly recorded in said office in book 31, at page 274 of the records therein. That since said time, until the execution and delivery to plaintiff of the deed hereinafter mentioned, the said Eli Annis was in possession of the real property above described, has paid taxes thereon, and enjoyed the rents and profits thereof. (3) That the said Erma E. Annis mentioned in said deed was the infant child of plaintiff, of the age of about seven years at the time of the execution of said deed. That plaintiff executed and delivered to the said Eli Annis as aforesaid, for the sole purpose of providing his said daughter Erma E. Annis with some property in case she should arrive at the age of eighteen, this said deed, and intended by said deed that the said Eli Annis should hold the title to said real estate for the purpose of conveying the same to the said Erma E. Annis, in case she should arrive at the age of eighteen years, and in case she should not live to that age that he should reconvey the same to plaintiff. (4) That on the 18th day of January, 1886, the said Erma E. Annis departed this life at the age of eleven years, intestate, and leaving this plaintiff, her father, her sole heir at law. That on or about the 14th day of May, 1886, the defendant, Mary E. Wilson, who is the mother of said child, duly received letters of administration upon the estate of said Erma E. Annis from the county court in and for the county of Weld, sitting for probate business. That claims amounting in the aggregate to eleven hundred dollars, or thereabouts, have been by the county court of Weld county, sitting for probate business, allowed against the estate of the said Erma E. Annis. That the said estate of Erma E. Annis has no property, real or personal. (5) That the said Mary E. Wilson, as such administratrix, claims that, by the terms and provisions of the deed hereinbefore set forth, the said Erma E. Annis at the time of her decease was seized in fee of the real property before mentioned, and that the said real property is subject to the payment of the debts allowed by said court

against the estate of said Erma E. Annis, deceased; and said administratrix threatens and intends to proceed, pursuant to the statutes, by the filing of a petition in the county court in and for Weld county, to have said lands sold for the purpose of paying such claims so allowed against the estate of the said Erma E. Annis, deceased. (6) That on the 25th day of October, 1886, the said Eli Annis made, signed, sealed, executed, and delivered to plaintiff his certain quitclaim deed, wherein and whereby he conveyed to plaintiff the said real property, for good and sufficient consideration to the said Eli Annis, and in pursuance of the intent of plaintiff in executing and delivering to said Eli Annis the deed before mentioned; and that since the delivery of said deed plaintiff has been in possession of said real property as owner thereof, and is now, by virtue of said deed, the owner in fee-simple of said real property. Wherefore plaintiff prays it may be adjudged and decreed by this honorable court (1) that plaintiff is the owner in fee-simple of the real property hereinbefore described; (2) that said claim of the defendant, as administratrix of the estate of Erma E. Annis, deceased, is without foundation or merit; (3) that the said defendant, as said administratrix, shall be restrained and enjoined from any proceeding to subject the said real property to the payment of the debts of the said Erma E. Annis, deceased, and from, in any manner, interfering with plaintiff's title therein; (4) and for costs of this action. HAYNES, DUNNING & ANNIS, Attorneys for Plaintiff." A demurrer was filed to the complaint, the grounds stated being—*First*, that it was ambiguous and uncertain; *second*, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment entered dismissing the complaint. From such judgment this appeal was taken. The errors assigned are—*First*, that the district court erred in sustaining the demurrer of defendant to the complaint; *second*, the district court erred in dismissing the action, and entering the final decree in favor of defendant.

*E. F. Dunning, H. N. Haynes, and F. J. Annis*, for appellant. *Jas. W. McCreery*, for appellee.

REED, C., (after stating the facts as above.) It is alleged in the complaint "that plaintiff executed and delivered to said Eli Annis as aforesaid, for the sole purpose of providing his said daughter Erma E. Annis with some property in case she should arrive at the age of eighteen, this said deed, and intended by said deed that the said Eli Annis should hold the title to said real estate for the purpose of conveying the same to the said Erma E. Annis, in case she should arrive at the age of eighteen years, and in case she should not live to that age that he should reconvey the same to plaintiff." Such may have been appellant's intention. If it was, his intention evidently was defeated by the execution and delivery of the deed. By the deed in question, the title did not, as supposed, pass to Eli Annis in trust, but passed by the conveyance directly to the child, and the

title vested by the execution and delivery of the deed for record. There is no question of execution and delivery. The execution is alleged in the complaint, and also that the deed was delivered to Eli Annis for the purpose of having it recorded. In determining the sufficiency of the complaint, the first inquiry would seem to be whether a father can, by deed direct, make a legal conveyance to an infant child so as to vest the title without creating a trust or the intervention of a trustee. That such a conveyance can be so made is well settled by numerous authorities: Co. Litt., 2b, 3b. In 3 Washb. Real Prop., (4th Ed.) 267, it is said: "The capacity to take as grantee is much less restricted than that required to make a grant. Persons *non compotes mentis*, married women, infants, corporations, and bodiless politic may take as grantees." See, also, Bank v. Bellis, 10 Cush. 278; Masterson v. Cheek, 23 Ill. 75.

The conveyance to the infant is full, clear, and unequivocal. The intention of the grantor to divest himself of all interest in the property is manifest. There was no reservation, no language from which a resulting trust for his own benefit could be inferred in the event of the death of either the infant or Eli Annis. The child took the full and complete legal title, the grandfather took no title. What he took under the deed was the beneficial use of the property for the payment of taxes until the child should be 18 years old. The allegation in the complaint is directly contradictory of the plain legal effect of the deed. In order to recover under the complaint plaintiff would have to annul and abrogate his deliberate act in making the conveyance, and having the same placed of record, on the allegation that he did not intend to do what he deliberately did do. Deeds absolute on their face, and of record for years, cannot be overthrown on the allegation of the grantor, in a suit to recover the property, that he did not intend to do what he unquestionably did do. There are many cases in the books where the grantor has been allowed to show by parol his intention in reserving a resulting trust to himself, but an examination of them will show that, in every instance, parol evidence was limited to the inquiry of the completion of the conveyance by the delivery or record of the deed to render it operative as a conveyance, and the grantor has been allowed to show non-delivery of the deed, or an intention to retain its possession to defeat its operation; but I can find no case where the grantor was allowed to assert by parol an intention prior to or at the time of the conveyance contradicting his intentions as expressed in the deed and abrogating it. Several cases have arisen where the father purchased and paid for land, and took the title in the name of the children, and the question was whether there was a resulting trust to the father, or whether it was an advancement to the children, and the grantor was made to show by clear and satisfactory evidence that it was intended as a trust and not intended as an advancement. But where the father having the title in himself conveys directly to a

child, no case can be found where he was allowed by parol to show that he intended a resulting trust to himself. In *Souverbye v. Arden*, 1 Johns. Ch. 240, Chancellor KENT said: "A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted nor intended to part with the possession of the deed; and even if he retains it the weight of authority is decidedly in favor of its validity, unless there be other circumstances besides the mere fact of his retaining it to show that it was not intended to be absolute." In *Cecil v. Beaver*, 28 Iowa, 246, DILLON, C. J., said: "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby." See, also, *Robinson v. Gould*, 26 Iowa, 92; *Mitchell v. Ryan*, 3 Ohio St. 377; *Masterson v. Cheek*, 23 Ill. 72. In *Rivard v. Walker*, 39 Ill. 413, the grantor conveyed his property to his infant children to prevent its being squandered by the wife, and delivered the deed without reservation for record. Afterwards, the wife procured a divorce, and the grantor filed a bill praying that the deed might be set aside, and alleging that he had never delivered it. The court held that, in the case of infant children, a filing for record was a delivery, and denied the relief asked, and said: "By directing the deed to be recorded, and by its record, he gave to the public the most solemn assurances in his power that he had transferred his title to his children, and he cannot be permitted to resume it at pleasure, because he may have afterwards been inclined to regret the act."

It follows that, under the allegations contained in the complaint, the court could not grant the relief asked in this case,—viz., that it be adjudged and decreed "that plaintiff is the owner in fee-simple of the real property hereinbefore described; second, that the said claim of the defendant, as administratrix of the estate of Erma E. Annis, deceased, is without foundation or merit; third, that the said defendant, as said administratrix, be restrained and enjoined from any proceeding to subject the said real property to the payment of the debts of the said Erma E. Annis, deceased, and from in any way interfering with plaintiff's title therein." It is apparent that the relief sought in the premises is predicated upon the theory that the plaintiff, by the operation of a resulting trust and the death of the child, is reinvested with the title to the property. That, in my view of the case, not being the fact, and the legal title having passed upon the death of the child to her heirs, it is unnecessary to consider what, if any, relief plaintiff might be entitled to in a proper case, growing out of the fact of the reconveyance to him by quitclaim deed of whatever beneficial interest or use Eli Annis had by virtue of the former conveyance. What interest he took, if any, by such conveyance, I do not attempt to determine. That he did not take the legal title in fee is clear; hence, the complaint proceeding

entirely upon that supposition, the demurrer was properly sustained. Without being understood as deciding that plaintiff is not entitled to some relief in the premises on proper proceedings, as heir of the child or grantee of Eli Annis, I am of the opinion that the judgment of the court below should be affirmed.

BISSELL, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is affirmed.

ELLIOTT, J., did not participate in the foregoing decision, having tried the cause below.

(15 Colo. 206)

# HUGHES v. SPRUANCE.

(Supreme Court of Colorado. Nov. 12, 1890.)

## EVIDENCE—DECLARATION.

S. went surety on a bail-bond for T., and took as security a certificate of deposit for \$1,400 belonging to T., and then in the hands of H., his attorney. In settlement of proceedings upon the bond, S. paid \$1,134, leaving in his hands \$266, which he turned over to H., taking his note for the amount to cover possible liability in certain garnishment proceedings which were subsequently disposed of. In an action on the note, it was admitted that S. made no personal claim to the money, and a witness for defendant testified that T. and H. came to him and arranged that if he would go security for T., the latter would leave a certificate of deposit as security, and that if any money was left in his hands it was to be paid over to H. for his services. *Held*, that the testimony was improperly stricken out on the ground that S. was not present during the conversation.

Commissioners' decision. Appeal from district court, Clear Creek county.

W. T. Hughes and L. C. Rockwell, for appellant. Morrison & Fillins, for appellee.

RICHMOND, C. In this action plaintiff sought to recover the sum of \$266, evidenced by the following promissory note: "\$266. January 27, 1881. On demand, we promise to pay to the order of William Spruance and Hutchinson \$266, without interest. W. T. HUGHES." Defendant answers denying that there was anything due to either Spruance or Hutchinson, and alleges that Hutchinson had no interest in said note, and never had. That the real owner and holder was and is William Spruance. That the mention of Hutchinson's name in the note was an inadvertent act. That on the 21st of February, 1879, one Trevarrow was under arrest, and ordered to give recognizance bonds. That Spruance became the surety on two bonds of the above character in the penal sum of \$500 each. That, in consideration of Spruance becoming such surety, there was deposited with Spruance a certificate of deposit, of the value of \$1,400, with the understanding that Spruance was to save himself harmless as such surety, and after a full discharge of the obligation arising under the bonds, if there remained any part of the proceeds of the said \$1,400, such balance was to be paid to appellant, who was acting as attorney for said Trevarrow in said pro-

ceedings. That Spruance has been relieved and fully discharged from any and all obligation arising out of his said suretyship, and that out of the sum of \$1,400 he paid on both of said bonds the aggregate sum of \$1,134, leaving a balance in his hands of \$266. Spruance turned over to Hughes this sum of \$266, taking the note sued on to cover any possible liability in certain garnishee proceedings. That the garnishee proceedings were dismissed and Spruance discharged. That Trevarrow was indebted to Hughes for professional services rendered in the various proceedings; and that this balance was due to Hughes and to be applied in payment of his claim for professional services, and that he is entitled to hold the sum of \$266, and appellee herein, plaintiff below, is not entitled to recover on the note. The facts as we gather them from the record are, in detail, as follows: Trevarrow was charged with criminal offenses, and was required to furnish bail. Spruance on the night of February 21, 1879, became surety on these bonds, taking as his security a certificate of deposit belonging to Trevarrow, then in the hands of Hughes. Thereafter Spruance returned the certificate of deposit to Hughes. Some time afterwards, when is not positively stated in the record, Spruance received from Hughes and Strousse the certificate of deposit, Trevarrow forfeited his bail, and proceedings were instituted upon the bonds, and in settlement out of the \$1,400 Spruance paid \$1,134 principal, interest, and costs, leaving in his hands \$266 to be accounted for. Hughes claimed the balance, but Spruance being garnished by attaching creditors, Spruance allowed Hughes, pending the garnishment proceedings, to take the \$266, giving him his, Hughes', note. The garnishment proceedings being disposed of, nothing further passed between Hughes and Spruance until the institution of this suit on the note, nearly five years after the date thereof, to-wit, July 16, 1886. Verdict of the jury against appellant for the amount sued for. Motion for a new trial was overruled, and judgment entered, to reverse which judgment this appeal is prosecuted.

The assignment of error is directed to the errors of the court in rejecting evidence, and that the verdict was contrary to the evidence, and in overruling motion for a new trial. In the trial of the case Strousse was called on behalf of defendant, and testified that on February 21, 1879, Trevarrow and Hughes came to him and arranged that if he would go security for Trevarrow and Laity that Trevarrow would leave with him a certificate of deposit, which should be held for security for going on the bonds, and that if any of this money was left in his hands the balance was to be paid over to Hughes to pay him for his services. Spruance was not present at this conversation. Plaintiff moved to strike out the conversation between Trevarrow, Hughes, and Strousse, Spruance not being present. The motion was sustained, and defendant excepted. The exclusion of this testimony is assigned for error, and we think in this the court did err. It is admitted that Spruance



made no personal claim whatever to the sum of \$266, that it was the money of Trevarrow. If this be true, we are unable to conceive why the presence of Spruance was necessary to the conversation detailed by Strousse between Trevarrow and Hughes, as the conversation amounts to an attempt to prove a verbal assignment of any balance remaining of the \$1,400 to appellant. Save and except for the purpose of indemnifying him against any possible loss growing out of his obligation as surety upon the bonds, Spruance had no claim to the balance, and when he was discharged from the obligation the amount of money remaining in his hands belonged to either Trevarrow, who had absconded, or Hughes, and the evidence offered should have been admitted for the purpose of proving the assignment and Hughes' right to retain the money as that of Trevarrow. The fact that this note was executed payable on demand, without interest, and for the exact sum of money remaining unappropriated in the hands of Spruance, and that no demand was made for the payment of the note until late in the year 1885, in our judgment would seem to support the position assumed by appellant. It is unnecessary for us to consider the other errors assigned, as the conclusion here reached is that the testimony offered and excluded from the consideration of the jury tended to establish appellant's right to the \$266 mentioned in the note sued upon. The money advanced to Hughes for which the note was given was not the money of Spruance, it was the money of Trevarrow, and Hughes should have been allowed the opportunity to show his title to it. The judgment should be reversed, and the cause remanded for further proceedings.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is reversed.

(15 Colo. 367)

SCHOOL-DIST. NO. 3 v. HALE.

(Supreme Court of Colorado. Nov. 19, 1890.)

DISCHARGE OF SCHOOL TEACHERS — RIGHT OF ACTION.

1. A public school teacher engaged for a specific term, who is discharged without cause, need not allege or prove, as a condition precedent to a recovery of his salary for the whole term, a compliance with Gen. St. Colo. § 3077, providing that any person aggrieved by the decision of a board of directors may appeal within 30 days to the county superintendent.

2. A rule in the teacher's hand-book to the effect that the tenure of office of all teachers, regardless of contract, should be at the pleasure of the board, was of no value as a defense to an action on the contract.

Commissioners' decision. Appeal from Boulder county court.

This action was brought by James R. Hale against school-district No. 3, to recover \$402.50, as the balance due him upon his employment from the 1st of September, 1886, to the 27th of May, 1887, as a teacher in the public schools of that district. His complaint sufficiently set forth the contract of hiring, and

his performance, until he was wrongfully discharged in the month of November. It was made to appear that on Sunday, the 28th day of November, at 2 in the afternoon, he was asked to tender his resignation as a teacher. By the same notice he was requested to come before the board, at half past 7 of that day, at the residence of one of the directors. He went, and was again requested to resign. With this request he declined to comply; and thereupon, without further action, and without a hearing, or any other notice, the board assumed to discharge him, and subsequently refused to pay him anything except for the work which he had already performed. The complaint contained all the allegations essential to enable the plaintiff to introduce the proof necessary to his recovery, providing it be unnecessary for him to either allege or prove an appeal by him from the action of the board of directors to the county superintendent, under section 3077 of the General Statutes. The defendant demurred, for failure to make this allegation. The demurrer having been overruled, an answer was filed which set up no defense other than the failure to take the appeal. The record shows that testimony was introduced by the plaintiff in support of his complaint, and that thereupon, the school-district refusing to offer testimony, the court rendered judgment for Mr. Hale for the amount claimed. From this judgment the school-district appeals.

Thomas R. Owen and Charles M. Campbell, for appellant. Richard H. Whitely and Richard H. Whitely, Jr., for appellee.

BISSELL, C., (after stating the facts as above.) Upon sufficient proof of the contract, its breach, and the damages sustained, the plaintiff was entitled to recover, unless the statute has established a condition precedent, with which the plaintiff must show a compliance, to entitle him to a judgment in a court of competent jurisdiction. That the plaintiff made ample proof of whatever facts were necessary to entitle him to a judgment, other than proof of an appeal taken, must be presumed. The evidence upon which the judgment was rendered is not before this court, either in the abstract or in the record, and the court rendering the judgment being one with jurisdiction of both person and subject matter, it will be presumed that it proceeded regularly, and upon sufficient evidence. There is thus remaining for determination the naked question whether the statute has imposed upon the plaintiff a duty in a case of this description which he has failed to discharge. In the statute relating to schools, the board of directors is given full power to do whatever may be necessary for the due and regular management of the schools of their district. This in terms includes the hiring and discharge of teachers. This power, however, must always be exercised in obedience to the general principles of law governing contracts of this class, unless there be some specific restriction in the statute which prevents their application. There is nothing whatever in the statute which gives the board the right to make

a contract for a specific term, at a specified price, which shall not be subject to the legal consequences of a breach. The power of employment and discharge is not in terms beyond the control of the general law. It was always true that where a contract of hiring was entered into between two parties for a fixed period, at a definite price, the employer could not escape liability for a discharge without cause. If the contract was broken by the employer, a cause of action at once arose in favor of the one discharged, who might, upon the expiration of the period of hiring, recover the damages resulting from the breach. Ordinarily these are measured by the amount of the stipulated wages, though the recovery is always subject to mitigation by proof either of earnings or their possibility. *Reduction Co. v. Cook*, 7 Colo. 569, 4 Pac. Rep. 1111; Pars. Cont. (6th Ed.) pp. 33, 34, and notes. The case, as made by the plaintiff, comes clearly within this well-established rule. He was hired for so many months at \$70 per month, and discharged, as shown by the record, without cause, and he brought this suit upon the expiration of the term of his employment for the wages unpaid, and due from the day of discharge to the end of his term. The appellant does not seriously controvert this well-established rule, nor offer any evidence to reduce the damages, but asserts, as a defense, the provision of the statute, that any person aggrieved by the decision of a district board of directors may, within 30 days from the rendition of the decision, or the making of the order, appeal to the county superintendent. Gen. St. § 3077. It is contended that this section, *ex vigore*, ousted the courts of jurisdiction to hear and determine controversies of this character. This is not believed to be the law. In the absence of an imperative necessity, it should never be held that a tribunal which is incompetent to afford relief to the suitors, and which is regulated and restrained by none of the rules and methods of procedure essential to a satisfactory investigation, nor by those legal principles which are supposed to enter into and form a part of every contract, can oust the courts of the country of the jurisdiction and powers conferred upon them by the statutes and constitution. Our whole judicial system is at variance with the idea that, in the absence of specific, mandatory, legislative restrictions, the courts may not be appealed to, to determine the rights of contract between citizens, or between citizens and corporate bodies which the statutes have created. It might easily be conceded that there are certain classes of questions of which the board might well be given exclusive jurisdiction, and where the sole remedy in case of defeat would be by taking the appeal provided for by statute. In this case it is unnecessary to either define or limit that class of cases. The one under consideration is one which relates to a contract of hire, and where the only remedy of any benefit to the plaintiff must be had in tribunals clothed with power to enforce their own judgments and decrees. By section 3084 of the statute, the right to render or enforce judgments for money,

which is the only effective judgment possible in this case, is expressly withheld from the board, the county superintendent, and the state board of education. In connection with section 3077 is found a similar provision for an appeal from the county superintendent to the state board. To decide in this case that the teacher who has been discharged must first appeal to the county superintendent before he can sue would render it necessary to hold that, being defeated there, he must appeal to the state board before he has the right to resort to the courts. This is to require of the plaintiff to take two useless, ineffectual, and expensive steps before he resorts to the only tribunal which can afford him relief. It certainly could never have been the intention of the legislature to confer upon boards, or superintendents, exclusive authority to decide questions, and then withhold from them the power to enforce the judgments which they might render. That the plaintiff had a right to appeal, and take a chance of reinstatement without resorting to the courts, there can be no question. That he was compelled to withhold his application to the courts of the country for relief from an unauthorized breach of contract cannot be maintained.

No other defense of much importance was interposed by the school-district. It set up a rule alleged to have been contained in the teacher's hand-book which substantially provided that the tenure of office of all teachers, regardless of contract, should be at the pleasure of the board. Neither the rule nor its plea was of any value as a defense. It was utterly impossible for the board to make or publish any rule of that description which should be of the slightest force as to any contract of employment, for a definite period at a fixed rate, into which the board might enter. The rule is in direct contravention of a specific statutory provision. Section 3055 definitely enacts that no teacher shall be dismissed except on good cause shown. The entire action of the board in the premises was in complete disregard of the common-law and statutory rights of the teacher. According to the answer the action was not based upon any well-defined and stated grounds of complaint. No cause of action was alleged. There was a like want of proof of anything which would justify what was done. There was no attempt to establish a "good cause," nor was an opportunity given to defend against what was asserted. There was a like want of that investigation which should always precede the breach of a contract. The course taken amply illustrates the inequitable nature of the rule, and furnishes cogent reasons for declaring it to be wholly inoperative, and to confer no power on the board to take the course which they pursued. If the board saw fit to make a contract like that sued on, they would be bound by its terms, regardless of any rule which they might promulgate or adopt for their own guidance, or the guidance of the teachers. If they desired the rule to be of any value, they should make their contracts in terms conform to it, and let them run during their pleasure, and not for

a specific period. The judgment should be affirmed.

REED and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

(15 Colo. 254)

BRERETON v. BENNETT.

(Supreme Court of Colorado. Nov. 19, 1890.)

CHATTEL MORTGAGES—ACKNOWLEDGMENT—MORTGAGOR IN POSSESSION—EXTENSION OF LIEN.

1. The fact that the officer taking the acknowledgment of a chattel mortgage was the partner of the mortgagee, and negotiated the loan secured by the mortgage, does not render the mortgage fraudulent and void as to other mortgage creditors, when it is not shown that he was a party in interest to either the lien or the note.

2. Where a chattel mortgage, made the basis of an action, is fair upon its face, it cannot be impeached for fraud, unless the facts relied on to constitute the fraud are pleaded in the answer.

3. Where, by the terms of a chattel mortgage, the mortgagor is to retain possession of the property until maturity of the note and mortgage, it is the duty of the mortgagee to take possession of the property within a reasonable time after a default, and, where he delays acting for nearly two months, his rights under the mortgage become subject to those of subsequent mortgagees.

4. In such case, the lien of the note and mortgage cannot be extended by the contract of the parties to the prejudice of the intervening rights of third persons.

Appeal from superior court of Denver.

The controversy in this case is over the priority of lien of different chattel mortgages. On the 23d day of June, 1887, one C. P. Shore, the owner of the property in controversy, executed and delivered to appellant, S. W. Brereton, a chattel mortgage on the same to secure the payment of a promissory note for \$250, due October 1, 1887. On the 30th of September, 1887, Shore, made a new note for the amount, payable on the 1st day of December, 1887, and at the same time he gave a new mortgage to appellant, which was duly recorded at 4 o'clock P. M., the said 30th day of September. On the same day, however, Shore executed and delivered to appellee, H. W. Bennett, his note for \$275, due six months after date thereof, to secure the payment of which he gave a chattel mortgage upon the same property to appellee, which mortgage was duly recorded at 12:30 P. M. of said day. The mortgage given to appellee was acknowledged before Julius A. Meyers, a notary public. Meyers was a member of the firm of Bennett & Meyers; and it is claimed that the money was advanced by the firm, and not by Mr. Bennett, and for this reason this chattel mortgage is claimed to be invalid. The real question in the case is as to which one of the parties has the better right to the possession of the property thus mortgaged.

Stewart Bros. & Andrews, for appellant. Rogers & Webber, for appellee.

HAYT, J., (after stating the facts as above.) The taking of an acknowledgment before a mortgagee, who is also an officer, authorized generally to take acknowledgments of such instruments, is against the policy of the law, and an in-

strument so acknowledged is fraudulent and void as to other mortgage creditors. *Hammers v. Dole*, 61 Ill. 307. Meyers, the party taking the acknowledgment to the Bennett mortgage, was, however, not the mortgagee named therein. And, although it is shown that he negotiated the loan, and was at the time engaged in business as a partner with Bennett, the mortgagee, the evidence does not show that he was a party in interest to either the lien or the note. Aside from this, the suit is brought directly upon the instruments. The mortgage, which is the basis of the plaintiff's claim to the property, is set forth, in legal effect, in the complaint. It is fair upon its face; and if the defendant desired to impeach it for fraud the facts relied upon as constituting such fraud should have been pleaded by the defendant in his answer. No such plea was interposed in this case. In its absence, the instrument must be taken as valid. *Jones, Mortg.* § 538; *De Votie v. McGerr*, 15 Colo. —, 24 Pac. Rep. 923. Appellant bases his claim to the right of possession of the property upon two chattel mortgages; the first bearing date June 23, 1887, and the other, September 30th of the same year. As the latter instrument was not filed for record until after the mortgage given by appellee upon the same property was recorded, appellant's claim, founded upon the subsequently recorded instrument, is of no force as against the mortgage of Bennett. Is appellant entitled to the possession of the property under the instrument of June 23d? By the terms of this instrument the mortgagor was to retain possession of the property until the maturity of the note and mortgage. These instruments became due early in October. Then it became the duty of appellant to take possession of the property within a reasonable time. Appellant, however, made no effort to reduce the mortgaged property to his possession until the last of November. Whatever may have been his rights had he acted promptly, they were forfeited by this delay, and the mortgage became, in law, fraudulent as to other mortgage creditors. By his own negligence, his rights under the chattel mortgage became subject to those of appellee. *Rhines v. Phelps*, 3 Gilman, 455; *Cass v. Perkins*, 23 Ill. 382. It is urged, however, that the giving of the note and mortgage of September 30th was no more than an extension of time upon the prior instruments, and that the lien of the old mortgage was thereby continued. There is no authority for allowing the lien to be extended in this manner by the contract of the parties so as to preclude the rights of third parties. "The chattel mortgage act is in derogation of the common law, and must be strictly construed." *Crane v. Chandler*, 5 Colo. 21. The facts relied upon by appellant were not such as to give him a right to a prior lien as against appellee. The judgment of the trial court sustaining the demurrer to the defense setting up such facts cannot be disturbed. For the same reason, the court below properly held that the evidence of such facts was not sufficient to entitle appellant to a judgment. The judgment in favor of appellee is accordingly affirmed.

(15 Colo. 143)

KEELER v. TRUEMAN *et al.*

(Supreme Court of Colorado. Nov. 19, 1890.)

MINING CLAIMS—QUIETING TITLE—PARTIES—PLEADING.

1. An interest claimed by an intestate in a mining claim at the time of his death is an interest in real estate, and descends to his heirs, who alone can maintain an action to quiet title thereto. The right to maintain such action is not conferred upon the administrator of the intestate by Rev. St. U. S. §§ 2322, 2324, providing that the locators of mining claims, "their heirs and assigns," so long as they comply with the laws of the United States, and with state and local regulations not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and that, upon failure to comply with the conditions as to annual labor, the ground shall be open to relocation, provided that the original locators, their heirs, assigns, or "legal representatives," have not resumed work upon such claim after failure, and before such location.

2. Under Act Cong. May 10, 1872, declaring that only those who are citizens of the United States, or have properly declared their intention to become such, can either locate or purchase mineral lands, an allegation of citizenship, or its equivalent, is necessary to constitute a good complaint in a proceeding to determine adverse mining claims preliminary to the issuance of a patent therefor.

Appeal from district court, Lake county.  
*S. J. Hanna*, for appellant. *N. Rollins*, for appellees.

HAYT, J. Adverse suit to determine the right to a patent to mining property. The appellant, George O. Keeler, brought suit as administrator in the court below, alleging in his complaint that, on January 1, 1887, one Herbert H. Judson died intestate, and that plaintiff was the duly appointed, qualified, and acting administrator of the estate. It is further alleged that Judson died seised of a certain mining claim, and that the defendants wrongfully entered upon a portion of said claim, and made application at the proper land-office for a patent therefor. The complaint also contains, with a single exception, the usual averments to be found in a complaint in support of adverse proceedings. The exception referred to relates to the citizenship of Judson. There is no allegation whatever of citizenship. To this complaint, the defendants demurred upon several grounds, among which were that the complaint did not state facts sufficient to constitute a cause of action. After argument, the court sustained the demurrer, and the plaintiff electing to stand upon the complaint, judgment was entered for the defendants. We are not advised as to the particular reason assigned by the court for sustaining the demurrer. We infer, however, from the nature of the attack made here upon the judgment, that it was because, in the opinion of the trial court, the action should have been brought by the heirs, and not by the administrator. In this, at least, there is sufficient basis for the judgment. The interest claimed by Judson in the mining claim at the time of his death is to be deemed and treated as an interest in real estate, and must descend accordingly. This is admitted. It is further conceded that at common law the administrator of

such intestate could not maintain the action of ejectment for the real estate with which the intestate died seised. Support for the present action is sought, however, under the statutes of this state, and of the United States. It was held by this court, in the case of *Filmore v. Reithman*, 6 Colo. 120, that under our statutes, as at common law, the lands of an intestate descend to the heirs and not to the administrator. The heirs, therefore, being the real parties in interest, can alone maintain the present action. Our statutes, in reference to descents and distributions, are quite similar to those of the state of Illinois; in fact, the resemblance between the two is so striking as to leave no doubt that the former were largely borrowed from the latter state. The adjudications of the court of last resort in Illinois are, for this reason, particularly valuable here. The case of *Smith v. McConnell*, 17 Ill. 135, has long been considered a leading case. It was there held that the lands of one dying intestate descend direct to the heirs; the heirs holding the title in their own right, subject only to the payment of the debts of their ancestor, in the mode provided by law. And it has been repeatedly held in that state that the administrator can only affect the title of such heirs by a sale duly authorized by an order of court. *Walbridge v. Day*, 31 Ill. 379; *Phelps v. Funkhouser*, 39 Ill. 401. We find nothing in our statute to change this rule, and, hence, conclude that the administrator in this case must look beyond the state statutes for authority to maintain the action. This is true, at least in the absence of some authorization by the court of probate, and no authority from that source is claimed. If, then, the right of the administrator to maintain this action exists, it must be by virtue of some act of congress. Counsel call our attention to sections 2322 and 2324 of the Revised Statutes of the United States. By the first of these sections it is provided, in substance, that the locators of mining claims, their heirs and assigns, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, etc. By section 2324 it is provided *inter alia* that, upon failure to comply with the conditions as to annual labor, the ground shall be open to relocation, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon such claim after failure and before such location. These two sections taken together, it is claimed, confer the right of possession upon the legal representatives of the intestate, and it is contended the administrator is included in the term "legal representative." As we have seen, at common law, the right of possession to the real estate did not descend to the administrator. Upon doubtful or uncertain language, courts will certainly be very reluctant to change the general rule so as to make the mining claim of an intestate an exception. If congress had intended to change such rule, we doubt not language

would have been employed which would have left little doubt of such intention. The sections cited do not contain such language. The term "legal representative" is only used in reference to the performance of annual labor upon mining claims. The inference to be drawn from its absence from the only section fixing the right of possession is certainly not favorable to appellant's theory. In our opinion, appellant's claim of right to maintain this action finds no support in any statute which has been cited, and we, therefore, conclude it is not sanctioned by either state or national legislation. Had a different conclusion been reached, however, upon this branch of the argument, the judgment of the court below could not have been disturbed, the citizenship of Judson not being averred in the complaint. Actions of this character are purely statutory.

Under the act of congress of May 10, 1872, only those who are citizens of the United States, or have properly declared their intention to become such, can either locate or purchase mineral lands belonging to the United States. Hence, an allegation of citizenship, or its equivalent, has repeatedly been held necessary to constitute a good complaint in a proceeding to determine adverse claims to such lands preliminary to the issuance of a patent therefor. *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. Rep. 421; *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. Rep. 1019; *McFeters v. Pierson*, 15 Colo. —, 24 Pac. Rep. 1076; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, and 8 Pac. Rep. 621. The judgment must be affirmed.

(15 Colo. 133)

#### MILES V. MAYS.

(Supreme Court of Colorado. Nov. 19, 1890.)

##### LIABILITY OF AGENT TO THIRD PARTIES.

In an action for commissions for procuring a purchaser for land, it was admitted that defendant was the duly-constituted agent of one W. by written power of attorney, and had full power to sell and convey the land. Defendant proceeded in all respects as if the property was his, and the sole responsibility for rejecting the purchaser rested with him. *Held*, that the question of defendant's liability as a subagent was for the jury, whose finding in favor of plaintiff would not be disturbed, and that it was immaterial that defendant disclosed his agency, and did not in words assume individual responsibility.

Appeal from district court, Arapahoe county.

*Enos Miles*, for appellant. *C. A. Lott*, for appellee.

HELM, C. J. Mays, the appellee, brought suit and recovered judgment against Miles, the appellant, for commission earned in procuring a purchaser for certain real estate in the city of Denver. The property in question belonged to Emma C. Whitsitt, for whom Miles acted as agent. The proof clearly establishes the fact that Mays furnished a purchaser for the premises in accordance with the terms of his contract with Miles. The affirmative testimony of Mays, supplemented by that of Dr. Elsner, the would-be purchaser, and the admissions of Miles, clearly show that Elsner stood ready to take the property at the price and upon the conditions stipulated for by Miles. There would be no justifica-

tion for our interference with the judgment of the court below, in so far as this particular objection is concerned.

The only serious question to be considered is as to whether the action and recovery can be maintained against Miles alone, his principal, Mrs. Whitsitt, not being a party or bound by the judgment. The complaint states the cause of action in two separate counts. The second of these is substantially a count at common law for services rendered to defendant at defendant's instance and request, in connection with the sale of the property mentioned. The first count presents a simple and concise statement of facts in accordance with the provisions of the Code. Among the averments therein is the following: "That defendant, George T. Miles, was the duly-constituted agent of said Whitsitt by written power of attorney, and had full power to sell and convey said lots for the price of \$16,500." This averment is not denied in the answer, and therefore must be accepted as true. Miles was the brother of Mrs. Whitsitt, and appeared to have entire control of the property. Mays was employed by Miles exclusively, having no negotiations whatever with Mrs. Whitsitt touching the transaction. It does not appear that she was at any time consulted, or that her advice or wishes were made known to Mays, or otherwise considered. According to the testimony, Miles proceeded in all respects precisely as he would had the property belonged to him. There is nothing in the evidence to show that Mrs. Whitsitt refused or objected to the sale as negotiated by Mays; the sole responsibility for such rejection appears to rest with Miles. It is true he disclosed his agency and the name of his principal; it is also true that he did not in words assume individual responsibility for the payment of Mays' commission. But, under all the circumstances, there was sufficient in the record to warrant a submission to the jury of the question as to whether or not Mays' employment was in the nature of a subagency, where reliance is placed upon the intermediate agent, the credit being given in whole or in large part to him, and not exclusively to his principal. In such cases, the rule is that suit may be brought against the immediate employer, even though his principal may sometimes also be liable. *Story, Ag. §§ 386, 387*. The charge upon this point was certainly as favorable to Miles as the law required. The jury were told, in substance, that if they found from the evidence that Miles on his own account employed plaintiff to procure a purchaser for the property, and if, before the property was withdrawn, the latter did secure such purchaser, in accordance with the terms agreed upon, Miles was liable for his commission as provided in the contract. The jury having weighed the testimony, under proper instructions, and having resolved in plaintiff's favor the question of fact thus submitted to them, their verdict will not be disturbed, and the judgment based thereon is affirmed.

ELLIOTT, J., having presided at the trial below, did not participate in this decision.

(15 Colo. 131)

## STEVENSON v. LORD.

(Supreme Court of Colorado. Nov. 19, 1890.)

## PLEADING—DEMURRER—REPLEVIN—DAMAGES.

1. The objection that a complaint fails to state a cause of action may be taken at any time, and is not waived by pleading over.

2. In replevin by a chattel mortgagee against an attaching creditor of the mortgagor, an allegation in the complaint of the non-payment of the mortgage is not necessary.

3. In such action the recovery is properly for the full value of the property, even though plaintiff's interest may be less.

4. The Colorado statute providing that, in an action for the recovery of personal property, judgment may be for the possession or the value thereof, in case a delivery cannot be had, is satisfied by a finding of the total aggregate value of all the chattels wrongfully withheld.

Appeal from superior court of Denver.

*Reddin & Allphin*, for appellant. *Stuart B. Andrews*, for appellee.

HELM, C. J. E. M. and L. R. Smith borrowed of Mrs. Lord a sum of money, giving their promissory note therefor, secured by a chattel mortgage upon certain personal property, which was duly filed for record. The mortgage contained a provision permitting the mortgagors to retain possession of the property until default in payment of the note, or until the happening of certain other contingencies therein specified. The property while thus situated was attached by a creditor of the mortgagors. By virtue of such attachment, Mrs. Lord became entitled to immediate possession of the mortgaged chattels. She brought suit in replevin therefor against appellant, Stevenson, who was the sheriff holding under the attachment. A demurrer to her complaint having been overruled, answer was filed, the cause was tried, and she recovered judgment for the possession of the chattels, or, in case possession were not obtained, for their value.

The objection, taken by demurrer, that the complaint failed to state a cause of action, was not waived, as counsel contend, by pleading over. Under the statute, this question may be raised at any time; but the demurrer was correctly overruled. The complaint, in our judgment, sufficiently pleaded a cause of action. Had the note matured, and suit been instituted to recover the principal and interest thereon, an express averment by plaintiff of non-payment would not have been necessary. In most of the states payment is regarded as a defense, and is usually pleaded as new matter in the answer. Pom. Rem. § 700; *Watson v. Lemen*, 9 Colo. 200, 11 Pac. Rep. 88. But if a complaint in *assumpsit* upon a promissory note need not affirmatively aver non-payment, much less need the complaint in the present action contain this allegation. The evidence sufficiently establishes the execution and delivery of both the note and mortgage, and the acknowledgment of the latter instrument is in substantial conformity to the requirements of the statute. While in some of the states the value of the different articles involved in this action must be separately found, such has not been the rule in Colorado. The statute provides that, "in an action for

the recovery of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had." This provision has been regarded as satisfied by a finding of the total aggregate value of all the chattels wrongfully withheld.

It is further contended by counsel for appellant that plaintiff's interest in the property was less than its full value, and therefore that judgment, in case a return were not had, should have been only for the principal of the note, and interest. There would, in any event, be but little merit in this contention. The value of the property found by the jury differs so slightly from the amount of the note as to almost justify an application of the maxim, *de minimis non curat lex*. But in *Machette v. Wanless*, 1 Colo. 225, it is held that the mortgagee is entitled to maintain replevin for the property mortgaged, where it is seized under a prior invalid mortgage, provided any portion of the debt secured by plaintiff's incumbrance remains unpaid. If a mortgagee is, by virtue of his contract or otherwise, entitled to maintain replevin against an attaching creditor, in our opinion his recovery may include all the property covered by the mortgage, or by virtue of the statute, the full value thereof. Besides, many authorities declare that when, as in the present case, the plaintiff in replevin is a stranger to the process under which the officer holds possession, the judgment should be for the full value, though plaintiff's interest may be less. Other objections to the proceedings in the court below are presented, but they are not deemed important enough to warrant discussion. The judgment is affirmed.

(15 Colo. 249)

## BUTLER et al. v. HOWELL.

(Supreme Court of Colorado. Nov. 19, 1890.)

## FRAUDULENT CONVEYANCES—EVIDENCE—CHANGE OF POSSESSION.

1. In an action involving the validity of the sale of a stock of goods as to the seller's creditors, a piece of a promissory note signed by the seller is admissible in corroboration of the purchaser's testimony that the seller had been indebted to her for some time before the purchase of the goods, for which indebtedness he had executed his promissory notes; that these notes were surrendered to the seller at the time of the sale as a part of the purchase price, and by him torn up; and that the purchaser had picked up the piece offered in evidence.

2. One who has been engaged in the merchandising business for five or six years, and who has purchased the entire stock in question at a sheriff's sale, is a competent witness as to its value.

3. Evidence that after the sale the purchaser continually replenished the stock while continuing the business in her own name is admissible on the question of change of possession of the stock from the seller to the buyer.

4. There was evidence that at the time of the sale the purchaser took possession of the goods, locked up the store-room, and retained the key until the levy of an attachment by the seller's creditors 10 days thereafter; that, between the time of the purchase and the levy, the store remained closed the greater part of the time; that when customers came to the store the purchaser went from her place of business on the opposite side of the street, and waited on them; that she replenished the stock, as occasion required, with goods purchased by her; that the seller did not,

after the sale, exercise any control over the business, though at times, when requested, he came to the store to point out goods with which the purchaser was not familiar. Held sufficient to warrant a finding by the jury that there had been a change of possession, though other witnesses living in the neighborhood, but whose means of information were shown to be meager, testified that they had noticed no change of possession.

Appeal from district court, Summit county.

The facts of this case may be briefly stated as follows: For some time prior to August 8, 1887, the appellee, Mrs. Howell, then Mrs. Mary Weinart, was engaged in conducting a confectionery store in the town of Montezuma, Summit county, Colo. Almost or directly opposite to her place of business was a general merchandising store, belonging to one B. Marks, the stock in which consisted of boots and shoes, hats, caps, clothing, dry goods, groceries, etc. The appellee claims that prior to said date she advanced and loaned to the said Marks large sums of money, aggregating the sum of seventeen or eighteen hundred dollars; that upon that date, to-wit, August 8th, she, failing to receive payment of the money so advanced by her, bought out said store, and took possession thereof, giving to Marks credit for the sum of \$1,200 on his indebtedness to her. The appellants Butler Bros. were a firm engaged in the business of merchandising in Denver, Colo., and at and prior to said time they were the creditors of said Marks; and appellant Daniel Hanley was the sheriff of said Summit county. About the 16th day of August, 1887, Butler Bros. commenced an action in attachment against the said Marks, in the district court of Arapahoe county, to recover from said Marks the sum of \$638.71, and, a writ of attachment having been duly issued in said cause, the same was forwarded to Hanley, as sheriff of said county, for service, and was by him levied on said stock of goods as the property of Marks. Afterwards the complaint in this action was filed by the appellee, she claiming to have been the owner of said property. The suit was brought for the purpose of recovering from appellants the value of the stock of goods so seized by the sheriff, the same having been, in the mean time, sold to satisfy the judgment rendered in the attachment suit. To this complaint answers were filed by the appellants setting up the claim that the property, at the time the same was levied upon and taken, was in truth and in fact the property of Marks; and that the same was so seized and taken under and by virtue of the writ of attachment issued in the suit against him; that the pretended transfer of said goods by Marks to appellee was fraudulent, and was made for the purpose of hindering, delaying, and defrauding the creditors of said Marks, particularly these appellants, to-wit, Butler Bros. The cause was tried to a jury, and a verdict returned in favor of appellee for \$1,200. A motion for a new trial was overruled by the court; and appellee, having remitted the sum of \$200 from the amount of the verdict rendered by the

jury, judgment was entered in her favor for \$1,000, from which judgment this appeal is prosecuted.

*J. H. Richards, B. F. Montgomery, and Patterson & Thomas, for appellants. Harvey Riddell and Sam W. Jones, for appellee.*

HAYT, J., (after stating the facts as above.) The first error assigned relates to the admission in evidence of a certain exhibit. This exhibit, which was admitted over the objection of appellant, appears to be a part of a promissory note signed by Marks. It was shown to be in Marks' handwriting, and was admitted, in connection with the testimony of appellee, solely for the purpose of showing that there had been a series of business dealings between Marks and herself. We think the testimony competent in view of the nature of the issues. Appellee's title was attacked on the ground of fraud, and for failure of consideration. It was proper, under the circumstances, for appellee to show that she had given a good consideration for the property, and the portion of the note introduced was competent in corroboration of the testimony upon this point. Appellee testified that Marks had been her debtor for some time prior to the purchase by her of the property in controversy; that to evidence said indebtedness he had executed to her several promissory notes, which were surrendered up to Marks at the time of the purchase of the stock of goods from him as a part of the purchase price, and by him torn up; that she had afterwards picked up one of the pieces containing a portion of one of said notes, and that this was the piece.

When the witness Porges was on the stand the appellee propounded to him this question: "What is the value of these goods?" The witness was allowed to answer the question against the appellants' objection, and the action of the court in permitting such answer is made the basis of the second assignment of error. It is contended here that this testimony was improperly admitted, for the reason that no sufficient foundation was laid to warrant the witness to give an opinion upon the question of value. It does not appear that this objection was made in the court below, at least not in its present form, and for this reason it must be denied. If the specific objection had been made at the trial, we doubt not the competency of the witness would have been more fully established. We think, however, sufficient appears to show that the witness was qualified to testify as to the value of the property in controversy. In answer to preliminary questions, the witness stated that he had been engaged in the merchandising business in the neighboring town of Dillon for six years; that he attended the sheriff's sale, and purchased the entire stock in controversy. He further said that he estimated the value upon the basis of first cost, freight, etc. We think the testimony was properly admitted.

The third assignment of error is the same as the second, and need not be separately considered.

The fourth relates to the introduction in



evidence of the bill of sale for the goods in controversy given by Marks to the appellee, and is abandoned in this court.

The fifth relates to the introduction in evidence of a certain bill for merchandise purchased by appellee after she took charge of the Marks stock. The bill appears to be in form of a monthly statement, such as it is usual for wholesale merchants to send out to their customers at the end of each month. We think the testimony was properly admitted. The real controversy in the case is upon the sufficiency of the change of possession from Marks to appellee. The fact that appellee was continually replenishing the stock while conducting the business in her own name was a proper circumstance for the consideration of the jury. It, perhaps, should be given but slight weight, but the question here turns upon its admissibility, and not upon the weight to be accorded it.

The remaining assignment of error relates to the instructions given by the court to the jury. It is not necessary to consider these instructions in detail. It is sufficient to say that they fully and accurately state the law applicable to the facts as presented, as the same has been declared in repeated decisions of the court. *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 528, 4 Pac. Rep. 966; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. Rep. 809.

The question upon the sufficiency of the change of possession was fairly submitted to the jury, and decided against appellants. It is in evidence that at the time of the sale she took possession of the property, locked up the store-room containing the goods, and retained the key until the levy of the attachment writ; that, between the time of the purchase by her and the levy, the store remained closed the greater part of the time; that when purchasers came for goods she went from her place of business opposite to the Marks store, and there waited upon them; that she replenished the stock as occasion required, with goods purchased by her; that Marks did not, after the sale, exercise any control or supervision over the business, although at times, when requested, he came to the store for the purpose of pointing out certain goods with which appellee was not familiar. To overthrow the testimony, a number of witnesses living in the neighborhood were called by appellant, and testified that they had not noticed any change in possession, but, upon further examination, the means of information of these witnesses was shown to be very meager, and the testimony correspondingly weakened. Under these circumstances, the finding of the jury in appellee's favor upon the question of change of possession cannot be disturbed.

Finally, the judgment is challenged as being excessive. The opinion of the witnesses varied materially as to the value of the goods. The jury, in the verdict, placed the value at \$1,200, the price which, according to the testimony, appellee paid for the property. And it is in evidence that the goods were actually worth this amount, although some witnesses placed the value lower. Judgment was

finally entered for \$1,000 and costs. We cannot say, under the circumstances, that the same is excessive. The judgment will be affirmed.

(15 Colo. 220)

KESTER *et al.* *v.* JEWELL.

(*Supreme Court of Colorado*. Nov. 19, 1890.)

APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.

Upon appeal from a decree in an equity suit to quiet title, the material question was as to the validity of certain attachment proceedings under which the property in question was sold. *Held*, that in the absence of a transcript of the record in such proceedings, the appellate court would adopt as correct the conclusions of the trial judge as to their regularity.

Commissioners' decision. Appeal from district court, Pitkin county.

*D. C. McDevitt*, for appellants. *W. D. Cooley and Rucker & Scott*, for appellee.

REED, C. This was a suit in the nature of a proceeding in equity, brought by appellee (plaintiff below) against appellants under section 255, c. 22, of the Civil Code, which is: "An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest." It appears from the record that prior to April 21, 1886, one Mattie B. Jansen was the owner of the undivided one-half of lot K., in block 81, in the city of Aspen; that appellant Kester was the owner of the other half; that Jansen was a resident of Topeka, in the state of Kansas; that on the 21st day of April, 1886, Jansen, by her deed, conveyed her interest to appellee; that, on the same date, the deed was deposited with the Wells-Fargo Express Company to be transmitted to the recorder of Pitkin county for record; that it was received by that officer and filed for record on the 11th day of May; that on May 1st, Kester, claiming an indebtedness from Jansen to himself, caused a summons to be issued, which was returned on May 3d, "Defendant not found." On the 3d of May he sued out an attachment, which was levied upon the half interest in the property as belonging to Jansen. On the 5th of May a complaint was filed. On June 30th a default was taken for want of an answer, and on July 12th a judgment was rendered against Jansen for \$750.66, and costs. A special execution was issued, which was by the sheriff returned on the 16th day of August, with an indorsement of sale of the property to Webber, (appellant.) On the 30th day of August, Jansen filed a motion to vacate all proceedings on the ground that the summons was defective, and that there had been no proper service. What disposition was made of the motion, if any, does not appear, but it is said: "It appearing to the court that Jansen was a non-resident, affidavit was made, and an order for the publication of the summons was made, September 10th." On September 31st, plaintiff moved to set aside the judgment previously rendered for him, and for an *alias* summons to be issued, and

that the attachment theretofore levied be allowed to stand. What disposition was made of this application does not appear. It is afterwards stated that an *alias* summons, an *alias* writ of attachment, and copy of the complaint, were served on Jansen in Shawnee county, in the state of Kansas, by a deputy-sheriff of that county, on September 20th. On November 22d, Jansen appeared specially and moved to dismiss the action and dissolve the attachment, for the reasons—*First*, that the suit had not been diligently prosecuted; *second*, that the writ of attachment was issued before the summons. What was done with this motion does not appear, but, from the proceeding that followed, we conclude that it must have been overruled. On the 24th of May, following, (1887,) Webber (appellant) moved the court to set aside the sale of the property previously made; that the satisfaction of judgment be canceled; and that he, as the purchaser of the property, be allowed to prosecute the suit in the name of the plaintiff for his own benefit. Afterwards, but of what date is not shown in the record, another special execution was issued to sell the same property by virtue of the levy of the attachment of May 3, 1886, which was returned, showing another sale of the same property to Webber. These proceedings upon the trial of the former case are so complicated, mixed, and multiform, that a recital of them in their order seems necessary, not to a proper understanding of the case, for that we do not pretend to have, but to show in what manner and through what proceedings the pretended title of Webber to the property was acquired, which appellee in this suit seeks to set aside as a cloud upon his title.

The plaintiff upon the trial of this cause introduced oral evidence of his possession as a tenant in common with Kester to show himself entitled to maintain the suit under the Code; also put in evidence the deed from Jansen. No question is made as to the *bona fides* of the transaction between Jansen and appellee, nor in regard to the validity of the deed. The only important question being whether there was a valid lien by the levy of the attachment before the filing of the deed for record. Appellants put in evidence, it is said, as exhibits, copies of the various papers and proceedings making the record in the former case against Jansen, under which the supposed title of Webber accrued. No copies are furnished us, but the clerk in making up the record states what, in his opinion, each one of the respective exhibits was supposed to be. The case was tried to the court, and the learned judge, after taking the case under advisement, found "that at the time of the issuance of said writ there was no valid summons issued in said cause, nor an action commenced, as required by law; that the said Mattie B. Jansen was, at the time of the attempted levy of said attachment, a non-resident of the state of Colorado, and that steps and proceedings required to be taken by statute to acquire jurisdiction over such non-resident were not taken; that the court never had jurisdiction of the said cause, or over the property or person of

the said Mattie B. Jansen, and the said judgment in said cause, and the sale thereunder, appear to the court to be wholly void, and of no effect, and that all the material allegations of the complaint are sustained by evidence, competent and material, and that the equities are with the plaintiff;" and entered a decree in accordance with the prayer of the complaint. There being no transcript of the record and proceedings in the case of Kester against Jansen before us, and only the conclusions of the clerk in regard to it, we have no *data* by which we can intelligently pass upon the validity of those proceedings. They seem to have been so numerous and contradictory on the part of the plaintiff in that action as to have suggested doubts in regard to its regularity in the minds of his counsel. It appears that the case of Kester against Jansen, in the county court, was tried before the same judge as this case, he having been elected to the district bench after that trial. He, having a transcript of the record and proceedings, certainly had opportunities for determining whether the proceedings in the former case had been regular or otherwise, which, as shown, we have not; and, in the absence of sufficient *data* for a review, we must adopt his conclusions as correct. We advise that the judgment and decree be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

(15 Colo. 244)

GALLOWAY *et al.* v. CARLISLE *et al.*

(Supreme Court of Colorado. Nov. 19, 1890.)

APPEAL—REVIEW—OBJECTIONS WAIVED.

1. Where there is no transcript of the evidence, it will be presumed that the judgment was warranted by it.

2. Where, after a demurrer is overruled, defendant answers, and no exception is taken to the judgment on demurrer, any error therein is waived.

Appeal from district court, La Plata county.

James Hoffmire and H. Garbanati, for appellants. Russell & McCloskey, for appellees.

REED, C. Appellant Galloway brought a suit in replevin before a justice of the peace. Upon a hearing, the suit was dismissed. This suit was brought upon the bond in replevin filed in that suit, for alleged damages. A demurrer was filed to the complaint, containing several supposed special grounds. The demurrer was overruled, and appellants answered at great length. Exceptions were filed to the answer, which were sustained as to part, which was ordered stricken out. A trial was had to the court, without a jury, resulting in a finding for appellees in the sum of \$100. Motion for a new trial was overruled, and judgment for that amount entered. No exception was taken to the judgment. This appeal was taken under the act of 1885. There was no transcript of the evidence in the abstract, and it

is presumed that the judgment was warranted by it. No exception having been taken to the judgment, we would not be required to review it, even if we had the evidence. The correctness of the judgment under the evidence and pleadings is not questioned in argument, nor does it seem to have been the intention to appeal from the final judgment, but from the interlocutory judgments upon the demurrer, and the striking out of a part of the answer. Counsel for appellants say: "For a reversal of the judgment, appellants rely on the first, second, third, fourth, and sixth grounds of their demurrer;" also upon the ruling of the court in striking out part of the answer. No exception appears of record to the judgment of the court upon the demurrer, and counsel answered over, and went to trial upon the issues made. The want of an exception is fatal as to the judgment upon the first, second, third, and sixth grounds of demurrer. The fourth ground was that the complaint did not state facts sufficient to constitute a cause of action. On examination of the allegations of the complaint as contained in the abstract, we think them sufficient, and the judgment of the court in overruling the demurrer correct. No exception appears to have been taken to the judgment of the court in striking out part of the answer, but we have examined the answer, and think the judgment was warranted. The matter stricken out was irrelevant, and presented no defense. We advise that the judgment be affirmed.

RICHMOND and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is affirmed.

HAYT, J., having presided at the trial below, did not participate in this decision.

(15 Colo. 492)

#### HUTCHINSON v. McLAUGHLIN.

(Supreme Court of Colorado. Nov. 7, 1890.)

APPEAL—Final Order—Eminent Domain—INTERVENTION—INFANCY.

1. In condemnation proceedings, one H. was allowed to file a petition alleging that before the proceedings she was owner of one of the lots in question, and conveyed the same to defendant's grantor; that at the time of the conveyance she was a minor; and that she had elected to disaffirm the conveyance; and praying that the damages assessed for such lot be paid to her, less the consideration received by her. The court adjudged that the entire compensation be paid to defendant. Held, that such judgment was, as to H., a final judgment from which a writ of error would lie.

2. Under the Colorado eminent domain act, (section 6,) providing that the commissioners shall fix the compensation to be paid to the owner and all persons interested in the land taken, and (section 5) admitting interpleaders, it was error on the part of the court to ignore her petition.

3. The filing of her petition was an election on the part of H. to avoid the deed.

Error to district court, Pueblo county.

The Denver & Santa Fe Railroad Company instituted, in the Pueblo county district court, condemnation proceedings for the purpose of acquiring title to certain

real property situate in the city of Pueblo, desired by the company for depot purposes. Included in the property sought to be condemned were two lots, to-wit, lots 15 and 16, block 19, State addition to Pueblo, the title in fee to which was shown by the land records to be in C. M. McLaughlin, defendant in error. Pending such condemnation suit, and prior to the report of the commissioners ascertaining and assessing the damages for the lots in question, plaintiff in error, by Aaron Hutchinson, her next friend, sought and obtained leave to file her petition in intervention, and thereby became a party defendant to said condemnation suit, over the objection made thereto by defendant in error. In said petition, it is alleged, in substance, that intervenor, prior to the commencement of said condemnation suit, was the owner of one of said lots, to-wit, lot 15; and, in pursuance of a sale for \$350, conveyed, by a general warranty deed, the said lot to one Leo Breen, who shortly thereafter conveyed the said premises by quitclaim deed to defendant in error; that intervenor was, at the time of said conveyance, and is now, a minor, having been born, as alleged in her petition, September 22, 1870. The petition also alleges other facts, which are not, however, material to the case at bar. The petition further recited that she had elected to disaffirm and avoid the conveyance made to said Breen, and prays that she be permitted to intervene in said condemnation suit, and that the damages assessed be paid to her, less the consideration money received upon the said sale to Breen. By the report of the commissioners, the value of said lot 15 was assessed at \$1,975, which report was confirmed by the court, January 6, 1888. On the 7th day of January, 1888, defendant in error, by her attorney, appeared in court, and moved for an order directing the clerk to pay over the compensation assessed for both lots to defendant in error. The motion was resisted by intervenor, who, through her attorney, moved that the \$1,975, less \$350, consideration received upon sale of said lot 15, be paid over to her, or to her legally appointed guardian. The court ordered the entire compensation assessed for both lots to be paid to defendant in error. The only error assigned is as follows: "The court erred in not ordering compensation assessed on lot 15 to be paid to her, or her legally appointed guardian, or in not ordering the clerk to hold said compensation pending plaintiff in error's minority, or in not making some other similar appropriate order to protect intervenor's interest in said lot."

Fred Betts and A. W. Arrington, for plaintiff in error. John M. Waldron and John W. Sleeper, for defendant in error.

HAYT, J., (after stating the facts as above.) Two questions of practice have been raised by counsel which will be considered *in limine*. The first of such preliminary questions is predicated upon the claim that the judgment here sought to be reviewed was pronounced subsequent to the entry of final judgment in the case. In support of this claim, the case of Rail-

road Co. v. Jackson, 6 Colo. 340, is cited. In that case it was claimed by counsel that the petitioner must first pay or deposit the amount of the award before it could be allowed an appeal. The court, however, decided against such claim, and held that such a construction would practically deprive the petitioner of any benefit from his appeal, or writ of error, or prevent such relief altogether. The rights of third parties were not involved, and the court held that in such cases, when the commissioners had filed with the clerk their certificate of "ascertainment and assessment," and a motion to vacate the same had been overruled, this was such a final determination as would entitle the petitioner to his appeal, or writ of error. In the case at bar no fault was found with the award. All parties were willing to have the same confirmed. And plaintiff in error is not now complaining because of such confirmation. She accepted the amount as fixed by the commissioners as representing the true value of the property, claiming only the right to share in the distribution thereof. By the judgment of January 7th, this claim was determined against her. Then, for the first time, she had cause to complain. To say that she cannot prosecute a writ of error to such judgment would be to entirely deprive her of the benefit of the review provided by statute, a conclusion we cannot indorse. In our opinion, the judgment of January 7th, by which the entire fund was awarded to defendant in error, was, as to plaintiff in error, a final judgment, to which a writ of error will lie. The court below, against objection, and after argument, permitted the petition of intervention to be filed. No further order in terms applying to this petition appears to have been made. We infer, however, from the record that the court, upon reflection, concluded that the petition was insufficient, and consequently ignored the same. Plaintiff in error claims that it was incumbent upon defendant in error to support her plea by evidence, and, as no such evidence was offered, he says the petition was properly disregarded. The practice under the eminent domain statute is not well defined. Provision, however, is made therein for the filing of a cross-petition in the nature of an interplea. It is further provided that, when such interplea has been filed, the rights of the party interpleading should be fully considered and determined; and the court is empowered, by section 5 of the act, to make such rule or order in relation to the interplea as may be reasonable and proper. Under the latter provision, the court below, either at the time of or after allowing the petition to be filed, might have entered a rule requiring the original parties to the action to plead thereto. This, however, was not done. The court should have taken some action for her protection, if the petition shows that she was entitled to any relief whatever. It is the policy of the law to fully protect the rights of minors, and this may be done even if the guardian or *prochein ami* does not properly claim such rights, or has even failed to claim them at all. So it has been held that, when an infant

plaintiff neglects to reply where a pleading in reply is necessary, this will not be taken as an admission of the facts alleged in the answer, as in the case of an adult, but all the facts must be established by competent evidence. Tyler, Inf. § 139; Legard v. Sheffield, 2 Atk. 377; Claxton v. Claxton, 56 Mich. 557, 23 N. W. Rep. 310; Gilmore v. Gilmore, 109 Ill. 277.

It is claimed, however, that a minor who has executed and delivered a deed to real estate owned by her cannot thereafter, and during the continuance of her minority, intervene in a condemnation suit brought to condemn the same tract, and to so far control such proceedings as either to compel the payment of the award to her, instead of her grantee, or to tie up the fund in the hands of the court until she attains her majority. Counsel says that, whatever doubts may have been at one time entertained in reference to the deed of a minor, it is now well settled that title may be conveyed by such deed. It is not absolutely void, but voidable only, and, until revoked in a manner and form prescribed by law, the title to the purchaser is as complete as though the grantor was an adult. It is further said that the conveyance cannot be avoided in any event until the infant arrives at full age; and therefore it is claimed that plaintiff in error cannot intervene during her minority. Should the correctness of the propositions of law announced be conceded, the deductions drawn by counsel do not, we think, necessarily follow. It is the policy of the law to settle once for all, so far as possible, in the condemnation proceedings the amount of damages resulting from the taking. The statute expressly provides that the commissioners shall fix the compensation to be paid, not only to the owners, but to all parties interested in the lands taken, as well as all damages accruing to such owners or parties interested in consequence of the condemnation of the same. See Eminent Domain Act, § 6. In Crane v. City of Elizabeth, 36 N. J. Eq. 339, the court had under consideration a statute, if anything, less comprehensive than the statute of this state, in that it required compensation to be made only to the "owner or owners of lands and real estate taken for the improvement;" and yet in that case it was decided "that the compensation is to include the value of all the interests burdened by the public easement, and is to be paid to the owner of the land if no other claimant intervenes, and, if in any such case such owner ought not, in equity, to receive the whole, timely resort must be had to the court of chancery, which will see to the equitable distribution of the fund." It was said, in the course of the opinion, that the proceedings were in the nature of a proceeding *in rem*,—a taking, not of the rights of designated persons, but of the thing itself; and, if in any case the designated owner of the land is not entitled to receive the fund, equity will, at the instance of any interested complainant, direct its proper distribution. Under our statute, we think the relief may be granted in the original action upon a proper showing. In no other way can

the provision requiring the rights of the interpleader to be fully considered and determined be carried out. In the case at bar, petitioner did intervene in the court below, and in her petition shows that she has an interest which ought to be protected. The statute allows the interests of minors to be taken by virtue of the proceedings. The fact that the record title was in plaintiff in error may have relieved the railroad company from making plaintiff in error a party defendant in the first instance, but, she having voluntarily appeared, the action of the court below entirely ignoring her claim cannot be sustained. In the case of *Chandler v. Aqueduct Corp.*, 125 Mass. 544, relied upon by defendant in error, one Ward granted the Aqueduct Corporation the privilege of laying logs and wooden pipes on his land, in consideration whereof, and for five dollars in money paid by Ward, the company, in turn, deeded to him certain other lands, "to have and to hold the same to the said Ward, his heirs and assigns, as long as said corporation shall keep pipes in his land as aforesaid, and no longer." Afterwards the title acquired by Ward passed to Chandler. Thereafter the corporation instituted proceedings for the purpose of having the same land condemned for its uses, and, upon the trial, claimed that by the Ward deed, which, as we have seen, was a part of Chandler's claim of title, only a base fee was conveyed, and that the company had a right to rely upon this fact in reduction of damages. The court, however, decided against such claim, upon the ground that the possibility of such interest was too remote and contingent to be the subject of an estimate of damages by a jury, and could not be allowed. It was further held that the owners of the fee had the right to recover the entire value of the land, even if a part of it was held by them under the Ward deed, and they had only a base or determinable fee in it. So in this case, as we understand counsel, the claim is that, notwithstanding the voidability of the deed made by intervenor, the grantee is entitled to full compensation for the land condemned. This would have the effect of entirely cutting off the right of plaintiff in error to revoke the deed made during her minority, a result we cannot entertain. Although it may be that a minor cannot avoid his deed during the continuance of his minority, he may, nevertheless, enter upon the deeded premises, and receive the rents and profits thereof until he arrives at an age when he has the capacity to affirm or disaffirm the deed at his election, or the infant may, by his guardian or next friend procure the appointment of a receiver for the purpose of collecting the rents and profits of the premises. *Mathewson v. Johnson*, Hoff. Ch. 560; *Boyl v. Mix*, 17 Wend. 132; 1 Washb. Real Prop. \*306; *Edgerton v. Wolf*, 6 Gray, 453; *Chandler v. Simmons*, 97 Mass. 508.

The right of entry was a present existing right in petitioner at the time the petition in intervention was filed. In this respect the case is dissimilar from the case of *Chandler v. Aqueduct Corp.*, supra. The filing of the petition should have

been taken as an election on the part of plaintiff in error to assert such right. And, under the statute, it should have been "fully considered and determined," and it was error to enter final judgment awarding the fund to the defendant, while the plea of intervenor was undisposed of. As we have seen, courts should be vigilant in protecting the rights of minors; and, if the court below had been of the opinion that it was necessary for plaintiff in error to resort to an equitable action to enforce her rights, it should have preserved the fund until her rights could have been adjudicated in such action. But we cannot think such an action necessary. Ample power seems to have been given the court in the condemnation proceedings, and the fact that she was still a minor at the time of the trial did not justify the court in passing over her petition in silence, and awarding the entire fund to defendant in error. The judgment directing the fund to be paid to defendant in error, is accordingly reversed, with directions to the court below to proceed in accordance with the views expressed in the opinion. Under our statute, plaintiff in error reached her majority a few months after the trial in the district court. *Jackson v. Allen*, 4 Colo. 263. The disabilities under which she was laboring at the time of the trial no longer existing, we apprehend the court below will find no difficulty in fully determining the rights of the parties. Reversed.

(15 Colo. 103)

ROLLINS *et al.* v. BOARD OF COMMISSIONERS.

(Supreme Court of Colorado. May 9, 1890.)

DECLARATIONS AND ADMISSIONS—PAROL EVIDENCE—CONSPIRACY—TRIAL BY COURT—ULTRA VIRES—APPEAL.

1. Where public officials are charged in a civil action with a fraudulent conspiracy against the rights and interests of the people, the court is justifiable in its discretion in allowing one of the defendants to be interrogated by leading questions, and even cross-examined by the party calling him; such witness being a party to the record, his previous declarations relating to matters in issue, if otherwise competent, may be proved against him independent of the question whether a party may impeach his own witness.

2. The rule that contemporaneous parol evidence is not admissible to contradict or vary the terms of a valid written instrument is limited in its application to the language of the instrument, and does not exclude the light of extrinsic circumstances; and the instrument itself, being attacked on the ground of fraud, is not, while that issue is undetermined, the best evidence of the actual contract.

3. The declarations of a defendant are not admissible in evidence against his co-defendants under a charge of conspiracy until there be *prima facie* proof of the existence of the alleged conspiracy; but a concert of action between the defendants in the unlawful enterprise as charged being shown to the satisfaction of the trial court, the acts and declarations of each conspirator in furtherance of the unlawful object may be given in evidence against all the co-conspirators.

4. When the trial is to the court, it is presumed that the court is governed by proper rules of law in considering the testimony, unless by asking for a declaration of the law in the nature of an instruction the contrary is made to appear.

5. Parties having obtained money belonging to the county cannot justify their use of it by pleading that they acted by the authority of the county commissioners, and then refuse to account

for it on the ground that the commissioners could not lawfully give them such authority. A contract entered into by the agents of a corporation, without authority, may not be enforced against the corporation so long as the contract remains executory; nevertheless, the other contracting party, being *sui juris*, and having reaped the benefit of the execution of such contract without interference, cannot plead the agents' want of authority to enter into the contract as a defense to relieve himself from accounting to the corporation *ex aequo et bono*.

6. Where cases have been decided upon oral testimony in the trial court, it is not the province of this court upon appeal to decide mere questions of fact, but only questions of law, nor to determine the result of the evidence, but only its legal tendency. Where there is conflicting evidence, this court will not undertake to pass upon the credibility of the witnesses, nor to consider and weigh the evidence. If, upon a review of the record, it appears that the case was fairly tried, that the rules of evidence were substantially observed, that the evidence tends to sustain the findings, and that the findings support the complaint, this court cannot properly disturb the judgment.

(Syllabus by the Court.)

Appeal from district court, Pueblo county.

Teller & Orahood and G. Q. Richmond, for appellants. John M. Waldron and John W. Sleeper, for appellees.

ELLIOTT, J. This was an action by the board of commissioners of Pueblo county, plaintiffs, against Edward W. Rollins, Frank C. Young, Ludwig Kramer, and John S. Thompson, defendants. Kramer and Thompson were former commissioners of the county, and Rollins and Young were brokers, through whom certain United States government bonds belonging to the county were disposed of, and from whom certain railway aid bonds outstanding against the county were obtained by the county for cancellation. The complaint contains two causes of action: The first is an ordinary count for money had and received by defendants to the use of plaintiffs; the second charges that Kramer and Thompson entered into a conspiracy with Rollins and Young to defraud the county in the disposal of the government bonds and the purchase of the railway bonds. Upon issues joined, the cause was by consent of parties tried by the court without a jury. The finding of the court was in favor of all the defendants upon the first cause of action. Upon the second cause of action, the finding was also in favor of the defendants Kramer and Thompson, but was against the defendants Rollins and Young. Judgment was rendered according to the findings. The defendants Rollins and Young bring this appeal, assigning numerous errors. The plaintiffs also appeal and assign cross-errors, as provided by the act of 1885. Under plaintiffs' assignment the review by this court is limited to the inquiry whether or not the evidence tends to sustain the findings of the court. After careful consideration of the evidence, and making due allowance for the superior advantages enjoyed by the trial court in hearing the oral testimony, and observing the living witnesses, we cannot say there was any fraudulent conduct on the part of the defendants Kramer and Thompson,

or that either of them appropriated any of the county funds to their own use, or that they intentionally permitted or suffered their co-defendants so to do. Therefore, the judgment, as to the defendants Kramer and Thompson, is affirmed.

Before considering the assignment of errors interposed by the defendants Rollins and Young, it will be convenient to notice further the nature and effect of the findings and judgment of the court: *First*. The findings practically eliminate from the case all charges of conspiracy against the several defendants, and exonerate Kramer and Thompson from the charge of having appropriated any of the county funds to their own use. *Second*. The findings, however, show that Rollins and Young were the agents for Pueblo county in the purchase of the railway bonds, and that, in their final accounting concerning the same, they overcharged the county; and, to the extent of such overcharge, judgment is rendered against them. It is manifest from the evidence that the court based its findings concerning the overcharge, not on any conspiracy or collusion between the several defendants in the accounting, but on the ground that the terms of the contract were not construed as favorably to the county as the law requires under the circumstances. On the part of Rollins and Young it is claimed that they were not agents of the county in the purchase of the railway bonds, but that they were acting under a contract with the county to furnish a certain amount of the bonds at a stipulated price, and that they were entitled to receive such stipulated price without regard to what they may have paid for the bonds. In support of this claim, they rely upon a certain letter received by them from Kramer and Thompson as follows: "Pueblo, Colorado, Nov. 30, 1881. Mess. Rollins & Young, Denver, Colorado: You are hereby authorized and directed to buy for the county commissioners of Pueblo county, one hundred thousand dollars Pueblo county railroad aid bonds, at ninety per cent. of face and accrued interest, and sixty thousand dollars at ninety-five per cent. of face and accrued interest, Denver delivery. If, by the purchase of these bonds, the dismissal of the Stebbins suit is accomplished, we will pay you two per cent. commission on the entire purchase, in addition to the above figures. J. S. THOMPSON, LUDWIG KRAMER, Commissioners of Pueblo County." The special assignments of error in behalf of defendants are to the effect that the court erred in admitting the testimony of certain witnesses as to what Kramer and Thompson, or one of them, had told said witnesses respectively in regard to their contract with Rollins and Young; and also in admitting statements of the co-defendants in the case when it was shown that there was no conspiracy between the said defendants. The reasons stated in support of the objections to such testimony on the trial were to the effect that the letter of November 30, 1881, as above set forth, was the best evidence of the terms of the contract, and that what the defendants had said about the terms of the contract

was immaterial and hearsay; that there being no proof of the alleged conspiracy the admissions of one defendant could not be interposed against another. The defendant Thompson, being sworn and examined as a witness for plaintiff, was asked if he had not made certain statements, at certain times and places, in the presence of certain parties, as to the terms of the contract with the defendants Rollins and Young, different from what he had already testified and contrary to the terms as claimed by defendants. This question was objected to on the ground that the witness had already sworn that there was no such contract as the question implied, and that plaintiff should not be permitted to impeach his own witness; that whatever admission he might have made against his co-defendants Rollins and Young, there was no proof of a conspiracy, and that the admissions of parties in the situation of defendants are not competent as evidence one against the other, inasmuch as the actions of one are not binding upon the other. The objection was overruled, and exception taken. The answer of the witness not being satisfactory to plaintiffs, they were permitted, against the objections of defendants, to show his declarations by other witnesses in respect to the matters inquired about. Exceptions were duly reserved.

In determining whether or not the testimony objected to was admissible, the character and terms of the instrument relied on by defendants as evidence of their contract with the commissioners of the county must be considered; also the nature of the action, the relation of the parties thereto, and the *status* of the proof at the time of the objection, must be borne in mind. The instrument does not purport to be a complete contract. Upon its face it is a mere letter of authority containing promise of compensation in a certain contingency. It is unilateral in form and substance, binding only to the extent of its execution, and to some extent difficult of comprehension without the aid of external evidence. Hence, in order to arrive at a construction which will give effect to the intention of the parties in executing the same, not only its language, but all extrinsic circumstances relating to the subject-matter thereof, and to the situation and condition of the parties therein mentioned, as well as the conduct and dealings of the parties in reference thereto, were proper subjects of investigation. Thompson and Kramer were parties defendant. The complaint charged them with conspiring with their co-defendants Rollins and Young to defraud the county. They had occupied positions of trust and confidence as the official agents of the county. The plaintiffs were their successors in office, and were complaining that defendants had been guilty of a fraudulent conspiracy against the rights and interests of their constituents,—the people. Under these circumstances, the most thorough investigation, and the largest latitude of inquiry consistent with the rules of evidence, and the discretion of the court, was allowable. It was a ju-

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icious exercise of such discretion to permit the witness Thompson to be interrogated by leading questions, and even cross-examined by the party calling him; and, as the witness was a party to the record, his declarations relating to the matters in issue, if otherwise competent, might be proved by other witnesses, independent of the question whether plaintiffs might impeach their own witness.

The evidence had disclosed dealings between the defendants covering a period of more than six months, and involving the disposal of government bonds belonging to the county amounting to more than a quarter of a million dollars, and the investment of the proceeds thereof in the purchase for cancellation of nearly \$200,000 of railway bonds against the county. These transactions between the defendants Kramer and Thompson, of the one part, and Rollins and Young, of the other, had been carried on with the utmost secrecy. The minutes of the proceedings by the commissioners in reference thereto had been privately kept in a separate book, other than the regular record, inaccessible to those not in the official confidence of the commissioners, with the view that nothing whatever of their bond transactions should be disclosed to the public. Correspondence between the defendants relating to these affairs was arranged to be carried on by means of cipher messages. It was also arranged that telegraphic dispatches should be sent by the commissioners to Rollins and Young in the name of a third party in Denver, so as not to attract attention at Pueblo; and secret meetings were arranged between the parties for a like purpose. It was at this stage of the trial, and after the admission of evidence showing the foregoing state of facts, that the court permitted the defendant Thompson and the other witnesses to be interrogated as above stated. We recognize the rule which excludes the admission of mere contemporaneous parol evidence to contradict or vary the terms of a valid written instrument. But the rule is limited in its application to the language of the instrument, and does not exclude the light of extrinsic circumstances. Moreover, in a case of this kind the rule does not have its usual application; the instrument itself being attacked on the ground of fraud could not, while that issue was undetermined, be considered the best evidence of the actual contract.

We also recognize the rule that the declarations of a defendant are not admissible in evidence against his co-defendants under a charge of conspiracy until there be *prima facie* proof of the existence of the alleged conspiracy. But a concert of action between the defendants in the unlawful enterprise as charged being shown to the satisfaction of the trial court, the acts and declarations of each conspirator in furtherance of the unlawful object may be given in evidence against all the co-conspirators. The trial judge evidently had this rule in mind when he ruled upon defendants' objections to the testimony, as follows: "You may introduce it [the evidence] at this time as against these two defendants, and it may be considered, if



necessary, as introduced against them all if it should become material." Under the circumstances the ruling was not erroneous. It is true, when the whole case had been heard, all the suspicious, and apparently damaging, circumstances against Kramer and Thompson were satisfactorily explained; and their manner of transacting the county business, as well as their mode of dealing with Rollins and Young, were shown not only not to have been fraudulent, but to have been dictated by business sagacity, and intended to subserve the financial interests of the county. It was developed by the trial that prior to 1881 the county was too poor to pay its railway bonds; payment of interest thereon had been refused, and the legality of the bonds had been denied by the county authorities. In consequence of this the bonds had become very much depreciated in the market. Some of the bondholders had brought suit against the county, and obtained judgment in their favor; and when the negotiations between the defendants commenced, that suit was pending on appeal in the United States supreme court, and an early decision was anticipated. With the year 1881, the finances of the county had materially improved; the assessed valuation of the property within its limits had more than doubled; and it had realized a large sum of money from the sale of its railway stock which was invested in the government securities heretofore mentioned. Under these circumstances, the defendants Thompson and Kramer, believing the county would ultimately be obliged to pay the railway bonds, resolved to secure as many of them as possible for cancellation while they were at a discount. To do this, they must act before the judgment against the county should be affirmed. To have met openly as a board of commissioners, and announced this policy by public resolution, or otherwise, would have been to defeat their object by causing the bonds to advance to par, and perhaps to a premium. Hence the special private record was kept, and great precautions were taken to keep secret their dealings with Rollins and Young in regard to the bond transactions. When at the close of the trial, the court by its findings exonerated the defendants Kramer and Thompson from the charge of conspiracy, and from all liability, we must presume that the court excluded from its consideration the testimony relating to their mere oral declarations about the terms of the contract with Rollins and Young, and that the finding as to the liability of the latter defendants was based upon other evidence. If defendants' counsel had desired, they might have submitted a request for a declaration of the law upon this point, in the nature of an instruction, notwithstanding the trial was to the court, and thus have preserved in the record the ruling of the court upon such legal question. Not having done this, the presumption is that the court was governed by proper rules of law in arriving at its findings of fact. 1 Greenl. Ev. §§, 110, 111, 275-286; 2 Whart. Ev. c. 12; Id. c. 13, § 1205; Mining Co. v. Tierney, 5 Colo. 82; Railway Co. v. Taylor, 6

Colo. 1; McPhee v. Young, 13 Colo. 80, 21 Pac. Rep. 1014; Babcock v. People, 13 Colo. 515, 22 Pac. Rep. 817, and cases there cited; Wilson v. Marlow, 66 Ill. 385.

It is further contended by defendants that the court erred in rendering any judgment whatever upon the complaint, since the evidence failed to sustain the first cause of action, or to show any conspiracy between the parties, as charged in the second. The second cause of action as pleaded, though containing charges of fraud and conspiracy against all the defendants, nevertheless charges, in substance, that Rollins and Young, as agents of the county, agreed to purchase the railway bonds at the lowest price for which they could be obtained in the market, and deliver the same to the county for cancellation at the purchase price for the compensation or commission of 2 per cent. on the amount of the purchase; but that in their settlement with the county they made overcharges on the purchase price in a sum greatly exceeding the amount found by the court. Hence, excluding the first cause of action, and the charges of fraud and conspiracy in the second, which may be regarded as surplusage, and the complaint still contains sufficient averments in substance upon which to base the findings and judgment against the defendants Rollins and Young.

The remaining assignments of error interposed by defendants may be considered together. In substance, like the assignments in behalf of plaintiffs, they are general, merely calling in question the sufficiency of the evidence under the law to sustain the findings of the court. The general character of the letter of November 30, 1881, under which Rollins and Young claim to have acted in the purchase and delivery of the railway bonds, has already been noticed. It now becomes necessary to make a further and closer examination of the instrument, and first of its language. It will be observed that, at the commencement the letter, both in form and express terms, is an authority and direction to the defendants Rollins and Young to buy railway bonds "for the county commissioners of Pueblo county." This language certainly does not indicate a contract, nor an offer by the commissioners to buy bonds of or from said defendants; it denotes rather an employment of them to act for and in behalf of the county in the purchase of bonds. The next paragraph of the letter contemplates the dismissal of a certain lawsuit through the agency of Rollins and Young, and seems to make their "commission" as agents dependent upon securing such dismissal. The words at the close of the instrument, "in addition to the above figures," are the only ones which occasion serious trouble in the construction. These words unquestionably tend to show that, for certain bonds at least, Rollins and Young were to receive the price stated in the letter. Excluding mere parol statements and the testimony of parties as to their understanding of the agreement, which, for the purpose of construing the writing, are not regarded as competent, and looking to its subject-matter in the

light of the extrinsic circumstances and the actual dealings of the parties in carrying on the business mentioned, as disclosed by their correspondence, and other competent evidence, and what do we find? The subject-matter has been already pretty fully explained. The Stebbins suit was one brought against the county on account of non-payment of some of the railway bonds. This suit was controlled by Rollins, one of the defendants. In order to carry out the policy of securing the railway bonds at a discount, it was necessary that an appearance of resistance to this suit should be kept up as a means of preventing a rise in the market price of the railway bonds while they were being purchased, and so, though apparently a hostile suit, it was really held by Rollins for the benefit of the county. The whole claim in suit was ultimately discharged by payment at par, though, by request of the commissioners, it was not paid till after the bond transactions were closed. That it was the commissioners, and not Rollins and Young, who were mainly interested in having the suit remain pending during this period, is apparent from the fact that they voluntarily paid interest on the claim for a long period of time, while the money for its payment was in the hands of those who were to procure its dismissal. If Rollins and Young were mainly interested in keeping the suit pending as a means of preventing a rise in the railway bond market, it is improbable that the commissioners would have consented that the interest should thus accumulate against the county. The evidence shows that Rollins and Young owned or controlled about \$60,000 of the railway bonds outstanding against the county at the time of entering into the contract with Kramer and Thompson. These were to be transferred to the county as a part of the transaction. Evidently they were not employed to purchase for the county the bonds which they already owned; for they could not be agents to purchase the very bonds which they had to sell. Therefore, as to their own bonds, their contention is correct, that it was immaterial what they had paid for them, and what profit they made by disposing of them to the commissioners; and so the trial court held. Thus we have an explanation of so much of the language of the letter of November 30, which seems to indicate that the relation between the parties was that of vendor and vendee, instead of principal and agent. It is a reasonable inference that "ninety-five per cent. of face and accrued interest" was the amount exacted by Rollins and Young for their own bonds; also, that they were to have 2 per cent. commission on the entire purchase, thus securing 97 per cent. for their own bonds, provided they should control the dismissal of the Stebbins suit as the commissioners desired. But as the county finally paid the whole claim in controversy in that suit, principal, interest, and costs, it is quite plain that the commission of \$3,200 must rest upon some more substantial consideration than the mere services of defendants in accomplishing the dismissal of the suit. As before stated, the letter of November 30th is in-

complete in itself. It may, therefore, be supplemented by other contemporaneous writings passing between the parties in the transaction of business under its provisions. The following letters and receipts by Rollins and Young were introduced in evidence. They tend strongly to confirm the theory of plaintiffs that, as to the railway bonds purchased by Rollins and Young from third parties in pursuance of their agreement, they were acting as the agents of the county; that they relied upon the county to provide the funds with which to make the purchases; and also that the county was interested in the prices which they should pay. Letter of December 14, 1881, as follows: "Hon. J. S. Thompson, Chairman Board Co. Commissioners, Pueblo, Colorado.—Dear Sir: We inclose statement of sale of \$60,000 U. S. 4 per cent. reg. bonds made to Fisk & Hatch by A. Wilkins, No. 46 Exchange Place, New York, for William J. Quinlan, Junr., cashier Chemical Nat. Bank. The bonds being sold for account, Rollins and Young, Denver, Colorado, as per order of county of Pueblo, Colo. Net proceeds of same \$76,256.25, which amount we place to your credit on our books. Yours, truly, ROLLINS & YOUNG." Letter of April 1, 1882, reads as follows: "J. S. Thompson, Esq., Chairman C. C. Com.—Dear Sir: Since you were here we have taken in some \$4,000 coupons, \$4,000 bonds at \$1.07 to \$1.10 flat, \$20,000 suit bonds at 88 to 90, though the latter are not all delivered, but will be on Tuesday. This will clean us out of funds, and we shall have nothing to tackle Barth with. We think you had better send us by express, at once, about \$40,000 U. S. fours, or else have some one come up, and we can deliver everything we have in shape. We have not received copy of Poppleton assignment. Yours, truly, ROLLINS & YOUNG." Receipt offered and received, as follows: "Received, Pueblo, Colorado, April 5th, 1882, of the board of county commissioners of Pueblo county, Colorado, one United States registered four-per-cent bond of 1907, numbered 1,692, of the face value of fifty thousand (\$50,000) dollars, assigned for sale to the Chemical National Bank of the city of New York, by resolution of the said board of county commissioners, the proceeds of which said bond, when sold, are to be placed to our credit with the said Chemical National Bank, and also to be credited on our books to the county of Pueblo, we agreeing to furnish to the said county of Pueblo the original statement of sale of the aforesaid registered bond, as handed us by the said Chemical National Bank; the proceeds of said bond to be used by us in the purchase of certain bonds of Pueblo county as authorized and instructed by said board of county commissioners under date of November 30, A. D. 1881. ROLLINS & YOUNG, Z." Also paper not signed, but in handwriting of defendant Young, which reads as follows, dated May 27, 1882: "For and in consideration of the assignment to E. W. Rollins, as trustee of the county of Pueblo, and a certain judgment in favor of William R. Stebbins, and against the county of Pueblo, obtained from U. S. court, December term, 1879, for principal, \$7,282.33,

we hereby authorize and instruct said Rollins to apply so much of the funds now standing in the bank to the credit of Pueblo county as may be necessary to pay said judgment in full and costs, and said amt of judgment, \$7,282.33, interest, \$2,124, costs, \$36.15, and to charge the said amount to the account of Pueblo county, on their books; and we further authorize said Rollins and Young to charge to the account of Pueblo county \$3,812.50, as a payment in full of commissions due them for purchase of bonds, coupons, and judgment for account of Pueblo county, as per contract with them in November, 1879, [1881,] and also to reimburse them for moneys refunded to various persons for legal services and expenses incurred in connection with judgments of the said Stebbins and other parties against Pueblo county on unpaid coupons." It is unnecessary to comment further upon these letters and receipts. Their significance is unmistakable; and there are still others of similar tenor. We turn now to such further oral evidence as we deem admissible and competent in connection with the writings for the purpose of construing the terms of the contract. A distinction is to be observed between mere naked declarations of the parties as to what the terms of the contract were and evidence of what they did in conducting the business in pursuance thereof. The former, when mere hearsay, or matter of opinion, are not admissible. The latter may always be resorted to in connection with other competent evidence, when the meaning of the written instrument is doubtful.

There was evidence tending to show that, in the transfer of the railway bonds by Rollins and Young to the commissioners, the prices of 90 and 95 per cent. of face and accrued interest were not uniformly observed. The defendant Thompson testified that the prices varied; that some of the bonds were charged to the county at prices other than those stated in the letter,—some more, some less, some as low as 88 per cent., and some in excess of 95; that "the bulk of the bonds that were turned in were delivered at prices which were neither ninety nor ninety-five cents," but he thought the average was about the same as specified in the letter, though, "in excess of the true average, \* \* \* an infinitesimal fraction." It is difficult to comprehend why in the accounting there should have been any departure from the prices stated in the letter, if the statement in the letter indicated absolute and unconditional contract prices to be paid by the commissioners to the defendants for the bonds, instead of maximum limits to be paid by defendants, as agents "authorized and directed to buy for the county commissioners." To charge less than the contract price was a course of dealing entirely inconsistent with the interest of defendants, if in fact they were acting under a contract to furnish bonds to the county at stipulated prices; but was perfectly consistent with their duty and obligation as agents furnished with money to buy bonds for the county at as low a price as possible. It was also inconsistent with

the contract theory for the commissioners to consent to any charge in excess of 95 per cent. Rollins and Young both testified that, in addition to what they may have made upon the bonds which they themselves previously owned or controlled, they made a profit of about \$4,000 on the further amount procured by them and transferred to the county. It was upon this sum that the court based its finding. Kramer and Thompson testified that they did not know of this profit being made; hence the claim that the present plaintiffs cannot recover because their predecessors before the commencement of this action made a voluntary settlement in good faith upon the terms of the contract, as construed by defendants, is not well taken. The allowance to defendants of several hundred dollars on account of their extra trouble, and fees paid to attorneys, in addition to their full commission of 2 per cent. on the \$160,000 purchase, whether warranted or not, having been knowingly and voluntarily allowed by the commissioners in the final settlement, was not included in the findings of the court against defendants; but such extra allowance strongly confirms the theory that defendants were regarded and treated as agents, and not as contractors, throughout the transaction, except as to the bonds they originally owned.

It is urged in argument that while the board of commissioners could and did employ defendants as brokers or bankers to convert the government bonds into cash, and while defendants could and did use that money to purchase outstanding railway bonds, yet the board could not employ agents to purchase the railway bonds, because they themselves being the agents of the county must exercise their own discretion and judgment in such matters, and could not delegate the same to others. *Delegata potestas non potest delegari*. Without questioning the proposition thus advanced as a general rule, it is clearly inapplicable to the circumstances of this case. In the first place, Rollins and Young could not lawfully use the money of the county in the purchase of railway bonds without authority from the county so to do. In the next place, their discretion and judgment were substantially controlled by the terms of their agreement as we have indicated; and in any event, whether as agents or contractors, they were bound to pursue the terms of their agreement such as they were, and to account concerning their actings and doings in the premises in accordance with such terms. Hence, in determining this litigation, the real terms of such agreement must be ascertained from the evidence as questions of fact. That the foregoing argument has some weight in the determination of such questions of fact may be admitted; but we cannot concede that it has a controlling effect as a matter of law. It would be a strange doctrine if the defendants, having obtained the money of the county, could justify their use of it by pleading that they acted by the authority of the commissioners, and then refuse to account for it on the ground that the commissioners could not lawfully give them such au-

thority. The doctrine of *ultra vires* cannot be made to subserve such purposes. While a contract, entered into by the agents of a corporation without authority, may not be enforced against the corporation so long as the contract remains executory, nevertheless, the other contracting party, being *sui juris*, and having reaped the benefit of the execution of such contract without interference, certainly cannot plead the agents' want of authority to enter into the contract as a defense to relieve himself from accounting to the corporation *ex æquo et bono*. Green's Brice, *Ultra Vires*, p. 42; also *Id.* (2d Amer. Ed.) p. 729, note a; Ang. & A. Corp. § 256; 1 Dill. Mun. Corp. (3d Ed.) § 96; Insurance Co. v. McClelland, 9 Colo. 11, 9 Pac. Rep. 771; Scollay v. County of Butte, 67 Cal. 249, 7 Pac. Rep. 661; Gold Mining Co. v. Bank, 96 U. S. 640.

No principle of law or justice has been advanced why defendants should not be bound by the terms of their employment. The difficult question in the controversy has been to determine from competent evidence what were the real terms of their undertaking. But it is unnecessary in this opinion to further consider the bearing of the evidence. It is not the province of this court upon appeal in cases of this kind to decide mere questions of fact, but only questions of law, so far as they are raised by appropriate assignments of error. To do this we need not determine the result of the evidence, but only its legal tendency. That there was much conflict in the evidence must be admitted; but it is not for this court to pass upon the credibility of the witnesses, nor to consider and weigh the evidence with the view to substitute its own judgment for that of the trial court. It would not be sufficient ground for reversal that the findings of fact by the court below do not correspond with the views of this tribunal. If, upon a review of the record, it is found that the case was fairly tried, that the rules of evidence were substantially observed when challenged by the respective parties, that the evidence tends to sustain the findings, and that the findings support the complaint, this court cannot properly disturb the judgment. Finding no substantial error of law in the record, the judgment of the district court must be affirmed.

(15 Colo. 499)

COLORADO IRON-WORKS v. SIERRA GRANDE MIN. CO.

(Supreme Court of Colorado. Nov. 7, 1890.)

FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE—SERVICE OF PROCESS.

1. A single purchase of machinery within the state by a foreign mining corporation, to be transported to and set up in the state of its domicile, is not within the inhibition of Gen. St. Colo. § 260, which prohibits foreign corporations from doing business within the state until they have filed with the secretary of state a certificate designating their principal place of business within the state, and appointing an agent upon whom process may be served.

2. But the purchase of the machinery by the foreign corporation is a sufficient doing of business in the state to render it amenable to the jurisdiction of the courts of the state, so far as the

enforcement of the purchase price is concerned, if jurisdiction can be obtained as provided by the laws of the state.

3. One who gratuitously transfers his stock in a foreign corporation to trustees, whose names he does not know, for some unknown and undefined purpose, and at the same time contributes \$50 to cover the expense of the transfer, is still a stockholder in such foreign corporation, within the meaning of Code Civil Proc. Colo. § 40, which authorizes the service of process on a foreign corporation by a delivery of the writ to a stockholder, when it has no agent or officer within the state.

Commissioners' decision. Appeal from district court, Arapahoe county.

The appellant, plaintiff below, is a domestic corporation doing business in the city of Denver; the appellee is a foreign corporation organized under the laws of, and engaged in mining in, the territory of New Mexico. In August, 1885, the two corporations entered into a written contract by which appellant was to manufacture, furnish, and erect at the mines of appellee in New Mexico, certain machinery and appliances for the reduction of ores, for \$39,260. The contract was made by the general manager or agent of appellee in its behalf, and was to become operative upon its receiving the signature of the president. Payments were to be made,—\$10,000 upon the signing of the contract by the president; \$15,000 upon the shipment by appellant of the heavy machinery; \$5,000 when the work was completed, and the balance when the work was accepted by a committee, within 30 days after its completion. As far as is shown by the record, the contract was fully performed by appellant and the work accepted by appellee. It is alleged in the complaint that appellant furnished extra supplies and labor, to the amount of \$3,340. It is admitted that certain payments were made, and alleges the balance remaining unpaid to have been \$11,987.97. It is also alleged that a settlement was had at the city of Denver on the 25th of February, 1886; that the balance found due and agreed upon was as above stated, viz., \$11,987.97. On the 13th of November, 1886, this suit was brought to recover such balance, with interest from the alleged date of settlement. Summons was issued, which was returned with the following indorsement: "State of Colorado, Arapahoe county—ss.: I do hereby certify that I have duly executed the within summons on this 13th day of November, A. D. 1886, by delivering a true copy of the same to Samuel Alsop, a stockholder of the within-named defendant, the Sierra Grande Mining Company, personally, at the city of Denver, in the county of Arapahoe, and state of Colorado. I further certify that said corporation keeps no principal office in any county in the state of Colorado, and there is no county in which the principal business of said corporation is carried on, and that no president, or other head of said corporation, or vice-president, secretary, treasurer, cashier, general agent, general superintendent, or agent thereof, could then be found, or was then or can now be found, or is now in the county of Arapahoe, state of Colorado, but each and every officer was then, and is now, absent from

said county; and I further certify that, at the same time and place, I delivered to said Alsop a copy of the complaint herein. FREDERICK CRAMER, Sheriff. By J. M. CHIVINGTON, Under Sheriff." On the 22d of November, the following motion was filed by counsel of appellee: "Now comes the defendant, the Sierra Grande Mining Company, by its attorney, R. H. Gilmore, and appears specially for this purpose, and no other, and moves the court that the summons herein be quashed, on the ground that it appears upon the return thereon, and on the face of the complaint served therewith, that defendant is a foreign corporation, not doing business within the state of Colorado, and that the said summons was not served upon the proper person, as prescribed by law." On the 9th of December, appellee, by its counsel, presented the following paper: "Making special appearance, and moves the court that the summons and the return thereon be quashed, and that defendant be not compelled to answer the complaint, on the ground that this court has no jurisdiction of person of defendant; states that defendant is a foreign corporation, organized and incorporated under the laws of New Mexico, and not elsewhere; that no summons has been served on it in this state, or elsewhere; that, at the time of pretended commencement of this action, or at any time previous thereto, or since, it was not and is not doing business in this state, and that it has no principal or other office in any county in this state, nor had it at the time of commencement of this action, nor at such times had it any principal or other place of business or of doing business in this state; nor had it at the time of pretended commencement of this action, or before or since, residing in this state, or having any office or place of business in this state, any president, secretary, treasurer, cashier, general agent, general superintendent, or agent, or any other representative, stockholder, or other person, who in any manner represented it, or who was by it authorized to receive service of summons or other processes in this state; and further that said Samuel Alsop, Jr., did not at the time of the service of the summons in this action, nor did he at any time before or since, represent the defendant in any capacity whatever, official or otherwise, in the state of Colorado, or elsewhere; nor was he at such time or times in this state in any official character or capacity as an agent, officer, or representative of defendant; nor was he doing at such time or times any business for said company in this state, or elsewhere; nor was he authorized to do any business for the defendant, or to represent it as an officer or agent, or to receive service of summons or other process. And further, said Alsop was not at the time of said service, a stockholder, officer, agent, or representative of defendant. THE SIERRA GRANDE MINING COMPANY OF NEW MEXICO. By R. H. GILMORE, Its Attorney. Verified by R. H. Gilmore, as attorney." On January 4, 1887, a hearing was had upon the motion of appellee of November 22d, when the following proceedings were had, and order entered: "The defendant, by its at-

torney, R. H. Gilmore, Esq., who appears specially only in this action, asks leave to have its motion to quash the summons and return in this case, which was filed on December 9, 1886, to stand in lieu of its former motion for a similar purpose, served upon the plaintiff on the twenty-second day of November, 1886, and which is now, by direction of the court, upon plaintiff's request filed herein as of said twenty-second day of November, 1886, and it is accordingly so ordered without prejudice to the plaintiff's right to object to such substitution, or to any advantage which plaintiff may have been given by the service of said former motion." On the 7th of January, counsel of appellant filed a motion to strike from the files appellee's motion of December 9th, for the following reasons: "That the defendant had already, before that date, served on plaintiff herein a motion to quash the summons, which was by the court ordered filed as of November 22, 1886, and that defendant had already appeared in said action and waives all the matters set forth in said motion, and said motion was not filed in apt time, and moving for judgment as for want of an answer." On January 27th, counsel of appellee moved the court for leave to withdraw its motion ordered to be filed as of November 22d. On January 31st, an affidavit of Alsop that he was not a stockholder of appellee at the time of the service of the summons, also affidavits of Mellor, president, and Brosius, secretary, of appellee, made in Philadelphia, that Alsop was not a stockholder, were filed. A hearing was had upon the motion of appellant to strike appellee's motion of December 9th from the files, and appellee's motion for leave to withdraw the motion of November 22d. Both motions were denied, and the court ordered "that both the former and the latter motions, attacking the service of the summons herein, and the jurisdiction of the court over the person of the defendant, be allowed to stand as an answer or a motion in plea in abatement to the jurisdiction of the court over the person of the defendant, and that the plaintiff have leave to reply to said motions of the defendant as it shall be advised in twenty days from this date." Appellant excepted to the judgment of the court in denying the motion to strike the motion from the files. On February 18, 1887, appellant replied as follows to appellee's answers or motions for pleas in abatement: "Now comes the plaintiff in the above-entitled action, and makes this, its replication, to the motions of the defendants, heretofore ordered by the court to be taken as a plea in abatement or answer herein, and alleges the issuance of summons and service and returns thereof setting out the returns in full; denies that defendant was not at any time previous to the commencement of this action doing business in this state, but, on the contrary, alleges that said defendant did, prior to the commencement of this action, enter this state and do business therein, and submitted itself to the jurisdiction of the courts of this state, and on the 31st day of August, 1885, in the city of Denver, in the county of Arapahoe, and state of Colo-

rado, enter into the written contract set out in the complaint herein and upon which this action is brought; alleges that nearly all the machinery called for by said contract was to be manufactured by said plaintiff at said city of Denver, as was well known to said defendant when said contract was entered into, and was so manufactured; that all the moneys that were to become due and payable under said contract were to become due and payable at said city of Denver, and the cause of action in said contract arose within the state of Colorado, and that the goods, wares, and merchandise, alleged in the second cause of action to have been sold and delivered, were sold by plaintiff to defendant at the city of Denver, state of Colorado, and were to be paid for at said city; and that the second cause of action arose in the city of Denver, and that the accounting alleged in the third cause of action was had and said cause of action arose in said city; that as to whether or not, at the time of the commencement of this action, or since, the defendant was not or is not now doing business in said state, this defendant has not and cannot obtain sufficient knowledge or information on which to base a belief, except as hereinbefore stated, and alleges that, by reason of the matters and things done and performed in this state, in respect to which this suit is brought, the defendant is estopped from and will not be heard to say that it was not at the time of the commencement of this action doing business in the state of Colorado, and alleges that by reason of said matters and things in respect to which this suit is brought, defendant has submitted itself to the jurisdiction of the courts of this state; and, without in any way or manner waiving any of the rights it has acquired by reason of the sheriff's return aforesaid, but insisting upon the conclusiveness of said return, alleges, on information and belief, that said Alsop was at the time of the service of summons and the complaint herein upon him a stockholder of the defendant company, and that November 13, 1886, a writ of summons was served on defendant, and this court has jurisdiction of the person of defendant; prays for judgment in accordance with prayer of complaint. Signed by Teller & Orahood, attorneys for plaintiff, and duly verified by H. M. Orahood as attorney." On July 5, 1887, the cause was heard on appellee's motion to quash the summons or return of service, and the motion sustained, and an appeal taken to this court.

*Teller & Orahood*, for appellant. *R. H. Gilmore*, for appellee.

REED, C., (after stating the facts as above.) The first and most important question to be determined is whether appellee could be subjected to the jurisdiction of the courts of this state. It is contended that being a foreign corporation, it had not by its acts and dealings in this state submitted itself to the jurisdiction of the state courts, and that this cause could not be here tried and determined. There are two or three axiomatic princi-

ples applicable to corporations, so well understood, and generally recognized and conceded, that no authorities are necessary in their support. They are: *First*, that a corporation is in law for civil purposes deemed a person, may sue and be sued, contract and be contracted with, and do all other acts which a natural person could do, not *ultra vires*. *Second*, being an artificial person created by and deriving all its powers from its charter, it is local in its character, cannot migrate, can only, in a state or country foreign to that of its creation, make such contracts and do such business as is permitted by the laws of the state, and under such restrictions as may be imposed by its laws. We do not think section 260 of the General Statutes<sup>1</sup> of this state applicable to the case under discussion, nor that such a construction was intended or contemplated by the legislature. Corporations being, as above stated, confined in their business operations to the state from which they derive their existence, and being only allowed to exercise their functions in a foreign jurisdiction by the comity, and under the laws of that state, the intention of the section above referred to was to enable such corporations as moneyed institutions, insurance companies, and that class of corporations, perhaps not to migrate, but by means of agents to extend their business and allow such agencies to become domiciled and transact the business of the corporations under the parent office and original charter. True, in a limited and technical sense, almost any business transaction, no matter how trivial, made by a corporation, whether in its own or an adjacent state,—the buying of goods by a domestic mercantile corporation in New York for the purpose of sale and business here, or any transaction of that kind,—may be deemed the doing of business in New York. A sale and delivery of goods in Wyoming or Nebraska by a domestic corporation of this state might technically be termed doing business in those states; but such accidental or incidental transactions were not, in our view, contemplated by nor within the intention of the legislature in the section under consideration. Nor in this case can the purchase of machinery to be manufactured here, transported to, set up and operated in, New Mexico, nor the selling of ores mined and produced in New Mexico, and shipped here to a market, be regarded as doing business in this state, as contemplated in such section.

Nor do we deem it necessary that the acts of appellee should be construed to be doing business in this state, outside of the transaction in question, to render it in

<sup>1</sup> Gen. St. Colo. § 260, provides: "Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate, signed by the president and secretary of such corporations, duly acknowledged, with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served."

this case amenable to its courts, and subject to its laws. The rule is well settled that a corporation of one state may exercise its functions in another to any extent permitted by the other. No legislative permission is necessary to allow a foreign corporation to contract for and buy machinery or supplies necessary to the transaction of its business, nor is it necessary in order to allow a foreign corporation to sell its wares or manufactures to a citizen of this state. Any corporation may sell its products to a party doing business, and if in the purchase a debt be contracted, it can proceed to collect it in our courts. A foreign corporation can, as in this instance, buy of a domestic manufacturing corporation the same as a natural person, and contract a debt for the articles so bought. In order to invoke the aid of our own courts in the collection of such debt, it is not necessary for a citizen of this state to show that the debtor was doing business generally in this state, but that he is a debtor, that the debt is due and payable here; and the debtor, whether a natural or an artificial person, if brought by process within the jurisdiction, is amenable to our courts. Persons, including corporations, by contracting debts in a foreign jurisdiction, will be presumed to have assented to the laws in regard to the collection of debt. It is not, as is supposed in argument, of controlling importance where or when the original contract, out of which the indebtedness grew, was perfected and became operative, whether at Denver, New Mexico, or Philadelphia, where it was executed by the president of the appellee. The contract appears to have been fully executed by appellant, the work accepted, large partial payments made; all that remained was for appellee to pay the balance due,—an uncontradicted debt,—which by the proofs, and former course of dealing, was due and payable in Denver, and if not made specifically so became so by operation of law, no other place having been designated. The appellant, a citizen of this state, had a right to invoke the aid of its courts to collect his debt. A proper regard to the administration of justice, the interests of trade and commerce, and to the rights of citizens requires that the jurisdiction of courts be sustained, and not circumscribed, except by the necessity of law. In cases of this kind for collection of debts, as was well said in *Railroad Co. v. Gallahue*, 12 Grat. 655, which was cited with approval in *Railroad Co. v. Harris*, 12 Wall. 65: "It would be a startling proposition if in all such cases citizens of Virginia, and others, should be denied all remedy in her courts for causes of action arising under contracts and acts entered into and done within her territory; and should be turned over to the courts and laws of a sister state to seek for redress." If such construction would prevail, it would in many instances work a denial of justice, and give the foreign corporation complete immunity from its contracts. That a corporation may be sued in a foreign jurisdiction is a well-settled, general principle, without regard to the manner in which jurisdiction may be obtained; which is a different question,

and dependent upon statutes in most states.

In *Bennington Iron Co. v. Rutherford*, 18 N. J. Law, 158, it is said: "The existence of a foreign corporation is recognized in other states, and they have the capacity to sue and be sued out of their own states."

In *Moulin v. Insurance Co.*, 24 N. J. Law, 244: "If they authorize their officers to transact business for them in another state, they thereby subject themselves to the jurisdiction, and become answerable to the laws of that state." In the same case, at page 233: "By the comity universally acknowledged in the states of this Union, \* \* \* corporations may send their officers and agents into other states, transact their business, and make contracts there; and, in some instances, the laws of the states prescribe the mode and the terms upon which they may do so. I am not prepared to say that, if they choose to avail themselves of this privilege, natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the state whose comity they thus invoke. For the purposes of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state. Any natural person who goes into another state carries along with him all his personal liabilities; and there is quite as much reason that a corporation which chooses to open an office and transact its business, or to authorize contracts to be made, in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suits against it as to the interpretation of the contracts so made."

And in *Milk Co. v. Brandenburgh*, 40 N. J. Law, 112: "Since the case of *Moulin v. Insurance Co.*, 24 N. J. Law, 222, and 25 N. J. Law, 57, it must be regarded as the settled law of this court that, if a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state." See, also, *Bank v. Earle*, 13 Pet. 519, and *Day v. Bank*, 13 Vt. 97, where the same general principles are recognized and asserted; and the same may be said of the courts of most of the states, and that in England the same jurisdiction is asserted over foreign corporations. See *Newby v. Manufacturing Co.*, L. R. 7 Q. B. 293.

The question whether Alsop, upon whom service was had, was or was not, at the time of such service, a stockholder of appellee, is not one easy of solution. It is apparent from the record that his relations with the company were such that he very shortly after the service communicated the fact to the counsel of the company; and, on the 22d of November, when the first pleading was filed, it is claimed by appellee, and admitted of record, that counsel did not know he was not a stock-



holder. If he had at the time of service of process parted with his stock, and severed his connection with the company, it is not easy to understand why the fact was not stated. The first intimation of the fact appears in the pleading of December 9th. The affidavits introduced to establish the premises were unsatisfactory and evasive. They show that there had been a transfer on the books, and that no stock stood in his name. But the attempt to show why, and for what purpose, it was transferred to trustees, and for what purpose the trust was created, signally failed, and casts great suspicion on the transaction. The case as made is one where a stockholder holding stock that cost over \$500 gratuitously transfers it to trustees, whose names even he does not know, for some unknown and undefined purpose, and at the same time contributes \$50 in money. There is a marked discrepancy in one respect between the affidavit of Mellor, president of appellee, and the testimony of Alsop. Mellor states the stock "was transferred for value." Alsop testified that there was no consideration, and says: "There was a request in this circular that those who should transfer their stock to the trustees should make a payment of 10 cents a share for expenses, and I inclosed my check for 10 cents on five hundred shares,—\$50." In order to establish the fact pleaded, the testimony should have fairly and unequivocally shown that he had, in good faith, divested himself entirely of all ownership and interest, and severed all connection with the company. A transfer in name upon the books might be no evidence of a change of ownership. It might be collusive, or made for convenience to allow another as agent to represent it. The burden of showing that he was not a stockholder was upon appellee, and he should have established the fact affirmatively, by clear and conclusive testimony, of a change of ownership. The testimony failed to establish it. Counsel for appellant regard the question as settled by the trial court that Alsop was a stockholder; counsel for appellee regard it as having been left undetermined. We are, after reading the opinion of the trial court, in doubt as to how the question was determined in that court, but are clearly of the opinion that appellee failed in proof to establish the allegation in his plea or motion, and that Alsop must be regarded as having been a stockholder at the time of the service of process. Section 40 of the Code of Civil Procedure provides: "If the suit be against a foreign corporation, or a non-resident joint-stock company or association doing business within this state, service shall be made by delivering a copy of the writ to an agent, cashier, or secretary thereof; in the absence of such agent, cashier, treasurer, or secretary, to any stockholder." We conclude, therefore, that the contracting of the debt in question was a sufficient doing business within this state to render the corporation amenable to the courts of this state, if jurisdiction could be obtained by service of process as provided in section 40 of the Code. We cannot agree with counsel of appellee that the district

courts of this state are courts of limited jurisdiction, and that their jurisdiction over foreign corporations is dependent upon the voluntary acts of such corporations in placing themselves under such jurisdiction by complying with the requirements of section 260, Gen. St. They are courts of general jurisdiction, but depending, in obtaining such jurisdiction over corporations, upon the statute in so far as the statute departs from the common law in providing in what manner service can be had. We also conclude that Alsop, at the time of service, was a stockholder, and that the service upon him brought the appellee within the jurisdiction of that court, and that the court erred in sustaining the motions or pleas in abatement of the action. We advise that the judgment be reversed, and the cause remanded.

BISSELL and RICHMOND, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment below is reversed.

(1 Wash. St. 476)

HANFORD *et al.* v. DAVIES.

(*Supreme Court of Washington.* Dec. 19, 1890.)

APPOINTMENT OF ANCILLARY ADMINISTRATOR.

Under Code Wash. T. 1881, § 1444, providing that the administrator shall be entitled to the immediate possession of all real estate, and may receive the rents and profits thereof, until the estate shall be settled, or delivered over by order of the probate court to the heirs or devisees, administration of the real estate of one deceased in another state is necessary, and the appointment of an administrator by the probate court of the county where the land lies, upon a petition setting out the death of decedent in another state, the probate of his will there, that there was no personal property in Washington belonging to the estate, and that there were no debts to the knowledge of the petitioner, is valid. *Distilling Territory v. Klee*, 28 Pac. Rep. 417.

Appeal from superior court, King county; I. J. LICHENBERG, Judge.

*Howe & Corson*, for appellants. *Thomas Burke* and *Junius Rochester*, (*Andrew Woods*, of counsel,) for appellee.

HOYT, J. Plaintiff, for his cause of action, alleged, among other things, that he was the owner, and in possession, of a certain described piece of real estate; that defendants had caused to be recorded certain deeds purporting to cover the same, and were asserting rights thereunder, and thereby injuring plaintiff's title. In the progress of the trial, plaintiff put in evidence a record of certain proceedings had in the probate court of King county, culminating in a sale of the land in question to the plaintiff. These proceedings were attacked by the defendants, and the rulings of the court, in regard thereto, are relied upon by the appellants as cause for reversal. The proceedings objected to were commenced in the probate court, by the filing of a petition therein by one Finley Holl. The facts set up in said petition, so far as it is necessary for our purpose, may be stated as follows: That one Lumley Franklin was dead; that he died seised of the land in question; that he left a will which had been duly admitted to probate

in the county of San Francisco, Cal., and that Phillip Roach, public administrator, was then administering the estate of said decedent, under the provisions of said will, and the orders of said probate court; that, to the knowledge of the petitioner, there was no personal property in this territory belonging to said estate; and that, to his knowledge, there were no creditors. Under this state of facts appellants contend that there was no authority in the probate court of King county to administer said estate, and that all of its proceedings therein were void for want of jurisdiction. There has been some discussion as to the nature of our courts of probate. It being contended on the one hand that, in matters relating to the sale of lands of deceased persons, it has only a special and limited jurisdiction; while, on the other, it is claimed that in these matters, as in all others relating to the estates of deceased persons, its jurisdiction is general, if not exclusive. However this may be is not important in this case, as it affirmatively appears just what facts were shown to the probate court, upon which it assumed jurisdiction, and, if they were sufficient, for that purpose, that would end the inquiry, even in a court of special jurisdiction, and, if they were insufficient, the presumption in favor of a court of general jurisdiction would be negatived. The material question here then, in either case, is as to the sufficiency of the facts alleged in said petition. This must depend upon the relation which the personal representatives of a deceased person hold to the real estate of which he died seised. Have such representatives, during administration, any duty to perform, as to such real estate, irrespective of the question as to whether or not it is needed to pay debts. This question must be determined largely by the statutes of the state in which the land is situated. In this state, the administrator has a right to the immediate possession of all real estate, and may receive the rents and profits of the same, until the estate shall be settled, or delivered over, by order of the probate court, to the heirs or devisees, and shall keep in repair all houses, etc. Code 1881, § 1444. From this provision, it seems clear that whenever an administrator is appointed in this state it is his duty to take possession, not only of the personal property, but also of the real estate. It would seem to follow that, though the heirs may at once take title to the real estate, yet that title is not perfect, as it is subject to the right of the administrator to take possession thereof, and retain the same until the probate court shall have judicially determined who the heirs or devisees are, and made its order thereon. How, then, can the heirs' title be made perfect, and his right to the title and possession of the real estate be assured? We know of no other way than by administration, and the judgment of the probate court of the jurisdiction in which the real estate is situated. And, as it is the policy of the law that titles to real estate should be certain and assured, every jurisdiction in which the deceased left real estate must have the right to have administration thereof, that it

may be judicially determined who the heirs or devisees are, and that there are no debts which can affect the title or possession which shall be awarded them. It follows that administration is proper outside of the domicile of the deceased, even although the application therefor shows that there are no debts to the knowledge of the applicant, as his want of knowledge cannot take the place of a judicial determination; and, further, that the facts set forth in the petition were sufficient to give the court jurisdiction, irrespective of administration elsewhere, and, *a fortiori*, would they be sufficient to authorize administration, auxiliary to that conceded to be regular, then in progress, and unsettled in another state. If the administration was proper, there must be some way to pay the expenses thereof, and, where there is no personal property, the real estate must be sold, even although no debts are proven. In this case, the petition for the order of sale shows that certain taxes assessed against the real estate in question were due and unpaid, and, although it may have appeared that these taxes accrued after the death of the testator, yet, under our statute, they were charges against the estate, and among the claims which the administrator must provide for. He is entitled to the possession of the real estate, and to the rents and profits derived therefrom, and it would not do to say that he has nothing to do with the taxes accruing during administration. The proceedings in other regards are conceded to be regular, and the record was properly admitted in evidence. This disposes of the case, and makes it unnecessary for us to determine the other question involved therein. The case of *Territory v. Klée*, 23 Pac. Rep. 417, (decided by this court at its last session,) has been cited by appellants, and it is urged that the language used by the chief justice, in that case, is applicable to this. We cannot agree with this contention. In that case, administration of the estate was in progress in King county, and that which was sought to be sustained had been commenced in Pierce county, pending such administration. Under these circumstances, and under the provisions of chapter 98 of the Code, the court might well say that the administration in Pierce county was "unnecessary, if not illegal." The judgment and decree must be affirmed, and it is so ordered.

ANDERS, C. J., and DUNBAR and STILES, JJ., concur.

(1 Wash. St. 389)

POTVIN v. MCCORVEY *et al.*

(Supreme Court of Washington. Nov. 19, 1890.)

APPEALABLE ORDER—DEMURRER.

An order sustaining a demurrer to complaint is not appealable, when no judgment has been entered thereon.

Error to superior court, King county.

Palmer & Easley, for plaintiff in error, Neagle, De Steiguer & Ryan, for defendant in error McCorvey.

DUNBAR, J. The record in this case shows that there was no judgment rendered in the court below, and that the ap-

peal was taken from the order of the court sustaining the demurrer to the intervenor's complaint. An appeal cannot be taken to this court from such an order. The appeal will be dismissed, with costs to appellee.

SCOTT, STILES, and HOYT, JJ., concur.

(1 Wash. St. 452)

CASCADÉ FIRE & MARINE INS. CO. v. JOURNAL PUB. CO.

(Supreme Court of Washington. Dec. 10, 1890.)

FIRE INSURANCE—PREMATURE ACTION—CONDITIONS OF POLICY—WAIVER.

1. Where an insurance policy stipulates that the loss shall not be payable till 60 days after proof of loss, an action commenced 58 days after proof of loss is premature, unless the company has absolutely refused to pay the loss.

2. The proof of loss made to the company after the fire is not evidence of the value of the property; and, where such proof is the only evidence of the value of the property, there is nothing for the jury to decide.

3. A firm, agents of an insurance company, procured a policy on the property of their debtor, payable to themselves in case of loss. Afterwards, the debtor sold the property, and assigned the policy to the purchaser, with the consent and at the solicitation of the agents. The policy was conditioned to be void, if assigned in case of sale, unless the assignment was approved by the president or secretary of the company. This consent was never asked for, nor obtained. *Held*, that the policy was forfeited, as there was no waiver of the condition as to assignment, since the agents were in the first place the beneficiaries, and could not therefore bind the company by their acts.

Appeal from superior court, King county.  
*Preston, Albertson & Donworth*, for appellant. *Lewis & Gilman*, for appellee.

STILES, J. 1. In this case it clearly appears that proof of the loss was made, July 10, 1889, and the terms of the policy were that the loss should not be payable until 60 days thereafter. The action was commenced September 6, 1889, on the fifty-eighth day after proof of loss was made. Under the letter of the policy, therefore, the suit was premature. But it was agreed by both sides, and we believe correctly, as matter of law, that under such contracts as this, as the limitation is solely for the benefit of the insurer, for the purpose of enabling him to examine into the circumstances of the loss, and satisfy himself of the justness of the claim, and prepare himself for payment, so, if, at any time before the expiration of the time limited, the insurer has so satisfied himself, and thereupon communicates to the insured his unqualified refusal to pay the loss, all further claim to indulgence under the stipulation is waived, and suit may be forthwith commenced. Accordingly, in this case, the complaint alleged a demand and a positive refusal to pay, which laid upon the plaintiff the burden of proving such a refusal as the law requires, and, upon the defendant's motion for a nonsuit, made it incumbent upon the court to say whether or not any evidence had been produced tending to show a refusal. The court found against the defendant on this proposition, and its exception to this ruling requires that we examine the testimony on that point. The sub-

stance of the evidence in the record is that one of the officers of the plaintiff corporation, after making the proof of loss, called several times upon the secretary of the insurance company, and inquired as to the intentions of the latter company with regard to the policy in question. The secretary suggested, as a possible objection, that the transfer of the policy from the original insured had not been approved, and mentioned the probability that the matter would be referred to a committee of trustees to report. Several other visits of the appellee's agent resulted in nothing more definite except that a committee had been constituted to consider the policy, which committee, it was rumored to the appellee, had reported favorably to the payment of the loss. No attempt was made to establish the truth of this rumor, however, and it is material only as it shows the information chargeable to the plaintiff, and under which the suit was brought. Thus far the testimony was nothing more than what might have been expected as introductory to some positive declaration, and, being unsupported, was of no force whatever. Finally, however, the same agent of the plaintiff met one of the insurance company's trustees upon the street, and got into conversation with him upon the subject of the company's probable action; whereupon the trustee, who was apparently in some passion over certain remarks made by the president of the Journal Company derogatory to home insurance companies, remarked that "he guessed he would see what they would do about this matter," and there the subject was dropped. The introduction of this remark of the trustee was allowed by the court over objection, and is assigned as error. Regarding the trustee of the corporation as in some sense its agent, as he undoubtedly was, he would not, unless specially charged by the board, of which he was a member, with the duty of communicating its decision to the policy-holder, be authorized to bind it by his declaration, and still less could his mere street talk be taken as the expression of his principal. An agent's declaration binds his principal only when he is intrusted with the conduct of the particular matter in hand, and while he is engaged about the performance of the duty assigned to him. In this instance, the witness was asked what reason the trustee gave for not paying the demand, from which the court probably gathered that some formal declaration would be shown, as really coming from the company. But the witness' answer was not responsive, and did not touch the point of inquiry. This left the case with no showing of a refusal to pay, and therefore no warrant for the commencement of the action on the 6th day of September.

2. The proof of loss made by the claimant under the policy was no evidence, at the trial, of the property lost in the fire, or of its value. It was admitted, if at all, upon the cross-examination of plaintiff's witness, and at the request of the defendant, to show by the jurat attached to it the precise date on which it was made, — July 10th. The insurance was on "office

furniture and library, \$200; stones, press, and tables, \$300; type, \$500." By the proof of loss it is alleged that the furniture and library had a sound value of \$500, and the loss was \$264.60. The sound value of the stones, press, and tables was \$256, and the loss was the same; while the types were worth \$2,000, and the loss was \$846.55. The total sound value was \$2,856, the loss \$1,467.15, and the policy was \$1,000. The seventh paragraph of the complaint alleged the loss to have exceeded \$1,000, and it was for the plaintiff to sustain that allegation with competent proof. We doubt whether the proof of loss was intended to be proof of value, when it was introduced, and even if it had been it could have served no such purpose. The proof of value having been omitted, there was no case for the jury.

8. The points discussed previously affect merely the plaintiff's recovery in this action. The remaining point goes to the right of the plaintiff to maintain any action at all. The policy in question was in the usual form of insurance contracts against loss by fire, being a printed blank, one of many like it, with the signatures of the president and secretary already affixed, and only requiring the signature of the local agent and its delivery to make it a contract in full force as the obligation of the company. As originally issued, December 31, 1888, it insured the firm of Begg & Meany, who were then the owners of the property; "loss, if any, payable to G. E. Miller & Co., as their interest may appear." This firm of G. E. Miller & Co. were the local agents for the issuance of policies of the Cascade Company, and they had some kind of a lien upon the goods of Begg & Meany for money advanced. Thus, in the beginning, this policy was issued by Miller & Co. to themselves, to secure their claim for advances, and it remained in their possession for several months, during which the property was sold and transferred—*First*, to one Kittenger; and, *secondly*, to the Journal Publishing Company. The premium was paid to the insurance company at once by Miller & Co., and charged up on their books as an additional claim against Begg & Meany. Miller & Co. notified the insurance company of the issuance of the policy, thereby, of course, conveying to it information of their relation to the policy and to the property insured, and the company made no objection that its agents had thus insured themselves. The policy was voidable at the option of the company within a reasonable time, upon return of the premium; but the company did not elect to cancel it, and we hold the policy good under the circumstances. But, on the other hand, agents of an insurance company, who place themselves in such a relation to a policy, certainly very greatly endanger the insured in case of loss, since all the rulings of the courts as to waiver of the terms of a policy, through knowledge of the insurer's agents, of subsequent facts warranting a cancellation, are rendered of no avail, when the agent is himself one of the parties to the contract. In such a case, knowledge of the agent is not knowledge of the principal; but to with-

hold knowledge of any material fact becomes a fraud on the principal, sufficient to avoid the policy. In such cases the general rules of agency, and those particular rules which pertain to matters of insurance, forbid that the agent should occupy any place other than that of an interested third party, neither whose acts nor whose knowledge are imputed to the principal. Begg & Meany were chargeable with notice of this state of things, so was Kittenger, and so was the Journal Publishing Company; and each of them was bound to know that, so long as Miller & Co. remained the beneficiaries of the policy, no subsequent knowledge of theirs concerning the property covered by this policy, or concerning the policy itself, would be of any force whatever against the insurance company, unless actually communicated to its officers. Miller & Co. retained the policy in their possession until after the property had passed into the possession of the publishing company. Then they sought out Begg & Meany, and got their signature to an assignment printed in blank form on the back of their policy, as follows: "For value received we hereby transfer to the Journal Publishing Co. all our title and interest in this policy of insurance;" and again the policy was returned to Miller & Co.'s safe, for Begg & Meany had not paid the premium, and Miller & Co. still had their lien. But an arrangement was made by which the publishing company agreed to pay the amount advanced by Miller & Co. for the premium, and upon that the policy was delivered to the publishing company. Now, in the body of this policy, there is a clause as follows: "Whenever this policy may have become void from any cause, it shall not be revived or reinstated in any way, except by a special contract for such reinstating in writing thereon, or by the issue of a new policy;" and on the back of the contract, as a part of the blank assignment, there was printed as a heading to it, "Assignment of policy in case of sale. Not good except approved by the president or secretary of this company." This is the blank to which Begg & Meany's signature was affixed, but which was never approved by the president or secretary of the Cascade Company, or presented for their approval. The sale of the insured property, and its transfer to third persons, rendered the policy void, and the purpose of the blank assignment was to provide an acceptable form of reinstatement under the clause of the policy first quoted. Perhaps the approval of the assignment in this manner was not the only way in which a reinstatement could be accomplished. The plaintiff endeavored to show a course of dealing which might, in case of another policy, tend to support a revival of the policy upon the approval of the agents who issued it, under some of the decisions of courts on the subject of waivers. But, in this case, aside from the fact that the agent did not sign the approval, we have held above that, as to this policy, Miller & Co. were not agents, but principals. Possibly under some of the decisions, if Miller & Co. or the publishing company had communicated the fact of the

transfer to the latter with a request for reinstatement, mere failure to announce its unwillingness would be held sufficient to charge the insurer, if the insured were prevented from getting other insurance, by its delay in acting. But such is not this case. Miller & Co. kept a policy book, and made a daily report of business to the company. But very curiously the policy book showed no entry whatever of the assignment of Begg & Meany, and it did not appear that the insurance company ever knew of the assignment or of the transfer of the property, until after the fire. This neglect was not the neglect of the company, but of the insured and their assignee, who knew Miller & Co.'s position with regard to the policy, and had under their very eyes the notice that an express approval was required. The head office of the company was in the city of Seattle, only a short distance from the publishing company's office, where the matter could have been settled in a few minutes. It was the right of the insurer to know the individual holding its policy, which was not a floating promise to pay into the hands of any holder with no other condition than loss of the property. Moreover, although this policy was issued in December, 1888, and the assignment of Begg & Meany was dated April 13, 1889, not even then nor until after the fire, June 6, 1889, was there any offer to pay the premium. Miller & Co., as was mentioned, had advanced the premium to the company, and charged Begg & Meany. Later they charged the publishing company, and after the fire the latter paid the debt. This we regard as making no change in the *status* of affairs. It was not in any sense an acceptance of the premium by the insurance company, which had been fully paid months before. Miller & Co. at that time had actually ceased to be the agents of the Cascade Company for any purpose. But they were not at any time agents to bind the company by any act or statement of theirs in connection with this policy. This aspect of the case makes it unnecessary for us to refer to many other features of it, involving numerous rulings of the court, and the charge to the jury. The testimony of plaintiff was uncontradicted, so that defendant's motion for a nonsuit raised a question for the court as to whether any material allegation was unsupported, the answer to which must have been that no renewal, revival, or reinstatement of the policy had been shown after the sale of the insured property by Begg & Meany, based on the admission that Miller & Co. were the real insured to an indefinite extent, as expressed in the policy. This would have sustained the motion, and the nonsuit should have been allowed.

In considering this case, although the industry of counsel presented an immense array of cases, we have not seen it to be necessary to found our decision, so far as the last point is concerned, upon any of the so-called principles of insurance law waivers. Cases, we find, can be cited for the waiving of nearly or quite every possible clause of a policy; but, upon examination, it will be discovered that almost

every case of this kind rests upon some peculiar state of facts of its own. The enforcement or non-enforcement of a policy of insurance, although a purely legal matter in form, is rarely without its equitable features; and so, in spite of the strongest prohibitions contained in the express language of policies against many things on the part of the insured, if the agent of the insurer gets knowledge of them, there must be a prompt cancellation, or the policy will be held to stand, on account of the waiver. But here is rather a case of agency than of insurance. The policy, by reason of the knowledge of the secretary of the company that it had been issued, and to whom, and for whose benefit, was good for want of objection; but, by the assignment and transfer of the property, it became suspended and of no effect, until application was made to revive in the hands of the assignee and purchaser, not an application to the co-party insured, (Miller & Co.,) but to the company's proper officer. For want of any such application the policy never revived, and there was no right of action upon it. The judgment is reversed, with directions to the court below to sustain the motion for nonsuit. Costs to the appellant.

SCOTT, HOYT, and DUNBAR, JJ., concur.  
ANDERS, C. J., did not sit at the hearing.

(1 Wash. St. 464)

MORGAN V. MORLEY.

(*Supreme Court of Washington*. Dec. 19, 1890.)

DEFECTIVE STREET—LIABILITY FOR INJURIES.

A city granted to a private person the privilege of constructing, in one of its streets, a wharf 30 feet wide. The grantee constructed the wharf 32 feet in width, and erected guard-rails on the outer edges. Subsequently the abutting owners on the street planked out the intervening space between their property and the wharf, and removed the guard-rails, making a road-way the entire width of the street. *Held*, that a subsequent assignment by the grantee of all his rights in the wharf gave the assignee only the 30 feet originally granted by the city, and that such assignee was not liable to a person injured by a defect in the planking outside of the 30 feet, but within the limits of the wharf as originally constructed.

Appeal from superior court, Jefferson county.

Action by Frank Morley against H. E. Morgan for personal injuries occasioned by the defective condition of a wharf. The second and third paragraphs of the complaint are as follows: "(2) That the right and privilege to construct and maintain said wharf in and upon said Tyler street had originally been given by the city of Port Townsend, with certain conditions, to one Charles Elsenbels; that said defendant became the owner of said wharf by purchase, and on said date was operating the same for pecuniary profits. (3) That said wharf was negligently and carelessly built, and negligently and carelessly maintained by said defendant, inasmuch as there was an open and unguarded hole about 12 inches long by 4 inches wide at a point about one hundred feet from the land on Water street, and being sufficiently large to admit a man's foot and leg into and through said hole

or crack, while in the ordinary course of walking over said wharf; said hole being about ten feet above the land beneath said wharf, and about twenty feet from the north-east corner of a certain store or brick building on the south-east corner of Water and Tyler streets." The case was tried by the court without a jury. The court found substantially the following facts: Tyler street, in the center of which said wharf is located, is seventy-three (73) feet wide, and the ordinance of the city of Port Townsend granting to defendant's grantor the right to erect and maintain said wharf limited said right or franchise to a distance of fifteen feet on each side of the center of said street. The hole or crack where plaintiff was injured is sixteen and three-tenths (16 3-10) feet from the center of said Tyler street. The road-way of said wharf, at the point where plaintiff was injured, was closely and substantially planked more than thirty (30) feet wide. The court also found that defendant's grantor, when he built the road-way, extended the planking out more than fifteen (15) feet on each side of the center of the street, viz., 16 3-10 feet; that one of the planks in said road-way was about 4 inches shorter than the others; that subsequently the persons who were in the possession of the land on each side of said street planked the intervening space on each side of said road-way, joining onto the planking on said road-way, except at the point where the plank was short, and where this injury occurred. The court gave judgment in plaintiff's favor for \$1,000, and defendant appeals.

*Calhoun & Coleman*, for appellant.  
*Hays & Plumley*, for appellee.

STILES, J. Appellant's objection to the sufficiency of the complaint is not well taken. It is true that the second paragraph of the complaint alleges that the "right and privilege to construct and maintain said wharf in and upon said Tyler street" had been given by ordinance, etc., but the allegations which show where the wharf was actually built, and where the accident happened, make it clear, so far as the complaint is concerned, that that part of the wharf where the plaintiff was injured was not "in and upon Tyler street," but about 100 feet from land of Tyler street, and out over the water. If the facts exactly correspond to the complaint, therefore, perhaps this judgment might stand; but it seems, from the testimony and the findings, that, in fact, the wharf was "in and upon" Tyler street, at the point where the hole which caused the injury was, and this cast upon the city of Port Townsend the duty of seeing that it was maintained in proper condition for travel. 2 Dill. Mun. Corp. § 1012; *Fowler v. Town of Strawberry Hill*, 74 Iowa, 644, 38 N.W. Rep. 521; *Hutchinson v. City of Olympia*, 2 Wash. T. 314, 5 Pac. Rep. 606; *Charter Port Townsend*, (Laws 1881, p. 134, § 93.) Perhaps if this structure had been maintained merely as an approach to the wharf, in the condition in which it was originally built, 32 feet wide, the defendant might have been liable for the injury. But he did not construct the wharf;

Eisenbels constructed it; and at the time of its construction, even though it were 2 feet and over wider than the ordinance permitted, it had a sufficient guard-rail, which would have prevented this accident. But Tyler street was 73 feet wide, and, soon after the wharf was built, people began to build upon and occupy the property along the street and wharf. The front of the buildings so erected was over 20 feet from the outer edge of the wharf, and the owners planked out over the intervening space on the wharf level, and removed the guard-rail, so that a solid road-way was made from side to side of the 73-foot street, and the whole came thus to be used as a public street. It was as "a public street that the plaintiff was passing over it; otherwise, he would have had no right there unless business connected with the wharf gave him a license to walk upon it, which was not alleged or proven. Morgan acquired the wharf from Eisenbels, presumably after the planking by abutting owners, the removal of the guard-rail, and the use of that part of the wharf as a public street. Taking it at that time and under those circumstances, he acquired nothing but the 30 feet granted by the ordinance, which did not include the hole at all, and he was under no duty to look after it at all. The city, either by positive requirement or permissive license, had caused the abutting property owners to plank out to the wharf, and the negligence, if any, in leaving the hole was thus not the negligence of either Eisenbels or Morgan. Sundry items of damage seem to have been allowed by the court which were unsupported by evidence, but it is not necessary to pass upon them. The judgment must be reversed, with instructions to the court below to dismiss the action, and it is so ordered, costs to the appellant.

ANDERS, C. J., and HOYT and DUNBAR, JJ., concur.

(1 Wash. St. 426)

REED V. MILLER.

(Supreme Court of Washington. Dec. 19, 1930.)

MORTGAGE—PRESENTATION OF CLAIM AGAINST MORTGAGOR'S ESTATE—INTEREST.

1. Failure to present against a decedent's estate a claim secured by a mortgage on his land, within a year after notice to present their claims is given to creditors of the estate, under Code Wash. § 1467, which provides that claims shall be barred unless so presented, does not prevent the foreclosure of the mortgage, where no recovery is sought beyond the proceeds of the mortgaged lands. Following *Scammon v. Ward*, 23 Pac. Rep. 439.

2. A mortgage bearing interest at the rate of 1½ per cent. per month, payable semi-annually, is valid, under Code Wash. § 2389, providing that any rate of interest may be agreed on by the parties to a written contract; and, on the non-payment of the interest due on the mortgage, the same may be compounded semi-annually.

Appeal from superior court, Thurston county; MASON IRWIN, Judge.

*James Kiefer*, for appellant. *Allen & Ayer*, for appellee.

SCOTT, J. The record in this case shows that on August 14, 1884, the defendant,

Julia S. Israel, with her husband, George C. Israel, executed a note to the plaintiff, the principal sum being \$1,000, due one year from its date, and bearing interest from date at the rate of  $1\frac{1}{2}$  per cent. per month until paid, the interest payable semi-annually, and if not so paid to be added to the principal, and draw like interest, and, at the same time, secured the payment thereof by a mortgage upon certain lands in said county. On the 28th day of October, 1885, the note being unpaid, plaintiff instituted a suit in the territorial district court for said county to foreclose the mortgage; and on October 21, 1886, during its pendency, said Julia S. Israel died intestate. It is conceded that on December 6, 1886, T. M. Reed, Jr., was appointed administrator of her estate, and duly qualified as such, and on the same day caused the usual notice to be published requiring all creditors of said deceased to present their claims to him within one year thereafter, and that the claim in question was not so presented. June 11, 1888, the administration being still pending, said administrator was substituted as defendant in the action in place of deceased. At the trial the court found \$2,449 to be due the plaintiff upon the note; and, in arriving thereat, computed interest upon the principal sum, less a small payment which had been made, at the rate of  $1\frac{1}{2}$  per cent. per month, and compounded the same semi-annually. The court also found the additional sum of \$244.90 to be due as attorney's fees in said action, and on April 29, 1890, decreed a sale of the mortgaged lands, and directed the proceeds to be applied in payment of the amounts so found to be due the plaintiff, together with the other costs and expenses. No judgment for any deficiency over was rendered. The mortgage provided, in case of a foreclosure, that the plaintiff might have her counsel fees, to the amount of 10 per cent. upon the principal and interest found to be due, paid out of the money arising from a sale of the lands. The defendant appealed the cause to this court. He alleges that the plaintiff's claim was barred by reason of a failure to present the same to the administrator in the probate proceedings; that it was error to compound the interest; and that the plaintiff could not recover her costs and attorney's fees without having presented such a claim to the administrator.

The first point is disposed of in the case of *Scammon v. Ward*, not yet reported in our own state, but to be found in 23 Pac. Rep. 439, wherein this court decided that a failure to present such a claim would not prevent a foreclosure of the mortgage where no recovery is sought beyond the proceeds of the mortgaged lands.

The findings of the court as to interest and attorney's fees is in entire accord with the terms of the note and mortgage. Neither of these instruments is attacked upon the ground of being unconscionable, nor is the amount of the attorney's fee claimed to have been unreasonable. There is no law in this state prescribing a different rate of interest in case of the death of

a party from that provided by the contract, and there was none at the time the same was entered into. The objections urged in this case cannot be allowed to prevail, whatever opinion the court might entertain as to the advisability of a different rule. The Code provides (section 2369) that "any rate of interest agreed upon by the parties to a contract, specifying the same in writing, shall be valid and legal;" and this is the law until changed by legislative enactment, excepting cases where contracts should be set aside upon some of the recognized grounds, for which the same may be annulled. The judgment is affirmed.

ANDERS, C. J., and DUNBAR, STILES, and HOYT, J.J., concur.

(1 Wash. St. 446)

ILWACO RY. & NAV. CO. v. HEDRICK.

(Supreme Court of Washington. Dec. 10, 1890.)

NEGLIGENCE—DANGEROUS PREMISES—TURN-TABLES—INJURIES TO CHILD.

1. In an action for the wrongful death of a child between five and six years old, it is not admissible for the attending physician, who has already stated that the child was frail and weak, to further testify whether in his opinion the child would have survived the injury had it been a healthy one.

2. In an action for the death of a child caught in defendant's turn-table, left unfastened, it is inadmissible to show that it is the custom of all railway companies to keep their turn-tables unfastened, whether in use or not, and whether in an inclosed or public place, as such a custom is unreasonable, and manifestly negligent.

3. Where it is shown that the managing agent of the company had his office near the turn-table, and had seen the children playing on it several times before the accident, the fact that he tied the table with a rope so that it could not be revolved unless the rope were cut or untied, does not relieve the company of liability for its negligence in not adopting securer means to prevent so dangerous a machine from being revolved by children likely to be attracted by it.

Appeal from superior court, Pacific county.

*Fulton Bros.*, for appellant *Watson*, *Hume & Watson*, for respondent.

ANDERS, C. J. This was an action by appellee, as administrator, to recover damages for the death of his son, a child between five and six years of age, alleged to have been caused by the negligence of appellant in not properly securing a turn-table situated upon its own premises, in an open area, near one of the principal streets, and close to the business portion, of the town of Ilwaco, in this state. It appears that the turn-table had been constructed but a short time previous to the accident to the child, and that, up to that time, it had not been used by appellant for the purpose for which it was designed. A considerable number of the children of the town had been in the habit of playing upon and revolving it previous to the accident to deceased. It was tied to a stake the day before, with a piece of rope, by one Hoffman, not in the employ of the railroad company, but was soon after untied by one of the children, and play resumed upon it. The managing agent of appellant, whose office and place of busi-



ness was in close proximity to the turn-table, testified, in substance, that he also tied it, or caused it to be tied, with a rope two days before the boy was injured; that the next day he noticed it was unfastened, and tied it with the same rope and in the same place; that it remained tied all that day; that he saw the children again on the table the evening before the accident; that they had untied it, and were revolving it and riding on it; that he drove them away, and told the men working on the track to keep them away from the turn-table, and that he tied it four times in all, with the same piece of rope. But that the table was ever tied or fastened at all, except by Hoffman, is disputed by other testimony in the case. The deceased child had never been to this turn-table before the time he was injured, but on that day he was sent by his mother on an errand to the store, about 300 yards distant from his home, and close to the turn-table. Returning from the store, he was attracted by the children at play upon the turn-table, and stopped and sat down to watch them on the abutment on or near the rails of the track connecting with the turn-table, in such a manner that his feet hung down on the side next to the turn-table. While in that position, the children turned the table so that his legs were caught between it and the abutment, and so injured that the flesh of both legs, from his knees down, was mangled and torn from the bones, from the effects of which he died three days afterwards. Upon the trial in the court below, the jury returned a verdict in favor of the plaintiff for the sum of \$2,000. Judgment was entered upon the verdict, from which defendant appeals, and assigns the rulings of the court below in excluding certain testimony offered by defendant, and the refusal of the court to charge the jury as requested by it, as error.

To prove the character of the injury, and that the death of deceased was caused thereby, the plaintiff called as a witness a physician and surgeon, who, having stated, among other things, that he attended the child from the time of the accident until his death, and that he died from the injuries received at the turn-table, further testified—but whether on direct or cross-examination is not clear—that the child was a frail, weak child. On cross-examination, counsel for defendant asked the witness this question: "State whether or not, in your judgment, if the child had been a healthy child, it would have survived the injury?" This question was objected to by counsel for plaintiff, on the ground that it was irrelevant and immaterial, and the objection was sustained by the court; and this ruling, appellant contends, was erroneous and prejudicial. It is claimed that the evidence sought to be elicited by the question was material in aiding the jury in arriving at plaintiff's damage. And in support of the proposition it is argued that a child so weak or feeble that he could not survive an injury that a healthy child would have survived, has a less expectancy of life than the ordinary child, and could

not be expected to accumulate so much for his estate; and that an estate would be less damaged by the death of a weak child than by that of a healthy one. It is true that the measure of plaintiff's damage is the loss occasioned by the death of deceased, and that his health, mental and physical condition, and his expectancy of life, were proper subjects to be submitted to the jury for their consideration in estimating the amount of the damage sustained by the estate. But it does not follow that defendant should have been permitted to show that, in the opinion of the witness, deceased would not have died from the effects of the frightful injury he received if he had been as strong and healthy as some other boy, or even if he, himself, had been more vigorous. There was no controversy as to the cause of the child's death, and the question, then, before the jury was not what amount of injury of the character suffered by him he could or would have survived under other circumstances, but what was, in fact, his health and physical condition at the time of the injury; and that the witness had already stated. We see no error of the court in excluding the question.

It is next contended that the court erred in excluding the testimony offered by appellant to show that it is not the custom of railroad companies, or those operating such turn-tables, to have or keep the same locked or fastened at any time, but, on the contrary, that the custom and practice of all such companies is, and always has been, to have and keep them unfastened and unlocked at all times, whether in actual use or not, and whether inclosed, or in an open public place. We think this evidence was clearly immaterial, and was rightly excluded by the court. The question at issue was whether the defendant secured the turn-table as careful and prudent men would ordinarily do under like circumstances. What would be clearly negligent in one case and under some circumstances might be ordinary care under other and different circumstances; and whether there is negligence in any particular case must generally be determined by the facts and circumstances of that case, and not by any general custom or practice. *Koester v. Ottumwa*, 34 Iowa, 41; *Koons v. Railway Co.*, 65 Mo. 592. See, also, *Deer. Neg.* § 9, and cases cited. Besides, the custom proposed to be shown is manifestly unreasonable and negligent, and was not relied on by appellant as a defense in the cause, for it claimed, and still claims, immunity from liability, on the ground that it secured its turn-table properly.

The next assignment of error is the refusal of the court to give, without modification, the following instruction asked by defendant: "(1) If you shall find that the turn-table was tied on the day of the accident and injury complained of in such manner as to prevent its being revolved without untying or cutting the rope by which it was tied, and that on that day, without the knowledge or consent of the defendant, the rope was cut or untied by a person or persons not in the defendant's employ, and that the accident producing

the death of the child Franklin G. Hedrick, occurred before the fact that the rope had been cut or unfastened became known to the defendant or its officers, then I charge you that the defendant is not liable in this action. (2) If the defendant so fastened the turn-table that it could not be revolved so as to injure a person or a child, and, in the absence of the officers of defendant, some person wrongfully cut or untied the fastenings, so that the turn-table could be revolved, and thereby the deceased received the injury that caused his death, I charge you that the defendant is not liable, and your verdict should be in favor of defendant." The court modified the first of these instructions by adding thereto: "Unless there was want of ordinary care in the method or manner in which the company undertook to secure the turn-table, and you believe that this method was the proximate and controlling cause of the injury,"—and the second by adding the words: "If you do not further find that the accident or injury was the result of want of ordinary care in the manner in which the company undertook to secure the turn-table, and that such want of ordinary care was the proximate and controlling cause of the injury." As so modified, the court gave both instructions. Whether this action of the court was erroneous or not must depend upon the measure of duty which appellant owed to the deceased, under the circumstances. It had erected this alluring and dangerous machine in an open, public place, and its agent and manager not only knew that young children were instinctively attracted by it, and were in the habit of playing upon and around it, but that the method adopted, if any, to prevent them from so doing was wholly insufficient. It certainly would not have been a matter of very great inconvenience to have securely fastened or locked this unused turn-table before the deceased was injured, as was done immediately afterwards. And we think it was the duty of appellant to so secure it as to prevent injury to those who, by reason of their tender years, were incapable of comprehending its dangerous character, either by locking it or in some other way preventing access to it; and a failure to take such precaution was negligence on the part of appellant. *Railroad Co. v. Styron*, 66 Tex. 421, 1 S. W. Rep. 161; *Railroad Co. v. Caldwell*, 74 Pa. St. 421; *Nagel v. Railroad Co.*, 75 Mo. 653; *Railroad Co. v. Bohn*, 27 Mich. 503; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; 2 Ror. R. pp. 1121, 1122. The instruction asked by appellant, in effect, requested the court to charge the jury, as matter of law, that, if they found that appellant took the precautions and used the means claimed by it to secure the turn-table, it would not be liable in this action; and we are of the opinion that the court committed no error in refusing to give the instructions as requested. The question whether or not appellant, under all the facts and circumstances of the case, was guilty of negligence, was for the jury, and was fairly submitted by the instructions given by the court. *Railroad Co. v. Stout*, 17 Wall. 657; *Hoye v. Railway Co.*, 62 Wis. 666, 23 N. W. Rep.

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14; *Hydraulic Works Co. v. Orr*, 83 Pa. St., supra. There appearing no error in the record, the judgment of the court below must be affirmed.

DUNBAR, SCOTT, and STILES, JJ., concur.

(1 Wash. St. 389)

# CITY OF OLYMPIA v. MANN.

(*Supreme Court of Washington*. Nov. 21, 1890.)

## MUNICIPAL CORPORATIONS—ORDINANCES—FIRE LIMITS—WOODEN BUILDINGS.

1. The charter of Olympia provides that the city "shall have power to make regulations for the prevention of accidents by fire, to establish a fire department \* \* \* to prevent by all possible and proper means danger or risk of injury or damages by fire arising from carelessness, negligence, or otherwise, \* \* \* and such other powers and privileges not herein specially enumerated, as are incident to municipal corporations of like character and degree." *Held*, that the city has implied power to pass an ordinance creating fire limits, and prohibiting the erection of any wooden buildings therein.

2. An ordinance forbidding the erection of any wooden building within the fire limits as therein set out, except by special permission of the council, is valid. STILES, J., dissenting.

Appeal from superior court, Thurston county.

C. H. Ayer and B. F. Dennison, for appellant. J. W. Robinson and Cavanaugh & Fitch, for appellee.

ANDERS, C. J. Appellee, being the owner of a vacant lot on Fourth street, in Olympia, described as lot 1 in block 24 of the town (now city) of Olympia, and being desirous of erecting thereon a two-story frame building to be used as store-rooms and offices, applied to the city council of said city, in accordance with section 8 of ordinance No. 304 of said city, entitled "An ordinance defining the fire limits, and to protect property from fire," approved April 24, 1889, for a permit to erect said building. The said lot being within the fire limits, as established by said ordinance, the city council refused permission to erect the proposed building, and notified appellee not to undertake the erection of the same. Appellee thereupon brought this action to perpetually enjoin and restrain the city and its officers from, in any manner, enforcing, or attempting to enforce, said ordinance against him or his employees laboring upon said building. In his complaint he alleges, substantially, in addition to the facts above mentioned, that the boundaries of said fire limits, as fixed by said ordinance, are unreasonable, injurious, and inequitable, and the same was passed with a desire to force brick and stone buildings on Fourth and Main streets, and increase the value of neighboring property at the expense of those intending to improve; and that since the passage of said ordinance, and the rejection of plaintiff's application for a permit, the said city has granted permits for the erection of wooden buildings within said fire limits, but not on Main or Fourth streets, whereby the danger of conflagration has been much more increased than it would be by the erection of plaintiff's desired building; that said ordinance is null and void; that the said city had and has

no authority to create or maintain fire limits; that the ordinance is void also for want of conformity to the city charter, and federal laws, even if the city had such power that a court of equity should prohibit its enforcement; that the city has no authority to declare anything a nuisance, and only has authority to abate such nuisances as are known and defined by statute. The complaint further sets forth the penalty prescribed by said ordinance for its violation, and avers that the defendant, the city of Olympia, through its marshal, threatens to arrest plaintiff, and all those who may be found at work on said building; that he has a large number of men employed and ready to commence work on said building, and that unless the city and its officers are restrained and prohibited from enforcing said ordinance plaintiff will suffer great and irreparable damage, for which there is no speedy or adequate remedy at law, and that the threatened arrests will create great and vexatious litigation. To this complaint the defendant filed a general demurrer, which was overruled by the court, and, defendant electing to stand upon the demurrer, judgment was rendered for plaintiff, from which defendant appeals to this court.

We are therefore called upon to decide the question whether the city ordinance complained of is or is not valid, or, in other words, whether the city council were legally empowered to pass it. This ordinance, after setting out the boundaries of the fire limits within the city, among other things, provides as follows: "Sec. 7. No wooden building shall be constructed within the fire limits, provided that the city council may grant permits to construct wooden buildings within the fire limits as hereinafter provided. \* \* \* Sec. 10. Any person who shall erect, or cause to be erected, or assist in the erection of, any building contrary to the provisions of this ordinance, or shall maintain and refuse to remove any building erected contrary to the provisions of this ordinance for ten days after receiving notice to remove the same from the fire-wardens, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and be fined in any sum not greater than one hundred dollars, or be imprisoned in the city jail not more than thirty days, or be both fined and imprisoned, at the discretion of the court." This ordinance is assailed by counsel for appellee upon the ground that the city charter did not authorize its passage, and upon the further ground that it is unreasonable, or rather that the boundaries of the fire limits are "unreasonable, injurious, and inequitable." Among the powers granted to the city of Olympia by its charter, and which are relied on by appellant to sustain the ordinance in question, are these: "The city of Olympia shall have power to make regulations for the prevention of accidents by fire, to organize and establish a fire department, and make and ordain rules for the government of the same; to provide fire-engines, and other apparatus, and to levy and collect special taxes for that purpose; \* \* \* to prevent, by all possible

and proper means, danger or risk of injury or damages by fire arising from carelessness, negligence, or otherwise; \* \* \* to adopt proper ordinances for the government of the city, and to carry into effect the powers given by this act; \* \* \* and the city of Olympia shall have such other powers and privileges, not herein specially enumerated, as are incident to municipal corporations of like character and degree." The learned counsel for appellee contends with much earnestness that, notwithstanding these legislative grants, the city had no power to enact the ordinance, for the reason that the powers, if any, conferred by the charter are general in their nature, and that a special grant of power is necessary to authorize the establishment of fire limits, or the prevention of the erection of wooden buildings within the city. To sustain this position counsel cites, among others, the following, as especially in point: *City of Keokuk v. Scroggs*, 39 Iowa, 447; *Pye v. Peterson*, 45 Tex. 312; *Kneedler v. Borough of Norristown*, 100 Pa. St. 368; *City of Champaign v. Harmon*, 98 Ill. 491; and *Mayor, etc., v. Thorne*, 7 Paige, 261.

In the case of *City of Keokuk v. Scroggs*, it appears that the original charter conferred a general power upon the city to make such ordinances as should be necessary to secure the city and its inhabitants from injury by fire. This charter was amended, and the amendment contained a full and specific enumeration of the acts which the city might do for the purposes of guarding against calamities by fire. In the enumeration of powers in the amended charter nothing was said about the control of wood or lumber yards. The defendant was prosecuted for the violation of that portion of the city ordinance relating to the location of lumber yards within the fire limits. And the court said: "The power to pass an ordinance requiring the removal of a lumber yard from a specified portion of the city is not expressly conferred in the charter, nor can it be claimed that it is necessary to make the power conferred available." And further that the general provision contained in the original charter has become absorbed in the particular enumeration in the amendment. "Therefore whatever power is conferred upon the city respecting fires must be found in the amendment to the charter." There being neither a general nor special power in the charter authorizing the city to enact the ordinance as to lumber yards, the court held no such power existed.

The case of *Pye v. Peterson*, 45 Tex. 312, was a case involving the validity of a fire ordinance. The charter provided generally that the city might have power to "ordain and establish such acts, laws, regulations, and ordinances not inconsistent with the constitution or laws of this state as shall be needful for the government, interests, welfare, and good order of said body politic," also "to abate and remove nuisances and to punish the authors thereof by penalties, fine, and imprisonment, and to define and declare what shall be nuisances." And the court said that "without an express grant a city cannot

establish fire limits, declare wooden buildings erected therein to be nuisances, and to provide for the removal of such buildings and the punishment of those erecting them." And in this case the court also said: "The form of the ordinance indicates that it was framed under the latter clause." And the point really decided was that the council had no power to declare wooden buildings to be nuisances.

In the case of *Kneedler v. Borough of Norristown*, 100 Pa. St. 368, the court says: "The charter of the borough of Norristown contains no authority to the council to enact ordinances prohibiting the erection of wooden buildings. Nor is there anything in the grant of general powers conferred upon the borough from which such an authority can be necessarily inferred or to which it is indispensable." But the court was apparently influenced in its decision by the fact that the legislature had previously assumed jurisdiction of the subject, and had expressly enacted that wooden buildings should not be erected on certain streets of the town, which fact was a very strong reason for the conclusion that it had not delegated the power claimed to the borough itself. And further, the court seems to concede that if the power to enact the ordinance had been conferred by the charter of the borough, or could necessarily be implied from any of the provisions thereof, it would have been valid.

The controversy in the case of *City of Champaign v. Harmon*, 98 Ill. 491, arose out of a claim made by the city to certain real estate purchased by it at a tax-sale. And the court very properly held that, while the city had the power to purchase and hold real estate necessary for corporate purposes, it could not do so for the purposes of speculation without special power granted to that end.

The case of *Mayor, etc., v. Thorne*, 7 Paige, 261, seems strongly to support the position of appellee. Other cases are also cited by counsel bearing more or less directly upon the point; but, in view of the provisions of the charter under consideration, and of the decisions of other courts of high standing and ability to the contrary, we do not feel bound by these decisions. In fact we do not think they are sustained by the better reason, or by the weight of authority.

Judge Dillon defines the powers possessed by municipal corporations to be (1) those granted in express terms; (2) those necessarily or fairly implied in or incidental to the power given; and (3) those essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. (4th Ed.) § 89.

And taking this to be a correct statement of the law, it follows that if the charter of Olympia, either expressly or by necessary or fair implication, gave the city council authority to enact the fire ordinance, or if such power is essential to the declared objects and purposes of the municipality, then the ordinance ought to be sustained.

The power to do a particular thing may be, and often is, delegated to a municipal corporation in general terms, and these

general terms may be quite as broad and comprehensive as if expressed in specific language. In the case before us, the city charter confers upon the city power to make regulations for the prevention of accidents by fire, and to prevent, by all possible and proper means, danger or risk of injury or damages by fire arising from carelessness, negligence, or otherwise. And if these expressions of the legislature did not expressly authorize the council to establish fire limits within the city, and to prevent the erection of wooden buildings therein, such power is certainly fairly implied in what is expressed, provided the means employed are proper or necessary to prevent accidents or danger or risk of injury or damage by fire. The propriety or necessity of the methods to be pursued to accomplish the object sought was left to the discretion of the council, who are the representatives of the people themselves, and who are the sole legislative body of the corporation. The council having by its acts declared the ordinance to be a proper one, we are of the opinion that this court is not warranted in setting it aside as invalid. In fact, it is held by learned courts and text-writers that municipalities have inherent power to pass ordinances for the protection of its citizens from fire, without express legislative authority. In a recent work upon the subject of municipal police ordinances we find this language: "The power to take all measures necessary to prevent fires and their spread is of prime importance to the citizens of every community. It belongs to that class of powers exercised for self-preservation, which are inherent in every municipality, and which do not need the authorization of an express grant. Every precaution possible should be taken to prevent the destruction to property and the danger to life incident to conflagration; and for this purpose as great a degree of interference with personal rights is permitted as under any other power. Private interests are entirely subservient to the public safety." "The first preventive step taken is usually to prescribe fire limits; that is, territorial limits within which it shall be unlawful to erect certain classes of buildings. This is always permissible." "Owing to the extreme importance of such regulations, and their vital interest to the community, one would hardly think that the power of erecting fire limits in a thickly built up district would ever be denied; still it is surprising to note that two courts have insisted that express authority must exist for such regulations. It seems that their regard for personal rights had been carried to an unwarranted extent, in view of the importance of preventing the destruction of property by fire, and, great as our regard must be for their reasoning and conclusions, the rule above enunciated seems to be the true one, and the great majority of the well-advised decisions tends to its support." *Horr. & B. Mun. Ord.* §§ 221, 222.

In the case of *Wadleigh v. Gilman*, 12 Me. 403, the court held that an ordinance of the city government of Bangor prohibiting the erection of wooden buildings in the city within certain limits was within the

authority conferred, under authority in the charter "to ordain and establish such acts, laws, and regulations, not inconsistent with the constitution and laws of the state as shall be needful to the good order of said body politic."

In *Alexander v. Town of Greenville*, 54 Miss. 659, the court held that a power "to provide for the prevention and extinguishment of fires" implies a right to establish fire limits.

In *Mayor, etc., v. Hoffman*, 29 La. Ann. 651, it was decided that a municipal corporation has inherent power, independent of legislative grant, to forbid the erection and compel the removal of buildings formed of combustible materials, within the densely built up parts of a town. And in *Baumgartner v. Hasty*, 100 Ind. 575, after citing authorities sustaining the proposition that municipal corporations possess inherent power to prohibit the erection of wooden buildings within prescribed limits, and to cause their removal, at page 580, the court says: "These cases rest on solid principle; for the rule has always been that a municipal corporation has inherent power to enact ordinances for the protection of the property of its citizens against fire." And the court says further: "A legislative act granting authority to take precautions against fire, and ordinances passed under such an act authorizing the removal of wooden structures erected within forbidden limits, are little more than express declarations of the existence of powers which existed at common law, and are necessarily implied in the grant of a charter to a city." Page 581. See, also, 1 Dill. Mun. Corp. §405. We will not now stop to notice other cases cited by counsel to the same effect, as many of them are commented on and approved in the cases already mentioned by us.

It is further contended by counsel for appellee that the ordinance is unreasonable, and therefore void for that reason if for no other. This is a proper question for the court to determine. The city council, as the legislative body of the municipality, must of necessity be vested with more or less discretion as to the reasonableness of the means necessary to effectuate lawful objects. They are in a better position than the court to judge of the best course to pursue, as well as the methods best calculated to effect desired results, and the courts should not set aside or review their acts, unless, upon their face, they are manifestly unreasonable, or based upon fraud, or passed in wanton disregard of private rights, or are in excess of the power of the council. The motives of the council cannot be inquired into, but must be presumed to have been to accomplish the natural and reasonable result of their act. We see nothing unreasonable in the ordinance, viewed in the light of all the facts before us. Its burdens, if any, are cast alike upon all persons within the limits of the district prescribed by it, and the city council had lawful authority to pass it. We cannot see that it is unduly oppressive, or that it discriminates against any particular individual, or that it was passed in a spirit of wanton disregard of proprietary rights. For the foregoing reasons, the

judgment of the court below will be reversed, and the cause remanded for further proceedings in accordance with this opinion. So ordered.

HOYT, J., concurs.

SCOTT, J. I concur in all that is said in regard to the power of the city of Olympia to establish fire limits, and concur in the result reached, because it appears to me the question as to the invalidity of the ordinance upon the ground of its unreasonableness is not properly before us in this case. I do not think, however, the city has the power, or can have it even by express legislative enactment, to grant or refuse permission at its pleasure to erect wooden buildings within a fire-limit district where the same are prohibited by the ordinance, although an attempt is made therein to except cases where the city council should see fit to grant a special permit, unless certain rules, regulations, or conditions are laid down by ordinance which apply to all persons alike, and are conclusive in themselves; that it cannot exercise the arbitrary power to grant such a permission to one person and refuse it to another under like conditions and circumstances. As to whether any of the provisions of this ordinance have this effect, or might be so applied, and if so whether the entire ordinance is thereby invalidated, or rendered void only in so far as it relates to the granting of such special permits, and be otherwise valid, which would prohibit the erection of all wooden buildings within the prescribed district without exception, I desire not to express an opinion in the absence of an argument of the particular questions. Powers granted to a municipality must be reasonably and fairly exercised, and its laws made applicable to all alike. The attempted enforcement of power and the unreasonableness and injustice of ordinances whereby a different result could be brought about, or this principle violated, can be inquired into to this extent at least. There was no attempt to attack the ordinance upon this ground in the complaint, but it is alleged to be void because the boundaries of the fire-limit district as fixed therein are unreasonable, without stating the facts wherein such unreasonableness consists.

STILES, J. I dissent. No objection was made upon the argument here to the discussion of the question as to the equality and fairness of sections 7-9 of the ordinance which it was assumed was raised by paragraph 7 of the complaint, and to my mind those sections set up such a system of arbitrary control of buildings in the city of Olympia by the council as is not entitled to be termed reasonable. The establishment of fire limits means the designation of a territory within which wooden buildings must not be erected. But this ordinance, while it designates limits, and says that no wooden buildings shall be constructed therein, clearly shows by its context that that was not its real purpose. The true purpose of it was to compel every person desiring to erect a wooden building to go before the council, which

retained within itself the power to say whether he should erect it or not, not according to any fixed rules of determination, under which all applicants would be treated alike, but without rules or regulations, whereby favoritism, or influence, or other motives not proper to the determination of such a question, might enter into and actually determine it. If there were to be exceptions to the ordinance, the exceptions should have been declared, and regulations made under which they could have been availed of. If there was territory embraced in the ordinance within which it was not expected to enforce the ordinance, by reason of its unsettled condition, it was unreasonable to so embrace it, and the limits should not have been extended over it until such time as the conditions were proper for such extension. I concur in holding that the city of Olympia has the power to ordain fire limits implied in its charter; but I cannot agree that such an ordinance was ever contemplated by the legislature, and therefore hold the court's action in overruling the demurrer to have been eminently right.

(1 Wash. St. 429)

**RITCHIE v. GRIFFITHS et al.**

(Supreme Court of Washington. Dec. 19, 1890.)

**VENDOR AND VENDEE — BONA FIDE PURCHASER — RECORDING DEED.**

1. The mere delivery of a deed to a county auditor for record is not constructive notice to a *bona fide* purchaser, where the auditor neglects to record the same, in accordance with the registry law. Distinguishing *Lytle v. State*, 9 How. 315.

2. Sess. Laws Wash. T. 1890, pp. 313, 314, §§ 13, 19, 24, provide that, when deeds are given to a county auditor for record, he shall note the time of filing in an index book, with a reference to the book where recorded, and with names of parties, description of property, etc. Held that, without a compliance with these provisions, the record affects no party with notice.

Appeal from superior court, Clallam county; MORRIS B. SACHS, Judge.

*Bush & Noyes*, for appellant. *Johnson & Moody*, for appellees.

DUNBAR, J. The first question to be decided in the consideration of this case is, does a grantee, who deposits his deed for record in the auditor's office, where it is received by that officer, discharge his duty of notice to the public, so that his title cannot be prejudiced through the fault or negligence of the auditor in not recording said deed, in accordance with the requirements of the registry laws? If it is concluded that he does so discharge his duty, and that constructive notice is thus given, it will be conclusive of this case; and it will not be necessary to enter into the question of whether or not the index is an essential part of the record. It will be seen that important questions arise here, affecting valuable rights, and that, whichever way they are decided, a hardship will be imposed upon an innocent party. In one instance, the first grantee relies on the officer, who is a creature of the law, to do his duty; and in the other, the purchaser, reposing faith and confidence in the correctness of the record, acts upon it. Shall the deed prevail, or the record of it? On

the first question there is a somewhat perplexing conflict of authority; some courts holding that a deed is recorded, in contemplation of law, when it is entitled to registration, and is deposited with the recorder in his office for that purpose, and if, through any fraud or neglect or mistake of the recording officer, the proper notice is not conveyed to a subsequent purchaser or incumbrancer, that the misfortune will fall upon the subsequent purchaser; while other courts hold the opposite doctrine, that the *onus* is on the grantee, who deposits his deed with the recorder, to see that every step is taken, and every act done, that is prescribed by the registry laws. For collated authorities on this question, see *Mangold v. Barlow*, 61 Miss. 597; and *Wade*, Notice, pp. 70-73. In many of the cases, however, that are cited as holding the doctrine claimed by plaintiff, the courts, on a careful investigation, are found to have based their opinions on statutes materially different from ours; and others, on the peculiar circumstances of the case. The enunciation by the supreme court of the United States, in *Lytle v. State*, 9 How. 315, that "it is a well-established fact that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right, by the misconduct or neglect of a public officer, the law will protect him," has been largely relied upon by the plaintiff, and has been quoted by a majority of the cases reported, which hold to plaintiff's view, but in none of these cases, that we have seen, have the circumstances of that case, which called forth the opinion, been reported. To get the full scope and meaning of this expression, we must not regard it as a segregated proposition, independent of the case under consideration, and applicable to all cases; for judges, in rendering opinions, use expressions with reference to the application of principles involved in the case under consideration, and the language employed must be construed, and its meaning gathered, from an examination of the questions involved, the circumstances surrounding, and the argument that leads up to the utterance, or, in homely phrase, it is necessary to know what the court was talking about. Of course, there are certain underlying or basic principles of law, from the true deductions of which are constructed legal maxims, which may be stated as independent propositions, and which will admit of no modification; but the examination of the case cited shows that the quoted utterance of the eminent judge has no application to the principles involved in, and the circumstances surrounding, this case. That was a case where a preemption claimant tried, through a succession of years, to obtain title to some fractional subdivisions of land, and was prevented, not by any negligence of the register and receiver in the land-office, but on account of their construction of the law, and circular instructions from the general land-office. Afterwards, by act of congress granting a thousand acres of land to the state of Arkansas, for the purpose of building a court-house, the governor selected

and sold the land in controversy to one Russell, under whom the defendants held. Of course, many interesting questions were raised during the trial of this case; but the particular circumstances of the case, which called out the quoted utterance, and the intended applications of the principles therein enunciated, can probably be gathered from the balance of the paragraph following the quotation, which is as follows: "In this case the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act; and, subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the fractions, which the register would not permit him to do." Thus it will be seen that none of the principles involved in the case at bar were involved in that case, and it shows the misleading tendency of quoting detached sentences from the opinions of courts. In that case, the action of Cloyes was at every step a matter of public record, and of official report, and the whole circumstances of the case show that the defendants had actual notice of his claim, though some of them denied such a notice in the answer, while others admitted that they had heard of his claim, but believed it to be fraudulent; but the court spoke with reference to the acts of an officer acting in a judicial capacity, and deciding questions of law,—decisions and acts over which the plaintiff could not possibly exercise any supervision or control. It will certainly not be hard to see that a very different rule might obtain, when the act required by the applicant was purely ministerial, and which he had a right to see was done in the manner prescribed by law. It is doubtful if the judge who rendered that opinion would have concluded that the grantee "had done everything which the law required him to do," when he contented himself with simply handing his deed to the auditor, without exhibiting any further concern about it. In our judgment, the scope and meaning of this opinion has been entirely misconstrued, when applied to this character of cases.

In *Mangold v. Barlow*, 61 Miss. 593, and one of the best argued cases sustaining the doctrine that the *onus* is on the purchaser, and a case which is also largely quoted, the court bases its opinion on the peculiar language of the Mississippi statute, which declares that certain instruments "shall be void, as to all creditors and subsequent purchasers for valuable consideration, without notice, unless they shall be acknowledged or proved, and lodged with the clerk of the chancery court of the proper county, to be recorded." Here the statute seems, by express terms, to make the lodging of the properly proved instrument with the clerk the proof of constructive notice. And thus it is with a great majority of cases cited in favor of plaintiff's theory. A close examination of them will show that the opinion is based upon some express language

of the statute, which would justify the conclusion reached; but, on the general proposition, however, the decided weight of authority seems to be in favor of the view that the record can be relied upon by subsequent purchasers, without actual notice, and that constructive notice cannot be given by an attempt to comply with the registry laws. And this view we think is supported by right reasoning, and founded on principles of equity and justice.

As is most admirably stated by Mr. Jones, in his work on Mortgages: "Registry laws are intended to furnish the best and most easily accessible evidence of the title to real estate, to the end that those designing to purchase may be fully informed of instruments of prior date, affecting the subject of their contemplated purchase; and also that, having availed themselves of this means of knowledge, they may rest there, and purchase in absolute security, provided that they do so without knowledge, information, or such suggestion from other facts as would be gross negligence to ignore of some antecedent conveyance or equitable claim." The recorder cannot be considered the agent of the purchaser, as is asserted by some of the authorities. It is a much fairer construction of the law, and more in harmony with the law of agency generally, to consider him the agent of the party who has the business transaction with him, who gets him to do the work. And to him he should be responsible for any damage flowing from his refusal or neglect to do the work according to the contract between them; and that contract is, either express or implied, that the instrument shall be recorded according to law. That is what the grantee pays him to do, and he must see to it that his work is done right, or accept the consequences as between himself and third parties, who are misled. It cannot be said that the purchaser is alone subject to damages from the non-recording of the instrument. The very object in having it recorded is to give constructive notice to innocent purchasers, and to protect the grantee's title against said purchasers. The law imposes upon him the duty of having his deed recorded. It is not the *attempt* to record a deed that the law requires; but it is the *recording* of the deed. It would be an empty benefit, indeed, that would accrue to the buying public if the attempt to record were held to take the place of the record. The obligation rests upon the grantee to give the notice required by the law. He controls the deed. He can put it on record or not, as he pleases. He has the right and the opportunity to see that the work is done as he directs it to be done, in legal manner. No one else has this opportunity, and if, from any cause, he fails to give the notice required by law, the consequences must fall on him. It may be a hardship; but, where one of two innocent persons must suffer, the rule is that the misfortune must rest on the person in whose business, and under whose control, it happened, and who had it in his power to avert it. Any other rule would be abhorrent to our natural ideas of right, and



would render perilous every business enterprise. The fact that the recorder gives to the grantee a certificate that the deed is properly recorded does not relieve him of the responsibility of seeing that it is actually so recorded. The certificate binds no one but the recorder, and cannot possibly, under any known rule of law or ethics, affect the rights of an innocent purchaser, who cannot be bound by a transaction to which he is in no sense a party, of which he has no knowledge, and for which he is in no way responsible. As we before intimated, it might aid the grantee in recovering damages from the auditor, but could do no more than that. The record is the essence of the law. The recorder is only a convenient instrument for the use of those whose duty it is to make the record. If, under the law, a public record were kept, where every grantee was required to come and record his deed, he could certainly not plead his own mistakes or negligence; and the only reason why every man is not allowed to record his own instruments is simply that the record can be kept in a legible, orderly, and presentable manner; and the law provides one man to do the work for the many; or, in other words, makes the one man the agent for the many, and who does the work at their instance, and under their pay and control. It is true that, in another department of his work, he may be said to be the agent of the purchaser, or searcher of the records; for the law also makes him the custodian of the record books. Every man has a right to see the records, and the law, for the purpose of preserving the records, and assisting the searcher of the records, constitutes the recorder their keeper, who, at certain hours, found by the law to be reasonable, must exhibit them to all who wish to see them, and must also certify to what the record shows, when requested so to do, and paid for said services; and if, in the exercise of either of these duties, he either misrepresents the books, by exhibiting false or blind records, or makes a false certificate, whether through fraud or negligence, the person for whom the service is rendered must suffer the damage, if any flow from the negligent or fraudulent act, and his only remedy is against the recorder for damages. A. employed the recorder to search the records, and the recorder certified to A. that the record title to a certain tract of land stopped with, and rested in, B., upon the strength of which A. purchased of B., for a valuable consideration, said land, and it afterwards eventuated that C. had a good deed on record for the same land, which the recorder overlooked. No well-regulated court would, we think hold that the title of C. would be jeopardized by the mistaken certificate of the recorder. We cannot conceive how the inconsistency or injustice would be diminished by holding that the innocent purchaser did not have a right to rely on the true record, or that the grantee would be protected by the false or mistaken certificate of the recorder.

With this view of the case, it becomes necessary to investigate the next question involved, viz.: Is the index an essential

part of the record, under the registration laws of this state? On this proposition, also, there is conflict of authority, though the conflict in many cases is more seeming than real; for, as with the first question discussed, a great many of the decisions, which are cited as in point on the abstract principle, prove, upon close investigation, to have been decided upon statutory provisions differing materially from ours. And as constructive notice, by means of recorded instruments, depends wholly upon statutory provisions, we will first examine the statute in force at that time. The statutes in force at the time of the alleged constructive notice will be found in the Session Laws of 1869, on pages 313, 314, and 315, and the sections to be construed in this case are as follows: "Sec. 18. The auditor of each county in this territory shall record, in a fair and legible handwriting, in books to be provided by him for that purpose, at the expense of the county, all deeds, mortgages, and other instruments of writing required by law to be recorded, and which shall be presented to him for that purpose, and the same shall be recorded in regular succession, according to the priority of their presentation, and, if a mortgage, the precise time of the day in which the same was presented shall also be recorded. Sec. 19. Upon the presentation of any deed, or other instrument of writing, for record, the auditor shall indorse thereon the date of its presentation, \* \* \* and, when such deed, or other instrument of writing, shall be recorded, the recorder shall indorse thereon the time when recorded, and the number or letter and page of the book in which the same is recorded." Section 20 prescribes the penalty for failing to record when fees are tendered. Section 21 provides for keeping a seal, and making copies of records. Section 22 directs the turning over the records to successor in office. "Sec. 23. Each auditor shall, upon the written demand of any person, make out a statement in writing, certified under his hand and the seal of his office, of all mortgages, liens, and incumbrances of any kind of record in his office, in relation to any real or personal property, in relation to which the demand shall be made; and, if said statement shall be incorrect, he, and the sureties upon his official bond, shall be liable to the person aggrieved for all damages sustained by him in consequence of such incorrect statement, to be recovered in a civil action. Sec. 24. Each county auditor shall keep a general index, direct and inverted. The index direct shall be divided into seven columns, with heads to the respective columns, as follows:

Time of reception.	Grantor.	Grantee.	Nature of instrument.	Volume and page where recorded.	Remarks.	Description of property.
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He shall correctly enter into such index every instrument concerning or affecting real estate, the names of the grantors being in alphabetical order. The inverted index shall be divided into seven columns precisely similar, only that the names of the grantees shall be alphabetically ar-

ranged, and occupy the second column. Sec. 25. Whenever any mortgage, bond, lien, or instrument incumbering real estate has been satisfied, released, or discharged from record, whether by written release across the record, or upon the margin thereof, or by the recording of an instrument of release, or acknowledgment of satisfaction, the auditor shall immediately note in both the indices, in the column headed 'Remarks,' opposite to the appropriate entry, that such instrument, lien, or incumbrance has been satisfied." These different sections were not only all passed at the same session of the legislature, but are all incorporated in one act, and must, therefore, be construed together; and, construing them as a whole, we conclude that sections 18, 19, and 24 intended to provide a system for the registration of deeds and other instruments affecting real estate, the compliance with which would be constructive notice to strangers. The act points out several successive steps to be taken by the auditor, when the instrument comes into his possession, before his duty with reference to it is accomplished: (1) He must file it for record, noting the time when it was presented for record; (2) record it in a fair, legible hand, in a book provided by the county for that purpose; (3) correctly enter it into an index book provided for that purpose, showing the time of reception, names of the grantor and grantee, nature of the instrument, volume and page where recorded, and description of the property; and all three of these successive steps must be taken before the record is complete. The other sections, which we have quoted, are simply directory to the auditor, or affect, simply, the auditor, and the person with whom he is dealing; but the three requirements, specified above, are for the direct and only purpose of giving notice to the public. They are vital provisions, essential to constitute constructive notice. The appellee's counsel cites section 4 of the act of November 9, 1877, which is as follows: "All deeds and mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid, as against *bona fide* purchasers, from the date of their filing or recording in said office, and when so filed or recorded shall be notice to all the world;" and argues, from that, that legal notice is given simply by filing the deed with the county auditor, and that no other notice is necessary. If that view could be entertained, it would practically render the provision, in regard to recording, a nullity; for the notice would be complete when the instrument was filed, and no man would go to the unnecessary expense of recording, and the record would soon become a voluminous and unapproachable mass of loose papers. There was evidently no such contemplation by the statutes. The auditor has 20 days within which to record the deed after it is filed, and it is the evident meaning of the law that it would be notice by virtue of the filing only during the interim of 20 days, at the expiration of which time it is presumed to be recorded, and the deed can be withdrawn, when the record becomes the notice. Or, as is more elegantly stated by

Judge DILLON, in *Barney v. McCarty*, 15 Iowa, 519, in construing a similar statute: "As the filing is but one step in a series of steps, this language presupposes, and is in fact based upon the assumption, that the other, and, in the order of time, the subsequent, requirements of the law will be observed." The Iowa statute was substantially as ours, except that the recorder was required to keep a "fair book," in which he entered every deed, giving date, parties, and description of land, in addition to an index with about the same requirements as ours. So that there was really more chance for an innocent purchaser to be put on his guard, under their registration laws, in the absence of the index, than under ours; and yet the supreme court of that state has uniformly held that the index was necessary to give constructive notice. We are strengthened in our opinion that the index is an essential part of the record, necessary to give notice, by the provisions of section 25, which require that the satisfaction of instruments affecting real estate shall be noted in the index. The legislature, recognizing the importance of the index, and the universal custom of depending upon the index, in searching the record, required that every step taken, both as to conveying, incumbering, and releasing real estate, should be made to appear briefly on the index. It is asserted by plaintiffs "that the general construction placed upon statutes similar to ours is that the index constitutes no part of the record, and that a grantee cannot suffer from any error or omission in it;" and, in defense of this proposition, cites: *Musgrove v. Bonser*, 5 Or. 313; *Bishop v. Schneider*, 46 Mo. 472; *Chatham v. Bradford*, 50 Ga. 327; *Curtis v. Lyman*, 24 Vt. 338; and *Devl. Deeds*, §§ 695-697.

In the first case cited (*Musgrove v. Bonser*) the court decided—*First*, that a deed, which had been acknowledged in Washington Territory by an officer, other than a commissioner of deeds for Oregon, where the deed did not have the certificate of a certifying officer of a court of record under seal that the acknowledging officer was such officer as he represented himself to be at the time of said acknowledgment, was not entitled to record under the statute, and therefore did not give notice; *second*, that the recording acts of Oregon only protect persons who act in good faith; and, *third*, cited a case of *Hastings v. Cutler*, 4 Fost. (N. H.) 481, holding that, where a defective deed has been recorded, while it did not operate as constructive notice of the conveyance it might operate as actual notice, and the court, in the case above cited, said: "But if, by means of that registration of the defective deed, the defendants had actual notice of the plaintiff's title, they are charged with the notice. When the defendants found the copy of the plaintiff's deed on record they must have understood that the intended record was to give information that such a deed had been made, and that plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act on." There is no suggestion of an in-

dex in the case; but it is plain that on the other proposition, which we have already considered, the plaintiff's case does not fall within the reason upon which this conclusion is based. In that case, it might be urged, with some degree of justice, that there was enough revealed by the record to put the purchaser on his guard, and, once being notified of the conveyance, it would be his duty to investigate; and if, from such investigation, the will of the grantor could be gathered, he would not be an innocent purchaser if he purchased contrary to such revealed will. But, in the case at bar, the very instrument by which this notice is given is wanting, and the avenues of knowledge are closed up.

In *Bishop v. Schneider*, the court holds that the index is no part of the record, asserting that the proper office of the index is what its name imports, to point out the record; "that the grantee has no control over the official acts of the recorder, and, when he delivers his deed to the officer, he has performed all the duty within his power." But the court states that this decision is based alone on the construction of the statutes of that state, and they are materially different from ours, both with regard to the definiteness of the index concerning deeds, and the absence of the requirements to note the satisfaction of mortgages, and other instruments affecting real estate, in the index. Altogether their statute does not make the index so important a part of the system of registration as ours does. Their statute also provides that, when an instrument is filed with the recorder, it shall be considered as recorded from the time it is delivered. The opinion in this case quotes approvingly the case of *Sawyer v. Adams*, 8 Vt. 172. There, the town-clerk copied a deed, delivered to him for record, on a book which had ceased to be a book for recording for a number of years, and, for the purpose of concealment and fraud, did not insert the names in the index or alphabet. It was held that the deed was not recorded, and was not notice to after-purchasers. This is indorsed by the Missouri case, on account of the fraud that was perpetrated. But it seems to us that it makes little difference, so far as the equities of the innocent purchaser are concerned, whether the obscurity of the record was the result of fraud or negligence on the part of the recorder. Certainly there is no logical basis for such a discrimination. The rights of the purchaser must depend upon something more tangible, and more easily ascertained, than the motive of the officer. Evidently, the idea upon which the decision in this case was based was that the searcher of title had been misled by the state of the record. But, as a practical fact, he would have been no more liable to have been misled by reason of the deed being recorded in an unused book than if it had been recorded in the proper book, and not indexed. The recording in the unused book was an unnecessary act of caution on the part of the recorder in his attempt to deceive.

In *Chatham v. Bradford*, 50 Ga. 327, while the court, to a certain extent, argues the general proposition, insisting that an index is only a means of access to the rec-

ord, and that ease of access is wholly a question of degree, it says "that many of the records of that state have no index; that their acts for the recording of deeds do not any of them require the clerk to keep an index;" and states, in conclusion, that they put their decision mainly on their own statutes, and on the condition of the records, and the uniform practice of that state. They also approvingly cite *Sawyer v. Adams*.

*Curtis v. Lyman*, 24 Vt. 388, cited by plaintiff on this point, we have been unable to obtain; but, from reference to it in other cases, we conclude that their statute is different from ours in reference to indexing. Considering the difference in the statutes, we think that none of the cases cited are directly in point. While it is true that Devlin, in his work on Deeds, (section 696,) seems to imply that an index is not necessary to give constructive notice, yet he evidently bases the idea not so much on the theory that the index is not a part of the record, as from his general conclusion that the obligation of the grantee, as to notice, ceases when he has filed his deed for record. And he qualifies this general statement by saying, "Unless the language of the statute necessarily leads to a different conclusion," a qualification, it seems to us, which renders meaningless the general statement; for, as constructive notice is purely statutory, it must necessarily follow that it is the "language of the statute" that leads to one or the other of the conclusions. He cites *Barney v. Little*, 15 Iowa, 527, but says that "the decision in that case was founded upon the express language of the statute of that state," intimating that, in consideration of the statute, the conclusion of the court was correct; and, inasmuch as our statutes make the index a more important factor in the system of registration than does the Iowa statute, we may fairly conclude that, under a statute like ours, this learned author would consider the index an essential part of the record. Indeed, upon a painstaking investigation, not only of all the cases cited by plaintiff, (except the Vermont case, above referred to,) but of many others, we have been unable to find a case reported, which decides that an index is not an essential part of the record, upon a statute substantially like the registry laws of 1869. It is true that in numerous cases it has been decided that, where an instrument affecting realty was not indexed, as required by law, the title of the grantee should not be disturbed. The greater part of such decisions, however, will be found, on examination, not to be based on the theory that the index is not a part of the record, but upon the broad principle that the recording officer is the agent of the subsequent purchaser, and that the grantee is acquitted, when he places his deed for record in the hands of the proper officer,—a position which, we think, is untenable for the reasons above given. It is urged by the court, in *Schell v. Stein*, 76 Pa. St. 398, in deciding the case adversely to the interest of the purchaser, that the provision for indexing the records is of comparatively modern origin, and that such provisions did not exist in the early

registry laws. This, we think, is a good argument; but the application by the learned judge was in our judgment bad. The law was, no doubt, suggested by the necessity of some such provisions as the records accumulated, and, at the present day, considering the accumulations of deeds, mortgages, and liens of all kinds, affecting real estate, and the rapidity with which titles are changing every day, if we give the effect of constructive notice to the record at all, the only practical way by which the public can obtain the benefit of that notice is through the medium of the index. Laws are enacted for the benefit of the citizen; not only in theory, but in practice. They are not intended as pitfalls for the feet of the unwary. The state provides in express terms for the keeping of this index; and its mandate to the auditor is to enter in said index, in alphabetical order, the names of the grantors and grantees. This law the citizen is aware of. He has a right to presume that the law has been obeyed. If there was no such law, and he had abundance of time, and untold patience, he might devote himself to the task of examining the vast accumulations of records, page by page; but with the law in effect, and the universal custom recognized, of examining the record through the index, if the instrument is not indexed, the law, instead of aiding and protecting the citizen, becomes a delusion and a snare, and a ready vehicle for collusion and fraud. It would be a policy worthy of the consideration of the ancient tyrant, who wrote his laws in small characters, and posted them so high that his subjects could not read them, while, at the same time, he held them accountable for their strict observance. In this connection, we cannot refrain from quoting the language of the court, in *Barney v. McCarty*, that "a deed might as well be buried in the earth as in a mass of records, without a clue to its whereabouts." In *Speer v. Evans*, 47 Pa. St. 141, the court says: "As a guide to inquirers, the index is an indispensable part of the record, and, without it, the record affects no party without notice." This, we think, is the better view of the law. In this case, there is no question of actual notice, and applying the law, as we have found it to be, to the case at bar, it follows that the judgment of the lower court must be reversed. The case is remanded to the lower court, with instructions to reverse the judgment.

ANDERS, C. J., and HOYT, STILES, and SCOTT, J.J., concur.  
(1 Wash. St. 445)

**ANDERSEN V. GRIFFITHS *et al.***

(*Supreme Court of Washington*. Dec. 19, 1890.)

Appeal from superior court, Clallam county; MORRIS B. SACHS, Judge.

*Bush & Noyes*, for appellant. *Johnson & Moody*, for appellees.

DUNBAR, J. For the reasons given in the case of *Ritchie v. Griffiths*, ante, 341, the judgment of the lower court is reversed, and the cause is remanded to said court, with instructions to proceed in accordance with this opinion.

ANDERS, C. J., and HOYT, STILES, and SCOTT, J.J., concur.

**DERRICKSON V. GRIFFITHS *et al.***

(*Supreme Court of Washington*. Dec. 19, 1890.)

Appeal from superior court, Clallam county; MORRIS B. SACHS, Judge.

*Bush & Noyes*, for appellant. *Johnson & Moody*, for appellees.

DUNBAR, J. For the reasons given in the case of *Ritchie v. Griffiths*, ante, 341, the judgment of the lower court is reversed, and the case is remanded to said court, with instructions to proceed in accordance with this opinion.

ANDERS, C. J., and HOYT, STILES, and SCOTT, J.J., concur.

(87 Cal. 178)

**STAPLES V. MAY. (No. 12,167.)**

(*Supreme Court of California*. Dec. 18, 1890.)

MORTGAGES—DESCRIPTION—RECEIVERS—TRESPASS.

1. A mortgage of a specifically described tract of land in which is a vein or lode of metal on which some mining has been done, with all the mines, minerals, mining rights, privileges, and appurtenances belonging or appertaining to the same, does not cover an undeveloped portion of the lode contained in land adjoining the tract described, and in which also is the *situs* of the lode.

2. On the same day that the mortgage was given on the specifically described tract, the owner, a mining company, executed a deed of trust thereon to secure other indebtedness. The trust-deed also covered all lands, mines, etc., owned by the company. It appeared that the title to said adjoining tract was in the United States, except that the mining company claimed it, and its claim to title was recognized by its immediate neighbors, though it had not extended its mining operations into said tract, or inclosed it. *Held*, that the trust-deed did not cover said tract.

3. At the time of commencing suit to foreclose the mortgage and trust-deed, an *ex parte* order was made on application of complainants, appointing a receiver of the company's property, to take charge of and preserve it, and he was authorized to borrow money to work the mine and do things necessary for the preservation of the property. At this time the company owned the adjoining tract of land, and had a station thereon connected with the mines in the mortgaged tract, and worked as a part of the same general system, under a single management. The minerals extracted from the whole system by the receiver did not pay the expenses, but in the mining done on said adjacent tract there was a profit. *Held*, that the receiver had no right to take ores from such tract, and that for such profit he was liable to a general creditor of the company on supplementary proceedings against the company.

Reversing 23 Pac. Rep. 710.

In bank. On rehearing. For former report, see 23 Pac. Rep. 710.

*T. I. Bergin*, for appellant. *S. F. Leib* (*L. D. McKisick*, of counsel,) for respondent.

BEATTY, C. J. This is an appeal from an order overruling defendant's motion for a new trial. The cause was originally submitted in department 1, where the order appealed from was reversed upon grounds stated in an opinion by Commissioner FOOTE, opinion filed March 31, 1890, 23 Pac. Rep. 710. After a rehearing, and a more careful consideration of the record, we find it necessary to modify in some particulars the statement of the case as then made. The facts are as follows: On the 1st day of August, 1881, in the superior court of Santa Clara county, the plaintiff and respondent herein recovered a judgment against the Santa Clara Mining Association of Baltimore, a foreign corpo-

ration, for \$5,000, upon which execution was issued and returned unsatisfied. She then, proceeding under sections 717-720, of the Code of Civil Procedure, cited this defendant to answer as to his indebtedness to the corporation, and in due course obtained an order from the superior court, authorizing her to institute and prosecute an action to recover any indebtedness owing by said defendant to said corporation. In pursuance of that order she commenced this action in October, 1881. In her complaint she sets out the proceedings above mentioned, and alleges that, between July 19, 1880, and May 31, 1881, said corporation was the owner of a tract of land containing 161 acres in Santa Clara county, together with the minerals and ores therein contained. This allegation is not only not denied by the answer, but is expressly found by the court to be true, and is in no wise assailed by the appellant, so that this fact, at least, may be set down as unquestionable: that between the dates mentioned the Santa Clara Mining Association of Baltimore was the owner of the tract of land specifically described in the complaint, together with the ores and minerals therein contained. Whether the corporation was so the owner of said tract at a prior date—that is, at the date of the mortgage and trust-deed hereinafter mentioned—is, as will be seen, one of the principal questions in the case, and will call for some discussion in its proper connection. Returning to the plaintiff's complaint, her only other allegations, which it is necessary to note here, are that between said dates (July 19, 1880, and May 31, 1881,) the defendant entered into and upon said tract of land, mined and extracted therefrom ore of the value of \$100,000 and upwards, reduced the same to quicksilver, sold it, and received therefor over \$100,000, no part of which had been paid to said corporation. These allegations are denied in the answer, and, in addition to such denials, the defendant sets out, with great fullness, the proceedings in a foreclosure suit against said corporation, in which he was appointed receiver of the property mortgaged, which included, as he alleges, the land and mine specifically described in the complaint in this action.

The facts with respect to the mortgage, action to foreclose, appointment of defendant as receiver, and his proceedings under such appointment, are as follows: In the year 1873 said Santa Clara Mining Association was the owner of a tract of land in Santa Clara county, containing about 1,100 acres, and adjoining the tract described in the complaint herein. In this 1,100-acre tract there existed a vein or lode of cinnabar, upon which some mining had been done, but at that time the lode had not been worked or explored outside of the limits of that particular tract. Such being the case on the 14th of June, 1873, said corporation, to secure its bond for \$100,000, executed a mortgage to McCalmont, and on the same day, to secure its bonds to the amount of \$400,000, executed a deed of trust to a loan and trust company. In the year 1880 an action was commenced by the assignee of the McCalmont mortgage against the mortgagor

and numerous other parties, including the trustees under said trust-deed, to foreclose the mortgage. The complaint in this action alleged the insolvency of the corporation, the existence of mines and mining works upon the mortgaged premises, the danger of loss and destruction to the property, the mine especially, if the pumps were stopped, and mining operations suspended during the litigation, and prayed the appointment of a receiver to take charge of the property, and to protect and preserve it. Accordingly an order was made *ex parte* at the time of the commencement of the suit appointing this defendant such receiver, and from time to time thereafter other orders were made by the superior court, authorizing him to borrow large sums of money to enable him to work the mine, pay taxes, and do other things deemed necessary for the preservation of the property which was the subject of the litigation. In pursuance of these orders, the defendant entered into possession of the mine and other property, borrowed money, extracted ore, reduced it to quicksilver, which he sold, and applied the proceeds, with the general result of leaving himself, at the end of the litigation, indebted to the extent of about \$60,000 for borrowed money. But, although his entire operations resulted in the loss of this large sum, there was one part of the lode, known as "Station 8," from which he took about \$138,000, at a cost of about \$100,000, leaving a net profit of \$38,200, all of which was prior to May 1, 1881, and two years before entry of the decree in the foreclosure suit. It is to this \$38,200, or a share of it, that the plaintiff herein makes claim, upon the ground that station 8, the part of the lode from which the ore producing it was taken, is entirely outside of the mortgaged premises, and, consequently, that the appellant, as receiver in the foreclosure suit, had no right to enter there; that he was in fact a trespasser, and became liable to the corporation for at least the net value of the ore. Such was the view of the superior court, and such the theory upon which the judgment in favor of the respondent was based.

Against this view the appellant urges a number of objections, which we shall proceed to consider:

*First.* It is claimed that the McCalmont mortgage embraced station 8. But this position we do not think can be sustained. Station 8 is a part of the lode, the *situs* of which is within the 160-acre tract specifically described in the complaint herein, and wholly without the 1,100-acre tract to which said mining corporation had title at the date of the McCalmont mortgage, and at that time the lode had not been followed beyond the limits of said tract. The following is the description contained in the mortgage: "All that certain parcel or tract of land being and lying in the county of Santa Clara, state of California, designated as lot number thirty-nine, (39,) in township eight (8) south, of range one (1) east, and lot number forty, (40,) in township eight (8) south, of range (1) west, of the Mount Diablo meridian, containing eleven hundred and nine acres and sixty-seven hundredths of an acre, being

the same parcel or tract of land more particularly described and delineated by 'plat,' and to which title was confirmed in and by that certain patent issued by the United States of America on the twentieth day of September, A. D. eighteen hundred and seventy-one, recorded in Liber B patents, page 31, on the twelfth day of October, 1871, and being the same premises described in the above recited mortgage to R. D. Cullen, together with all and singular the buildings and improvements thereupon erected, made, or being, and the rights, roads, ways, waters, mines, minerals, mining rights, machinery, privileges, appurtenances, and advantages to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate and interest, right, title, use, trust, claim, and demand whatsoever, both at law and in equity, of the said Santa Clara Mining Association of Baltimore, in, unto, and out of the said described property and premises, or any part thereof." It is evident that this description cannot be stretched to cover an undeveloped portion of the lode contained in land adjoining the tract described. It is neither parcel of nor appurtenant to such tract, nor does it become so by being subsequently connected by workings on the lode with that portion of the mine included in the description.

*Second.* It is contended that the description in the trust-deed to the loan and trust company is sufficiently comprehensive to include station 8, and that, since the parties secured by the trust-deed were parties to the foreclosure suit, claiming affirmative relief, and concurring in the application for the appointment of May as receiver, he was thereby authorized to enter and mine at station 8. It is one objection to this proposition that it appears that the defendant extracted all the ore and made all the profit from station 8, with which he is charged in this action, before the loan and trust company sought the foreclosure of their deed, or asked for his appointment. But, without regard to this objection, the force of which we do not care to consider, we think it must be held that the description in the trust-deed embraces no more than that of the McCalmont mortgage, for it contains nothing material in addition to the description above quoted, except these words: "And all the lands, tenements, mines, minerals, real and personal property, rights, privileges, and appurtenances, of every kind whatsoever, of or belonging to said party hereto of the first part, in Santa Clara county, aforesaid." This part of the description would no doubt have embraced station 8, if the land in which it is found had belonged to the corporation at the date of the trust-deed. But it did not belong to the corporation at that time. The court so finds, by finding as it does that no part of the tract described in the complaint herein was included in said trust-deed, and there is nothing in the bill of exceptions to show that this finding was contrary to the evidence. The statement in respect to this

matter is as follows: "That it was the owner of the lands, premises, and property specifically described in the McCalmont mortgage in the answer of the defendant herein mentioned, and of the lands, premises, and property specifically described in the deed of trust to the 'Farmers' Loan and Trust Company' of New York, in the answer of the defendant herein mentioned, at the time of the execution of both of said instruments; that the particular piece of land in the complaint in this action described is not included in the specific metes and bounds of the lands described in the said McCalmont mortgage, or in the lands specifically described in the said deed of trust of the Farmers' Loan and Trust Company, mentioned therein; that at the time of the execution of the said McCalmont mortgage and said deed of trust the legal title thereto was in the United States, and has thence hitherto been, and still is, in the United States, otherwise than as such title may be affected or modified by the facts following,—that is to say: At the time of the execution of the said McCalmont mortgage and said deed of trust, and prior thereto, said Santa Clara Mining Association made claim of title thereto; that said particularly described parcel of land immediately joins upon the lands described in said McCalmont mortgage and in said deed of trust, and there was no fence, inclosure, or line separating said particularly described parcel of land from the lands included in the said McCalmont mortgage and in said deed of trust; that at that time said Santa Clara Mining Association had not extended its mining operations into or upon any part of said parcel of land in said complaint particularly described; that at that time the claim of title of said Santa Clara Mining Association to said parcel of land in said complaint particularly described was in fact recognized by the immediate neighbors in that vicinity, but the same was not then inclosed by any fence or inclosure separating the same from the lands surrounding it; that subsequently to the execution of said instruments the same was inclosed by inclosures, which, with the inclosures inclosing the land specifically described in the said McCalmont mortgage and in said deed of trust, would make a complete inclosure, save and except that on the southerly part of said parcel of land in said complaint particularly described there was no fence; on the side of said land not so fenced the same consisted of a cañon, which cañon of itself constituted a natural barrier, preventing cattle from getting into or going out of said parcel of land in said complaint particularly described, and which cañon constituted the only inclosure upon that side of said parcel of land in said complaint particularly described." This statement fully sustains the finding that at the date of the trust-deed the smaller tract, containing station 8, did not belong to the corporation, and also supports the finding, if it needed support, that during the time defendant was mining at said station said smaller tract did belong to the corporation, at least as against all persons not

connecting themselves with the source of title by compliance with the mining laws of the United States.

*Third.* The third point of the appellant is disposed of in saying, as we have already said, that neither the mortgage nor the trust-deed embraces station 8.

*Fourth.* It is contended that, even if station 8 was not covered by the mortgage or trust-deed, it was comprehended in the terms of the order appointing the receiver, and, being at that time connected with the mines in the larger tract, and worked as a part of the same general system, under a single management, and as the proceeds of that, as well as of other parts of the lode, were devoted to the care and preservation of the whole, it necessarily participated in the advantages derived from the appointment of the receiver; an advantage which inured to the mortgagor in enhancing the value of the security and diminishing its personal liability. Wherefore it is contended May could not have become liable to the corporation as a trespasser, and, if not, that he was never liable to the plaintiff.

This position also appears to be untenable. As to the terms of the order, if they embraced property not included in either of the securities, the order was to that extent in excess of the jurisdiction of the court, and void. But, construed with reference to the pleadings upon which they were based, the several orders appointing the receiver and defining his powers and duties did not apply to any property except that against which the foreclosure was sought. We do not think the receiver had even color of authority to extract ores within the tract described in the complaint herein, and thus destroy the very substance of an estate in which the mortgagees and beneficiaries of the trust had no direct interest, but which was, on the contrary, subject to the claims of the general creditors of the corporation. Nor do we think that the circumstance that station 8 was connected with other portions of the mine, with which it was worked as part of the same system, and under a single management, makes any difference. It was none the less a distinct piece of property, to which the mortgagees and the receiver, as their agent, had no right. While they remained in the hands of the mortgagor it was perfectly natural that both properties should be worked together, if that was the more economical plan; just as a farmer might work a mortgaged and an unmortgaged tract together, or, to give a more forcible illustration, just as owners of separate locations on the same vein often use the same shaft and hoisting apparatus for raising ores, or as many locators sometimes combine for the purpose of pumping water from the lower levels. In all such cases there is a common system of working, but the properties are distinct. A receiver of a mortgaged field would have no right to cut timber from other land of the mortgagor to build fences or houses on the tract covered by the mortgage, although it might be for the benefit of the mortgagor, by preserving or enhancing the value of the security and

lessening his personal liability. And, moreover, there is nothing to show in this case that the value of the security was in any degree enhanced by the extraction and reduction of the ores. No doubt it was necessary to pump the water out of the mine, and very probably it appeared at the time to be a wise measure to carry on mining at the same time with the pumping; but if this was so, we know of no principle upon which station 8 could be charged with the expense of keeping other parts of the mine free of water. And if it be said that the works at station 8 were also preserved by and participated in the benefits of the pumping, it may be replied that there is nothing to show that its equitable share of the expense of pumping was not included in the \$100,000 deducted from the gross value of the ores extracted from station 8.

As to the claim that the corporation stood by and saw what May was doing, and, by not objecting, tacitly approved his proceedings, it does not appear to be borne out by the record. The orders appointing the receiver were made *ex parte*. It is not shown that their terms, or the proceedings of the receiver under them, ever came to the knowledge of the corporation. It does appear that the corporation was insolvent, and it seems to have left its creditors to get what they could out of its property, without making any sign of approval or objection to their proceedings. The only presumption we are entitled to indulge under such circumstances is that it desired its property to go to its creditors according to their respective legal rights, viz., the mortgaged property to its mortgagees, and the rest to its creditors at large. No advantage could possibly accrue to it from any other disposition, for just so far as its ultimate personal liability to its mortgagees might be diminished by taking from its unpledged assets to enhance the security of the mortgagees, just so far was its ultimate liability to the general creditors increased. Assuming, therefore, as we ought to assume, that the actual desire of the corporation was that its unpledged assets should be devoted to the payment of its general creditors, and that it never either expressly or tacitly approved the proceedings of the receiver in removing the ores from station 8, we must hold that he became liable to the corporation for the net proceeds of such ores.

It is strenuously contended that this conclusion does a great injustice to the receiver, and that an opposite conclusion would do no injustice to the general creditors, because it is said the ores in place were not liable to attachment, and were only made available by means of a fund raised upon the credit of the secured creditors. We cannot, however, see the injustice of requiring the receiver to put back into the fund, where it belongs, a sum of money to which he never had a right; and as to the other proposition, we do not know why the 160 acres of land with all its ores in place was not liable to attachment, nor is there anything to show that the ores in place at station 8 were worth less than their net proceeds.



*Fifth.* It is contended that the liability of May, which sounded wholly in tort, was not the subject of garnishment or attachment. The question here, however, is not what classes of debts are the subject of garnishment or attachment, but what liabilities of third parties to an execution debtor can be reached by proceedings supplemental to the execution. We know of no reason to hold to any narrower construction of our statutory provisions on this subject than obtains in New York, where it is said that these proceedings can reach everything which could formerly have been made to contribute to the payment of judgments by the aid of creditors' bills, and where it was held that creditors' bills would reach choses in action arising from torts committed on the property of the judgment debtor to which his creditor would have a right to resort. *Freem. Ex'ns*, § 420; *Hudson v. Plets*, 11 Paige, 180.

The sixth objection of the appellant has been sufficiently stated and considered in connection with the fourth. We find no error in the order of the superior court, and it is therefore affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; MO-FARLAND, J.

REAY v. BUTLER *et al.* (No. 14,051.)  
(*Supreme Court of California*. Dec. 19, 1890.)

APPEAL—DISMISSAL—LACHES.

1. A motion to dismiss an appeal for failure to file the transcript in time, made pursuant to a notice given before the settlement of the bill of exceptions, will be denied, where the bill of exceptions was settled and allowed only two days before the return-day of the notice.

2. Laches in having a bill of exceptions settled or allowed is a question which addresses itself to the lower court in allowing the bill, but is not a ground for dismissing the appeal in the supreme court.

3. Failure to file the undertaking on appeal within five days after the service of the notice of appeal, as required by Code Civil Proc. Cal. § 940, renders the appeal ineffectual for any purpose.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*Fisher Ames* and *W. C. Burnett*, for appellants. *Flournoy & Mhoon*, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from an order refusing to strike out a cost-bill. The motion is made on several grounds:

1. That the transcript is not filed in time. The papers filed here show that at the time the notice of motion was given, the bill of exceptions to be used on the appeal had not been settled and allowed. It was so settled and allowed only two days before the return-day of the notice. The appeal cannot therefore be dismissed on that ground.

2. On the ground of laches, and that appellant is not acting in good faith. This is based upon laches in having the bill of exceptions settled and allowed. Laches in that particular might in certain cases be good ground for refusing to settle and

allow the bill, but it is a question which addresses itself to the court below, and this court cannot review its action in that regard except upon appeal.

3. That the appeal was not taken or perfected within the time allowed by law. The notice of appeal was served and filed March 24, 1887. The undertaking on appeal was not filed until April 30, 1887. Under section 940, Code Civil Proc., the appeal was "ineffectual for any purpose." It must, therefore, be dismissed, and it is so ordered.

(87 Cal. 203.)

MARTIN V. MORGAN. (No. 13,783.)  
(*Supreme Court of California*. Dec. 19, 1890.)  
SPECIFIC PERFORMANCE—DILIGENCE BY COM-  
PLAINANT.

A contract to convey land which provides for the payment of the purchase price within 60 days from its date, "otherwise this agreement to be null and void," clearly shows the intention of the parties to make time the essence of the contract; and the failure of the vendee or their assignee to make or tender payment within the specified time precludes them for maintaining an action for the specific performance of the contract.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

*Church & Cory*, for appellant. *R. H. Ward* and *Sayle & Coldwell*, for respondent.

SHARPSTEIN, J. This is an action to compel specific performance of a unilateral contract by which the respondent agreed to convey to appellant's assignors a certain tract of land at any time within 60 days from the date of said contract, upon the following express conditions: The said assignors to pay to respondent \$150 of the purchase money down on the delivery of said contract, and the balance within 60 days from the date thereof, otherwise said agreement to be null and void. One hundred and fifty dollars was paid on the delivery of the contract, but the balance of the purchase price, to-wit, \$4,350, was not paid or tendered within 60 days from the date of said contract. As an excuse for not paying said balance within said 60 days, the plaintiff in his complaint alleges that, before the expiration of said 60 days from the date of said contract, the defendant, for a valuable consideration, extended the time of performance on the part of his assignors to a reasonable time after the expiration of said 60 days. The court found that the defendant never extended the time for the performance of the conditions expressed in said agreement, or for the payment of any money stipulated to be paid as balance of the purchase price of said land, and rendered judgment in favor of the defendant. From that judgment and the order overruling his motion for a new trial, this appeal is prosecuted by the plaintiff. We cannot say that the finding, of which we have above given the substance, was not justified by the evidence. We shall therefore consider the case as we would were there no claim made of an extension of the time specified in the written contract for the payment of the deferred payment. As be-

<sup>1</sup> Reversed on rehearing, post, 685.

fore stated, plaintiff's assignors agreed to pay defendant \$150 of said purchase money down, upon the delivery of the agreement, and the balance within 60 days from the date thereof, (August 31, 1887,) otherwise the agreement to be null and void. Neither plaintiff nor his assignors performed, or offered to perform, the conditions expressed in said agreement within 60 days from the date thereof, and said agreement was not assigned to plaintiff within 60 days from the date thereof. The court finds that the plaintiff, after the assignment of said agreement to him, offered to pay and tendered all the balance of the purchase money required to be paid by said agreement. No other excuse or reason than the one above stated is alleged in the complaint, by plaintiff or his assignors, for non-performance of the condition expressed in the contract. The plaintiff alleges that, upon the delivery of said contract to his assignors, they entered into the possession of said land, and expended the sum of \$270 in valuable improvements. The court finds: "That said M. J. and P. B. Donahoo (plaintiff's assignors) accepted said agreement, and paid said sum of \$150, and plowed said land, surveyed, mapped, and platted it into lots, but did not expend any sum of money whatever in the improvement of said real property." This finding is justified by the evidence introduced by the plaintiff as to what his assignors did upon the land, although one of the witnesses stated that the expense of the plowing was \$30. We are not prepared to hold that what was done upon the land constituted an improvement. We think the finding last above quoted is a sufficient finding that plaintiff's assignor entered into possession of said land at the time alleged in plaintiff's complaint. The precise time at which plaintiff tendered the deferred payment provided for in the contract does not appear. But the court finds that he took an assignment of the contract after the time of making said payment had expired; and that, after he had received such assignment, he offered to pay all of the balance of the purchase money due thereunder.

This brings us to what we deem the principal question in the case. Was time made the essence of this contract? In other words, is the intent to make it so clearly, unequivocally, and unmistakably shown by the stipulation? The defendant's stipulation was that he would convey at any time within 60 days from the date of said agreement upon certain express conditions, one of which is that the final payment of the purchase money should be made within 60 days from the date of said agreement, otherwise the "agreement to be null and void." The contention of appellant's counsel, that the general rule of equity is that "time is not the essence of the contract," is not supported by any modern authority. The general rule, as expressed by 3 Pars. Cont. (7th Ed.) 339, and by this court, in *Grey v. Tubbs*, 43 Cal. 359, is that "time is not necessarily the essence of a contract." But it may be made so. Prof. POMEROY says: "It is now thoroughly established

that the intention of the parties must govern, and, if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or of performance or of complying with the terms will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary; but any clause will have the effect which clearly and absolutely provides that the contract is to be void, if the fulfillment is not within the prescribed time." Pom. Cont. 462. Among the numerous cases cited by the learned author in support of this doctrine is that of *Benedict v. Lynch*, 1 Johns. Ch. 370, decided by Chancellor KENT. In that case the contract was signed by the defendant only, and he agreed to give a deed upon certain express conditions being performed by the plaintiff at the specified times; "but if he should fail in them, or either of them, the agreement to be void." The plaintiff failed to perform within the time specified, but offered to after the expiration of that time. The opinion of the learned chancellor is the most full and satisfactory explanation of the question involved in this case that has ever fallen under our observation; but we deem it unnecessary to quote more from it than the following: "There was an express stipulation in this contract that, if the plaintiff failed in either of his payments, the agreement was to be void. The first question which naturally presents itself is whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment." He held that it was, and decreed accordingly. In that case the intention of the parties to make time the essence of the contract did not more clearly and unequivocally appear than it does in this case. *Grey v. Tubbs*, supra, is in the same line as *Benedict v. Lynch*. In *Grey v. Tubbs*, this court said: "Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and, whenever it appears that the parties have in fact contracted that, if the purchaser make default in the payments as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase, and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default." Judgment and order affirmed.

We concur: THORNTON, J.; MCFARLAND, J.

(87 Cal. 214)

GILLIS *et al.* v. CLEVELAND. (No. 13,969.)  
(Supreme Court of California. Dec. 20, 1890.)

STREET ASSESSMENTS—ENFORCEMENT OF LIEN.

1. Laws Cal. 1885, p. 147, § 7, provides that the expense of work on a street under the act "shall be assessed upon the lots and lands fronting thereon, \* \* \* each lot or portion of a lot being separately assessed in proportion to frontage." Section 8 provides that the assessment shall show the number of each lot, and the assessment thereon, with the name of the owner, or, if he is unknown, then "unknown" shall be writ

ten opposite the number, and for a diagram showing the location of each lot with reference to the work done, and that the warrant of assessment shall then be recorded with the superintendent of streets. Section 9 declares that when so recorded "the several amounts assessed shall be a lien upon the lands or portions of lots assessed, respectively." *Held*, that the liability of each lot is a separate cause of action, and foreclosure of the lien upon one lot will not prevent a subsequent action against the same person to foreclose on another lot owned by him.

2. Under section 12, allowing an attorney's fee in all cases of recovery in actions to foreclose the lien, the fee may be allowed as to each lot, although owned by the same person.

3. Where the warrant of assessment was properly signed by the superintendent of streets, and countersigned by the mayor as required by the act, the fact that the signature of the mayor was omitted in recording the warrant did not invalidate the assessment.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

*Luce, McDonald & Henderson*, for appellant. *Hunsaker, Britt & Lamme*, for respondents.

GIBSON, C. This action was brought to foreclose a street-assessment lien for the grading of Logan avenue, in the city of San Diego. The defendant, in his answer, put in issue some of the material allegations of the complaint, and, as one of his affirmative defenses, set up a former recovery in another action between the same parties. This plea in bar was, upon plaintiffs' motion, stricken out, and upon the trial subsequently had before the court, without a jury, judgment was rendered for the plaintiffs, from which the defendant appeals. Appellant's counsel maintain that the court erred in striking out the plea in bar. The property affected in the former action was lot 2, in block 179, of Manassee & Schiller's addition to the city; while in this action it is lot 9 in the same block. They both were and are owned by the defendant, and front on Logan avenue, and were both assessed for the same grading, which was let as a single contract by the city to the plaintiffs, who performed the work. The latter brought a separate action against the defendant as to lot 2, and obtained a judgment, which appears to have been satisfied. And it is now claimed that, as that judgment was rendered in an action upon the same assessment, which constituted but one entire demand, it was a recovery upon a portion of such demand, and is good as a plea in bar of the present action. But we think an examination of the act of March 18, 1885, (St. 1885, p. 147,) under which the improvement and assessment were made, will show that the rule invoked by the appellant has no application here. It is provided in the first subdivision of section 7 of that act that the expenses incurred for any work authorized by the act "shall be assessed upon the lots and lands fronting thereon; \* \* \* each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expenses of the work." And section 8 provides that "after the contractor of any street work has fulfilled his contract to the satisfaction of the street superin-

tendent of the said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract, [including any incidental expenses.] This assessment shall show, among other things: "The amount of each assessment, the name of the owner of each lot, or portion of a lot, [if known to the street superintendent.] If unknown, the word 'unknown' shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot, or portion of a lot assessed, and shall have attached thereto a diagram exhibiting \* \* \* the relative location of each distinct lot, or portion of a lot, to the work done," etc. Section 9 provides that a warrant signed by the superintendent of streets, and countersigned by the mayor of the city, shall be attached to the assessment. The warrant, assessment, and diagram must then be recorded in the office of the superintendent of streets. "When so recorded, the several amounts assessed shall be a lien upon the lands, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged. After said warrant, assessment, and diagram are recorded, the same shall be delivered to the contractor, or his agents or assigns on demand, \* \* \* and, by virtue of said warrant, said contractor or his agents or assigns shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments."

Thus it appears that the expense of the improvement is a charge upon the property benefited, and not a charge against the owner personally. In furtherance of this end, the identity of the lot assessed, and not the person who may be the owner, is made the essential requirement of the statute. The first must be specifically described, while the latter may be designated as "unknown," as in the present case. Nowhere in the statute does any intention appear to charge the owner personally. In *Taylor v. Palmer*, 31 Cal. 241, it was held that, in cases of this character, the owner could not be made personally liable for the proportion of the expense of the improvement assessed against his property. And in *Dyer v. Barstow*, 50 Cal. 652, it was held that there was no privity of contract between the owner and the person who contracted with the city to do the work. It is to be observed that the several assessments which the contractor is authorized to demand and receive are the particular assessments against each lot, or portion of a lot. He is not empowered, in cases where a person owns two or more lots liable for their proportion of the cost of the improvement, to demand the sum of the several assessments against two or more lots, but must make a several demand as to each lot. Thus, in a case like the one here, where a demand was made upon the premises assessed, as may now be done, where the owner named in the assessment, or his agent, cannot conveniently be found, and which must be done whenever the

name of the owner is stated as "unknown," (St. 1885, § 10,) a demand upon each of two lots for the sum of the assessments due upon both was held to be bad, and insufficient to support a recovery. *Schirmer v. Hoyt*, 54 Cal. 280. Again in the same section of the act last referred to, the assessment against each lot is treated as a separate and distinct demand, for the superintendent of streets "may release any assessment upon the books of his office on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns, to whom the assessment and warrant were issued." And, by section 12, when suit is brought: "The court in which suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts." It is obvious that the lien here referred to is one for the particular amount assessed against each lot, and not the whole amount of several assessments against all the lots of one owner without regard to the proportion properly chargeable to each. Thus, in *Brady v. Kelly*, 52 Cal. 372, it was said: "Where two or more lots are assessed for the expenses of work on a street, each lot is chargeable only with the amount assessed upon it, and not for the amount assessed against another lot, and in enforcing the lien of the assessment the judgment should state the amount for which each lot is liable, and should order a sale of each lot, or so much thereof as may be necessary to satisfy such amount, and costs." We, therefore, think it manifest that each lot, or portion of a lot, is separately liable for its proportion of the cost of the improvement and that the liability of each is independent of any other, and constitutes a separate demand upon which a separate cause of action may be based. And, since this is so, the recovery as to lot 2, in the former action, although between the same parties, was not upon the same, but a different, cause of action, and therefore was not good as a plea in bar of this action, and was for that reason properly stricken out.

What we have said on this point also disposes of the suggestion regarding the allowance of \$15 as an attorney's fee, in addition to taxable costs, in all cases of recovery under the provisions of the statute, (section 12;) for it necessarily follows that if the charge against each lot, or portion thereof, is a separate and distinct demand, the attorney's fee prescribed by section 12 may be allowed in each case. And, in response to appellant's argument regarding this burden, it may be proper to add that such burden may be escaped by paying for the improvement before suit is brought. The appellant further maintains that the judgment is not sustained by the findings, since it appears from the latter that the warrant issued to the plaintiffs was never recorded in the office of the superintendent of streets. As already shown, a warrant of the character of the one in question must, in order to create a lien upon the property charged,

be recorded in the office of the superintendent of streets, before it is delivered to the contractor or his assigns. Act March 18, 1885, § 9. See *Himmelmänn v. Danos*, 35 Cal. 450; *Himmelmänn v. Bateman*, 50 Cal. 11; *Norton v. Courtney*, 53 Cal. 691. The findings here disclosed that the warrant, which was properly signed by the superintendent of streets, and countersigned by the mayor, was recorded in the office of the first-mentioned officer, but that the name of the mayor, and the designation of his office,—viz., "W. J. Hunsacker, mayor,"—were omitted from the record. And this omission, it is claimed, made the recording ineffectual. In *San Francisco v. Real Estate*, 50 Cal. 188, which was an action *in rem* to enforce a street assessment, the duplicate assessment roll required to be made under section 7 of the act of February 1, 1870, amendatory of the act of March 30, 1868, (St. 1869-70, p. 41,) did not contain the certificate of the mayor, which was appended to the original assessment roll. This omission on the trial was held to be immaterial, and in sustaining the ruling on appeal, this court said: "It appears in the record that the original roll was duly made, and properly certified by the mayor, who delivered it to the auditor; but in making the duplicate for the collector the auditor omitted therefrom the certificate of the mayor. The court below held the omission to be immaterial, and we agree in that opinion." So, here, the record shows that the warrant was properly signed and countersigned, but that the superintendent of streets, in recording it in the record book in his office, failed to copy the name and official designation of the mayor. We can see no difference in principle between this case and the one quoted from. The original warrant here was authenticated, as the original assessment roll was there, in the manner required by law, and the omission of the mayor's certificate from the duplicate of the original assessment roll in the latter case was deemed immaterial. And we think the omission complained of here is of the same character. This defect is not the same as those held to be fatal in *Himmelmänn v. Bateman*, and *Norton v. Courtney*, *supra*. In each of those cases the omission from the record was an essential part of the description of the premises against which the lien was sought to be enforced. In the first, the depth of the lot was, by mistake, omitted from the diagram; and in the second, the arrow showing the courses on the diagram was, in like manner, omitted. Compare this last case with *Whiting v. Quackenbush*, 54 Cal. 306. These omissions were fatal, because they rendered it impossible in either case to identify the property from the record. In *Himmelmänn v. Danos*, *supra*, which is to the same effect, the record of the assessment and diagram and warrant was held to be no record at all, because the same was not certified to by the superintendent of streets, or by any one for him. This disposes of the appellant's argument, and finding no error in the record we think the judgment should be affirmed.

We concur: BELCHER, C. C.; VANCILIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 275)

WOODRUFF *et al.* v. SEMI-TROPIC LAND & WATER CO. (No. 13,976.)

(Supreme Court of California. Dec. 22, 1890.)

VENDOR AND VENDEE—CONTRACT—TIME OF ESSENCE—RESCISSION.

1. Time is of the essence of a contract for the sale of land which provides for the payment of the purchase money in installments at specified dates, and for the execution of a good and sufficient deed by the vendor on the receipt of the final installment, and that, "in the event of a failure to comply with the terms hereof by the vendee, the vendor shall be released from all obligations in law or in equity to convey said property, and said vendee shall forfeit all right thereto."

2. The vendor is in default on his failure to execute the deed after a tender of the final installment by the vendee when due; and, where the vendee had elected to rescind the contract by a tender of a quitclaim deed of the land and a demand for the return of the installments already paid, no subsequent offer of performance on the part of the vendor will relieve him from the effects of his default.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge. *Willis, Cole & Craig*, for appellant. *Smith & Northrop*, for respondent.

FOOTE, C. The plaintiffs obtained judgment against the defendant for the sum of \$3,405.75, and costs. From that judgment this appeal is prosecuted on the judgment roll. The parties hereto entered into the following contract: "This agreement, made and entered into the 25th day of August, in the year of our Lord one thousand eight hundred and eighty-seven, between the Semi-Tropic Land and Water Company, a corporation, party of the first part, and Jesse W. Woodruff and George E. Baldwin, of the city and county of San Bernardino, state of California, the parties of the second part, witnesseth: That said party of the first part, in pursuance of a resolution of the board of directors of said corporation, duly passed, authorizing this agreement, and in consideration of the covenants and agreements on the part of the said parties of the second part hereinafter contained, agrees to sell and convey unto the said parties of the second part all that certain lot or parcel of land situated in the county of San Bernardino and state of California, and bounded and more particularly described as follows, to-wit: Farm block 28, containing 20.06 acres, (more or less,) in accordance with the map of the town of Rialto, and adjoining subdivisions, as recorded in the office of the recorder of deeds in and for San Bernardino county, California, —, 18—, book —, page —. The party of the first part reserves from premises above agreed to be sold the right of way to enter upon to ditch and to lay pipes for the distribution of water. And the said party of the first part agrees to sell said property for the sum of four thousand twelve dollars, gold coin of the United States. And the

said parties of the second part, in consideration of the premises, agree to pay to the said party of the first part the said sum of four thousand twelve dollars, gold coin, as follows, to-wit: Thirteen hundred thirty-eight dollars, cash on delivery of this agreement, receipt of which sum is hereby acknowledged by party of the first part; thirteen hundred thirty-seven dollars on or before August 25, 1888; thirteen hundred thirty-seven dollars on or before August 25, 1889,—with interest payable semi-annually upon the deferred payments, at the rate of eight per cent. per annum. And, if any part of the principal or interest be now (not) paid when due, it shall thereafter bear interest at the rate of twelve percent. per annum until fully paid, according to the terms of two certain promissory notes of said second parties of even date herewith, made in favor of said party of the first part, and payable at the Los Angeles National Bank, in Los Angeles, California. And the said parties of the second part agree to pay all state, school, and county taxes or assessments of whatsoever nature which may become due on the premises above described, and all assessments that may be lawfully made upon the shares of water-stock herein agreed to be delivered after the date of this agreement. In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all rights thereto. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said parties of the second part, or their assigns, a good and sufficient deed of bargain and sale, together with one share of stock in the Lytle Creek Water and Improvement Company for each acre of land above agreed to be sold. The party of the first part also agrees to pipe the water to a point adjacent to each twenty-acre lot of said tract, and to each town lot above agreed to be sold, after which the second parties, and other stockholders in said water company, must bear the expense of keeping up the water system. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties." From the pleadings it appears that the plaintiffs here (the parties of the second part) paid to the defendant, on the 27th of August, 1887, \$1,338, on the agreement, and at the same time executed and delivered to it two promissory notes in accordance strictly with the terms of the contract, and at maturity thereof paid the first note, \$1,443, principal and interest, and \$160.44, being interest on the note due on or before August 25, 1889, and also \$13.30, the amount of taxes assessed on the land included in the contract. On the 26th of August, 1889, when the last note was due, the plaintiffs were ready and willing, and offered in writing, to pay it and the interest due thereon, and then demanded a good and sufficient deed of bargain and sale of the premises

above described, and also that the defendant deliver the water-stock included in the purchase. This the defendant failed and neglected to do. On the 21st day of November, 1889, the plaintiffs surrendered possession of the land and premises, and tendered to the defendant a quitclaim deed to the premises and to the water-stock, and demanded that the defendant pay back the payments in money that the plaintiffs had made, and interest at lawful rates from the date of making the payments, and that the defendant deliver up the promissory note due August 25, 1889. That the defendant refused to accept the deed of reconveyance, or pay the money. Damages in the sum of thirty-five hundred dollars were prayed for, the rescission of the agreement of August 25, 1887, and that the note due August 25, 1889, be given up and canceled. A demurrer was filed, and overruled, for want of prosecution. The defendant then answered denying damage done to the plaintiffs, and setting up the defense that prior to the service of summons in this case, it was able and willing to deliver a conveyance and the water-stock, upon the plaintiffs paying the balance of the purchase price, which offer the plaintiffs declined. And the defendant avers that it is still able and willing to carry out the contract upon the payment by the plaintiffs of the contract price for the property. The court found that all the allegations of the plaintiffs' complaint were true, and that they had suffered damage in the sum of \$3,405.75; that before November 29, 1889, the defendant failed and neglected to comply with the contract; that on that day, after the commencement of this action, but before the service of summons, the defendant offered to comply with the contract, but the plaintiffs would not accept it; and that, since that date, the defendant has been, and still is, ready to deliver the deed and shares of stock on the payment of the balance due by the plaintiffs. The conclusion of law is that the plaintiffs are entitled to judgment for \$3,405.75, and costs. Judgment was rendered accordingly on the 17th of June, 1890.

The only point which seems to be made for a reversal of the judgment is that time was not of the essence of the contract, and therefore that the offer of performance on the 29th of November, 1889, was in a reasonable time after the date fixed for performance by the contract, or after suit brought by the plaintiffs to rescind. There is no doubt, however, that time was of the essence of this contract, as is seen by a reference to the opinions delivered in *Grey v. Tubbs*, 43 Cal. 364, and *Cleary v. Folger*, 84 Cal. 321, 24 Pac. Rep. 280, where a similar contract was construed with reference to this point. Time being of the essence of the contract, the defendant, having failed to comply with it after a tender of performance by the vendee, was in default. The plaintiffs tendered a deed to the premises, giving all their title thereto, and also the water-stock, and surrendered possession of the premises on the 21st of November, 1889, and demanded a repayment back of their money, and the giving up and canceling of their unpaid note. This was all

that the plaintiffs were required to do to effect a rescission of the contract, and, having done this, no subsequent offer of performance on the part of the defendant would relieve it from the effect of its default. Therefore we advise that the judgment be affirmed.

We concur: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(20 Or. 215)

#### STATE v. CHEW MUCK YOU.

(Supreme Court of Oregon. Dec. 16, 1890.)

##### LARCENY BY BAILEE—DELIVERY TO BAILEE.

1. It is not necessary that, when the defendant is charged with being a bailee, the facts and circumstances of the bailment should be set out. When one is charged with being a bailee, the allegation covers all necessary facts.

2. A bailment takes place when any article of personal property is put into the hands of one for a special purpose, and it is to be returned by the bailee to the bailor, or delivered to some third person, when the object of the trust is accomplished. Where gold-dust was intrusted to the possession of another, to deliver to a third party in Portland, when the object of the trust would be accomplished, and, upon demand of such bailee for the property, he promised to deliver it, but, failing to do so upon the third demand, he denied having received it, and refused to account, *held*, (1) that this was conversion, and that the court had jurisdiction; (2) that his admissions were only corroborative.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

T. A. Stevens, Dist. Atty., and W. T. Hume, for plaintiff. McGinn & Simon and H. Pilkington, for defendant.

LORD, J. The defendant was indicted, tried, and convicted of the crime of larceny by bailee, and sentenced to imprisonment in the penitentiary for the term of one year. To reverse the judgment rendered herein is the purpose of the present appeal.

It is first objected that the demurrer to the indictment should have been sustained, for the reason that it does not set out the nature and terms of the bailment. In support of this position, *People v. Poggi*, 19 Cal. 600; *People v. Peterson*, 9 Cal. 313; and *People v. Cohen*, 8 Cal. 42,—are cited. These cases hold that it is not enough to charge the defendant with being bailee, but that the facts and circumstances of the bailment must be set out. Tested by the principle established in these cases, the indictment is not sufficient; but the practice has been in this state to follow the statute in this part of the allegation, upon the principle that, when one is charged with being bailee, the allegation covers all necessary facts. Referring to the cases cited, Mr. Bishop expresses the opinion that it is not necessary to aver the character or circumstances of the bailment, and suggests the following reasons: "First. Although the fact of the bailment is material, it is, in a certain sense, incidental; the offense consisting in the person who sustains the relation of bailee to the property doing the forbidden thing.

The *gravamen* of the charge is that this person did convert the same to his own use. It is not denied, and it cannot be, that it is sufficient to follow the statute in this part of the allegation; therefore, *as for the first*, it should be sufficient in the other part. *Secondly*. The relation of bailee is well known in the law; just as well known, though not quite so common, as the relation of owner. It is not necessary to allege how a man became owner of personal property, or to state the facts and circumstances of the ownership. When one is charged with being owner, the allegation covers all necessary facts. In like manner it should be held that, when one is charged with being bailee, the allegation covers all necessary facts." Bish. St. Crimes, § 423; Bish. Dir. & Forms, § 610, and notes. As the indictment is admitted to be within the principle thus announced, which is thought to be in accordance with the practice in this state, the indictment is sufficient, and the demurrer was properly overruled.

The next error relied upon is the refusal of the court to direct the jury to return a verdict for the defendant, upon the ground that there was an entire failure of proof to show that any crime had ever been committed in Multnomah county, or in the state of Oregon. To properly dispose of this objection, it is necessary to examine and state the substance of the facts proved. The bill of exceptions discloses that one Li Moy, who kept a Chinese restaurant at Pierce City, Idaho, desiring to send 27 ounces of gold-dust to one Li Fook, a resident of Portland, Or., delivered such gold-dust to the defendant, with instructions to convey the same to Portland, and deliver it to Li Fook; that the defendant received the gold-dust into his possession for that purpose, and came to Portland, but failed to deliver the gold-dust; that Li Moy wrote to Li Fook regarding the gold-dust, and, learning from Li Fook that he had never received the gold-dust, came to Portland to see about the matter; that immediately on receiving the information contained in the letter from Li Moy, Li Fook sought out Chew Muck You, and demanded the gold-dust. It is enough to say that when the first demand was made on the defendant for the gold-dust that he promised to turn it over, but failed to do so; that he was again sought, and made a like promise and failure; that he was again sought, and the gold-dust demanded of him, and that then he stated for the first time that he had not received any gold-dust; that the defendant has never turned over the gold-dust, nor accounted for it, and the same has been wholly lost to the complaining witness. Upon this evidence the counsel for the defendant makes two points: (1) That, in the absence of a statute conferring jurisdiction, there can be no prosecution in this state for larceny by bailee, where the property intrusted to him was delivered in another state, to be brought into this state, and where the bailee, after bringing the property into this state, converts it to his own use; and (2) that, if such jurisdiction be conceded, there is a total failure of proof of the commission of any

crime in the venue laid, and that the jury ought to have been directed to return a verdict of not guilty. The first objection is based on the idea that the proof must establish a complete commission of the offense in the county where the offense was laid; otherwise, there is no jurisdiction to try it. The argument, in effect, is that, as the evidence discloses that the gold-dust was intrusted to the possession of the defendant in Idaho, to be transported by him into this state, such facts show that the bailment originated there, although the acts of conversion may have taken place here; but, as the facts both of bailment and conversion are necessary to constitute a complete offense, unless the facts in respect to each originated and occurred within Multnomah county, where the venue is laid, they do not show a complete commission of the offense in that county, and consequently, upon the facts as presented by this record, the court was without jurisdiction in the premises. The vice of this argument lies in supposing, because the contract of bailment originated in Idaho, it could have no binding force or effect in Oregon. It proceeds upon the hypothesis that, as the fact of bailment is essential to be proved, and as such fact in the present case originated without the state, it showed that the proof did not establish a complete offense in the county where the offense is laid, and therefore, no crime being proved, the court was without jurisdiction to inflict a judgment of punishment. A bailment is ordinarily defined to be a contract by which goods are delivered by one person to another for a certain purpose, upon an express or implied promise by the bailee to return them to the bailor, or to deliver them to some one designated by him, after the purpose has been fulfilled. But a bailment is not always accompanied by a contract, expressed or implied, and, in the absence of it, the law imposes duties which the bailee cannot neglect without liability. The duty of the bailee to make restitution of bail goods is one which the law imposes, and does not depend upon the existence of any contract. 2 Amer. & Eng. Enc. Law "Bailment," p. 56. Within the meaning as to what constitutes a bailee of the criminal statutes there does not appear to be any doctrine peculiar to the criminal law. "A bailment," Mr. Bishop says, "is where one has personal property intrusted to him, to be returned, or delivered to another in specie, when the object of the trust is accomplished." 2 Bish. Crim. Law, § 857. Again he says: "A bailment takes place where an article of personal property is put into the hands of one for a special purpose, and it is to be returned by the bailee to the bailor, or delivered to some third person, when the object of the trust is accomplished." Bish. St. Crimes, § 423; Krause v. Com., 93 Pa. St. 418. It is said that the object of these statutes is to cover that which is not larceny at common law.

Bearing in mind, then, what constitutes a bailment within the meaning of these statutes, and the purposes for which they were enacted, upon the facts as disclosed by this record, what was the relation



which the defendant sustained to the property put into his possession when it was demanded of him at Portland, and he refused to deliver it? When the gold-dust was intrusted to his possession, and he undertook to transport it to Portland, and deliver it to the party designated, his undertaking included the duty of a bailee, to be performed in this state, and the object of the trust he had assumed was only accomplished when he should deliver it to such party in Portland. That such an engagement is bailment, and valid here, where it is to be performed, and the relation of bailee terminated when the property should be delivered, would scarcely seem to admit of a doubt. The facts put themselves within the terms of the definition that certain "personal property was put into the hands of the defendant for a special purpose, to be delivered by him to a third person, when the object of the trust is accomplished." They established the relation of bailee in the defendant to the property intrusted to his possession, which continued with and followed him, from the nature of his engagement, until that relation should be terminated by a delivery of the property at Portland to the party designated, when the trust he had assumed would be discharged, and its object accomplished. There is no evidence or any pretense that he was in any way relieved from his engagement as bailee, or absolved from his trust, from its inception until his final repudiation of it in Portland, where he was then a bailee, within the venue in which his offense is laid, and subject to our laws, and to be punished by our courts in that locality for the violation of his trust. As bailee, when the defendant arrived in Portland in the performance of his trust, he was rightfully in the possession of the property, and was guilty of no violation of that trust, even after he had been sought out, and the gold-dust had been twice, and at different times, demanded of him, and he promised to deliver it in accordance with his engagement. So far as this record discloses, he had committed no offense here or elsewhere until he refused to account for it. But he was a bailee when he arrived in Portland, and sustained that relation to the property intrusted to him; and, as Mr. Bishop says, "our courts cannot ignore the relation sustained to the property by the defendant here, or the trespass committed upon it here, or the felonious intent which here existed." Bish. Crim. Law, § 130. When, therefore, sustaining the relation of bailee to the property intrusted to him, it was demanded of him by the person authorized to receive it, and he finally, upon the third demand, after he had promised twice to pay it over to such person, repudiated his trust, and refused to account for it, it was an act or conduct inconsistent with the nature of his trust, in violation of it, and effective as evidence of his conversion of the property. "Insolvency, flight, or refusal to pay," says Mr. Wharton, "are the usual and most effective evidences of conversion." Whart. Crim. Law, § 1950; Bish. St. Crimes, § 421. Being a bailee, and the conversion occurring within the venue where his offense is

laid, the court had jurisdiction of this crime with which he was charged. "Some act of conversion or appropriation by the bailee," says Mr. Wharton, "must be alleged and proved to have taken place within the jurisdiction of the court." Whart. Crim. Law, § 1957. And again, that "the defendant may be tried in any county where any part of the embezzlement was committed, or where, upon being called upon to account, he disowned having received the money." Id. § 1937. The *gravamen* of the charge, Mr. Bishop says, is that this person did convert the same to his own use. Bish. St. Crimes, § 422. "But here," said Lord ALVANLY, C. J., "there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he ever received it. This was the first act from which the jury could, with certainty, say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surry, nor could the offense be complete, nor the prisoner be guilty within the act, until he refused to account to his master. We are therefore of the opinion that the prisoner was properly indicted in the county of Middlesex." Rex v. Taylor, 3 Bos. & P. 596. Nor, in the present case, was there any evidence of any act for which the defendant was liable, or which indicated an intent to repudiate his trust, and convert the property to his own use, until he denied receiving the money, and refused to account. This, being charged, and proved to have taken place within the venue where his offense is laid, was within the jurisdiction of the court which tried and convicted him.

The next objection is that, conceding jurisdiction, there was no evidence of the commission of any crime, except the confessions of the defendant, or, in other words, there must be other proof of the *corpus delicti* than the confessions or admissions of the defendant. This is based on the assumption that the only evidence of the relation of the defendant as bailee to the property was the admission of the defendant, when, after his arrival in Portland, the gold-dust was demanded of him by the person authorized to receive it, he promised to turn over to him on two separate occasions. But enough has already been said to show that there was evidence that the gold-dust was intrusted to his possession, to be delivered to a designated person in Portland, and that he sustained the relation of bailee to such property when it was demanded of him, and that, if he had then and there refused to account for it or to deliver it, without any acknowledgment on his part of such relation as bailee to the property, it would have made a case for the consideration of the jury. The effect of his admissions was only to strengthen the evidence for the prosecution that he was such bailee of the property. It was only corroborative of his character as bailee of the property intrusted to him, and his intention then to fulfill his trust; but this was not enough.

Some act of conversion or appropriation of the property to his own use must be charged and proved before he could be guilty of the offense of larceny by bailee. That proof which is the *gravamen* of the charge was not furnished by him or by his admissions, but by another witness. It was when, as a bailee being called upon to account, he disowned having received the gold-dust, that he furnished the decisive evidence of its conversion. That a conviction should not be had on the extrajudicial confessions of the defendant, unsupported by any corroborating facts and circumstances, need not be questioned. It is proof *abundant* of the *corpus delicti* which is required, and Mr. Bishop intimates that the rule in this regard would be better applied as one of caution and discretion, than of law. 1 Bish. Crim. Proc. §§ 1070, 1071. But, however that may be here, neither the fact that the gold-dust was intrusted to his possession for the special purpose of delivering it to a third person in Portland, or the violation of such trust, and the conversion of the property to his own use, stands upon his unsupported admissions alone. All that can be said is that, when it was proved that such property was intrusted to his possession, to be delivered as specified, and the person designated to receive it applied to him for it, and he promised to deliver it, he only corroborated what had already been proven, and recognized his relation to the property as bailee, and perhaps his intention to fulfill the trust confided to him. It may be that Chinese testimony is open to the criticism claimed, but the credibility of the witnesses, and the weight and value of testimony, is for the jury, and not for our decision. We think the judgment must be affirmed.

(19 Or. 522)

#### HARTVIG v. N. P. LUMBER CO.

(Supreme Court of Oregon. Nov. 10, 1890.)

#### MASTER AND SERVANT—NEGLIGENCE OF MASTER—QUESTIONS FOR JURY.

1. It is well settled that a wrong-doer is liable for an injury which resulted as the natural and probable consequences of his wrongful act, and which he ought to have foreseen in the light of surrounding circumstances.

2. It is ordinarily the province of the jury to ascertain whether the injury is the natural and proximate cause of the wrong complained of.

3. It is the duty of the master to observe due care, and not to expose his servants to unreasonable risks, and, when the nature of the business requires it, to make needful rules or regulations for its safe conduct so as to protect those in his employment against accidents.

4. It is not for the court to speculate upon the facts, but to submit them to the jury, if they tend to support the cause of action.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

R. Citron, for plaintiff. Thos. N. Strong, for defendant.

LORD, J. This is an action to recover damages for injuries alleged to have been sustained by the plaintiff on account of the negligence of the defendant, its agents and servants. The only error complained of is the refusal of the court to grant a

motion for nonsuit interposed by the defendant. In substance, the facts are these: The plaintiff was an ordinary laborer on the night force at the defendant's saw-mill, who was engaged with other laborers at the foot of the lumber chute for the purpose of removing lumber as it descended to the foot of the chute, and distributing it about the yard. On the evening alleged, while the plaintiff was at his work, it being nearly dark, and the lighting of the lamps in the mill had begun, a large stick of timber was passed out from the saws over the rollers to the head of the chute by the men above, and when it passed the last rollers, coming end first, one-half of the stick would project straight out, and when the center was passed, without giving any warning, it was let go, and descended down the chute with great force, striking in its descent a small timber in the pile, which flew around and violently struck the plaintiff, and injured him. In the performance of this work at the foot of the chute, the evidence shows that the pushing of timber over the rollers at the head of the chute, especially when a heavy timber like the one in question was to be sent down it, rendered the place at which the men worked at the foot of the chute extremely dangerous, and an unsafe place to work, unless some notice or outcry was given so that they might take precautions for their safety. It does not appear that the defendant, in the conduct of this work, established any rule or regulation requiring such warning to be given, or that the men at the top of the chute gave it, except of their own choice, which was irregularly, and often caused the interchange of much swearing between the men at the top of the chute, and those at work at its foot. The plaintiff is a Russian Finn, and speaks very little English; had done little or no work of that kind; was not acquainted with, nor informed of, the dangers of the work. When the injury occurred, the plaintiff was a few feet away from the foot of the chute, engaged in the duties required by his employment. Upon this state of facts, the contention is (1) that the failure to give the warning when the timber was started in its descent down the chute was not the proximate cause of the injury; (2) that, if the failure to give the warning was negligence which caused the injury, it was the negligence of a fellow-servant, for which the defendant company was not liable; and (3) that if the warning had been given, a like injury would have occurred to the plaintiff. Taking these propositions as stated in their order, the first contention is that the injury was not occasioned by the descent of the timber for which no warning was given, but by another piece in the pile of lumber at the foot of the chute which it struck with great force and misplaced and sent forcibly and violently against the plaintiff, causing and inflicting upon him the injury of which he complains. The evidence shows that it was not unusual for timber and lumber to accumulate at the foot of the chute, and on the chute; that the chute is hardly ever free from it; that sometimes it is so full or choked with lumber that such lumber acts

as a buffer, and retards the downward progress of the descending timber,—all of which tends to show that if there are only some pieces of timber on the chute, or piled at the bottom of it, when a large piece is started down the incline, and the chute is not so choked up as to retard its headway, that, from the nature of the incline, it must descend with great force, and necessarily is liable to strike other sticks of timber, as here, of much less size, to which it will communicate its force and propelling power, sending it forcibly in the direction the power is received. But in this there is no break in the causal connection between the wrong complained of and the injury occasioned by it, no intervening agency changing or affecting the operation of the prime cause of the injury. As the heavy stick of timber was sent down the chute, without any warning to the men at work at its foot, the wrong in thus sending it is naturally and directly communicated to the other piece of timber, which was there at the time, under the circumstances indicated, and not through the intervention of some independent agency, making no break in the succession of events from the primary cause to its result in the injury. One event followed the other in a continuous sequence without any immediate cause operating between the wrong and injury. The small piece of timber struck was there as an incident to the work in hand, and it derived its force and propulsion, and became linked with the prime cause, by a causal connection, which made the injury it occasioned the natural and probable consequences of the wrongful act or omission. *Railway Co. v. Kellogg*, 94 U. S. 475; *Jucker v. Railroad Co.*, 52 Wis. 152, 8 N. W. Rep. 862; *Nelson v. Railroad Co.*, 30 Minn. 77, 14 N. W. Rep. 360; *Railroad Co. v. Hope*, 80 Pa. St. 377. This being true the wrongful act or omission was the proximate cause of the injury. The principle is well settled that a wrong-doer is liable for the injury which resulted as the natural and probable consequence of his wrongful act of which he ought to have foreseen in the light of surrounding circumstances, and, as the court said in *Ransier v. Railroad Co.*, 32 Minn. 334, 20 N. W. Rep. 332, "whether the injury in a particular case was such natural and proximate result of the wrong complained of is ordinarily for the decision of the jury." *Reiper v. Nichols*, 31 Hun, 495. It is their province to look at the facts as they transpire, and ascertain whether they are naturally and probably connected in orderly sequence with the prime cause, or disconnected by some intervening agency affecting its operation. Upon this state of the evidence, we are not authorized to take the case from the jury, and say the wrongful act or omission was not the proximate cause of the injury.

The next contention is based on the assumption that, as the men at the top of the chute and those at the foot were engaged in a common undertaking, they were fellow-servants, and, as the failure to give the warning was the negligence of some one of those above, it was the negligence of a fellow-servant, for which the defendant company was not responsible,

and therefore no recovery can be sustained upon that state of facts. The evidence establishes that it was the duty of the defendant company to provide such rule or regulation for the conduct of the work as would make the place at which the plaintiff worked reasonably safe; that to accomplish this object, and render those at the foot of the chute where the plaintiff worked reasonably safe, it was necessary that a warning outcry should be given, so that when timber was started down the chute, and especially heavy timber, and at night-time, the men at the foot of the chute might have notice of its coming, and get out of danger, or take precautions for their safety. The evidence shows that the plaintiff provided no such rule or regulation for the conduct of this dangerous work, but left the men engaged at the top of the chute without any direction in the matter, those at the top and bottom of the chute shouting backward and forward at each other, and, as the counsel for the defendant says, the men at the foot of the chute abusing and swearing at those at the top whenever, in their opinion, they failed to give the proper warnings. This exhibits a condition of things than which nothing could more plainly show the necessity of the defendant providing a rule or regulation in the conduct of the work, prescribing and requiring those at the head of the chute not to start timber, and especially heavy timber, and at night-time, when the danger is increased, without giving a warning outcry, in order that those at the foot of the chute engaged in the performance of their labor might have notice of the descent, and take precautions for their safety. The place at which they and the plaintiff worked could only be rendered reasonably safe by the establishment of some such rule or regulation. As it is the duty of the master to furnish a reasonably safe place for his servant to work, it became the duty of the defendant company to provide such reasonable rule or regulation in the conduct of the business as would protect the men while engaged in their work at the foot of the chute. It required the defendant not simply to employ skillful and competent agents and employees in its service, but to adopt rules and regulations adapted to the dangerous nature of the business, so as to guard against accidents; in a word, to be vigilant in the use of means, and in the adoption of measures, to make the servants reasonably safe in their employment. To this extent the master assumes the risks, while the servant assumes the natural and ordinary risks incident to the business in which he is engaged, including those arising from the negligence of his fellow-servants. As was said in *Anderson v. Bennett*, 16 Or. 529, 19 Pac. Rep. 755, the duty devolving on the master is affirmative to take such measures, or to adopt such precautionary measures, as the proper and safe conduct of his business requires to avoid accidents. An application of this principle to the defendant requires it to establish some suitable rule or regulation for the prosecution of this business which would render its employees reasonably

safe in the discharge of their duties in the course of their employment. It was bound to observance of such care as would not expose them to risks and perils which might be guarded against by proper diligence, or by the promulgation of suitable or needful rules for the safe management of its business. If the defendant had provided some such rule, requiring the men at the head of the chute to give warning before timber was started down the chute, and they should neglect to do it, and an injury should occur to those below, the defendant, having performed its duty, would not be liable, no more than when a master furnishes a safe instrument and competent servant, and, in using it, such servant negligently injures a co-servant. Upon the facts as disclosed by this record, the defendant has not exercised that care which the exigency of the situation required for the safety of those employed at the foot of the chute, and is not in a condition to avail himself of the rule of non-responsibility to a servant for an injury caused by a fellow-servant. "Though we have said," justly remarked Baron ALDERSON, "that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant while they are acting in a common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks. It results that upon this phase of the case there was no error in refusing to take the case from the jury.

The last point of contention is that, if the warning had been given when the timber was started down the incline, a like injury would have happened to the plaintiff. This is based on the assumption that the facts show that the position he occupied relative to the foot of the chute, when the injury occurred, was reasonably safe, and that if the warning had been given he would have remained where he was, and not likely have changed it. The evidence shows that he was at work near the foot of the chute, the nature of which necessarily required him to stoop often, his head in front of him, and his body inclined over, so that at such time it was not possible for him to see the timber, although it may be seen by looking while it is being trimmed. How he would have acted if the warning had been given, under such circumstances, it is not possible for us to know. The piece of timber was unusually large, and came down with a terrible crash and impetus, and we are bound to assume, in view of the facts, that he would have taken such precautions as the instincts of self-preservation would have suggested on the occasion. It is not for us to speculate upon this, especially when the fact appears that he was injured at the place where he was near the foot of the chute, while engaged in the performance of the duties. These facts tend to show that the place at which he worked was dangerous or unsafe, unless warning was given, and to emphasize its necessity, to afford him an opportunity at least to take precautions for his safety. In cases of this character, it is the peculiar province of the jury to determine the facts;

and the court below committed no error in refusing the motion for nonsuit, and allowing them to exercise their functions.

The judgment must be affirmed

(19 Or. 578)

BARR V. BORTHWICK *et al.*

(Supreme Court of Oregon. Nov. 17, 1890.)

SALE—WHEN TITLE PASSES—EVIDENCE.

1. In the sale of personal property, where there has been a complete delivery of the property in accordance with the terms of sale, and nothing remains to be done, in relation to the property, to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total quantity or value of the goods at the price specified in the contract.

2. In an action for wood sold, when the defense is that wood was not of the quality specified in the contract, evidence is inadmissible by the plaintiff to show the merchantable quality of wood of the same grade cut from the same place, and on hand a day or two before the trial, and some considerable time after the delivery of the wood sued for.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This action is founded upon the following agreement in writing: "This agreement made at Portland, Oregon, this 21st day of June, 1889, between Borthwick and Fraine, parties of the first part, and S. M. Barr, party of the second part, witnesseth: Said parties of the first part are to furnish cars sufficient to carry fifteen hundred cords of wood. Said cars to be placed on what it known as 'Barr's Spur' on the O. R. & N. Co. R. R.; and said parties of the first part are to pay the party of the second part the sum of two dollars (\$2) per cord for the said fifteen hundred cords of wood. Said party of the second part is to place on board said cars, when furnished, 1,500 cords of good, merchantable fir wood. Said parties of the second part are to accept the measurement as given by the government at Walla Walla. [Signed] BORTHWICK & FRANE. S. M. BARR. Witness: J. M. LEAVENS." The complaint avers the plaintiff did sell and deliver to defendants, on board the cars, at place designated in contract, 1,500 cords of good, merchantable wood, in all respects as agreed; that defendants have paid \$1,000 on account thereof, and no more; and demands judgment for \$2,000, the balance claimed to be due. The answer denies the delivery of any greater number of cords of wood than 1,054 cords. It alleges that it was understood between the parties to the agreement at the time it was made, and when the wood was sold and purchased, that defendants were purchasing it to fill a contract they had with the United States quartermaster for use at Walla Walla; that it was a provision of said contract between plaintiff and defendants, and was therein expressly stipulated and agreed, that plaintiff should accept the measurement of said wood made by the government officer on its delivery to the government at Walla Walla; that plaintiff furnished 1,325 cords of fir wood to apply on the contract, but that 271 cords of it were unmerchantable, and not good wood, and were rejected and refused, for that reason, by the government agent at

Walla Walla, where and when the wood was measured and inspected; that, by a subsequent contract, it was agreed that defendants should pay to the plaintiff on said contract \$1,000, when 1,000 cords of good, merchantable wood had been furnished thereunder, and that the remainder of the purchase price of said 1,500 cords of wood should be due and payable when said contract was completed, and said 1,500 cords of good, merchantable wood had been delivered at Walla Walla, and paid for and accepted by the government, and not otherwise. That said contract has not been completed or filled by plaintiff, and he has only delivered, under said contract, 1,054 cords of wood; that the government has not paid defendants for said wood already delivered, and will not, until said contract for 1,500 cords of wood is completed. They deny that \$2,000, or any other sum, is due or owing from them to plaintiff. The reply denies specifically each material allegation of the answer, and the only allegation of new matter it contains is that it was by the fault of the defendants that said wood was not measured by the government at Walla Walla, or elsewhere. A trial was had before a jury, and a verdict and judgment in favor of respondent was rendered for the amount demanded in the complaint, from which this appeal is taken. The facts sufficiently appear in the opinion.

*Watson, Hume & Watson and R. G. Morrow, for appellants. R. & E. B. Williams & Carey and C. J. McDougall, for respondent.*

BEAN, J., (after stating the facts as above.) The first question for our consideration is whether the court below erred in instructing the jury that under the contract in this case, the wood of the quality specified in the contract, when put on board the cars for the defendants at Barr's Spur, was thereafter at the risk of the defendants, and that plaintiff thereafter had no further liability or responsibility in respect to the wood. The contention of defendants is that the measurement of the wood, by the government at Walla Walla, is made, by the contract, a condition precedent to the transfer of the property. This contract, being in writing, must be construed by the court, and the intention of the parties, as gathered therefrom, must control; the general rule of law being that when the goods are to be weighed or measured, in order to ascertain the quantity, unless it appears that the intention of the parties was otherwise, the title does not pass until such measuring or weighing is done. *Rosenthal v. Kahn*, 24 Pac. Rep. 989, (decided this term.) But when there has been a complete delivery of the property, in accordance with the terms of the contract of sale, and nothing remains to be done, in relation to the property, to effect the transfer, the title passes, although there remains something to be done in order to ascertain the total quantity or value of the goods at the price specified in the contract. *Burrows v. Whittaker*, 71 N. Y. 291; *Graff v. Fitch*, 58 Ill. 373; *Hatch v. Oil Co.*, 100 U. S. 124. The delivery of the property is an impor-

tant factor in determining the intent of the parties, and is usually indicative of an intent that the title should pass, though not conclusive. If goods be completely delivered to the purchaser, it is usually very strong evidence of an intent that the property should pass to him, and be at his risk, notwithstanding that weighing or measuring is to be done afterwards. The inference to be derived from a delivery to the purchaser may, of course, be overcome by the terms of the contract, but, in the absence of any provisions indicating a different intention, it is usually considered that the title vests upon the delivery. The provisions of the contract in this case are that the defendants should provide the cars for the wood purchased by them of plaintiff, and should furnish these cars at a certain designated place on the Oregon Railway & Navigation Company's road. The only engagement of plaintiff was to load in these cars when furnished 1,500 cords of wood, of the quality called for in the contract. When he did this his contract was complete, and nothing remained to be done by either of the parties to effect the transfer. The possession of the wood passed from plaintiff to defendants as soon as put aboard of the cars, and there is nothing in the contract which would prevent the title vesting in them as completely as if plaintiff had delivered the wood in defendant's wood-yard, or loaded it in wagons furnished by them. The possession and control of the wood was immediately transferred from plaintiff to defendants, and upon what principle of either reason or authority it can be claimed that plaintiff had any further liability, or responsibility, in regard to the wood, we are at a loss to understand. The provision in the contract that plaintiff should accept the measurement, as given by the government at Walla Walla, simply bound him to abide by that measurement, if made, and cannot be construed into a condition precedent to the passing of the title. The contract does not provide for the receipt or acceptance of this wood by the government at Walla Walla, or that the government shall have anything whatever to do with the wood except to measure it, if it reached Walla Walla. The only effect of this provision is that if the wood should be transported to Walla Walla by the defendants, and there measured by the government, and such measurement did not agree with that made by the plaintiff, he will be bound by the quantity, as ascertained at Walla Walla. The duty of causing this wood to be taken to Walla Walla and measured is for defendants, and, before they can bind plaintiff by such measurement, they must show that they have performed this duty. Appellants' counsel claimed on the argument that this case is within the rule announced in the case of *Rosenthal v. Kahn*, supra, (decided this term.) The contracts in the two cases are materially different. In the *Rosenthal* Case, the contract provided that *Rosenthal* should furnish *Kahn* 2,900 cords, more or less, of good, merchantable fir wood, at \$1.90 per cord, on board the cars, at a certain station on the Oregon Rail-

way & Navigation Company's road, said wood to be received and measured by the quartermaster at Walla Walla. There the amount of wood, more or less, delivered was, according to the terms of the contract, to be determined by a person whom the parties had agreed upon for that purpose, and, until the quantity was so determined, the contract was not complete. After the wood was put on board the cars, there yet remained something to be done according to the very terms of the contract to complete the sale,—namely, the receipt and measurement of the wood by the quartermaster at Walla Walla; while here the contract fixed the amount of wood to be furnished, and provided that defendants should furnish the cars, and plaintiff should load the wood on board thereof, when so furnished. When the cars were furnished by defendants at the place designated, they became their vehicles for the transportation of the wood, and a delivery of the wood on the cars was a delivery to them. In the Rosenthal Case, there was no agreement that Kahn should furnish the cars, or that the wood should be loaded in cars over which he had any control; but it was to be put on the cars of a common carrier, to be transported to the place agreed upon by the parties for the receipt and measurement, and therefore the loading on the cars was not a delivery to Kahn, and under the contract could not be so considered. It appears from the contract that Kahn was fulfilling a contract he had with the government at Walla Walla, through Rosenthal, and consequently the parties, for reasons satisfactory to themselves, made the quartermaster's receipt and measurement a condition precedent to a right to the price of the wood, and, while that could be withheld, the sale could not be executed. On the trial before the jury, the defendants gave evidence tending to show that a portion of the wood delivered to them by plaintiff was not merchantable. To rebut this, plaintiff gave evidence that on the Saturday before the trial plaintiff, in company with one Rosenthal, examined a lot of wood, perhaps four or five hundred cords, piled up along Barr's Spur, which plaintiff testified was the same kind of wood, and cut from the same place, and a part of it was from the same pile out of which the wood furnished the defendants was taken, and was of a like quality therewith, and that it was cut about the same time. Rosenthal, being called as a witness, was permitted, against defendant's objection, to testify as to the quality of the wood examined by him. In this we think there was error. It is elementary that evidence of collateral facts is inadmissible, for the reason that such evidence tends to draw the minds of the jury from the real fact at issue, and in dispute, and the opposite party, having had no notice of such a course, is not prepared to rebut it. 1 Greenl. Ev. § 52. The wood examined by Rosenthal was not the same or any part of the wood delivered to defendants, and, if it was competent for plaintiff to introduce evidence tending to show it was the same kind, the defendants might have in-

troduced evidence to contradict it, and thus a new issue would have been presented to the jury, having nothing to do with the issue on trial. *Henkel v. Burke*, 10 Atl. Rep. 249; *Morawetz v. McGovern*, 32 N. W. Rep. 290; *Love v. Frogge*, 19 Mo. App. 368. The defendants did not claim that all the wood delivered to them was not merchantable, but only 271 cords thereof, and we think the evidence should have been confined to the quality of the wood actually delivered. The fact that the wood examined by Rosenthal was cut from the same place, or that a part of it was from the same pile, as that delivered to defendants would be a very remote circumstance indicating the quality of the wood actually delivered. Plaintiff was furnishing large quantities of wood from the same place to other parties, at the rate of from 800 to 1,000 cords per month, during the time he was furnishing wood to defendants, and it would be unsafe to say that he could show the quality of the wood delivered to the defendants by showing the quality of from four to five hundred cords that remained along the side track a few days before the trial, and evidently some time after he had ceased furnishing wood under his contract. The other alleged errors assigned in the notice of appeal under the views we have expressed become immaterial on this appeal, and it is not necessary for us to consider them. The judgment of the court will be reversed, and a new trial ordered.

(20 Or. 96)

**MORRILL v. MORRILL et al.**

(Supreme Court of Oregon. Nov. 24, 1890.)

**JUDGMENT—COLLATERAL ATTACK—TENANTS IN COMMON—PARTITION.**

1. A collateral attack on a judgment or decree is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree, or enjoining its execution.

2. The possession of land usually follows the legal title, where no adverse possession is shown, and the possession of one tenant in common, in the absence of an ouster, will inure to the benefit of his co-tenant.

3. When a court has jurisdiction of the subject-matter and the parties, its judgment cannot be impeached collaterally for errors of law or irregularity in practice.

4. When a party to a suit has an opportunity to present his defense, and neglects to do so, the decree against him is binding in a collateral proceeding.

5. A decree for partition is conclusive upon the parties and privies that they were tenants in common and in possession of the land at the date of its rendition.

6. A judgment of a court of this state having jurisdiction of the parties and subject-matter cannot be attacked collaterally for fraud *altunde* the record by the parties or privies.

7. Where only one referee is appointed in a partition suit, such proceeding is only an irregularity, and cannot be inquired into collaterally.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

This is a suit brought under section 504, Hill's Code, by plaintiff and respondent, to quiet her title to lot No. 3, block 116, in the city of Portland. The complaint avers that the plaintiff is the owner in fee and in the actual possession of this lot; that she

derives her title thereto by good and sufficient mesne conveyances from the United States, and also by virtue of the statute of limitations. The separate answer of defendant Killen avers that defendant Eli Morrill is the owner of the north 19 feet of this lot, and that on the 18th day of March, 1883, said Morrill executed a mortgage to him on this 19 feet, to secure the payment of the sum of \$1,000. The defendant Eli Morrill, after denying plaintiff's ownership in the north 19 feet of this lot, alleges that he is the owner in fee thereof, and as a further defense, and by way of estoppel, avers that in 1883 he instituted a suit for partition of the property described in the complaint against plaintiff, Ida Morrill, in the circuit court of Multnomah county; that she was duly served with process, and appeared by her attorney and defended said suit; that such proceedings were had in said suit that on June 7, 1883, a decree was duly entered by the court, adjudging and decreeing that this defendant, Eli Morrill, and plaintiff, Ida Morrill, were tenants in common and in possession of lot 3, block 116, in the city of Portland; that Eli Morrill was the owner of an undivided one-third of said lot, and said Ida Morrill was the owner of an undivided two-thirds thereof; that a partition of said lot could be made without prejudice to the rights of the parties; that said property was divided and partitioned in accordance with said decree by setting off in severalty to Eli Morrill the north 19 feet of said lot, and to Ida Morrill the south 31 feet thereof, and that said decree was duly entered in the journal of said court, and that said decree is in full force and effect. The reply, after denying the allegations of the answer, sets forth that on March 28, 1877, a divorce suit was brought in the circuit court of Multnomah county by Eli Morrill against his then wife, Ida, and a decree was made therein, among other things, decreeing Eli Morrill to be the owner of an undivided one-third of lot 3, block 116, and dissolving the bonds of matrimony between the parties. It then avers that Ida, soon after said decree, went into the adverse possession of said lot 3, and disseised and dispossessed the said Eli, and that ever since said date she has held it adversely. It also avers that defendant, for a valuable consideration, released his interest in said lot on August 19, 1879, and sets forth a copy of the alleged agreement as follows: "Agreement. In consequence of mutual agreement with Mrs. Ida Morrill, I declare under oath that I withdraw my individual right to the title in an undivided one-third interest in lot 3, block 116, in the city of Portland, allowed to me by law of the court. Portland, Oregon, August 9, 1879. [Signed] ELI MORRILL." The reply then attempts to impeach the partition suit by averring that the evidence did not justify it, and no referees were appointed as required by law; that, notwithstanding the failure and inability of said Eli Morrill to prove facts necessary to maintain said suit, her attorney therein, by and with the connivance and procurement of said Eli Morrill, was wrongfully induced, persuaded, and deceived into entering into a stipulation in said suit as to such facts, and in consent-

ing to said decree of partition, without the knowledge, acquiescence, or consent of the plaintiff, and against her instructions and directions. It then alleges said decree of partition to be a fraud upon the court and plaintiff, and that she never knew of said decree until the filing of defendant's answer in the present suit, and that she has never knowingly acquiesced therein. A demurrer was interposed in the court below to that part of plaintiff's reply alleging new matter, which was overruled. The issues so made were then referred to C. H. Carey, Esq., to take the testimony, and report his finding of law and facts to the court. The findings of the referee were in favor of the plaintiff. Motions to confirm and set aside this report were duly filed. The court overruled defendant's motion, and sustained the motion of plaintiff to confirm said report, and a decree was thereupon entered in favor of plaintiff, and decreeing that she was the owner in fee of said lot 3, block 116, and that neither of said defendants had any right, title, or interest in or to the north 19 feet of said lot. From this decree the appeal is taken.

*J. W. Whalley, for appellants. A. H. Tanner and R. R. Giltner, for respondent.*

BEAN, J., (after stating the facts as above.) It is conceded by the parties that, if the decree in the partition suit of Morrill vs. Morrill is valid and binding on her, this case should be reversed. Briefly, the facts concerning the partition suit are these: In August, 1882, the defendant herein, Eli Morrill, commenced a suit for partition in the circuit court of Multnomah county, Or., against the plaintiff in this suit. The complaint was in the usual form, alleging that he and plaintiff were tenants in common and in possession of lot 3, in block 116, in the city of Portland, setting out the interests of the respective parties, and praying a partition thereof. A summons being duly issued and served, the plaintiff appeared by her counsel and filed an answer, in which she denied the possession of the premises by herself and defendant, and alleged, as a defense, that she was then, and had been since the 1st day of March, 1878, in the actual and exclusive possession of all of the property, and that her possession was not joint with that of plaintiff or any other person. A reply being filed denying the new matter alleged in the answer, the cause was referred to a referee to report the facts and the law to the court. In January, 1883, the parties, by their respective attorneys, appeared before the referee for the purpose of taking testimony. The plaintiff offered in evidence a certified copy of the judgment roll in the divorce case of Morrill vs. Morrill, and the following stipulation of the parties was entered into: "It is hereby stipulated by the parties that up till the 4th of February, 1882, both plaintiff and defendant occupied the premises described in the complaint; that since that time the defendant has been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant nor any person for him has act-



ally occupied said premises, or any part thereof, since February 4, 1882, as a home or otherwise; that both before and since February 4, 1882, and up to the present time, both plaintiff and defendant have paid taxes and street improvements according to their respective interests. It is understood that this stipulation shall not be construed so as to affect the rights of either party as a tenant in common. It is further agreed that the referee may make personal inspection and investigation of the premises in question, and from the facts thus obtained report to the court (if this suit can be maintained) (1) whether the property can be divided; (2) if it can, then how division shall be made; (3) if it cannot be divided, then recommend a sale." On May 4, 1883, the referee filed his report, the findings of fact and conclusions of law being in favor of defendant, and he also reported that pursuant to the stipulation of the parties, he had made personal inspection of the premises, and found that they could be divided without injury to the rights of either. The report recommended that the north 19 feet of the lot be set off to defendant, and the south 31 feet to plaintiff, each portion being particularly described in the report. Motions were made to confirm and set aside this report by the respective parties to the suit. On June 7, 1883, the court being fully advised, and the counsel of the respective parties consenting thereto in open court, a decree was entered confirming said report, and it was adjudged and decreed that plaintiff and defendant were tenants and in possession of the property; that plaintiff was the owner of an undivided two-thirds thereof, and defendant of the remaining one-third; that the premises could be partitioned according to the respective interests of the parties without prejudice to the rights of either, and confirming the partition as made by referee, particularly describing in said decree the portion set off to the respective parties.

It is argued on behalf of respondent here that the decree in the partition suit of *Morrill vs. Morrill* is void (1) because defendant was not in possession of the land sought to be partitioned at the commencement of the suit, and such fact, it is claimed, appears from the records thereof; (2) that the stipulation entered into by her attorney was without her knowledge and against her instructions, and was done for the purpose of defrauding her; (3) that no referees were appointed to partition the land as by law required. It is first important to determine whether this is a direct or collateral attack on this decree. The contention of respondent is that it is a direct attack, and therefore no presumptions are to be invoked in order to sustain it. The complaint contains no allegations concerning this decree, but the first mention thereof is in the answer, where defendant pleads it as an estoppel. The plaintiff then seeks to avoid its effect by averring in the reply matters which she claims are sufficient to invalidate it. This is undoubtedly a collateral attack. It is an attempt to impeach the decree in a proceeding not instituted for the

express purpose of annulling, correcting, or modifying the decree or enjoining its execution. A collateral attack on a judgment is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree or enjoining its execution. 12 Amer. & Eng. Enc. Law, 147j. The fact that the parties are the same, and that the plaintiff seeks to attack the decree by the allegation of the reply, cannot change the rule, or make the attack any the less a collateral one.

The first objection to the validity of this decree is based upon the stipulation of the attorney "that the defendant in the partition suit has since February 4th been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant, nor any person for him, has actually occupied said premises or any part thereof since February 4, 1882, as a home or otherwise." The contention is that a plaintiff, in order to maintain a suit for partition, must not only be a tenant in common, but in the possession, of the land sought to be partitioned. If he has been ousted or dispossessed, and his co-tenant is holding adversely to him, the suit cannot be maintained, and many authorities are cited to that effect. It is urged that this stipulation shows that defendant was not in possession of these premises at the time he commenced this suit, but had been ousted by plaintiff long prior thereto. It may be doubted whether such a construction can be put upon the language of the stipulation, since possession usually follows the legal title where no adverse possession is shown, and the possession of one tenant in common of the land, in the absence of an ouster, will inure to the benefit of his co-tenant. *Freem. Co-Ten.* § 167. "Actual, exclusive occupancy" by the defendant in the partition suit may not have been inconsistent with the title of her co-tenant, but, however that may be, it was a question for the court before whom the suit was pending, and its decision, however erroneous it may have been, is binding on the parties, until reversed or annulled in some proper proceeding. *Atkins v. Kinnan*, 20 Wend. 246; *Voorhees v. Bank*, 10 Pet. 473; *Dolph v. Barney*, 5 Or. 192; *Woodward v. Baker*, 10 Or. 491; *Norton v. Harding*, 3 Or. 361; *Hill v. Cooper*, 8 Or. 254.

After a court has acquired jurisdiction, it has a right to decide every question arising in the case, and, however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent court with admitted jurisdiction of the subject-matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree, because, forsooth, it was mistaken, either as to the law applicable to the facts before it, or to the facts themselves. *BALDWIN, J.*, in the case of *Voorhees v. Bank*, supra, speaking on this subject, says: "The errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judg-

ment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be made more reasonable than that the person who complains of an injury done him should avail himself of his legal remedy in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitations on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot directly do, in the mode pointed out by law, he shall not be permitted to do collaterally, by evasion. A judgment irreversible by a superior court cannot be declared a nullity by any authority of law. If, after its rendition, it is declared void for any matter which can be assigned for error only on a writ of error or appeal, then said court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or process would not be exempt. "We need not pursue the examination of this question any further, for the principle is so well settled that it is said to be "an axiom of the law" that, when a court has jurisdiction of the subject-matter and the parties, its judgments cannot be impeached collaterally for errors of law or irregularity in practice. *Cooper v. Reynolds*, 10 Wall. 308; *Sibley v. Waffle*, 16, N. Y. 191.

On the argument of this case much stress was laid upon the effect of the alleged agreement of defendant concerning the property in dispute made in August, 1879; and it was claimed that by virtue of that agreement plaintiff became the equitable owner of this property. There are two reasons—either of them sufficient, in our opinion—why plaintiff can claim nothing by virtue of this agreement in this suit. The first is, such agreement is not alleged in the complaint, or in any way referred to therein. If plaintiff intended to rely upon this agreement she should have so averred in her complaint. Not having done so, she cannot aid the complaint by departing from the cause of suit stated therein, and alleging another and different one in her reply. In her complaint plaintiff seeks to prevail by virtue of a pure legal title. This agreement, if executed by defendant, only gave her an equitable title at best. The other is that this writing was executed, if at all, long prior to the commencement of the partition suit, and plaintiff should have availed herself of any rights it gave her in that suit. *Nell v. Tolman*, 12 Or. 289, 7 Pac. Rep. 103. If she neglected or failed without some reasonable excuse to produce all the evidence in her possession in that suit, it is now too late for her to be heard to complain. There must be an end to litigation, and, where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should

take the consequences, when the judgment or decree is sought to be enforced against him in a collateral proceeding.

This decree in the partition suit is conclusive between the parties as to the title to the land, and is a solemn adjudication that they were tenants in common therein. *Edson v. Munsell*, 12 Allen, 600; *Hancock v. Lopez*, 53 Cal. 362; *Freem. Co-Ten.* § 530. The plaintiff is estopped by that decree from showing or attempting to show that she was holding the premises adversely to the defendant, or that he had no interest therein, at the date of its rendition.

The next question in this case is, can the decree in the partition suit be impeached for fraud? It is claimed by respondent that the evidence and findings of the referee show that the decree was obtained by fraud and collusion between her attorney in that suit and the defendant here. It is argued with much force and learning that, since defendants rely upon the particular decree as one of the muniments of their title, plaintiff should be permitted to show, if the facts are with her, that such decree was obtained by fraud and collusion between her attorney and adversary; that, since fraud vitiates every transaction, even a judgment, she ought to be permitted to treat this decree as invalid, when sought to be enforced or relied upon even in a collateral proceeding. This, we believe, is the first time this question has ever been before this court for decision. In the case of *Murray v. Murray*, 6 Or. 19, the court held that a judgment of a sister state could be attacked collaterally for fraud by a party, when offered in evidence in the courts of this state, for the reason that the party sought to be affected thereby has no opportunity to attack it in our own courts by a direct proceeding, and should not be required to go into a foreign state to do so. As we have already said, this cannot be considered a direct attack upon this judgment. No reference is made to the judgment in the complaint. No facts are alleged upon which a court could base a decree annulling the decree or judgment. The plaintiff in her complaint claims title by good and sufficient mesne conveyances from the government of the United States, and by virtue of the statute of limitations. This is not sufficient to entitle her to attack this judgment. *U. S. v. Flint*, 4 Sawy. 42; *Mayor, etc., v. Brady*, 115 N. Y. 599, 22 N. E. Rep. 237; *U. S. v. Throckmorton*, 98 U. S. 61. It is a general rule, at common law, that parties and privies to a judgment may not attack it collaterally for fraud. And, after a party has been duly served with process, it is his duty to see that such a judgment is not obtained against him, and, if it is, he must take some proper proceedings to have it annulled. As long as it remains in full force and effect the parties cannot treat it as invalid, unless such invalidity appears upon the face of the judgment. It is true, fraud vitiates every transaction into which it enters, even a judgment, but such fraud must be made to appear in some appropriate proceeding known to the law. The statute points out ample methods by which a

party may be relieved from such a judgment, such as a new trial, review for error of law, an application to be relieved therefrom; and, beyond the methods provided by statute, courts possess inherent powers, as has been said, "to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake." These methods, however, must be resorted to. They give no countenance to the idea that a judgment wrongfully obtained may be completely ignored, and the rights of the parties again inquired into in a collateral proceeding. *Freem. Judgm.* § 334; *Davis v. Davis*, 61 Me. 395; *Mussey v. White*, 58 Vt. 45, 8 Atl. Rep. 319; *Granger v. Clark*, 22 Me. 128; *Railroad Corp. v. Sparhawk*, 1 Allen 448; *Demerit v. Lyford*, 27 N. H. 541; *Krekeler v. Ritter*, 62 N. Y. 372; *Weiss v. Guérineau*, 109 Ind. 438, 9 N. E. Rep. 399; *Callahan v. Griswold*, 9 Mo. 457; *Mason v. Messenger*, 17 Iowa, 273. From these, and many other authorities that could be cited, we take the law to be that a judgment of a court of this state having jurisdiction over the subject-matter and the parties cannot be questioned collaterally for fraud *alunde* the record by the parties or privies. The case relied upon by the respondent as announcing a contrary doctrine is *Mandeville v. Reynolds*, 68 N. Y. 523. This was an action on a judgment, the defense to which was based upon a satisfaction of the judgment of record, and upon an order of court ratifying that satisfaction. The plaintiff offered to show that the entry upon the docket and the order were obtained by fraud and collusion. The court held that such evidence was competent, and in the opinion there are statements to the effect that a judgment obtained by fraud could be attacked collaterally. This decision was made under the reformed Code of Procedure of the state of New York, which permits equitable defenses to be pleaded in actions at law; and the court say: "The court acts upon the matters involved in the action now in a double capacity,—as a court of law and one of equity. As a court of equity it meets the question of the validity of the judgment, not as one of law, but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which, by the changing nature of the suit and trial, has become the main question and legitimately before it for trial." In this state the distinction between proceedings at law and in equity is still maintained. *Burrage v. Mining Co.*, 12 Or. 169, 6 Pac. Rep. 766. Authorities under the reformed Codes of Procedure are therefore not applicable here. We have so far treated this question on the theory that the evidence shows the decree to have been obtained by fraud, and our views as to the law render it unnecessary to examine the evidence, but in passing we deem it proper to say that we cannot agree with counsel for respondent in their construction of the testimony. We think the evidence significantly fails to show that the decree was obtained by fraud or collusion. It is also claimed that the stipulation in the partition suit was entered into by plaintiff's

attorney without her knowledge or consent. This claim is not sustained by the testimony. It is true plaintiff says she knew nothing about the proceedings in the suit, but the attorney who appeared for her testifies that she was informed of and consented to every step taken therein, and the referee who made the partition says that she was present when he was examining the premises for the purpose of partitioning the same; that she knew what he was doing, and was consulted about the matter.

It is also claimed the decree is void because the partition was made by only one referee, and not three, as provided by statute. At most this was but an irregularity, and cannot be inquired into in this suit. *Cole v. Hall*, 2 Hill, 627; *Kinnier v. Kinnler*, 45 N. Y. 535.

It follows, therefore, that the decree of the court below must be reversed, and a decree entered here in favor of defendants.

(20 Or. 106)

#### MCCULSKY v. KLOSTERMAN.

(Supreme Court of Oregon. Nov. 24, 1890.)

##### CONTRACTS—EVIDENCE OF USAGE.

1. Usage may be used as evidence to interpret a contract, but not to vary or contradict it. Its purpose is to ascertain the intention of the parties where it cannot be ascertained by the terms of the contract.

2. In all contracts as to the subject-matter of which known usages prevail, the parties proceed on the tacit assumption of such usages, but commonly reduce into writing the particulars of their agreement, but omit to specify those known usages which are included as of course by mutual understanding.

3. Where, in a contract to ascertain the net profits of a firm, it was provided, among other things, that "from the outstanding accounts 5 per cent. be deducted to cover losses and bad accounts," and usage was admitted to show in such case that "outstanding accounts" meant those from which the bad accounts had been segregated and charged to profit and loss, held no error upon the facts as disclosed by the record.

4. Where the subject-matter of a contract is the ascertainment of the net profits of a firm for the purpose of paying in cash the value of a one-third share, the term "outstanding accounts," unless it otherwise appear, has a particular meaning, different from the common or ordinary meaning.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

This is a suit in equity for an accounting to enforce the rights of the plaintiff under a contract with the defendant, of which the following is a copy: "This agreement made and entered into this 6th day of August, 1889, by and between John Klosterman and Alexander E. McCulsky, both of the city of Portland, county of Multnomah, and state of Oregon, witnesseth: That whereas, said John Klosterman has been and now is doing business at Portland as a wholesale grocer, under the firm name of Klosterman & Co.; and whereas, he said A. E. McCulsky has been and now is in the employment of the firm of Klosterman & Co., in order to fix the compensation of the said A. E. McCulsky, it is agreed as follows: The said A. E. McCulsky shall be entitled to and shall receive one-fourth of the net profits of the said firm of Klosterman & Co., commencing

ing with the 19th day of November, 1886, and extending to and including the 19th day of November, 1888, and from the 19th day of November, 1888, up to and including the 19th day of November, 1889, the said A. E. McCulsky shall be entitled to and shall receive a sum equal to one-third of the net profits of the said firm for the said time last above named. The payments above provided for and the amounts thereof shall be ascertained and made as follows: On the said 19th day of November, 1889, an account of stock shall be taken, and from the amount of the outstanding accounts of the firm there shall be first deducted five per cent. thereof to cover losses and bad accounts; and then there shall be paid to the said A. E. McCulsky the share of net profit after said deduction to which he is entitled under this agreement. Such payment shall be made by giving him a credit on the books of said firm, or in cash upon thirty days' notice that cash is demanded. From the sum above provided to be paid to the said A. E. McCulsky, there shall be deducted all moneys drawn by him from said firm during the times hereinbefore mentioned. If on or before the 19th day of November, 1889, a new agreement is made between John Klosterman and A. E. McCulsky for a further period of service, and A. E. McCulsky allows his share of the net profits, to which he is entitled under this agreement, to remain in the business, then there shall be no deduction made from the above amount, of the outstanding accounts, provided they are collected by the said firm of Klosterman & Co. to cover losses and bad accounts on the day of settlement or the 19th day of November, 1889. Witness our hands in duplicate this 9th day of August, 1889. JOHN KLOSTERMAN. A. E. McCULSKY Executed in the presence of NORVAL FORDYCE." The defendant, after making his denials, sets up, among other things, an alleged custom or usage existing among the merchants of the city of Portland, with reference to which the said contract was executed, and in contemplation of which the said contract was modified and controlled by said custom or usage to the extent and in the manner therein alleged. During the trial, evidence of such usage or custom was admitted, which the court found to exist, and in view of which the contract was made and executed, and, to the extent and effect specified and alleged, applied it to the contract in its construction, which resulting adversely to the claim of the plaintiff in the accounting, he appeals from the decree rendered therein to this court.

*Williams & Wood*, for appellant. *Stott, Boise & Stott*, for respondent.

LORD, J. This suit is brought against the defendant partnership by the plaintiff, who was employed by them, but who furnished no part of the capital invested in the business upon the above agreement by which they stipulated that he should receive a sum equal to one-third of the net profits of the business for the time specified. The controversy between them arises upon the construction to be given

to the contract, the counsel for plaintiff claiming that it explains itself and needs no other interpretation, while those for the defendant insist that it was made with reference to a custom or usage, and extrinsic proof of that fact is essential to arrive at the true intention of the parties. The contract provides that the plaintiff shall receive a sum equal to one-third of the net profits, and that the payment shall be ascertained as follows: "On the said 19th day of November, 1889, an account of stock shall be taken, and from the outstanding accounts of the firm there shall be first deducted five per cent. thereof to cover losses and bad accounts, and then there shall be paid to the said A. E. McCulsky the share of net profits after said deduction to which he is entitled under this agreement." "Net profits" are said to be the gain which accrues on an investment after deducting expenses and losses. "The words 'net profits,'" said VAN FLEET, V. C., "define themselves. They mean what shall remain, as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution." *Park v. Locomotive Works*, 40 N. J. Eq. 121, 3 Atl. Rep. 162. With respect to the capital invested and the expenses incurred in the conduct of the business there is no controversy, and these elements may, for the present, be eliminated from our consideration. It is the losses sustained in the prosecution of the business to which our consideration is more particularly directed. The point of contention is confined to "bad accounts" as losses, under the contract, and involves an inquiry into net profits as there provided. That point is that, "from the outstanding accounts of the firm, there shall first be deducted five per cent. thereof to cover losses and bad accounts." Is the intention of the parties so clearly expressed by those words that no extrinsic proof of usage or custom is necessary to explain and ascertain what the parties meant by them? The argument for the plaintiff is that the language of the contract cited plainly means that 5 per cent. is to be deducted or allowed for bad accounts from the outstanding accounts, whether the bad accounts in fact amount to that much or not, and that it was so plainly fixed for the purpose of easily liquidating the amount of bad accounts as losses to be deducted in computing the net profits on account of the relation of the parties, and, to avoid the controversy which might otherwise arise by charging bad accounts to profit and loss, as is usually the custom. The argument for the defendant is that there is an immemorial usage or custom among the merchants of Portland to charge all accounts considered uncollectible, or bad accounts, to profit and loss, and that such bad or uncollectible accounts are not to be considered or estimated in determining the net profits; that the parties to the contract had full knowledge of such custom, and made the contract with reference to it; and that, construing the contract in contemplation of such usage or custom, the provisions of the contract adverted to only meant or

were intended to mean that 5 per cent. should be deducted for bad accounts from the outstanding accounts as remained after the uncollectible or bad accounts had been segregated by charging them to profit and loss. It thus appears that the real question at the bottom of the controversy is, how shall bad accounts to cover losses be deducted under the contract as provided from outstanding accounts after uncollectible or bad accounts have been segregated and charged to profit and loss, or from the outstanding accounts, including good and bad accounts? In its general sense, "outstanding accounts" means such accounts as are due, unpaid, uncollectible, as an ordinary outstanding draft or bond or other indebtedness, and is broad enough to include within its terms good and bad accounts which are due and unpaid. In its mercantile sense, when net profits are to be ascertained, it means such accounts as are deemed good and collectible, and from which accounts deemed to be bad and uncollectible have been segregated and charged to profit and loss. If we take the words "outstanding accounts," and apply to them the general sense in construing the contract, it will include good and bad accounts due and unpaid, and from which the 5 per cent. is to be deducted to cover losses, or to segregate the bad accounts. But if we take the same words and apply to them the mercantile sense in the construction of the contract, it means such "outstanding accounts" as have had the bad accounts sifted and are supposed to be good, and from which are to be deducted 5 per cent. to cover losses, which may occur notwithstanding such outstanding accounts are supposed to be collectible. In ascertaining the net profits of a business, if we take the capital invested, the expenses of running it, and the losses incurred in its prosecution, which last element necessarily includes such accounts as are to be treated as bad and uncollectible, and deduct from the account of stock and the outstanding accounts now freed from bad accounts and treated as outstanding accounts collectible, the difference will be the net profits. This calculation proceeds upon the hypothesis that the outstanding accounts are good, and the bad accounts have been separated from them, and charged to the losses of the business.

But it is common knowledge that it sometimes happens that some of the outstanding accounts turn out to be uncollectible or bad accounts, notwithstanding they have been treated and deemed to be good accounts, and collectible. Was not then the object of the provision of the contract in dispute to cover losses which might arise from outstanding accounts deemed to be good and charged up as collectible, but some of which might turn out to be bad and uncollectible? It was to show such was the sense in which outstanding accounts were to be considered when net profits were sought to be ascertained that proof of usage or custom was resorted to to ascertain the intention of the parties. This proof, it is insisted, was inadmissible, because it violates the plain terms of the contract; that the pro-

vision needs no extrinsic proof to aid its interpretation; and that to allow it was to vary or contradict the plain meaning and effect of this provision of the contract. As contracts are said to derive their force from the mutual assent of the parties to its terms, it would follow that its operation is to be ascertained from the intention of the parties; and this intention is to be collected from the expressions used by the contracting parties. When parties so draw their contracts as to leave little, if anything, to construction, the legal effect of the agreement must be enforced. It is when their meaning is not clear, or the language is ambiguous, that contracts are to be construed in the light of the circumstances surrounding the parties when the contract was made. *Wilson v. Randall*, 67 N. Y. 341; *Walker v. Tucker*, 70 Ill. 532; *Williams v. Jones*, 5 Barn. & C. 108; *Lowber v. Bangs*, 2 Wall. 737. Nor can usage or custom be admitted to vary or contradict the express terms of a contract, but it may be admitted to ascertain that which by the contract is left in doubt. "Usage," said Lord LYNCHBURST, "may be admissible to explain what is doubtful, but it is never admitted to contradict what is plain." *Blackett v. Assurance Co.*, 2 Crompt. & J. 244. It may be used as evidence to explain or interpret, but not to vary a contract. Its purpose is to ascertain the real intention of the parties where it cannot be ascertained by the terms of the contract. But it cannot be used as evidence to supersede or contradict a positive and definite provision of a contract, because the presence of such a provision in the contract is evidence of the intention of the parties to overrule such usage or custom in conflict with its terms. "When it is sought," says Mr. Justice MILLER, "to incorporate the custom into an express contract whose terms are reduced to writing, and are expressed in language, neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing." *Partridge v. Insurance Co.*, 15 Wall. 573; *Dixon v. Dunham*, 14 Ill. 324; *Harkins v. Warren*, 115 Mass. 535. In a word, a contract which is clear, certain, and distinct in its terms is not subject to modification by proof of usage or custom. These authorities go to the full extent in upholding the principle which is invoked to exclude the proof of usage or custom admitted in the present case. But none go to the extent of holding, when the meaning of the words are doubtful or ambiguous, or of technical import as applied to the subject-matter, that extrinsic proof is not admissible to ascertain the intention of the parties. Now, by the admitted terms of the contract, the plaintiff was to receive a sum in payment equal to one-third of the net profits of the firm. It was a mercantile contract, and its subject-matter was the ascertainment of the net profits of the firm. The contract says it was to "be made and ascertained as follows:" "On the said 19th day of November, 1889, an account of stock shall be

taken from the outstanding accounts of the firm, there shall be first deducted five per cent. to cover losses and bad accounts, and then there shall be paid to the said McCulsky his share of the net profits," etc. For the purpose of ascertaining the net profits of the firm, and paying the plaintiff a sum equal to his share, the contract provides the method in which it shall be ascertained and made, and yet it is too plain for argument that the taking of account of the stock, and deducting five per cent. from the outstanding accounts to cover losses and bad accounts, would not determine the net profits. There are other elements omitted, and which must be included in the calculation to ascertain the net profits, however outstanding accounts may be considered.

Upon the method provided by the contract, net profits cannot be ascertained, and his share of them computed for payment. It is true that there is no controversy between the parties in respect to them, and it is admitted "that running expenses were, of course, to be deducted before there could be any net profits," which shows quite plainly that the method provided to ascertain the net profits by the contract was imperfect, and not capable of accomplishing the object sought to be attained by it. The contract also provides that an account of stock shall be taken; but what object can be served by this, when the 5 per cent. deduction, further provided from outstanding accounts, in whatever way construed, will not ascertain the net profits? To say that this provision was only intended to ascertain the item of bad accounts as an element in determining net profits is to ignore this part of it; for to include it, the omitted matter must be supplied in the calculation, which not only exposes that the mode of ascertaining the net profits as provided is insufficient for that purpose, but tends strongly to indicate, if what is omitted shall be supplied, that the basis of such calculation will include outstanding accounts freed from bad accounts, subject to a deduction of 5 per cent. to cover losses arising from them, or as a protection against such liability, for the reason that the share of the net profits to which the plaintiff was entitled was to be paid in cash. But eliminating these matters, and confining ourselves exclusively to the matter of the deduction of 5 per cent. to cover bad accounts, do not the words "outstanding accounts," in a mercantile contract, when net profits are to be ascertained, have a technical or particular meaning different from their ordinary or general meaning when used without reference to net profits, or a calculation to ascertain net profits? The admission of the proof of usage was for this purpose, and the objection raised to its admissibility is not that the words may not have such particular meaning when net profits are to be determined, but that the parties have superseded this meaning by a plain and explicit statement that from the outstanding accounts 5 per cent. is to be deducted for bad accounts, which indicates clearly that it was the intention of the parties to overrule such usage in conflict with its terms. That it was plain-

ly intended, as counsel say in their brief, that instead of charging bad accounts to profit and loss,—that is, instead of segregating the bad accounts bodily,—5 per cent. of all accounts, good or bad, should be deducted to cover bad accounts and losses that otherwise would be written up as profit and loss. This argument plainly admits, were it not for the plain and unambiguous meaning of the provision, as claimed, that bad accounts otherwise would be written up to profit and loss; in a word, that the provision is so explicit as to supersede the meaning that would otherwise be given to it, and evinces an intention to repudiate any meaning derived from usage or custom in conflict with it. Hence, the proof of usage to aid in the interpretation of the provision was inadmissible. Now, this argument admits that outstanding accounts, when net profits are to be ascertained, are freed from bad accounts by charging them to profit and loss except for such definite meaning as is insisted supersedes it; but it recognizes at the same time that there is a particular meaning attached to these words, or that they do have a commercial signification, different from the sense in which they are employed when outstanding accounts are referred to generally, which may include good or bad accounts. But how is this definite and settled meaning ascertained by which the mercantile sense of these words is overthrown or precluded from being shown? Simply by resorting to the dictionary and defining the word "outstanding" in this wise: "Outstanding: To stand or remain beyond the proper time; hence, to be unpaid, as a debt, and the like. The whole amount of the revenues, . . . as well outstanding as collected. To remain uncollected, unpaid, as outstanding contracts." Hence, all accounts uncollected are outstanding accounts, and include both bad and good accounts. But this is only defining the word in its general sense, without reference to a particular sense with which it may be clothed when used in a mercantile contract to determine net profits. That in their general sense, outstanding accounts mean unpaid accounts, and may include good and bad accounts, is not questioned, and has already been admitted. This is their common meaning. But we are called upon to interpret these words in a contract where they may have a technical meaning which may modify that meaning. What is there in these words, or the provision, that fixes and settles the general sense as the proper one to be applied to them to the exclusion of the technical sense sought to be applied in the interpretation of the contract? The contract is a mercantile one, and the subject-matter to which the words are to be applied is the ascertainment of the net profits of a firm. In such case it can hardly be disputed that they have a meaning different from their common meaning, unless the intention is plainly to exclude it. What word or phrase is there to show such intention, or give it that effect? The whole argument is based upon treating the words in their general sense when the nature of the contract, its subject-matter,

and the usage of tradeshow that they have an accepted signification different from their common meaning. "What words," as Mr. Lawson says, "are more plain and unambiguous on their face than such words as 'a thousand,' 'a week,' 'a day.' Yet we shall see 'a thousand' has been held to mean 1,000, 'a week' only during a portion of the year, 'a day' only a working day." Lawson, Usages & Cust. 368. And again he says: "In all contracts as to the subject-matter of which known usages prevail, parties are found to proceed on the tacit assumption of these usages. They commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included; however, as of course by mutual understanding." In what respect are the words "outstanding accounts" plainer, of more positive signification, than "a thousand," or "a week," or the innumerable instances which might be referred to, and are cited in the excellent work just referred to? The case cited and relied upon is not in conflict with the principle of the admission of such testimony. The written agreement in that case, BILLINGS, J., said, "used a term—'working day'—which is unambiguous, and which had an accepted signification, both in commercial and judicial language;" and to allow "proof of usage to be introduced to show that the very respect in which this term had its origin, and a world-wide employment has a local meaning repugnant to its settled sense," would, as the learned judge said, certainly "introduce ambiguity where none exists, and defeat the clearly expressed intent of a written agreement." *Pedersen v. Eugster*, 14 Fed. Rep. 423, 424. In that case the meaning of the term was sought to be dwarfed from its accepted signification, alike in commerce and law, contrary to its settled sense,—a sense that could only be overcome by positive and definite language in the contract overruling it. No such settled sense alike attends the use of the words "outstanding accounts" without regard to the circumstances of its employment. They have a definite signification when employed to ascertain net profits by the usages of trade, unless the meaning is otherwise expressly intended, and the argument admits it. In such case, when the contract involves their employment for the purpose of computing net profits, the tacit assumption is that they were used in the sense of such usage, unless there is something in conflict with it. In the case at bar, the object of the proof was to show how "outstanding accounts" were understood and treated when net profits were computed, and that they had, by the usage of trade, a signification different than when otherwise employed, or generally. See *Myers v. Sari*, 107 E. C. L. 315. If we allow this proof, and give to these words this sense, the 5 per cent. is to be deducted from the outstanding accounts deemed to have been winnowed of its bad accounts. But it is common knowledge that outstanding accounts considered and treated as collectible often fail to realize the cash amount which they represent despite the utmost vigilance. All such calculations

are based upon an approximation to the actual collectibility of such accounts, but it is every-day knowledge that such calculations are liable to disappoint our expectations, despite our utmost circumspection, and in the face of our best-considered judgments. Bearing in mind that, when the net profits are ascertained, the plaintiff is to receive a sum in cash payment equal to the one-third value of such net profits, it is not difficult to understand why the defendant should require and the plaintiff be willing to contract to give 5 per cent. deduction from such outstanding accounts. The basis is a cash valuation, and it is hardly probable that the accounts would realize more after such deduction of 5 per cent. The truth is, there are few merchants, whether wholesale or retail, who, after they have sifted their accounts of all indebtedness deemed non-collectible, would not readily take a reduction of 5 per cent. for the cash in preference to running the risk of their collectibility. It results that there was no error, and that the decree must be affirmed.

(20 Or. 122)

## FLOWER V. BARNEKOFF.

(Supreme Court of Oregon. Dec. 1, 1890.)

## STATUTE OF FRAUDS—PARTNERSHIP TO DEAL IN LAND.

1. A valid contract of partnership for the purpose of speculating in real estate may be made by parol.

2. In a suit by one of the partners for an accounting of the profits realized under such an agreement, after the same has been executed, a partner who has received the entire profits is estopped from claiming that the agreement is void under the statute of frauds.

3. Where two persons agree jointly to secure an option on a tract of land, for the purpose of jointly selling the land, and sharing in the profits of the transaction, they are partners as between themselves for that transaction, and owe to each other the rights and duties of that relation, although option may be taken in the name of one of the parties.

4. Evidence examined, and held to constitute a partnership.

(Syllabus by the Court.)

Appeal from circuit court, Yamhill county; R. P. BOISE, Judge.

This is a suit in equity for a dissolution of a partnership, and for an accounting. The complaint alleges that the contract of partnership was entered into between the plaintiff, James Flower, and the defendant, F. Barnekoff, on March 10, 1889, and that it had for its object the purchase on partnership account of an option upon certain lands of one H. A. Tucker, lying adjacent to the town of McMinnville, Yamhill county, Or. The purpose of the partnership so formed was, as soon as the privilege had been secured, to plat the land as an addition to McMinnville, and to put it upon the market in the shape of town lots and blocks. Each partner was to pay half of all expenses, and upon the property being sold was to receive half of what was left of the proceeds after providing for the purchase price to be paid Tucker. It was understood and agreed at the time the partnership was formed that Flower should have the special and exclusive charge of that part of the firm busi-



ness which related to the platting of the land and putting it on the market. In pursuance of this partnership, and as a member of the firm, Barnekoff succeeded in getting a 60 days' option from Tucker on March 14, 1889, for which he paid him \$100 cash, the purchase price agreed upon being \$150 an acre. This option Barnekoff took in his own name, but for and in behalf of the firm. Barnekoff reported to Flower what he had done, and Flower approved of it, and then and there agreed to stand his half of the loss in the event of their not being able to turn over the purchase within the 60 days, to which agreement Barnekoff then and there became a party. The plaintiff at once set to work to carry out his part of the partnership, and before May 1, 1889, had secured a purchaser for the entire tract, able, willing, and ready to buy the same at an agreed price of \$200 per acre. On that, Barnekoff, taking advantage of the fact that the option stood in his own name, sold the land to the Investment Company of Portland for \$18,022, which was at the rate of \$200 per acre, without the knowledge or consent of Flower, and in fraud of his rights under the partnership agreement. Barnekoff now refuses to account to Flower for the profits thus made,—viz., \$4,505.50. The answer denies each and every allegation of the complaint, except that the defendant secured the Tucker option in his own name, and that he sold the land to the investment company at a profit of \$4,505.50. The case was sent to a referee to take testimony, and, upon the coming in of his report, a decree was entered dismissing plaintiff's complaint, from which this appeal is taken.

*Milton W. Smith*, for appellant. *W. D. Fenton*, for respondent.

BEAN, J., (after stating the facts as above.) It is contended by respondent at the outset of this case that the agreement of the parties, if a contract of partnership, being for a partnership to deal in real estate, is void under the statute of frauds, because not in writing. This question has been much discussed by the courts, and there is considerable conflict in the adjudged cases. On the one hand it is claimed that a parol agreement for a partnership to deal in lands would be within the statute which provides that no "estate or interest in real property" \* \* \* can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same." 1 Hill, Code, § 781. And to this effect is the case of *Smith v. Burnham*, 3 Sum. 435. On the other hand there are many authorities which hold that such an agreement is not within the statute, for the reason that the real estate is treated in equity as personal property for all the purposes of partnership. *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beav. 449; *Chester v. Dickerson*, 54 N. Y. 1. The question is ably and exhaustively examined in *Dale v. Hamilton*, and the conclusions reached by the vice-chancellor in that case seem to us to be supported both by reason and

authority. The general doctrine is there laid down that a partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands may be proved without being evidenced by a writing signed by, or by the authority of, the party to be charged therewith within the statute of frauds; and, such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any writing. In *Chester v. Dickerson* it is said: "Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But, suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in lands has been granted, assigned, or declared. When the agreement is made, no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners, and bear a partnership relation to each other? Within the meaning of the statute, in such case, neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands. It is simply aimed at the creation or conveyance of an estate in lands without a writing." In *Knott v. Knott*, 6 Or. 146, *Watson, J.*, in discussing this question, says: "While there is a conflict in the authorities, many of the courts having followed the decision in *Smith v. Burnham*, we regard the doctrine laid down in *Dale v. Hamilton* as better adapted to the course of business in this country, where mercantile, manufacturing, and various other partnerships are necessarily compelled, in the course of their business, the investment of their capital, and the collection of debts due them, to become the owners of real property." While the case just referred to was not a partnership formed for the purpose of dealing in real estate, the decision shows the tendency of this court to follow *Dale v. Hamilton* rather than *Smith v. Burnham*. From a careful examination of the authorities, we are of the opinion that a valid contract of partnership for the purpose of speculating in real estate may be made by parol. *Traphagen v. Burt*, 67 N. Y. 30; *King v. Barnes*, 109 N. Y. 267, 16 N. E. Rep. 332; *Richards v. Grinnell*, 63 Iowa, 44, 18 N. W. Rep. 688; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. Rep. 517; *Wallace v. Carpenter*, 85 Ill. 590; *Holmes v. McCray*, 51 Ind. 358; *Newell v. Cochran*, 41 Minn. 374, 43 N. W. Rep. 84; *Black v. Black*, 15 Ga. 449; *Coward v. Clanton*, 79 Cal. 23, 21 Pac. Rep. 359; *Meagher v. Reed*, 24 Pac. Rep. 681. Many of the cases above cited go much further than is necessary for us to go in this case in order to admit the proof of the formation of the partnership here. The contract does not in any way affect the title to real estate,

nor does the present controversy involve any such question. The subject-matter of the contract was the profits to be realized from the sale of the Tucker land, and the controversy here is as to such profits. The contract of purchase from Tucker was not secured to hold as land, or with any intention of ultimately vesting the legal title in the partnership, but for the purpose of sale and the acquisition of profits. It was secured simply as an article of commerce, and for speculation. No controversy exists here about the title to any land taken or owned by the partners, but it simply relates to the conduct of the defendant while he was acting as a partner; and in such a case the statute of frauds certainly cannot be invoked to defeat this suit. The object of the alleged partnership has been accomplished, and this suit is for the purpose of adjusting the accounts between the parties. This is a matter over which a court of equity has jurisdiction, and the defendant cannot, after the contract has been executed and the profits of the transaction gone into his hands, be heard to say that the contract, under which the profits were realized, is void under the statute of frauds. *Coward v. Clanton*, 79 Cal. 23, 21 Pac. Rep. 359; *Morrill v. Colehour*, 82 Ill. 619; *Chester v. Dickerson*, 54 N. Y. 1.

The next question presents more difficulty and relates to the allegation of partnership set up in the complaint and denied in the answer. The defendant, Barnekoff, resides at McMinnville, and is engaged in the milling business, while the plaintiff is a real-estate dealer in Portland. About the 1st of March, 1890, defendant, desiring to purchase some land for use in his business, applied to one H. A. Tucker, who owned a tract of land, containing 90 acres, adjoining defendant's mill property, with that object in view; but Tucker refused to divide his land, or sell any portion without selling the entire tract. The defendant then called upon plaintiff, with whom he had had previous dealings, for the purpose of obtaining his assistance in securing a purchaser for the Tucker land. What took place between the parties is thus related by plaintiff: "In Mr. Barnekoff's visits to our office he had several times mentioned the fact of a tract of land abutting on the town adjoining his mill property that he thought could be secured. After conversation and consultation with him, we concluded we could handle the property, the price being satisfactory, in our view. It was mutually agreed that we would secure a contract on the land consisting of 90 acres. The matter was all talked over, and fully understood, before any proceedings were taken towards securing the land. First it was suggested to procure a contract on the land on the most favorable terms possible, a small payment to be made to secure the land in lieu of a bond for a deed. It was agreed that the contract be taken in the name of F. Barnekoff, so as to create no suspicion of a movement in or around McMinnville, Mr. Barnekoff assuring me that he would stand a better chance of getting the contract in his name than by using the name of a non-resident,

as he had had previous business transactions with Mr. Tucker in land. \* \* \* The agreement was that a contract should be secured on this land for as small a sum as possible; \* \* \* that the entire handling of the property after securing such contract would be left with myself. The profits, if any, arising from the handling were to be divided share and share alike; and the losses, if any, in the same proportion. This was with Barnekoff and myself. On March 14th, Mr. Barnekoff did secure a contract on this identical piece of property, by paying the sum of \$100 to secure the same. The contract was duly drawn in legal shape, and, on the 16th of the same month, Mr. Barnekoff called at my office and produced the contract. I read it over, and said it was legally drawn, but said to him: 'I see you have paid \$100; don't you think you have paid a good deal of money for so short a time on this land?' He said it was the very best he could do. I then told him that, while the time was short, I felt perfectly satisfied in being able to handle the land as agreed upon, and that if it was not handled in the specified time I would reimburse him one-half of the \$100, and it was agreed on. He left the contract with me. I had it in my possession for four or five days. Proceeded to McMinnville on the 17th, examined the land carefully, and with him figured exactly how we should handle it. After a careful examination I surrendered the contract to him, and returned to Portland." The witness then narrates what he did in trying to secure a buyer for the land, and finally, as he claims, by consent and agreement of defendant, contracted to sell the land to Mr. Markle for \$200 per acre; but before the sale was consummated the defendant sold the property to other parties for \$200 per acre, and refused to recognize either plaintiff or Markle's right or interest in the matter. R. S. Howard, a witness for plaintiff, who was present at the conversation between plaintiff and defendant concerning this land, says: "My recollection is that probably the conversation began in February or March. \* \* \* There was a proposition to buy a piece of land adjoining McMinnville, some ninety acres more or less. Mr. Flower, my partner, insisted on going in with Mr. Barnekoff and buying this tract of land jointly, near McMinnville, and having it platted into lots and sold. Was present when Barnekoff came down with the contract. He remarked that he had secured a contract on the land,—my recollection is at \$150 per acre for sixty or ninety days,—and he and Flower talked it over here; that they could place the land at a profit, even before platting; that they could probably sell the land without platting it, but, in case that was not done, we were as real-estate agents; Howard and Flower to assist in placing the property,—in selling it. Flower said, 'If we do not succeed in placing it, I will give you my half of it back, [the \$100.]' My understanding was that Flower was an equal partner with Mr. Barnekoff in the profits of the transaction." Mr. George B. Markle, to whom plaintiff had negotiated a sale of this prop-

erty, and who, after being informed that defendant refused to consent to his purchase, but had sold the land to other parties, went to McMinnville in company with plaintiff to see defendant about the matter, testifies that after he and plaintiff arrived at McMinnville, and found that defendant would not let him have the property, "a discussion arose then between Mr. Barnekoff and Mr. Flower as to their working together,—as to the partnership. Mr. Flower asked Mr. Barnekoff if he had not agreed with him, if he did not tell him in the first place how, to secure this land; and afterwards, when Mr. Barnekoff did secure it, and pay some down, or agree to, whether he did not agree to reimburse him for half of the amount if the sale did not go through. At first Mr. Barnekoff said there was some talk about that, but he afterwards admitted that was the case. Then was the question put to him by Mr. Flower, 'Are we not partners in this deal?' Mr. Barnekoff admitted that they were partners in the deal." Mr. Barnekoff, the defendant, after testifying that he paid \$100 to Tucker on this contract for the land, and that he was not a partner with Flower in any transaction whatever, gives his version of the matter as follows: "Well, the first I thought of this land I needed some more land for my mill. I bought my mill-ground from the same party, H. A. Tucker. He told me that I could not have any land without buying the whole; so the next time I went down I went into Mr. Flower's office, and told him there was a piece of land up there, and the man did not want to sell it, except to sell as a whole, and if he could get a buyer for it I wished he would. He asked me the price of the land, and I told him that H. A. Tucker wanted \$150 an acre. He said: 'Well, I cannot get a buyer without we have some contract for it.' Well I told him that probably I could get a contract from H. A. Tucker. 'Well,' he says, 'if you can secure a contract, why get it, and then we will see what we can do towards handling the land, and getting a buyer for it.' After I got the agreement I went down and told Mr. Flower that I had got a contract for it, and if he would get a buyer I would like him to get one. Well, he said he would try and see if he could get one. That was all the talk we had that day. The next time I came down he made a proposition to me, and insisted on it, that he would like to go in with me, and we should buy the land. I told him right then and there that I had no money to buy land with, and that I had all my money invested in my mill, and that I could not go in on that agreement. 'Well,' he says, 'then I will try and get a buyer, and how would it be supposing we got \$200 an acre for it; supposing I get a buyer, and you take a share in it?' I told him that I had no money to put into land at all; that I would not handle the land on any consideration; that I had the land sold for the reason that I wanted a piece of land for my mill. That was all there was said about it at that time, and he said he was going to try to get a buyer for the land in some shape or other. I went in repeated-

ly to ask if he had secured a buyer yet for that land. Question. Upon what terms was he to secure a buyer? Answer. He was going to— I asked him if his commission was going to be the same as on the mill, and he said, 'Yes; without you agree to take up the proposition I made.' I did not conclude any arrangement with Flower at \$200 per acre, or at any other price. I did not give him the exclusive right to find a buyer for this land, but reserved the right to place the land for my own benefit while he was trying to find a buyer." The witness then gives his version of the Markle transaction, and of his disposal of the land to the investment company for \$200 per acre. Says that Flower never agreed to repay him one-half of the \$100 paid to Tucker in case the land was not sold; there never was any definite interest agreed upon between him and Flower in case the land was sold; took the contract from Tucker in his own name and for his benefit alone; nothing was ever mentioned about the partnership. The witness also denies the admission testified to by Markle. The foregoing is substantially all the testimony in this case material to be considered, and the question is, does it prove a partnership between plaintiff and defendant, in this transaction concerning the Tucker land?

A "partnership" is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be communion of the profits and losses thereof between them. Story, Partn. § 2; 3 Kent, Comm. 23. Partnership and community of interest independently considered are not always the same thing, nor is a mere community of interest sufficient; but there must be an agreement to share the profits and loss, and such profits must be shared as the result of the adventure or enterprise, in which both are interested, and not simply as a measure of compensation. Cogswell v. Wilson, 11 Or. 372, 4 Pac. Rep. 1130. More briefly, a "partnership" has been defined to be a contract in which two or more persons agree to put in something in common with a view of dividing the benefits which result from it. Strader v. White, 2 Neb. 362. There may be a general partnership at large, or it may be limited to a particular branch of business, or to one particular subject, as where the parties have united to share the benefits of a single transaction, (3 Kent, Comm. 30,) and may exist in the purchase and dealing in lands, (Kelley v. Bourne, 15 Or. 476, 16 Pac. Rep. 40.) The intention of the parties in forming a particular relation governs in determining whether they are partners or not. Where the facts are given, this question is one of law, and the intention of the parties will be determined from the effect of the whole contract, regardless of special expressions, (1 Bates, Partn. § 17;) the declaration of the parties, if not inconsistent with the other terms of the contract, of course controlling. A community of profits and loss in the advent-

ure or business is usually considered a test of a partnership, and an agreement to share in the profits and loss of a business shows an intention to create a partnership, unless such intention is controlled by the stipulation of the parties, or inferred from conduct inconsistent therewith. *Id.* § 25. Where it appears that there is community of interest in the capital stock, and also a community of interest in the profits and loss, then it is clear an actual partnership exists between the parties. *Berthold v. Goldsmith*, 24 How. 541. Profits may be, and in fact often are, received as mere compensation in case of service or special agency, where the employee has no interest in the business, or power as a member of the firm, and no interest in the profits, as such, but is employed as a servant, special agent, or broker, and to receive a given proportion of the profits as compensation for his services. In such case the receipt of profits does not constitute a partnership. 1 *Rates*, Partn. § 43; *Berthold v. Goldsmith*, 24 How. 536; *Ogden v. Astor*, 4 Sandf. 311. This distinction is recognized by repeated decisions of the courts; and while cases arise on one side or the other of the line, approaching, in their facts, so near to each other that the difference between them may appear to be unsubstantial, yet the distinction itself is recognized, and the only difficulty is in the application of the principle on which it rests. That a partnership may be formed to deal in land has already been held by this court, (*Kelley v. Bourne*, 15 Or. 476, 16 Pac. Rep. 40,) and it would seem that if two or more persons agree jointly to buy a tract of land for the purpose of jointly selling it, and sharing in the profits of the transaction, that they are ordinarily considered partners as between themselves for that transaction, and owe to each other the rights and duties of that relation. *Yeoman v. Lasley*, 40 Ohio St. 190; *Hulett v. Fairbanks*, *Id.* 233; *Morse v. Richmond*, 97 Ill. 303; *Canada v. Barksdale*, 76 Va. 899; *Clagett v. Kilbourne*, 1 Black, 346; *Dale v. Hamilton*, 5 Hare. 369. Without commenting on the evidence in this case, we are of the opinion that the preponderance of the testimony is with the plaintiff; and, while the case comes very close to the line between a partnership and a co-ownership, we think the facts show such a community of interest in the subject-matter of the contract and the profit and loss of the enterprise as to constitute a partnership. But whether the agreement constituted a partnership in a technical legal sense or a co-ownership is thought to be immaterial in this suit. The rights and liabilities of the parties rest upon their agreement, and are now to be enforced upon the principles applicable to partnership transactions. *King v. Barnes*, 109 N. Y. 285, 16 N. E. Rep. 332; *Hackett v. Railway Co.*, 12 Or. 129, 6 Pac. Rep. 659. The avowed object of defendant in consulting plaintiff about the matter was to obtain his skill and experience in securing a purchaser for the land. The option was secured at plaintiff's suggestion, and under his advice. It was submitted to him for examination and approval after it was secured. He

proceeded in good faith, with defendant's approval, to secure a buyer for this land, evidently believing that he was to share in the profits if a sale could be made. Defendant was present and participated in the negotiations with Markle, and at his suggestion a date was fixed for the examination of the land by Markle, with the understanding that if it was found as represented Markle would take it at \$200 per acre. But, before the time fixed for the examination of the land by Markle had arrived, defendant disposed of it at a profit of \$4,500, and now refuses to account to plaintiff for any portion of such profit. It is true, defendant claims that plaintiff was acting as a mere agent for him in the matter, and so testifies. This claim depends upon his own unsupported testimony, which is contradicted, not only by plaintiff, but the witnesses Howard and Markle, as well as the circumstances and action of the parties themselves. The defendant no doubt testifies to what he understands and believes to be a correct state of the facts, and the same may be said of the other witnesses in the case. In such conflict of the testimony, it is not only a delicate but difficult matter to adjust the conflicting statements so as to arrive at the true facts. Approximation is all that can be expected, and we must determine the question in accordance with the weight of evidence as we understand it. The acts performed by plaintiff, and the interested part he took in the matter, strongly rebut any presumption that he was a mere agent, to dispose of this land for defendant, and to receive a commission for so doing, and, in the absence of convincing proof that he was such agent, leaves no alternative but to conclude that his claim is correct, and that he was to share in the profit to be derived from the sale of this land. The conduct of defendant is, we think, inconsistent with the idea that he was the principal, and plaintiff his agent. He allowed plaintiff to handle this property under the belief that he was to share in the profits if a sale could be made, at no time intimating that he claimed the sole ownership of the option. He participated in the negotiations with Markle, and in so doing gave Markle to understand that he and plaintiff were jointly interested in the matter as partners. Not until a sale was about to be made to Markle do we hear of defendant's claiming a sole ownership in the option. Then, for the first time, it would seem, he conceived the idea of selling this land, and appropriating the entire proceeds to his own use, never even offering to compensate plaintiff for the services rendered by him. It is true the Tucker option was taken in defendant's name, but if our view of the testimony is correct it was so taken in pursuance of the contract of partnership, and was for the benefit of the firm. Defendant can claim no advantage by reason of that fact. The defendant contends that, if there was an agreement for a partnership, it never was executed, and there was no valid consideration to support it. In this view, we are unable to concur. The contention is that, even if defendant entered into a contract of partnership, the

business of the firm never was launched; nothing was done in furtherance of it; nothing was earned or lost by it; the defendant has simply violated his contract; and plaintiff's remedy is at law.

The business of the partnership was to secure an option on the Tucker land, and, if possible, dispose of the land at a profit. This business was entered upon and prosecuted until it was accomplished, and the land disposed of, and not until that time did defendant intimate that he would not comply with his agreement. The business of the firm was fully completed before defendant undertook to violate his contract, and then only in refusing to account to plaintiff for the profits of the enterprise. Under such circumstances, it is difficult to conceive how the contract can be an executory one. A sufficient consideration is afforded by the fact that the parties mutually promised to share the losses, if any, and to share equally in the profits of the contemplated enterprise. The profit realized by defendants from a sale of the Tucker land is admitted to have been \$4,505.50. It therefore follows that the decree of the court below must be reversed, and a decree entered here in favor of plaintiff for the sum of \$2,252.75, and the costs and disbursements in this court and the court below.

(20 Or. 150)

#### STATE v. POOL.

(Supreme Court of Oregon. Dec. 1, 1890.)

#### CRIMINAL LAW—ARRAIGNMENT—DYING DECLARATIONS.

1. If upon the arraignment the defendant be allowed a day to plead or to answer the indictment, he may, before otherwise pleading thereto, move to set it aside in answer to the arraignment; and, when such time is allowed to the defendant by the court, section 1315, Hill's Code, does not preclude him from making the motion at any time before pleading.

2. Facts referred to, and held they were sufficient to admit the account given by the deceased of how and by whom he was injured as dying declarations.

(Syllabus by the Court.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

On the 20th day of October, 1880, the defendant was indicted for the crime of murder. The journal entry recites that he was arraigned on the 18th of March, 1890, and pleaded not guilty; but, before pleading to the indictment, he moved to set the same aside, because the names of the witnesses examined before the grand jury were not indorsed on the indictment. The bill of exceptions, however, shows that he was arraigned on the 17th day of March, 1890, and asked his day to plead to said indictment, which was granted by the court. The bill of exceptions also shows that the defendant nor his counsel had no opportunity to inspect said indictment or to know its contents or the indorsements thereon, until the copy thereof was delivered to the defendant on the arraignment. On the 18th day of March, 1890, the defendant appeared in court with his counsel, and, before otherwise pleading to said in-

dictment, he moved to set the same aside, for the reason that the names of all the witnesses examined before the grand jury which returned the indictment are not inserted at the foot of the indictment, or indorsed thereon, as required by chapters 7 and 10 of the Code of Criminal Procedure. The court overruled said motion, to which defendant duly excepted. Afterwards, on the 25th day of June, 1890, the defendant was tried before a jury, and convicted of the crime of manslaughter, from which this appeal was taken. It is proper to add that the record discloses the fact that one Tiller was examined as a witness before the grand jury in relation to the charge against the defendant, and his name is not indorsed on the indictment, or set down at the foot thereof.

*W. R. Willis and Lane & Lane*, for appellant. *S. W. Condon*, Dist. Atty., for respondent.

STRAHAN, C. J., (after stating the facts as above.) The first question is, did the failure of the grand jury to set Tiller's name down at the foot of the indictment, or indorse it thereon, entitle the defendant to have the same set aside? This question must be answered by reference to the statute. Section 1314, Hill's Code, provides: "The indictment must be set aside by the court upon the motion of the defendant in either of the following cases: \* \* \*

(2) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed thereon." Section 1315 provides: "The motion to set aside the indictment must be made and heard at the time of the arraignment, unless for good cause the court postpone the hearing to a future time; and, if not so made, the defendant is precluded from taking the objections mentioned in section 1314." Section 1293 says that the arraignment "consists in reading the indictment to the defendant, and delivering to him a copy thereof, and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment." Section 1298 is as follows: "If on the arraignment the defendant require it, he must be allowed until the next day, or such further time as the court may deem reasonable, to answer the indictment." And section 1299 is in these words: "If the defendant do not require time, as provided in the last section, or, if he do, then on the next day, or at such further day as the court may have allowed him, he may, in answer to the arraignment, either move the court to set aside the indictment, or he may demur or plead thereto." The reasons upon which the learned circuit judge overruled the motion to set aside the indictment do not appear in this record, but it is to be inferred that it was because the defendant did not, at the precise time of the arraignment, interpose the motion to set aside the indictment. It was argued here with much force that the defendant was bound to make this motion when the indictment was read to him, and he was furnished with a copy thereof, or be forever precluded. Such a construction would be

very inconvenient in practice. Counsel would never be able to make an objection according to the facts. If compelled to make the objection at that particular instant, he must do it in ignorance of all of the facts upon which such objection would have to be based. He could not know who had been witnesses before the grand jury, nor any other fact that would justify the filing of a motion. Accordingly section 1299, *supra*, secures to the defendant the right on the arraignment to have until the next day, or such further time as the court may deem reasonable, to answer the indictment. How answer the indictment? Manifestly in any manner which the law has authorized or provided. In this case the record says he took his day to plead. This is not the precise form in which the entry should be made, but it is the one usually adopted, and it must be held to be of the same import as an order allowing time in which to answer the indictment. If time be allowed to answer the indictment, then section 1299, *supra*, declares what the answer may be. The defendant may, at such time as may have been granted to him by the court, in answer to the arraignment, either move the court to set aside the indictment, or may demur or plead thereto. These rights are secured to the defendant in plain and unambiguous language, and it is not believed that they are taken away by section 1315, *supra*. The postponement, when allowed, carries over with it every right which the defendant has, and cannot prejudice him in any way. By allowing time, the court postpones the hearing of whatever motion, plea, or demurrer the law authorizes the defendant to file, and this is entirely consistent with the requirements of the section under consideration. The first part of the section requires that "the motion to set aside the indictment must be made and heard at the time of the arraignment, unless," etc., can mean no more than that it must be done then, unless the court gives time, and this time, when given, is not confined to pleading to the indictment, but includes the rights to move to set it aside as well.

The exception to the admission of McNeill's statement to Morgan as a dying declaration cannot be sustained. McNeill's statement at the time he gave an account of the manner and by whom he was injured shows clearly enough the state of his mind. He was conscious that he stood within death's shadow, and could not escape. "I will not last long, and cannot get well, but will soon die." And the sequel proved too quickly the accuracy of his judgment. He died within 36 hours. The trial court thought the declarations excepted to were made by McNeill under a full consciousness that death was impending, and that he then had no hope or expectation of recovery; and we have no doubt that this conclusion was fully justified by the evidence. For the error of the court in refusing to set aside the indictment on the defendant's motion, the judgment must be reversed, with directions to the court below to set aside the indictment, and for such further proceedings as are by law authorized or required.

BEAN, J., having tried this case below, did not sit, and took no part in the decision.

(20 Or. 163)

#### HOUSE v. FOWLE.

(*Supreme Court of Oregon. Dec. 8, 1890.*)

##### DOWER—RELEASE TO HUSBAND.

Section 2369, Hill's Code, which provides that when property is owned by either husband or wife, the other has no interest therein which can be made the subject of contract between them, includes the wife's dower in the husband's lands and husband's estate by curtesy in the wife's lands, and therefore a conveyance or release to the husband, by the wife, of her inchoate right of dower in his lands, is a nullity.

(*Syllabus by the Court.*)

Appeal from circuit court, Polk county; R. P. BOISE, Judge.

The object of this action is to recover dower. There is a stipulation in the record as to the facts, from which it appears: (1) The lands in controversy in this action were owned by R. M. Montgomery, in his life-time. (2) That Temperance House, the plaintiff, was the widow of said Montgomery. (3) In 1880 the plaintiff, then Temperance Montgomery, gave a quitclaim deed for the consideration of \$300 to her then husband, R. M. Montgomery, conveying all of her right, estate, and dower in the lands in dispute. (4) That in 1884 said Montgomery died, and one Shedd was appointed administrator of his estate, who in due course of administration sold the real property described in the complaint to pay claims against said estate, and that at such sale the defendant became the purchaser thereof at the price and sum of \$3,400, and received the deed of the administrator therefor. The deed referred to is as follows: "This indenture witnesseth: That I, Temperance Montgomery, for and in consideration of the sum of three hundred dollars, to me in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, and quitclaimed, and by these presents do, bargain, sell, and quitclaim, unto R. M. Montgomery, my husband, all my right, interest, and dower in and to the following described premises, to-wit: The south half of the donation land claim of John M. Zumwalt and wife, being notification No. 5,076, claim No. 49, in T. No. 9 S., R. 6 west, Willamette meridian, in the county of Polk, state of Oregon. To have and to hold the said premises with their appurtenances unto the said R. M. Montgomery, his heirs and assigns forever. In witness whereof I have hereunto set my hand and seal the 24th day of March, A. D. 1880. TEMPERANCE MONTGOMERY. [Seal.] Done in presence of J. L. JOHNSON, M. M. ELLIS." This deed was acknowledged in the usual form, and recorded in Polk county the 24th of March, 1880. A jury trial was waived, and the court, after hearing the evidence in the cause, found in favor of the plaintiff on all the issues, and rendered a judgment in her favor for an equal undivided one-third of said real property for and during her natural life, from which the defendant has appealed to this court.

F. A. Chenoweth, for appellant. J. J. Daly, for respondent.

STRAHAN, C. J., (*after stating the facts as above.*) A single question has been presented on this appeal, and to that only will our attention be directed. It was conceded upon the argument that the judgment appealed from is right, and must be affirmed, unless the plaintiff is barred of her dower by her deed to her husband, R. M. Montgomery. 1 Hill's Code, § 2954, provides: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of the one-third part of all the lands whereof her husband was seised, of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." Section 2966 provides that a married woman may bar her right of dower in any estate conveyed by her husband, or by his guardian if he be a minor, by joining in the deed of conveyance, and acknowledging the same as prescribed in the Code, or by joining with her husband in a subsequent deed acknowledged in like manner. Section 2967 provides that a widow's dower may also be barred by a jointure settled on her with her assent before the marriage, but such jointure must consist of a freehold estate in lands, for the life of the wife at least, to take effect in possession or profit immediately on the death of her husband. Section 2969 provides that a pecuniary provision, made for an intended wife, and in lieu of dower, shall if assented to in the manner provided in the statute, bar her dower in all the lands of her husband. Section 2970 provides for an election in case of jointure or pecuniary provision after the death of the husband where the same has not been assented to, and section 2971 for an election in case lands are devised to her by the husband's will, unless it plainly appears that the testator intended she should have both. These are the only provisions in the statute of this state prescribing the manner in which a woman may be barred of dower in the husband's lands, and they clearly do not include the bar relied upon by the defendant. The effect of other statutes upon the transaction between Montgomery and wife remains to be noticed. Section 2992 provides that the property and pecuniary rights of every married woman, at the time of her marriage or afterwards, acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him. This section does not in any way relate to a wife's dower in her husband's property, but it does enable her to manage, sell, convey, or devise the property therein specified to the same extent and manner and as completely as the husband can property belonging to him, and it renders inapplicable much of the learning of the common law in relation to the disabilities of a married woman. Section 2993 places all property acquired by a married woman during coverture by her own labor, under the same protection as property owned by her at the time of her marriage or afterwards acquired by gift, devise, or inheritance. Section 2997 provides

that contracts may be made by a wife, and liabilities incurred and the same enforced by or against her to the same extent and in the same manner as if she were unmarried. Section 2870 provides; "Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same in the same manner and extent as if they were unmarried." Section 2869 provides that when property is owned by either husband or wife the other has no interest therein which can be the subject of contract between them or such interest as will make the same liable for the contracts or liabilities of either the husband or wife, who is not the owner of the property except as provided in the act; and section 2871 provides that a conveyance, transfer, or lien executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons. Section 2983 makes the husband, on the wife's death, tenant for life by curtesy in all the lands in which the husband and wife are seised in her right of any estate of inheritance. Unless authorized by statute a married woman cannot bar her right of dower by any release made to the husband during the coverture. *Rowe v. Hamilton*, 3 Greenl. 63; *Martin's Heirs v. Martin*, 22 Ala. 86; 2 Scrib. Dower, 290; *Carson v. Murray*, 3 Paige, 483. But it is unnecessary to pursue this line of authorities, for the reason that the proper construction of our own statute is decisive of this question. Our act of 1878, from which the main provisions above recited were copied into the Code, was taken literally from the Iowa Code. Prior to this enactment in that state the supreme court had held that under an agreement to separate a husband and wife could relinquish to each other dower held by each in the property of the other. *Robertson v. Robertson*, 25 Iowa, 350; *McKee v. Reynolds*, 26 Iowa, 578. After the enactment of section 2208 of the Code of Iowa, which is almost identical with section 2869, supra, it was held that it changed the rule theretofore announced. In construing it the court said: "This provision relates to the interest which a husband or wife holds in the lands owned by his or her spouse which arises under the marriage relations. It does not refer to a property interest that may be based upon contract, or may be derived from sources other than the marriage relation. This section evidently contemplates and includes in its language the dower estate. Upon the marriage relation this estate is based." And further on in the same opinion, that court said that the exception referred to other provisions of the Code which were cited, and that it could not be construed as applicable to contracts relating to dower. *Linton v. Crosby*, 54 Iowa, 478, 6 N. W. Rep. 726. This construction includes estates or interests growing out of the marriage relation from the classes of property concerning which a husband and wife may contract with each other. They include dower and estates by curtesy. The reason of the distinction is obvious



enough. These estates have their origin in public policy. They tend to strengthen the marriage relation, and to some extent they preserve to the survivor valuable property interests which may enable him or her to enjoy some of the fruits of their joint lives and in a measure render them independent of the vicissitudes of fortune. The judgment appealed from must therefore be affirmed.

(20 Or. 34)

**CURTIS v. LA GRANDE HYDRAULIC WATER CO.**

(*Supreme Court of Oregon. Dec. 8, 1890.*)

**RIPARIAN RIGHTS—ESTOPPEL.**

Facts examined and held, under the circumstances of the particular case, the plaintiff should not be permitted to set up her riparian interest so as to defeat the defendant's right to a certain portion of the water of Mill creek, where the diversion was made under a claim of title, and the defendant believed, and had reason to believe, that the claim was well founded, and the plaintiff stood by without asserting or making known her claim, while the defendant was expending large sums of money, and making extensive improvements under an honest and reasonable belief that it had the right to make such diversion, and without which its expenditures would prove a total loss. Modifying 23 Pac. Rep. 808.

(*Syllabus by the Court.*)

On rehearing. For former opinion, see 23 Pac. Rep. 808.

STRAHAN, C. J. This case was heretofore before this court, and a conclusion was reached reversing the decree of the court below, and enjoining the defendant from making the diversion of the water complained of. 23 Pac. Rep. 808. On the petition of the respondent a rehearing was ordered, and the case has been again fully argued at this term. There is one question that was overlooked, or at least the attention of the court was not sufficiently drawn to it, and that is the passive acquiescence of the plaintiff, or those under whom she claims, in the removal of the dam from the point on Mill creek where the La Grande Water Company had established it in about the year 1865 to a point about 1,000 feet higher up said stream, and the expenditures made by plaintiff in consequence of such removal. These are some of the findings of the referee and of the court below on those subjects: "(17) That the said defendant, since the said last diversion referred to, constructed a system of water-works in connection therewith in the said town of La Grande, Oregon, and have expended the sum of \$8,000 in the construction of the same; (18) that the construction of said water-works was public, and plaintiff knew of the same, but that she never objected to the construction thereof; (19) that the diversion of the nine square inches of water from Mill creek by the defendant and its grantor, the La Grande Water Company, as hereinbefore stated, was for the period of 22 years, and was open, notorious, uninterrupted, practically continuous, by the acquiescence of the plaintiff and her grantors, and under a claim of right, from the month of July, 1865, to the time the defendant built the new dam, in

1887; (20) that the plaintiff purchased her land described in her complaint subject to the right of the La Grande Water Company and its successors to divert said water out of said Mill creek as aforesaid, and with notice of the same at the time of her purchase, and that she is estopped to deny the same or allege to the contrary." The court, in disposing of the referee's report, among others, made the following findings: "No. 9. The court finds as follows: That in the month of July, 1865, after the organization of said company, the said Green Arnold gave to the said La Grande Water Company the right to enter and go upon the said lands hereinafter described, and to divert water from Mill creek for the purpose of supplying the town of La Grande with water for hire, or otherwise, and also gave it the exclusive right to erect and maintain all necessary works for the purpose of conducting said waters so diverted to the town of La Grande, Oregon, the same to be distributed as said company saw fit; that immediately thereafter the said La Grande Water Company, in pursuance of said grant, did enter upon said land of said Green Arnold aforesaid, at a point about sixty rods above the plaintiff's premises, on said Mill creek, and diverted water therefrom by means of a square box about 12 feet long and 3x3 inches at one end and 5x6 inches at the other, and also constructed across said creek a dam five feet high, and put in a system of water." "No. 19. The court finds as follows: That the diversion of five-sixths of the water of said Mill creek, during the dry season of the year, and as much water as said box, used for diverting purposes, and hereinbefore described, will carry during the remainder of the year, has been open, notorious, uninterrupted, peaceable, continuous, and under claim of right, by the defendant and its grantor, the La Grande Water Company, for a period of twenty-two years, and said use and enjoyment of said water and the rights and privileges thereto belonging had been acquiesced in by the plaintiff and her grantors ever since the month of July, A. D. 1865, to the time defendant built his new dam, in 1887." "No. 21. The court finds as follows: That the plaintiff has sustained no damage by reason of the removal of said dam or the diversion of said water."

The defendant and its predecessor in interest have been in the actual use of this water for a long time, so far as appears, without objection from any one, and it assumed that such possession had ripened into an absolute title. Whether the plaintiff participated in that view at the time of the removal does not appear affirmatively, nor is it material. She knew of the removal. She also knew that the defendant was making extensive improvements and large expenditures in money which, without the use of the water, would be utterly worthless. She knew that the defendant, in making these improvements, relied upon its assumed right to divert the water at its new dam, and she must have known that the defendant would not have made these expenditures if it had known such right did not exist. Under these cir-

cumstances, we think, she could not be silent. She was bound to make known her claim to defendant before it had so far changed its position that the assertion of such claim would operate as a fraud upon it, and inflict great damage without any possibility of compensation. We have the less hesitancy in announcing this conclusion for the reason that the plaintiff's situation is no worse than it was before the dam was moved up the creek. The same quantity of water will pass the upper dam that did the lower, and whatever advantages accrued to the plaintiff prior to such change will still be hers. Upon the second argument counsel for the appellant have cited *Ang. Water-Courses*, § 29; *Washb. Easem.*, p. 661; *Gould, Waters*, § 237; *Kidd v. Laird*, 15 Cal. 179; *Junkans v. Bergin*, 7 Pac. Rep. 686; *Davis v. Gale*, 32 Cal. 34; *Fuller v. Mining Co.*, 19 Pac. Rep. 336; *Belknap v. Trimble*, 3 Paige, 605; *Whittier v. Cochecho Co.*, 9 N. H. 454,—as tending to sustain his contention on the other question discussed, that is, the right claimed by the appellant to change the place of diversion of the water without forfeiting its right to the water. But it is not thought that these authorities reach the facts of this particular case. We do not deem it of importance to enter upon the re-examination of that question. The former opinion will therefore be so far modified that the defendant, its successors and assigns, may take from said mill creek, at its present dam and point of diversion, the same quantity of water, and no more, that it and its predecessor in interest had been accustomed to take at the lower dam. The defendant will also be required to have or permit no waste gate at its reservoir, so that the surplus water shall flow back into Mill creek at its dam, or, if that be impracticable by reason of the extent of the fall between the dam and the reservoir, then the defendant shall cause said surplus water entering its reservoir to flow back into Mill creek at the highest point up said stream above the plaintiff's premises, where the same is reasonably practicable, and for that purpose it may establish a waste gate at said reservoir; and for the purpose of giving effect to this decree the court below is authorized to issue such writs of injunction, mandatory or otherwise, as may be necessary. The parties may also, from time to time, apply to the court below for such modification of this decree in relation to the manner of the use of said water by the defendant as the justice of the case may require. In view of all the circumstances of this case, we have thought proper to award costs to the plaintiff.

(20 Or. 177)

ASTORIA & S. C. R. CO. v. HILL.

(*Supreme Court of Oregon*. Dec. 8, 1890.)

CORPORATIONS—ASSESSMENT OF STOCK.

1. After one-half of the capital stock of a private corporation in this state has been subscribed, and a board of directors elected, assessments may be legally be made upon the stock so subscribed. *Approving Freighting Co. v. Stanus*, 4 Or. 261.

2. In case of an ordinary subscription to the capital stock of a corporation, a tender of the cer-

tificate for the shares so subscribed is not a condition precedent to the right to maintain an action to recover assessments legally made on such shares.

(*Syllabus by the Court.*)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

This is an action to recover \$1,500, and interest, claimed to be due plaintiff from defendant as delinquent assessments on 20 shares of plaintiff's capital stock of the par value of \$100 each, subscribed for by defendant. A trial was had in the court below, which resulted adversely to defendant, and hence this appeal.

*C. J. Curtis*, for appellant. *C. W. Fulton*, for respondent.

BEAN, J. The facts in this case are these: On August 11, 1888, plaintiff was duly incorporated with a capital stock of \$75,000, divided into 750 shares of \$100 each, for the purpose of constructing, owning, and operating a railroad from Astoria to Tillamook bay, with its principal office at Astoria. On August 13th stock-books were duly opened to receive subscriptions to its capital stock, when defendant and other persons subscribed to the following contract, in writing, in said book, to-wit: "Subscriptions to the capital stock of the Astoria and South Coast Railway Company, incorporated Aug. 11th, 1888, at Astoria, Oregon, capital stock \$75,000, amount of each share \$100. We, the undersigned, hereby subscribe to the capital stock of the Astoria and South Coast Railway Company the number of shares set opposite our respective names, by us subscribed, and we agree to pay for each share the sum of one hundred dollars at the time or times and in the manner assessed and ordered by the board of directors of said corporation hereafter." That, when defendant subscribed said contract, he set opposite his name 10 shares, and the sum of \$1,000, as being the sum he agreed to pay therefor. On August 18th, more than one-half, but not all, of the capital stock of plaintiff having been subscribed at a meeting of the stockholders duly called, plaintiff was duly organized, and a board of directors elected, who immediately qualified and entered upon the discharge of their duties. On September 25, 1888, an assessment of 25 per cent., on November 3, 1888, an assessment of 10 per cent., and on February 25, 1889, an assessment of 65 per cent., was duly levied on the capital stock of the plaintiff. The defendant was notified of each of said assessments, and payment thereof demanded, and paid the assessments of September 25 and November 3, 1888, and \$150 on that of February 25, 1889, and no more. That in July, 1889, said stock-book of plaintiff still being open to receive subscriptions to its capital stock, defendant again subscribed for 10 shares, of the par value of \$100 per share. That on July 8, 1889, a large number of additional shares having been subscribed, including the 10 shares subscribed for by defendant, an assessment of 25 per cent. on each share of said additional subscription was duly levied, and on August 12, 1889, an additional assessment of 75 per cent. was duly levied on

each of said shares. That defendant, being duly notified of each of said assessments, refused to pay any part thereof. The defendant claims that, before plaintiff can maintain this action against him, it must aver and prove that its full capital stock has been subscribed; that it was an implied part of his contract of subscription that the contract was to be binding and enforceable against him only after the full \$75,000, the amount of plaintiff's capital stock, had been subscribed; and that, until the stock was all subscribed, the corporation could do no business except to elect directors. There are many authorities to the effect, and we suppose it will be generally conceded, that, unless otherwise provided by the act of the legislature authorizing the corporation to be created, or by the charter of the company, or by the contract of subscription, all the capital stock of the proposed corporation must be subscribed for before any stockholder can be compelled to pay any assessment on his stock, or before the company can enter upon any of its corporate business, but the act of incorporation may of course vary this rule. See sections 176, 177, Cook, Stocks, and notes, where the authorities seem to be fully collated. Plaintiff was incorporated under the general incorporation act of this state, which, among other things, provides "that it shall be lawful, in the organization of any corporation, to elect a board of directors as soon as one-half of the capital stock has been subscribed." 2 Hill's Code, § 3222. The question of defendant's liability must be determined by the construction to be given to this provision of the Code, in connection with the remaining provision of the general incorporation act. The question now before us was considered by this court in the case of *Freighting Co. v. Stannus*, 4 Or. 261, and the conclusion there reached, after an elaborate argument by counsel, and a careful and exhaustive examination by the court, was that in this state the subscription to the entire amount of the capital stock of a corporation is not a condition precedent to a legal corporate existence; and that, after one-half of the capital stock is subscribed, the stockholders may proceed to the election of directors, and, after the election thereof, assessments may be legally made upon the unpaid stock so subscribed, although the full amount has not been subscribed. The same construction of the statute is recognized by this court in the case of *Mining Co. v. Ruble*, 8 Or. 294, where BOISE, J., in speaking of Ruble's supposed liability to the plaintiff, says: "It is claimed that he owed the corporation this amount at the commencement of this suit. To put him in such a position, he must be a subscriber to the stock of \$50,000. The records of the corporation must show that this amount is due and owing. To show this, it must be shown by the records of the corporation (1) by the stock-books signed by Ruble, or evidence equivalent to such signing; (2) that one-half of the capital stock of the corporation has been subscribed; (3) that an assessment has been made on all of such stock for twenty-five per cent. of such

stock." The decision in *Freighting Co. v. Stannus* has been recognized as the settled law of this state, since its rendition, in 1872. Corporations have been organized, and, we must assume, have proceeded to business, without all the capital stock being subscribed for, relying on the doctrine of that case, as plaintiff probably did. They have levied and collected assessments on the subscribed capital stock, incurred debts and obligations, and engaged in vast and important enterprises, so that, whatever we might be disposed to hold if the question was *res integra*, we do not feel at liberty to depart from the rule heretofore announced by this court.

It is also claimed that the issuance and tender to defendant of certificates for the shares of stock subscribed for by him is a condition precedent to the right to maintain an action for the unpaid assessments. The effect of the ordinary subscription to the capital stock of a corporation is to constitute the subscriber a shareholder immediately, with the right to vote at meetings, and share in the dividends, and subject to a liability to contribute to the amount of his subscription, when called upon in a legal manner. His engagement is created directly by the act of subscription. It is the subscription that makes him a shareholder. The certificate is but evidence of the fact of his being a shareholder,—a written acknowledgment on the part of the corporation of his interest in the corporate franchise and property. It has been repeatedly held that the tender of a certificate for shares is never a condition precedent to the liability of a shareholder to contribute the amount of his shares after a proper call. 1 Mor. Priv. Corp. §§ 61, 148; *Railroad Co. v. Parks*, 8 S. W. Rep. 842; *Hawley v. Upton*, 102 U. S. 314; *Fulgram v. Railroad Co.*, 44 Ga. 597; *Railroad Co. v. Ayres*, 56 Ga. 230; *Cook, Stocks*, § 10. The case of an ordinary subscription for shares in a corporation differs from a sale and purchase. Where a person agrees to take or purchase shares, many authorities hold it is the intention to buy the certificates as a saleable article. The delivery of the certificate, and payment of the price, are considered concurrent acts; and, in a failure to carry out the contract, neither party can charge the other, without averring a tender of performance. Of this class is the case of *Railroad Co. v. Robbins*, 23 Minn. 439, relied on by defendant. This was an action to recover the amount of a subscription to preferred stock of the plaintiff, ordered issued and sold long after the company was organized, and was not a subscription to the original stock. The court held that the subscription by defendant constituted a valid contract on the part of the company to issue the stock to defendant, and on his part to pay for it, but before the company could maintain the action it must allege and prove a tender of the certificate for the stock to defendant. The court, in its opinion, however, recognizes the doctrine we have above announced as applicable to ordinary subscriptions, and says: "Such a subscription gives to the subscriber an interest in the corporation and the right to take part in organizing

it, and this interest and right are a sufficient consideration to support his promise." Judgment of the court below is therefore affirmed.

(20 Or. 126)

BUTLER v. SMITH.

(Supreme Court of Oregon. Nov. 24, 1890.)

NOTICE OF APPEAL — RETURN OF EXECUTION — RIGHT TO PROCEEDS — DOWER RIGHTS — ADMINISTRATOR.

1. Cases reviewed, and *Lindley v. Wallis*, 2 Or. 204, followed.

2. Subdivision 3, § 296, Hill, Code, requires a sheriff upon return of an execution to pay the money realized thereon to the clerk. *Held*, in an action against the sheriff to recover the surplus realized from the sale of land over and above the sum due on a decree of a foreclosure, that the complaint was demurrable which failed to allege that the sheriff neglected or failed to pay such money to the clerk at the time his writ was returnable; and that, for the want of such allegation, it is to be presumed that official duty has been regularly performed.

3. A wife's inchoate right of dower attaches to the surplus moneys realized upon a sale of the husband's lands upon a decree of foreclosure, and her interest in the fund will be protected against the deceased husband's creditors; but her rights cannot be litigated in an action to recover the fund in a case where she is not a party.

4. The administrator is entitled to the possession of all of the property of the deceased, both real and personal, for the purposes of administration; but the county court has power to protect the widow's dower interest in moneys in the hands of such administrator.

(Syllabus by the Court.)

Appeal from circuit court, Polk county; R. P. BOISE, Judge.

This case comes here on a demurrer to the plaintiff's complaint, which was sustained in the court below. The substance of the complaint is as follows: That plaintiff is the administrator of the estate of Isaac Vanhorn, deceased; that defendant is the sheriff of Polk county; that by virtue of an execution duly issued out of said circuit court, January 16, 1889, directed to such sheriff, upon a certain judgment and decree of foreclosure of said court, in favor of B. F. Smith, as executor of the estate of William Burns, deceased, against Isaac Vanhorn and Melissa Vanhorn, rendered May 11, 1885, for \$2,167.50, with interest thereon at the rate of 10 per cent. per annum, and \$200 attorney's fees, and \$17.60 costs and disbursements, such sheriff, the defendant, did, on February 16, 1889, duly sell the lands described in the decree to one B. F. Smith for \$2,850, a copy of which execution and return of sheriff herein is set out and made a part of the complaint as Exhibit A; that there was due on said execution \$2,415.72, and no more; that after the payment of said \$2,415.72, and the costs upon said suit of \$35.30, there remained in the hands of the said sheriff, the defendant, the sum of \$398.48, payable to plaintiff as such administrator; that said sale was confirmed by said court at the May term for the year 1889; that said premises, at the time they were sold, belonged to the estate of said Isaac Vanhorn, deceased; that said estate is unsettled, but in course of administration; that all of the personal estate has been applied, and

exhausted, in payment of claims against the estate allowed by law, and that there remains a large amount of claims unpaid; that there is no money, or other property, in plaintiff's hands, belonging to said estate, with which to pay these claims; that said \$398.48 has long since been and is now due and owing and payable from defendant to plaintiff; that defendant neglects and refuses to pay the same, though often demanded of him by plaintiff. The respondent filed a motion to dismiss the appeal, on the ground that both the respondent and his attorney, at the time of the service, resided in Polk county.

*Butler & Townsend* and *W. D. Fenton*, for the appellant. *Daly, Sibley & Eukin*, for the respondent.

STRAHAN, C. J., (after stating the facts as above.) 1. The first question presented is the respondent's motion to dismiss the appeal. The objection taken is that both the respondent and his attorney resided in Polk county at the time of the service, and that the notice was served on the respondent personally, and not on his attorney. This question has arisen in this court several times, and it is to be regretted that the decisions on the subject are not entirely uniform. Section 531, Hill, Code, provides: "When a party is absent from the state, and has no attorney in the action or suit, service may be made by mail, if his residence be known; if not known, on the clerk for him. When a party, whether absent or not from the state, has an attorney in the action or suit, service of the notice, or other papers, shall be made upon the attorney, if he reside in the county where the action or suit is pending, instead of the party, and not otherwise." But this section must be construed in connection with section 537, which provides: "An appeal shall be taken and perfected in the manner prescribed in this section, and not otherwise. The appellant shall cause a notice to be served on the adverse party," etc. *Lindley v. Wallis*, 2 Or. 204, is the earliest reported case on the subject. It was then held that service of notice of appeal may be made either upon the party or upon his attorney of record residing in the county where the trial was had. Outside of the county, the service can only be made upon the party. This construction was followed by *Upton, J.*, upon the circuit, in *Carr v. Hurd*, 3 Or. 160. It was again followed in *Rees v. Rees*, 7 Or. 78. In *Watts v. Hoyt*, Append. Sess. Acts 1872, p. 333, this court again followed *Lindley v. Wallis*; the court, per *McArthur, J.*, saying: "The rule of practice followed in this case appears to be so obvious, and so well established, that we feel justified in indulging the hope that all misconceptions in relation thereto will be of rare occurrence in the future." I have been unable to find this case elsewhere reported. The only reported expressions of this court which are directly opposed to these authorities are found in *Shirley v. Birch*, 16 Or. 1. 18 Pac. Rep. 344. In passing on the question as to who might give a notice of appeal, *Thayer, J.*, disapproved the rule of practice announced in *Lindley v. Wallis*, supra,

but this was not necessary to the decision of that case. It was only referred to by way of illustrating the particular question then before the court. Besides, it is believed that whatever may be the individual views of the members of this court, in relation to the proper construction of these provisions of the Code, it has already been settled by the cases cited declaring a rule of practice, which ought not to be departed from. On a mere question of practice, it is better that it should be fixed and settled, even though the grounds of the opinion may not be so manifest. The construction which was adopted at an early period of our judicial history is convenient in practice, affects no one's rights injuriously, has become well understood by the profession, and will be adhered to. It was said on the argument that there are some unreported cases at variance with these views. We have not had the opportunity of looking into those cases, or of examining the grounds upon which the decisions proceeded; but we feel constrained to say that, if they are at variance with *Lindley v. Wallis*, supra, they must be regarded as overruled. The respondent's motion to dismiss the appeal cannot, therefore, prevail.

2. This leaves the question presented by the demurrer to the complaint to be disposed of. The object of the action is to recover the amount realized from the sale of the property of plaintiff's intestate over and above the amount of the decree made in the foreclosure suit. Subdivision 3, § 296, Hill, Code, directs that, upon the return of the execution, the sheriff shall pay the proceeds of the sale to the clerk. There is no allegation in the complaint that the defendant failed to perform that plain duty. In the absence of some allegation by the plaintiff to the contrary, the ordinary presumption must prevail that official duty has been regularly performed. Subdivision 15, § 776, Id. Upon the argument there was considerable discussion whether a demand was necessary before the commencement of the action. The rule seems to be, where the officer cannot exonerate himself by the payment of the money into court, a demand is necessary. *Murfree, Sher.* § 962; *Sims v. Anderson*, 1 Hill, (S. C.) 394; *Church v. Clark*, 1 Root, 303; *De La Garza v. Booth*, 28 Tex. 478. But the decision of this question is unnecessary, for the reasons already suggested.

3. Defendant's counsel suggested that the plaintiff in his representative capacity was not entitled to the money sought to be recovered for the purposes of administration, for the reason that the same is to be regarded as land, and the widow of the estate would be entitled to dower therein. The better view is that the wife's inchoate right of dower in the husband's lands follows the surplus moneys raised by a sale in virtue of the power of sale in a mortgage executed by her with her husband, and will be protected against the claims of her husband's creditors. *Vartie v. Underwood*, 18 Barb. 561. She has a dower in the surplus as she had in the land before sale. *Matthews v. Duryee*, 45 Barb. 69. But this right of the widow to dower in this money in no manner inter-

feres with the right of the administrator to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof, until the administration is completed, or the same is surrendered to the heirs or devisees by order of the court or judge thereof. Hill, Code, § 1120. No doubt the county court of Polk county will, at the proper time, make the necessary orders in respect to this fund, to fully secure her dower interest in this fund, and if an order should be made, which injuriously affects her interests, it will be time enough for her to complain. In any event, the sheriff does not represent her interests, nor can her rights be litigated in this case. If the plaintiff shall hereafter apply to the county clerk of Polk county for this money, and fail to receive it, he will then be entitled to such remedy as the law affords in such case against the defaulting officer. But in this action, the court is unable to afford him any relief. Let the judgment be affirmed.

(20 Or. 154)

STATE *ex rel. DURKHEIMER et al.* v. GRACE.  
(Supreme Court of Oregon. Dec. 8, 1890.)

MANDAMUS—PARTIES—COUNTY-SEAT ELECTION.

1. When the question is one of public right, and the object of the *mandamus* is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a citizen of the county, and as such is interested in the execution of the laws.

2. Where an act of the legislature, after providing that the town of Harney shall be the temporary county-seat of the county, (which was a newly-organized county,) until otherwise located, as provided by the act, proceeds: "At the next general election the question of the location of the county-seat shall be submitted to the legal voters of the county, and the place receiving a majority of all the votes cast shall be the permanent county-seat of the county,"—held, that the words "a majority of all the votes cast" refers to the "place" receiving them, and means on "the question of the location of the county-seat," and not on some other question, for which votes may have been cast at such election.

(Syllabus by the Court.)

Appeal from circuit court, Harney county; M. D. CLIFFORD, Judge.

This is a proceeding for a *mandamus* to require and direct the defendant to keep the office of county clerk in the town of Burns, the alleged county-seat of Harney county. The facts, in substance, are these: The petitioners allege that they are residents within the county and legal voters and tax-payers therein, etc., and that the town of Burns is situated in said county of Harney; that the defendant was and now is the duly qualified and elected county clerk of said county, and, by virtue of his official position, is now, and at all of said times has been, in the possession of the public records, documents, etc., which, by the laws of the state, are records of the county clerk's office, and that the same are now, and have been at all times, held and kept by him in the town of Harney, within said county; that by an act of the legislative assembly, approved February 25, 1889, the county of Harney was created one of the counties of the state of Oregon, and that, among oth-

er things, it was provided that the said town of Harney should be the temporary county-seat until otherwise located by said act, which further provided that, at the next general election, etc., the question of the permanent location of the county-seat of said county should be submitted to the legal voters of said county, and that the place receiving the largest majority of all the votes cast therefor should be the county-seat of said county, etc.; that the permanent location of the same was duly submitted to the legal voters, as provided by said act, and thereafter the vote cast was duly canvassed, etc.; that upon such canvass it was found that the town of Burns received 512 votes, all of which were so polled and voted by the legal voters of said county in favor of locating the county-seat at Burns, and that said 512 votes was a full majority of all the votes cast at said election on the said question of the permanent location of the county-seat of said county, etc., and that, by reason thereof, the said town of Burns became the permanent county-seat of said Harney county, and is the only proper and legal place in said county for keeping the county records, files, documents, etc., of which the defendant herein now holds and has possession and custody thereof as said county clerk, and, by virtue of the act as aforesaid, the town of Burns is the only legal place in said county where the office of county clerk can be legally held, etc.; that the defendant, as such county clerk, now keeps and maintains, etc., all said records, files, etc., at the town of Harney, and conducts the office and official business there, and all of which is against the will of the legal voters of said county, and that the defendant unlawfully refuses to recognize said town of Burns as the said permanent county-seat, and unlawfully neglects and refuses to remove the records, etc., from Harney to the said town of Burns; that the defendant refuses for the reason that he says that the said town of Burns did not receive the majority of all the votes cast, etc., but your petitioners allege that the total of all the votes cast at the election upon the question of the permanent county-seat was the sum total of 1,016 votes, and no other or greater number; that, by reason of such neglect and refusal, etc., your petitioners pray, etc. Upon this petition an order was made for the issuance of a peremptory writ, from which this appeal is taken.

*Williams & Wood and Rufus Mallory*, for plaintiffs. *Thornton Williams and W. W. Thayer*, for defendant.

LORD, J., (after stating the facts as above.) Two questions are presented by this record: (1) That the petitioners, as relators, do not have such an interest in the subject-matter as to authorize them to institute such a proceeding; and (2) that the petition does not state facts sufficient to constitute a cause of action, in that it does not show that the town of Burns in the election received a majority of the votes cast for a permanent county-seat as found by the canvass of such votes. Upon the first point the conten-

tion is that the fact that the petitioners are residents, legal voters, and tax-payers of Harney county, does not vest in them any particular interest or right distinct from the public at large. Our statute provides that the writ shall be allowed by the court or judge thereof, upon the petition, verified as a complaint in an action, of the party beneficially interested. Hill's Code, § 594. It has been held that a petitioner, who is a tax-payer within the district of which the defendant is assessor, is "a party beneficially interested" in having all the taxable property in the district assessed. *Hyatt v. Allen*, 54 Cal. 360. And it would seem, upon like principle, that the petitioners, who are voters and tax-payers within the county of which the defendant is county clerk, is "a party beneficially interested" in having the records of the county clerk's office at the county-seat of the county, and is therefore a proper party to petition for the issuance of the writ. But, if there should be any doubt on the suggested analogy to justify its issuance, the case of *State v. Saxton*, 11 Wis. 23, discloses that one of the reasons assigned for quashing the writ there was that the relator did not state any right which entitled him to the relief prayed for; yet the court denied the motion, holding that a proceeding by a writ of *mandamus* was the proper remedy to test the result of an election as to the removal of a county-seat, and to compel a sheriff or other county officer to hold or keep his office at the place to which it is alleged to have been removed. When the question is one of public right, and the object of the *mandamus* is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a resident and citizen of the county, and as such is interested in the execution of the laws. *State v. Ware*, 13 Or. 380, 10 Pac. Rep. 885.

That the defendant, as county clerk, should keep the office of county clerk at the county-seat, as required by law, is the subject-matter in which the relator as a citizen and voter of the county has a general interest, and, in the absence of any other objection affecting the remedy by *mandamus*, that interest is sufficient to enable him to maintain this proceeding. When the law appoints a place for a county-seat, and fixes its officers thereat, it is a matter of public right in which all the citizens of the county are interested, and the officers should be kept at that place for the transaction of the public business. Such being the case the relators, as residents, voters, and tax-payers, are parties "beneficially interested" in the execution of the laws, and as such are entitled to enforce the performance of duty which devolves upon such officers to keep their offices at the county-seat by the writ of *mandamus*. While the authorities indicate some diversity of judicial opinion upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless its neglect entails some special injury, or affects some particular interest, the decided preponderance of American authority, Mr. Justice STRONG thinks, is "in favor of the doctrine that a

private person may move for a *mandamus* to enforce a public duty not due to the government as such without the intervention of the government law officers." *Railroad Co. v. Hall*, 91 U. S. 355. The writ is no longer regarded in this country or England as prerogative in its nature; nor does the right to it, nor the power to issue it, depend upon any of the privileges or prerogatives of power, but it is treated as an ordinary process in those cases to which it is applicable. Hence, as the question at bar is one of public right, and the object of the *mandamus* is to enforce the performance of a public duty, the people being regarded as the real parties in interest, it is not necessary that the relators should show any special interest or particular right to be affected by the result.

It is next assigned as error that the petition does not show that the town of Burns, at the election referred to therein, received a majority of the votes cast thereat for the permanent location of the county-seat. This objection involved at the argument two contentions: (1) That the facts stated in the petition were insufficient to constitute a cause of action; and, (2) assuming them to be sufficient, that it is not enough for the town of Burns to have received a majority of all the votes cast upon the county-seat question, but that the petition must show that it received a majority of all the votes at said election for any and every purpose. The objection upon the first point is to the effect that the petitioners do not allege that it appeared from said canvass that said 512 votes so cast was a full and complete majority of all the votes cast at said election, etc., nor exhibit any copy of the canvass, etc., but the petition does allege that the permanent location of the county-seat was duly submitted to the legal voters, as provided by the act, and that thereafter the votes so cast at such election was duly and regularly canvassed as by law in such cases made and provided, and that, upon such canvass, it was found that the town of Burns received 512 votes, all of which number of 512 votes, as polled and voted by the legal voters aforesaid, in favor of establishing the county-seat of said Harney county, at the said town of Burns, and that the said 512 votes was a full and complete majority of all the votes cast, etc., and that the total sum of all the votes cast upon the permanent location of the county-seat was the sum total of 1,016 votes, and no other or greater number. As the objection treats the facts alleged as upon demurrer, taking them as true, it does appear that the votes were duly canvassed as provided by law, and that it was found, because it so appeared from the canvass, that the town of Burns received 512 votes, which was a full and complete majority of all the votes so cast. Nor is the failure to attach as an exhibit a copy of the canvass fatal to the sufficiency of the complaint, for that is to be regarded rather as evidence of the facts to be alleged. It must be said, however, that these facts, although somewhat inartificially alleged, nevertheless present issuable matter which cannot stand confessed or admitted without conceding the town

of Burns to be the permanent, legal county-seat, and putting the defendant in default in the performance of a public duty. It is manifest, then, that the trial court ought not to have allowed, upon the state of facts presented by the petition, a peremptory, but an alternative, writ to be issued, for the defendant may set up as a defense that the county-seat has not been removed from Harney to Burns by a vote of the people, or some other proper defense which he may have to the action, and as the case of *State v. Saxton*, *supra*, shows he may do.

The next question presented is that, while the petition sufficiently shows that the town of Burns received a majority of the votes on the county-seat question, it does not show and allege that it received a majority of the votes cast for every purpose at that election; that is to say that, if there was, at the time of the election upon the county-seat question, an election for other county officers, the petition must show that there was a larger number of votes cast upon the county-seat question than for any county officer. These facts are not alleged, nor is it necessary, unless the act requires that it must appear that a majority of all the votes cast at that election, which was a regular election, and included the election of county officers, were in favor of permanently locating the county-seat at the town of Burns, and not a majority of the votes cast upon the single question of permanently locating the county-seat. The act, after providing that the town of Harney shall be the temporary county-seat of the county until otherwise located, etc., provides that, "at the next general election, the question of the location of a county-seat shall be submitted to the legal voters of the county, and the place receiving the majority of all the votes cast shall be the permanent county-seat of the county." *Sess. Laws 1889*, p. 47. Under this statute the contention of counsel for the relator is that it is sufficient to allege and show that the town of Burns received a majority of all the votes cast upon the county-seat question, and that the fact that it was a general election, and other county officers were elected at the same election, cannot affect the plain intention that it is a majority of the votes cast upon the county-seat question that is to govern. In some of the states there is a constitutional provision restricting the removal of the county-seat without the consent of the majority of the legal voters of the county, and in such cases, where two or more questions are submitted at the same election, it has been held that it must appear that a majority of the voters at that election had cast their votes in favor of removal before the county-seat could be changed. Section 5, art. 7, *Const. Ill.*, provides that "no county-seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point." In *People v. Wiant*, 48 *Ill.*, 264, where this constitutional provision was interpreted, it was held that, where an election on the question of the removal of a county-seat



happens to be held at the same time there is another election, as for a circuit judge, the votes cast on the single question of removal will not govern as to whether a majority of all the legal votes of the county were given in favor of removal; but it must appear that a majority of all the votes cast at that election were so given. In *Bayard v. Klinge*, 18 Minn. 249, (Gil. 221,) it is held that when the constitution provides that a question must be submitted to a vote of "the electors of the county," and requires "a majority of the electors voting thereon," it means a majority of the electors who vote at such election, and not merely of those voting on the particular question. In consonance with this principle, where the words of the constitution were "a majority of the legal voters of said county," it was held, in *State v. Lancaster Co.*, 6 Neb. 474, that it does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters of the county. See, also, *County-Seat of Linn County*, 15 Kan. 530; *State v. Sutterfield*, 54 Mo. 396; *Braden v. Stumph*, 16 Lea, 581; *Vance v. Austell*, 45 Ark. 400.

Where county-seats have been located, and there are constitutional provisions restricting such removal to the majority of the legal voters of the county, or without the consent of the majority of the electors of the county, the reasons are various and manifest why it has been construed and held under constitutional restrictions of this character to mean a majority of all the votes cast at such election, when there are means of ascertaining that fact, as by the vote for some county officer at the same election. But in this state there are no constitutional restrictions in respect to this matter, and the intention of the statute must be collected from its language, and the purpose it was designed to subserve. It is not the case of the removal of a county-seat once permanently located, but of a new county with its county-seat temporarily located, and an act of the legislature providing a method for the voters of the county to determine the place where their county-seat may be permanently located. The only question, then, involved is the construction of the section cited. Does it mean a majority of all the votes cast at such general election, or a majority of all the votes cast on the question of the location of the county-seat? While the section provides that the question of the location shall be submitted to the voters at the next general election, the object of such submission is to determine the place where it shall be permanently located by a "majority of all the votes cast." Its language is, "the place receiving the majority of all the votes cast," and not a majority of all the voters of the county, which, as we have seen, as a constitutional restriction, or in a statute, (*State v. Winkelmeier*, 35 Mo. 103,) when some other question was presented at the same election, and the vote showed a larger vote than on the county-seat question, furnished clear and decisive evidence that a majority of the legal voters

of the county had not voted for such change of location. "The place receiving the majority of all the votes cast" necessarily relates to the question of locating the county-seat, and not to some other question which may be involved at such general election, and means that the "place receiving the majority of all the votes cast" on that question "shall be the permanent county-seat of the county." This seems to us to be the plain intent of the statute in view of its language and the purpose to be subserved. In *State v. Echols*, 41 Kan. 1, 20 Pac. Rep. 523, the statute provided that, "after said election, the ballots on said question shall be canvassed in the same manner as in the election of county officers, and, if a majority of all the votes cast shall be in favor of establishing such high school," the county commissioners are required to appoint trustees, etc., and the court held that, where an election is legally called, etc., to determine whether a county high school shall be established, and at which a majority of the votes cast upon the proposition are in favor of the same, the proposition will be adopted, although it may not have received a majority of all the votes cast upon other questions submitted at the same election. In *Walker v. Oswald*, 63 Md. 146, 11 Atl. Rep. 711, the court held that the rule that, when an election is held at which the subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by those actually voting, applies equally where at a general election the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject. See, also, *Cass Co. v. Johnston*, 95 U. S. 369; *Gillespie v. Palmer*, 20 Wis. 572; *Sanford v. Prentice*, 28 Wis. 358. Under provisions of this sort, as distinguished from those recognizing "a majority of the legal voters of the county," the cases cited sustain the argument that the assent of those voting on the subject or question was to be presumed by their silence as acquiescing in the action of the majority. Keeping this distinction in mind, and that the provision of our statute was to secure the permanent location of a county-seat in a new county in which its county-seat had only been temporarily located, and we think the words "the place receiving a majority of all the votes cast" means cast on "the question of the location of the county-seat," and not cast upon some other question which may have been voted on at that election. In this view the complaint was not defective, and the objection cannot prevail. As the facts alleged were traversible, an alternative writ should have been allowed, which the argument indicated would have been, except for an excusable inadvertence or mistake. It follows that the judgment must be reversed, and the cause remanded, with directions to proceed in accordance with this opinion.

(20 Or. 190)

## COOK V. CITY OF ALBINA.

(Supreme Court of Oregon. Dec. 16, 1890.)

## APPEAL—TRANSCRIPT FILED PREMATURELY.

A transcript filed in this court before the time allowed by law for excepting to sufficiency of the sureties on the appeal is filed prematurely, and such appeal is not perfected by afterwards filing a new undertaking in the court below without leave, and more than 10 days after the service of notice, nor by having the surety justify on notice more than 5 days after such exception.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; E. D. SHATTUCK, Judge.

The notice of appeal in this case was served on the 1st day of March, 1890. The undertaking on appeal was filed the same day. The transcript was filed in this court on the 4th day of March, 1890. The case was continued at the March term. On the 6th day of March, 1890, the respondent's attorney gave notice that he excepted to the sufficiency of the sureties on appeal. On the 15th day of October, 1890, the appellant's counsel gave notice that he would produce the surety before the clerk on the 17th of October, 1890, for the purpose of justifying. On that day a new undertaking with the same surety was executed and filed in the court below. The said L. E. Thompson, surety, also justified as surety on the previous undertaking, of which fact the clerk made and filed a certificate. The present term of this court commenced on the 8th day of October, 1890. On the 13th day of said month, on motion of appellant, he was allowed time in which to perfect his appeal.

John M. Gearin, for appellant. P. L. Willis and C. H. Carey, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The respondent's motion to dismiss the appeal, for the reason that the same has never been perfected as required by law, was submitted under the direction of the court, with an argument upon the merits. Also, appellant filed a motion for leave to be permitted to file an undertaking on appeal in this court now, which was also submitted with an argument on the merits. As will be seen from the statement of facts, the appellant filed his transcript in this court prematurely,—that is, before the respondent's time allowed by law for excepting to the sufficiency of the sureties had expired; and within the time allowed by law, the respondent did except to the sufficiency of the surety. In a similar case it was held by this court that, in legal contemplation, there was no undertaking for the appeal. *Simison v. Simison*, 9 Or. 335. Whether, as in this case, when the transcript is filed in this court prematurely, and before the appeal is or can be perfected in the court below, this court acquires any jurisdiction to allow anything to be done here by way of perfecting the appeal may well be doubted. At the time the transcript was filed in this court, the cause was still pending in the court below, for the purpose of the justification of the surety. It is only from the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof, if excepted to, that the appeal shall be deemed perfect-

ed. Subdivision 4, § 537, Hill's Code. The appeal was inchoate and imperfect, then, when the transcript was filed, and, in such state of the record, it may well be doubted whether this court ever acquired any jurisdiction over the appeal. But, waiving this objection, the appeal is still imperfect. At the present term, on the application of the appellant's attorney, he was allowed time in which to perfect his appeal. He did not specify in what particular he deemed his appeal imperfect, and the court was not then advised of the state of the record. Instead of applying for leave to file an undertaking, he gave notice of the justification of the surety on the first undertaking long after the time fixed by law for such justification, and he also filed a new undertaking in the court below. None of these proceedings tended in any way to perfect or aid the appeal. To assume the authority of allowing an undertaking to be filed at the last moment, under all the circumstances, would be going a step beyond any precedent to be found in this court. For the reason that the transcript was filed before the appeal was perfected, and for the further reason that no sufficient undertaking has been given, as required by law, the appeal must be dismissed.

(20 Or. 182)

HOGUE V. CITY OF ALBINA *et al.*

(Supreme Court of Oregon. Dec. 16, 1890.)

## DEDICATION—MAP OR PLAT—EVIDENCE.

1. In order to constitute a dedication by parol, there must be some acts proved evincing a clear intention to dedicate the land to the public use.

2. Where it is sought to establish a dedication by the sale of lots with reference to a map or plat, the extent of such dedication is to be determined from the consideration of the whole map, the object being to ascertain the intention of the donor, the cardinal rule of construction being to give effect to the intention of the party as manifested by his acts.

3. A dedication of land to the public use is not presumed, but must appear by acts and declarations of the owner of such a public and deliberate character as clearly show an intention on his part to surrender his land for the use of the public, and the burden of proof is on the party asserting such dedication.

4. In order to constitute a common-law dedication, the owner's acts and declarations must be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the public use.

5. When the owner of land lays out a town, and records a plat thereof, on which streets are dedicated to the public, and it is sought to establish another and different dedication by the acts and conduct of the owner, in exhibiting to intending purchasers another map prepared on the same day, and selling lots by reference to the second plat, such second plat, to have this effect, must be essentially different from the recorded one, showing on its face an intention on the part of the owner to make an additional dedication.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; LOYAL B. STEARNS, Judge.

The plaintiff being the owner of a tract of land in size 1,141 feet north and south, and 408 feet east and west, within the corporate limits of the city of Albina, on April 3, 1889, caused an addition to the city to be laid off, of which under the name

of "Albina Addition" a map or plan was made, signed, acknowledged, and recorded by him, representing said addition, with its streets, lots, and blocks, the size and width thereof being stated thereon. On this plan or map a strip of land about about 18 feet wide along the south side of block 1 was dedicated to the public as a part of Morris street, which, together with a strip of land adjoining on the south before dedicated by the owner thereof, made Morris street in front of this addition about 46 feet wide. That prior to the platting of Albina addition, Riverside addition, which lies west of and adjoining the Railroad-Shops addition, which lies south of and adjoining said Albina addition, and Proebstel's addition, which lies south of and adjoining Riverside addition, had each been laid out, platted, and the streets therein dedicated to the public, and the plats thereof duly recorded. That Morris street, extending east and west between Albina addition and Riverside addition on the north, and Railroad-Shops addition and Proebstel's addition on the south, and between Riverside Addition, is 60 feet wide, and between Railroad-Shops addition and Albina addition is 46 feet wide, according to the said recorded plats, the south line of said street being a continuous straight line. On April 3, 1889, after making and filing the plat of Albina addition by plaintiff, he caused to be published and exhibited to intending purchasers a map of said addition upon which is represented lots, blocks, and streets, named and numbered, the same as on the recorded plat, and also represented, or attempted to represent thereon, the streets and public ways connecting with the streets in his said addition, but neither the size of lots or blocks nor width of streets are marked upon said last-named plat. On this plat, the north line of Morris street is represented to be a continuous, straight line, but its width is not marked on the map, nor does the map indicate that block 1 abutting on this street is of any less width than the other blocks in the addition. That prior to the commencement of this action, plaintiff sold and conveyed lots in Albina addition by reference to said map, but no sales were made by lots fronting on Morris street. That on May 23, 1889, the city of Albina duly passed an ordinance providing for the time and manner of improving said Morris street along and in front of Albina addition, the full width thereof, and on July 13, 1889, the city duly entered into a contract with defendant Richardson for the improvement of said Morris street, according to said ordinance, to the full width of 60 feet. That Richardson commenced the improvement of said street to the width of 60 feet, and, in doing so, entered upon a part of said street, — a strip of land 14 feet wide, — from the south side of block 1, Albina addition, as appeared on the recorded plat. Whereupon plaintiff began this suit for an injunction to restrain the defendants from entering upon said strip of land. A trial in the court below resulted in a decree in favor of the plaintiff, from which this appeal is taken.

P. L. Willis and C. H. Carey, for appel-

lants. H. W. Hogue and C. M. Idleman, for respondent.

BEAN, J., (*after stating the facts as above.*) The contention of the defendants is that plaintiff, by making and exhibiting to intending purchasers the second map or plat of Albina addition showing the north line of Morris street to be a continuous straight line, and by selling lots with reference to this plat, thereby dedicated to the public the south 14 feet of block 1 of this addition as shown on the recorded plat. It is not claimed that plaintiff ever expressly dedicated this strip of land to the public, or ever had any express intention so to do, but it is sought to conclude him upon the ground that he has suffered the public and individuals, relying upon his acts and conduct in exhibiting the second map to intending purchasers, and making sale of lots by reference to such plat, to acquire rights upon the faith that he has devoted this strip of land to the use of the public as a part of Morris street. The law is well settled that where the owner of land lays out and establishes a town thereon, and makes and exhibits a map or plan of the town, with lots, blocks, streets and alleys, and sells lots with reference to such plan, he thereby dedicated to the public the streets and public ways marked thereon; that the sale and conveyance of lots, according to such plan or map, implies a grant or covenant that the streets or other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map on the faith of which the lots are sold, and in this state such dedication becomes irrevocable, and no formal acceptance by the public or corporate authorities is necessary. *Carter v. City of Portland*, 4 Or. 339; *Meier v. Railway Co.*, 16 Or. 500, 19 Pac. Rep. 610.

It is, however, conceded in this case, by the plaintiff, that he did dedicate to the public a portion of his land as a part of Morris street, but the controversy here is whether the strip of land so dedicated is 18 feet wide, as claimed by plaintiff, or 32 feet, as contended for by the defendants, and this question must be determined from plaintiff's intention as evinced by his acts and conduct. In order to constitute a dedication by parol, there must be some acts proved evincing a clear intention to devote the premises to the public use. *Carter v. City of Portland*, 4 Or. 339. It is essential that the donor should intend to set apart the land for the use of the public, for it is held without contrariety of opinion that there can be no dedication unless there is a present intent to appropriate the land to the public. *Elliot, Roads & St.* 92; 2 Dill. Mun. Corp. § 636, and note. This intention is not a secret one, but that which is expressed in the visible and open conduct of the owner. His acts and declarations may, and often do, evince an intention to dedicate land to the public as a highway, when he had no real intention of so doing. His intention is to be inferred from his acts and declarations, but such acts and declarations must clearly indicate an intention on the

part of the donor to dedicate the land to the public, or no dedication can exist. When it is sought to establish a dedication by the sale of lots with reference to a map or plat, the extent of such dedication is to be determined from the consideration of the whole map, the chief object being to ascertain the intention of the donor, for the cardinal rule of construction is to give effect to the intention of the party as manifested by his acts. A dedication is not presumed, but must be shown by the acts and declarations of the owner of such a public and deliberate character as clearly show an intention on his part to surrender his land for the use of the public, and the burden of proof is on the party asserting such dedication. In *Tinges v. Mayor, etc.*, 51 Md. 609, it is said: "It is well settled by the decisions of this court that an intent on the part of the owner to dedicate his land to the particular use alleged is absolutely essential, and, unless such intention is clearly proved by the facts and circumstances of the particular case, no dedication exists. *McCormick v. Mayor*, 45 Md. 524." So in *Shellhouse v. State*, 110 Ind. 513, 11 N. E. Rep. 484: "To constitute a valid dedication, there must have been an actual intention on the part of the owner, clearly indicated by unequivocal acts or conduct, to dedicate the land to the public for use as an alley. *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. Rep. 803, and cases cited. As was in effect said in the case above cited, unless there appears an actual intent to dedicate on the part of the owner, the court cannot do otherwise than to find that there was no dedication." So in *Holdane v. Trustees of Village of Cold Spring*, 21 N. Y. 477: "The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal, and do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication." In *Lowndale v. City of Portland*, 1 Or. 405, DEADY, J., in discussing this question, says: "The burden of proof rests on the defendant to show a dedication. It must be clear and satisfactory. \* \* \* The security and certainty of the title to real estate are among the most important objects of the laws of any civilized community. Around it the law has thrown certain solemnities and formalities so that the fact may be known and read by all men. What a man once had he is not to be presumed to have parted with, but the fact must be shown beyond conjecture; and although, in the case of streets and public grounds in towns, from the nature of the case a dedication may be shown by acts resting in parol, they must be of such a public and deliberate character as makes them generally known, and not of doubtful intention." To the same effect are *Lee v. Lake*, 14 Mich. 18; *People v. Jones*, 6 Mich. 176; *Bridge Co. v. Bachman*, 66 N. Y. 261; *Rowan's Ex'rs v. Portland*, 8 B. Mon. 232; Ang. & D. Highw. § 142; 5 Amer. & Eng. Enc. Law, 400, and note. From these and other authorities that might be

cited it may be stated that the question of intent to dedicate is the paramount one in all cases of disputed dedication, and is to be determined as the question of mixed law and fact, from the evidence in each particular case.

The controversy here is not between a purchaser of lots fronting on Morris street and the plaintiff, but between him and the city of Albina acting on behalf of the public. The claim of the city is based wholly upon the fact that the north line of Morris street as shown upon the second map is a continuous straight line, and for that reason it is insisted that plaintiff is estopped from denying the dedication of the land in controversy to the public as a part of that street. This second map was made and published on the same day the original plat of Albina addition was recorded, and was evidently designed to be used by the plaintiff or his agents in the sale of lots, and to this end it undertakes to represent the public ways connecting with the streets in this addition, the distance from school-houses, churches, and public lines of transportation, and has published therein a statement of the many advantages claimed for this particular property. As far as Albina addition is concerned, it appears to be an exact copy of the recorded map, except that the size of lots and width of streets are not marked thereon. In fact the map in evidence, and by stipulation of the parties conceded to be a copy of the recorded map, appears to be one of the second maps published by plaintiff, with the portion representing the adjoining property removed, and with the size of lots and width of streets marked thereon in pencil; so that, as far as plaintiff's property is concerned, there is no difference whatever in the two plats, but one is an exact copy of the other, and there is nothing on the second plat to indicate that Morris street is more than 46 feet wide, unless it be that the north line of this street is represented to be a continuous straight line from the south-east corner of this addition, extending west. Block 1 of this addition, which fronts on this street, appears to be the same size and contains the same number of lots as the other blocks in the addition, which could not be the case if a strip 14 feet wide from the south side of this block is a part of Morris street. From an inspection of the map, we think it much more probable that plaintiff only intended to represent the width of Morris street as actually located in front of his property than its width in front of the adjoining property, which he did not own, or in any way control.

As we have already seen, in order to constitute a common-law dedication, "the owner's acts must be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the public use," and particularly is this true when there has been a statutory dedication by recording an acknowledged plat, and it is sought to establish another and different dedication by the acts and conduct of the owner in exhibiting to intending purchasers a map prepared on the same day as the recorded plat, and selling lots by reference

to the second map. The second plat, to have this effect, should be essentially different from the recorded one, showing on its face an intention on the part of its owner to make an additional dedication. In this case the second map, as far as plaintiff's property is concerned, is precisely the same as the prior recorded one. The dimensions of streets, lots, and blocks are not exhibited upon it, nor does it contain any evidence of an intention to make any dedication different from that already made. It is simply a plat, and made by the plaintiff for his own convenience in selling the property. Where the owner of property has complied with the statutory requirements in making and filing a plat of his proposed town or addition, we know of no rule of law that requires him to be bound by another or additional dedication simply because he makes a copy of his recorded plat for his own convenience in disposing of his property, upon which the lines do not appear with that complete accuracy as on the recorded plat, and especially when it does not clearly appear to be radically different from the recorded one. It follows, therefore, that the judgment of the court below must be affirmed.

STATE ex rel. WISECARVER v. SMITH.

(Supreme Court of Oregon. Nov. 24, 1890.)

SCHOOL MEETINGS—POWERS.

Reversed, and judgment of ouster entered against the respondent upon the authority of *State v. McKee*, ante, 292.

(Syllabus by the Court.)

Appeal from circuit court, Yamhill county; R. P. BOISE, Judge.

Geo. G. Bingham, Dist. Atty., and James McCain, for appellant. N. L. Butler, John J. Daly, and W. D. Fenton, for respondent.

STRAHAN, C. J. In all of its essential features this case is like *State v. McKee*, ante, 292, (just decided,) and which must govern it. The judgment must therefore be reversed, and the findings of law set aside, and the findings of law of this court substituted, and judgment of ouster entered against the respondent, and a judgment also entered admitting the relator to the office of school clerk mentioned in the pleadings.

(20 Or. 209)

HUMPHREY v. CHILCAT CANNING CO.

(Supreme Court of Oregon. Dec. 16, 1890.)

PAROL CONTRACT—MEMORANDUM.

Where, at the time parties enter into a parol contract, a memorandum is read containing the terms thereof, which are assented to by the parties except in two particulars, such memorandum becomes a part of the transaction, and in an action on the contract the same is competent evidence as a part of *res gestae*, and may be considered by the jury for the purpose of assisting them to determine what the terms of the contract were.

(Syllabus by the Court.)

Appeal from circuit court, Clatsop county; FRANK J. TAYLOR, Judge.

The substance of the complaint is as follows: The complaint alleged that on February 9, 1889, defendant employed plaintiff

to work at its cannery in Alaska for eight months, and agreed to pay him \$800 therefor, and his passage money between Astoria and Alaska, going and returning, and to board and lodge plaintiff during said period; that pursuant to said agreement plaintiff went to Alaska, and worked for defendant until March 10, 1889, when defendant wrongfully, and without any cause, discharged plaintiff. Also alleges that plaintiff was at all times ready and willing, and offered to perform his contract during said period, and alleges value of his board and lodging, and cost of passage; and alleges an indebtedness thereby of \$985 to his damage. The defendant's answer denies employing plaintiff for any definite period of time, or for any definite sum, except \$100 per month, with board and lodging, and return passage if not discharged. For a further and separate answer plaintiff alleged that on or about the 23d day of January, 1889, this defendant offered to enter into a written contract with the said plaintiff at and for the sum of \$100 per month for the period of eight months, or for and during the canning season in Alaska, upon the following terms and conditions, to-wit: "In consideration of free passage from Astoria to Chilcat, Alaska, and \$100 per month of thirty days, Sundays included, the said plaintiff agrees to go to Alaska with the Chilcat Canning Company, and work at their salmon cannery in Alaska during the season of 1889, fishing and doing any other work required by this defendant, such as erecting the necessary cannery buildings, getting out the necessary wood for fuel, lightering freight to and from the steamer to the cannery, and in fact doing any and all kinds of work, at any and all times whenever required by this defendant, and to act, if requested, as net tender when the fishing season began. The Chilcat Canning Company to pay plaintiff's passage from Chilcat, Alaska, to Astoria, Oregon, at the end of the season, but reserving the right to discharge said Humphrey for any cause, such as intoxication, neglect of duty, disobedience, or refusal to work whenever called upon at any time. The Chilcat Canning Company not to pay his return fare if so discharged, or if he quits on his own account, nor allow any wages for the time going up to Alaska on the steamer, but to pay only for the actual time worked in Alaska. Time to commence when steamer leaves Astoria and end when said Humphrey is landed back to Astoria, at end of season. Wages to be paid at end of season at the office of the Chilcat Canning Company in Astoria, Oregon." The plaintiff agreed to all of the terms of said contract except that he refused to bind himself, or this defendant, for any definite period of time for the service to continue, and on that account refused to sign the written contract, but offered to enter this defendant's service upon all the other terms as proposed aforesaid, reserving the right to either party to terminate the employment at any time at pleasure. The defendant thereupon accepted said plaintiff's offer and he thereupon entered into the employment of this defendant on or about February 9, 1889, under said contract as ac-

cepted as aforesaid, at which time said steamer left Astoria; that plaintiff arrived in Alaska, and wrought for defendant for the time only of two weeks, when, on March 10, 1889, the said plaintiff wrongfully violated his agreement to work, and failed and refused to work as requested by this defendant, in putting up the buildings to receive the freight from the beach, then exposed to the weather, which work was then and there necessary to be done and performed. During all of said time in Alaska, in defendant's employ, the said plaintiff was insubordinate in his conduct, and was creating a like spirit in his fellow-workmen. Thereupon this defendant dismissed the said plaintiff from its service on said 10th day of March, 1889. Plaintiff's reply denied the new matter in defendant's answer, including said written contract, except that he admits he refused to perform work on the 10th day of March, 1889, for the reason that said day was Sunday. Plaintiff recovered a verdict for the amount claimed, and defendant appeals.

*Sidney Dell*, for the appellant. *C. W. Fulton*, for the respondent.

*STRAHAN, C. J., (after stating the facts as above.)* The principal exceptions relied upon were taken during the progress of the trial. The record recites that the plaintiff gave evidence tending to support his cause of action, and then rested. The defendant then introduced testimony tending to prove that one Murray was its general manager, and engaged in hiring men to enter its service and go to Alaska and there engage in the business of canning salmon; that at the time said contract of hiring was closed, plaintiff and about 25 other persons, wishing to enter the defendant's service, were present; that at said time the contract, containing the terms upon which the men were being employed by the defendant, was read over, in the plaintiff's presence and hearing, and that he then and there assented to all of its terms, except that he would not be bound for any definite time, and his wages were to be \$100 a month. For the purpose of placing before the jury all of the terms and conditions of the contract, which the defendant claimed the plaintiff entered into with it, the defendant's counsel then offered to read to the jury the said writing, and to show that plaintiff assented to all of its terms except as above, but the court excluded it, and an exception was taken. The writing is as follows: "This agreement made and entered into this 23d day of January, 1889, by and between the Chilcat Canning Co. of Astoria, Oregon, and the undersigned, witnesseth: That, for the consideration of free passage from Astoria to Chilcat, Alaska, and \$50, with board, per month of thirty days, Sundays included, we do hereby agree to go to Alaska with the Chilcat Canning Company and work at their salmon cannery in Alaska during the season of 1889, fishing and doing any other work required by us, such as erecting necessary cannery buildings, getting out the necessary wood for fuel, lightering freight to and from the steamer to the cannery, and in fact doing

any and all kinds of work, at any and at all times whenever required by us. The Chilcat Canning Company further agree to pay to the undersigned one cent for every red salmon caught and delivered into their cannery, and also pay their passage from Chilcat, Alaska, to Astoria, Oregon, at end of season. The Chilcat Canning Company reserve the right to discharge any of the undersigned for any cause, such as intoxication, neglect of duty, disobedience, or refusal to work whenever called upon at any time. The Chilcat Canning Company will not pay the return fare of any one so discharged, or any one that quits of his own account, nor allow any wages for the time going up to Alaska on the steamer, but will only pay for the actual time worked in Alaska. Time to commence when steamer leaves Astoria and end when the undersigned are landed back to Astoria at end of season. Wages to be paid at end of season at the office of Chilcat Canning Company, in Astoria, Oregon. CHILCAT CANNING COMPANY, D. MORGAN, President. By W. A. SHERMAN, Secretary. [Signatures of employees.]"

The defendant's contention on this appeal is that this writing was read over to the plaintiff, and in his presence and hearing, at the time he was employed, and that he orally assented to all of its terms, and that it thus became a part of the transaction itself,—a part of what was said and done by the parties at the time of the hiring,—tending to prove what the contract was between the plaintiff and defendant, and that for this purpose it was competent. It is not claimed that the contract between the plaintiff and defendant is a written contract. On the contrary, it exists entirely in parol; but what was said and done by the parties, and what was read at the time the contract is alleged to have been entered into, were competent evidence to be considered by the jury for the purpose of enabling them to determine what the terms of such contract were. Hill's Code, § 686, clearly and succinctly states the principle of law applicable in such case: "Where, also, the declaration, act, or omission forms part of the transaction, which is itself the fact in dispute or evidence of the fact, such declaration, act, or omission is evidence as a part of that transaction." This section is declaratory of the common law. It is a legislative definition of *res gestæ*. What are *res gestæ*, and what not, are sometimes difficult to distinguish; but the difficulty in making the application does not in any manner impair the rule. 2 Whart. Ev. § 1102, says: "It may, however, happen that statements of a party are so interwoven with a contract as to form a part of it, or are so wrought up in a transaction that they form a necessary incident of any narrative of such transaction. In such case the party's declarations are admissible, as we have already seen, as a part of the *res gestæ*." So it is said in Wood, Pr. Ev. p. 431, § 150, "that, whenever the acts or declarations of a party, made at the time of a transaction, and so intimately connected therewith as to form a part of it, which tend to explain the transaction, or to aid in arriving at the real nature, character,

and purpose of the transaction, are admissible in evidence, as well for as against the party making them." So, in *Bank v. Kennedy*, 17 Wall. 19, it was held that conversations occurring during the negotiation of a loan or other transaction, as well as the instruments given or received, being part of the *res gestæ*, are competent evidence to show the nature of the transaction, and the parties for whose benefit it was made, when that is material. *Lathrop v. Bramhall*, 64 N. Y. 365, was a case where a memorandum relating to the terms of a parol contract was made at the time by one of the parties negotiating the contract, and read over to the others, and it was held that although not itself a valid contract it was competent as evidence to corroborate the oral evidence as to the terms of the contract. In that case, MILLER, J., delivering the opinion of the court, said: "It was not offered to refresh the memory of the witness, and was not admissible in that point of view, and the rule applicable in such case cannot be invoked, nor was it competent alone as the contract of the parties, but it was evidence which corroborated the oral proof as it coincided with it as to the terms of the contract. The two together showed what the contract was, and there can be no valid objection where an oral contract is made to prove that its principal terms were written down and a memorandum made of them and read at the time. The one is not a substitute for the other, and both are properly admissible without violating any rule of law. It is not a case where a valid contract is made in writing, which entirely supersedes the oral contract, but one where an oral contract is entered into and a memorandum made at the time regarding its general features and characteristics." The effect of these authorities is not countervailed or broken by anything presented in behalf of the respondent, and the paper offered in evidence was clearly within the principle announced. According to the defendant's contention the paper in question, with the exceptions already noted, recited the terms of the contract which the defendant entered into with the plaintiff. It became so not because it was executed by certain of the parties, but because it was read over in his presence and hearing at the time of the hiring, and assented to by the plaintiff. This made it admissible as a part of the transaction, and in the strictest sense *res gestæ*. Of course, in what is here said it could not be understood that we express any opinion as to the weight of any of the evidence. That is not the province of the court. All that we decide is that the memorandum offered was competent evidence to be submitted to the jury under the circumstances, and that its exclusion was error, for which the judgment must be reversed, and a new trial awarded.

(20 Or. 172)

SCHNEIDER v. OREGON PAC. R. CO.

(Supreme Court of Oregon. Dec. 8, 1890.)

SALE—REFUSAL TO ACCEPT—REMEDIES OF SELLER.

1. In an action for goods sold and delivered, if the plaintiff alleges and proves a delivery at the place agreed, and nothing remains for him to

do, he need not show an acceptance by the defendant.

2. Where, however, defendant refuses to accept or pay for such goods, plaintiff may elect to treat the goods as belonging to defendant, and bring an action for contract price; or he may otherwise dispose of the goods, and sue for damages.

3. Where, after such delivery and refusal of payment, plaintiff mortgages or pledges the goods to secure a loan of money, he cannot maintain an action for the value of the goods against the defendant.

(Syllabus by the Court.)

Appeal from circuit court, Linn county; R. P. BOISE, Judge.

This is an action to recover the value of wood alleged to have been cut and delivered to defendant by plaintiff, and for damages for breach of contract. The first cause of action set out in the complaint is as follows: "That on or about the 22d day of December, 1888, in Linn county, state of Oregon, the plaintiff made and entered into a contract with the said defendant above named, the Oregon Pacific Railroad Company, whereby and wherein plaintiff undertook and agreed to cut all the wood on a certain piece or parcel of land bought by said company from G. W. Drewery, in Fox Valley, in Linn county, Oregon, and the right of way of said company, near said premises, into cord-wood, and suitable for use in the railroad engines, and deliver the same to the said company on their said right of way, along the line of the railroad of said company, whenever it was convenient to deliver said wood, and the said Oregon Pacific Railroad Company promised and agreed to pay plaintiff, at the end of each month, for all wood delivered by him in accordance with said contract during said month, at the rate of two dollars per cord, deducting ten cents per cord for the wood or timber furnished by said company; that plaintiff, in accordance with the terms of said contract, cut and delivered to the said company, along the line of their said road, 306 cords of wood, of the agreed value of \$612, and of the net value, deducting the price of the timber purchased by defendant, of \$591.40, and that said wood was all cut and delivered, as aforesaid, prior to the 22d day of April, 1889; that defendant has failed, neglected, and refused to pay plaintiff for said wood, or any part thereof." There was a claim for damages and lumber also set forth in the complaint, but for the purposes of this appeal they are immaterial. The answer denies specifically each and every allegation of the complaint, and, among other defenses, alleges the following: "That said plaintiff never delivered to defendant any of the wood so cut by him, but sold and delivered the same to Fred Bender on the 11th day of March, 1889, together with other wood and property then claimed to be owned by him, and received from said Bender full payment therefor." The plaintiff, in his reply, denies each and every allegation in this part of the answer, with the qualifying phrase, "except as herein-after alleged," and then makes the following allegation in reference thereto: "Plaintiff, for a further and separate reply to defendant's further and separate answer, al-



leges that on or about the 11th day of March, 1889, plaintiff was, by reason of defendant's failure and refusal to comply with the terms of the contract for cutting wood mentioned in the complaint herein, and pay the money as it became due on said wood, according to the terms of said contract, compelled to give a lien on said wood to one Fred Bender, to raise money to pay off the men employed to cut said wood; that said lien was paid and satisfied and released in full before the commencement of this action." A jury was called, and, after the evidence was introduced and argument of counsel, they returned into court the following verdict: "Emil Schneider vs. Oregon Pacific Railroad Company. We, the jury in the above case, find for plaintiff for two hundred and eighty-two and a half cords of wood, at \$1.90 per cord, \$536.75, and lumber in the sum of \$34,—total, \$570.75."

*L. Flinn*, for appellant. *H. H. Hewitt*, for respondent.

BEAN, J., (after stating the facts as above.) The only error complained of here is the entry of a judgment on the verdict of the jury for the value of 282½ cords of wood, found by the jury to have been delivered to defendant by plaintiff. The contention of defendant is that the allegation in his reply, that on March 11, 1889, plaintiff gave a lien upon this wood to secure the payment of money borrowed by him, is such an admission as will preclude his recovery in this action for the value of such wood. The complaint avers that the wood was delivered along the line of the defendant's railroad prior to the 22d day of April, 1889; but, as the reply alleges that the lien was given on the 11th day of March, we must conclude, as a necessary consequence, that the wood was delivered on or before the date of the lien, so that it must be assumed, for the purposes of this case, that, after wood was delivered along the line of defendant's road, plaintiff either mortgaged or pledged the wood to Bender for money with which to pay his hands. This action is brought to recover the value of the wood, and not damages for a breach of the contract of defendant. The complaint alleges that plaintiff delivered the wood at the place provided in the contract for its delivery. In so doing, he complied with this contract on his part, and was entitled to his pay for the wood at the rate agreed upon. He was not required to allege or prove an acceptance of the wood by the defendant before bringing his action. *Nichols v. Morse*, 100 Mass. 523; *Pacific Iron-Works v. Long Island R. Co.*, 62 N. Y. 272.

It appears, however, from the record before us that after the wood was delivered by plaintiff at the place provided in the contract, and agreed on by the parties as the place of delivery, defendant refused to accept or pay for it, according to its agreement. Upon the refusal of defendant to pay for the wood, as it agreed to do, plaintiff had the right to elect to treat the wood as the property of the defendant, and sue for the contract price thereof, as he has done here, or otherwise dispose of the wood, and bring an action for

damages for breach of the contract, if he was damaged by such breach. But he could not take possession, sell, or incur the wood, and sue for the contract price. If he insists on having from the defendant the price at which he contracted to sell the wood, he cannot, consistently with such a demand, sell or dispose of it to another. In this case he has sued for the value of the wood, and must recover, if at all, upon the theory that the wood belonged to defendant, and the sale was complete. *Maclean v. Dunn*, 4 Bing. 722; *Miller, Sales*, § 28; *Girard v. Taggart*, 5 Serg. & R. 18; *Crooks v. Moore*, 1 Sandf. 297. If, after he delivered the wood along the railroad track, he saw proper, for any reason, to resume possession of it, or exercise such acts of ownership over it as were inconsistent with a right of property in defendant, he cannot recover in the action the value of the wood. When he mortgaged or pledged this wood to Bender to secure a loan of money, he thereby exercised such acts of ownership over it as preclude the idea of property in defendant. If the wood belonged to defendant, he could not give a lien upon it, for he had no such interest in the wood as could be subjected to a lien. He could not treat the wood as the property of defendant, and at the same time mortgage it to some other person. When he assumed the right to mortgage or pledge the wood to Bender to secure a loan, he must have elected to resume control over the wood, and to look to defendants for damages for breach of its contract. He claims that he was compelled to give this lien because defendant would not comply with its contract. In this action it matters not what reason may have prompted him to make his election,—whether the importunities of his creditors, or the conduct of defendant. The only inquiry is, did he, by his actions, evince an intention to repudiate the sale, and resume control of the wood? The conduct of defendant might possibly be a proper subject of inquiry in an action for damages, but the only question before us is the legal effect of the mortgage or pledge of the wood to Bender. The facts are admitted, and we must apply the law to them. The plaintiff claims in his reply that the lien to Bender was satisfied and discharged before the commencement of this action, but he does not allege that he delivered the wood to defendant after the lien was discharged. He says he delivered the wood prior to April 22, 1889, and the action was not commenced until October 14, 1889, so that the lien may have been satisfied prior to the commencement of the action, and yet after the alleged delivery of the wood; but we think it appears from the pleadings, and it was so assumed on the argument here, that the only delivery claimed to have been made was made prior to the date of the lien.

It was argued that the allegation in the reply is only a departure, and cannot be taken advantage of after verdict; but we are unable to concur with counsel in the theory that such allegation is a departure. A departure in pleadings is defined to be where a party quits or departs from the cause of action or defense which he has

first made, and has recourse to another. 1 Chit. Pl. 644. In this case the averment in the reply that gave a lien upon the wood to Bender does not in any way constitute a cause of action against the defendant, but is an affirmative matter, pleaded by plaintiff himself, which is a complete defense to the cause of action set out in his complaint. It follows, therefore, that it was error for the court below to enter judgment against defendant for the value of this wood, and the judgment must be reversed, and the cause remanded for further proceedings, as by law provided.

(20 Or. 199)

**POPE v. AMES et al.**

(Supreme Court of Oregon. Dec. 16, 1890.)

**INTERPLEADER—APPOINTMENT OF RECEIVER.**

1. When two or more persons severally claim the same thing, debt, or duty from the party liable therefor, such party may maintain a suit in equity to compel such parties to litigate the title thereto between themselves, such party having incurred no independent liability to any of claimants, and being merely in the position of a stakeholder without interest in the matter himself.

2. The title of a receiver on his appointment dates back to the time of granting the order.

(*Syllabus by the Court.*)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

The object of this suit is to determine the right to certain money in the hands of the plaintiff, and which is claimed by the defendants Ames and Detrick, as attaching creditors of A. Grant, and David McCully, receiver of A. Grant's estate. The complaint shows that about the 13th of December, 1888, A. Grant consigned to the plaintiff 74 bales of hops to be sold on commission; that prior to the 29th day of June, 1889, in an action instituted in the circuit court of Marion county, Or., wherein Lewis Pettyjohn was plaintiff and A. Grant was defendant, a judgment in the sum of \$2,841.70 was rendered in favor of said plaintiff and against said defendant, and an execution duly issued thereon; that on the date last aforesaid David McCully was duly appointed receiver by said court of all of the debts, property, equitable interests, rights, and things of said A. Grant in order that said judgment might be paid and satisfied; that on July 5, 1889, said McCully duly notified the plaintiff of his appointment as receiver, and directed him to hold for and turn over to him (said McCully) any and all moneys which plaintiff might then have or might thereafter receive belonging to said A. Grant; that on the 21st day of August, 1889, in an action brought in the circuit court for Multnomah county, Or., wherein J. P. Ames and E. Detrick, partners, were plaintiffs and the said A. Grant was defendant, a writ of attachment was served on this plaintiff, and \$757.10, with interest and costs, were attached, and requiring him to retain in his custody said sum of money; that on the 12th day of November, 1889, the plaintiff received from London, England, to which market said hops had been shipped for sale, an account thereof, and after deducting all expenses and his just charges and commissions, the sum of

\$1,439.44 remained, which, as between the plaintiff and Grant, belongs to said Grant; that on November 30, 1889, a judgment was rendered by the said circuit court of Multnomah county, in favor of Ames & Detrick, and against said A. Grant, for \$765.85, with interest and costs, and by said judgment the plaintiff was directed to pay over to Ames & Detrick an amount sufficient to satisfy said judgment; that the plaintiff is ignorant of the respective rights of the defendants, and cannot determine the same without hazard to himself; that he has no claim upon or interest in the said money, and is ready and willing, and hereby offers, to deliver the same to any person the court may direct; and that the suit is brought without collusion. It also appears that the receiver was made a defendant by leave of the court appointing him. Prays that the defendants interplead, and that their rights be determined in said fund. The defendants were severally enjoined pending the litigation. The receiver answered, setting up substantially the same facts alleged in the complaint, and demanding that the money in the plaintiff's hands be paid over to him as such receiver. Ames & Detrick also answered, claiming the amount of their judgment and costs out of said fund by virtue of their garnishment of the plaintiff and the judgment against Grant. The plaintiff, in reply to their answer, repeated in effect the same facts stated in the complaint. The cause being at issue a referee was appointed to take and report the testimony. Upon the final hearing the complaint was dismissed, from which plaintiff has appealed.

Wm. T. Muir, for Pope. Geo. H. Burnett & Geo. H. Durham, for Ames & Detrick. J. J. Shaw, for receiver.

STRAHAN, C. J., (*after stating the facts as above.*) Enough appears on the pleadings and papers accompanying them to show that the plaintiff is entitled to maintain this suit. The plaintiff is threatened with separate liabilities on claims which are substantially one and the same, which entitles such party to maintain the suit. By means of such suit, a plaintiff may compel two or more persons who severally claim the same thing, debt, or duty from the party liable therefor to litigate the title thereto between themselves, the party liable having incurred no independent liability to any of the claimants, and being merely in the position of a stakeholder, without interest in the matter himself. 11 Amer. & Eng. Enc. Law, 494, tit. "Interpleader," where the authorities are very fully and carefully collected. Ames & Detrick commenced their attachment proceedings long after the appointment of the receiver of Grant's property and assets. So far, then, as the right to the possession of this money is concerned, as between the receiver and Ames & Detrick it is one of priority. Ames & Detrick claim no right to this money, or any portion of it, except by virtue of their attachment and garnishment of the plaintiff. Those proceedings were taken long after McCully was appointed receiver. It is said in Beach on Receivers (section 200) that the

courts have now, as a rule, come to the conclusion that the title of a receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. The decree of the court below must therefore be reversed, and a decree be entered here that the plaintiff pay and deliver the money in question into the hands of the receiver, and that upon such payment he be exonerated from all claim or liability to either of the defendants on account thereof.

(20 Or. 192)

STATE V. WHEELER.

(Supreme Court of Oregon. Dec. 16, 1890.)

FORGERY—FICTITIOUS NAME.

The execution of a promissory note in the name of a fictitious person, or under an assumed name, with an intent to defraud, is forgery.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

L. Baker, for appellant. T. A. Stephens, Dist. Atty., for the State.

BEAN, J. The defendant was indicted, tried, and convicted of the crime of forgery, from which judgment he appeals. The indictment charges that on June 28, 1890, the defendant made and forged a promissory note for \$85.50, payable to John P. Fidock, or order, due 30 days after date, by then and there signing the name of John Williams to said note, with an intent to defraud and injure J. T. Milner. At the trial in the court below, after the evidence for the state was closed, defendant's counsel moved the court that the jury be instructed to render a verdict of not guilty, upon the ground that the evidence failed to prove the crime charged. The refusal of the court to give the instructions is the only error claimed on this appeal. An examination of this question renders it necessary to briefly state the evidence as given on the trial, which was as follows: On June 28, 1890, the defendant called at the office of J. T. Milner, in Mulkey's block, in the city of Portland, and represented to Mr. Milner that his name was John Williams, and applied for a loan of \$85.50, offering to secure the same by a chattel mortgage on a team of horses. He drove the team up in front of the office, and Mr. Milner looked at them, and agreed to make the loan. The note was drawn up by Milner, and the defendant signed the name of John Williams thereto, and Milner paid him the \$85.50 in money. When the note became due, the defendant did not call to pay it, and Milner wrote two letters to John Williams, calling on him to pay the note, one of which he directed to Albina. A Mr. John Williams, of Albina, responded to the letter sent him, but denied ever signing the note. That no part of the note has been paid, nor has defendant ever called at Milner's office, where the note was to be paid. That defendant was a stranger to Milner, and he supposed his true name was John Williams, and would not have made the loan had he known

otherwise. That defendant's true name is Edward Wheeler, as stated in the indictment, and not John Williams. The inquiry here is whether, under this state of facts, the defendant was properly convicted of the crime of forgery. "Forgery" is defined by Blackstone to be "the fraudulent making or alteration of a writing to the prejudice of another's rights." 4 Bl. Comm. 247. WILLES, J., in Reg. v. Epps, 4 Fost & F. 81, says: "'Forgery' consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document really in existence as it appears on the face of it, when in fact there is no such genuine document really in existence as it appears on the face of it to be." In State v. Wooderd, 20 Iowa, 541, DILLON, J., says: "The making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery." Mr. Bishop says: "'Forgery' is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Crim. Law, § 523. Section 1808, Hill's Code, provides that "if any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit \* \* \* any bill of exchange, promissory note, or evidence of debt, \* \* \* shall be punished in the penitentiary not less than 2 nor more than 20 years." From the definitions of "forgery" as above stated, as well as from the statute, it will be seen that the essential elements of the crime are (1) a false making of some instrument in writing; (2) a fraudulent intent; (3) an instrument apparently capable of effecting a fraud. That the first and third ingredients above stated appear in this case cannot be doubted. The note executed by defendant under the name of John Williams is certainly a false note. It is not what it purports on its face to be; is false, not genuine; fictitious, not a true writing. The falsity of the note consists in its purporting to be the note of some party other than the one actually making the signature. It purports to be a note of one John Williams, while the signature was made by the defendant, and, although the defendant represented that his name was John Williams, if he assumed that name for the purpose of defrauding, and under such a name executed the promissory note in this case with an intent to defraud Milner, such an act would constitute forgery. 2 Bish. Crim. Law, § 583. The law is well settled that the signing of a fictitious name to an instrument with a fraudulent intent constitutes forgery. 8 Amer. & Eng. Enc. Law, 457, and note; People v. Brown, 72 N. Y. 571; State v. Hahn, 38 La. Ann. 169; Luttrell v. State, 1 S. W. Rep. 886; 2 Whart. Crim. Law, § 1424; 2 Russ. Crimes, 733. As was said in Com. v. Costello, 120 Mass. 370: "The essential element of forgery consists in the intent when making the signature, or procuring it to be made, to pass it off fraudulently as the signature of another party than the one who actually makes it. If this intent thus to personate another exists, the instrument is still a forgery, even if the name

affixed is actually the same name with that borne by the party who signs it. So there may be forgery by the use of a fictitious name, as well as by the use of a person's own name, if the intent exists to commit a fraud by deception as to the identity of the person who uses the name."

In *Shepherd's Case*, 1 Leach, 226, the prisoner purchased some silver-ware of the prosecutor, giving in payment therefor a draft which he indorsed with the name "H. Turner, Esq.," his true name being Shepherd. The prosecutor testified that he gave credit to the prisoner, and not to the draft, the prisoner being a stranger to him. The jury found the prisoner guilty, and on a case reserved on the question whether, as the prosecutor had sworn that he gave credit to the prisoner and not to the draft, it could amount to the crime of forgery, the 12 judges were unanimously of the opinion that the conviction was right; for it was a "false instrument," not drawn by any such person as it purported to be, and the using of the fictitious name was only for the purpose of deceiving. So in *Whiley's Case*, 2 Leach, 983, stated by Mr. Russell in his work on Crimes, the prisoner was charged with forging a bill of exchange, drawn in the name of Samuel Milward, in payment for some goods by him purchased of the prosecutor. The prisoner's real name was Samuel Whiley, and he was a stranger to the prosecutor, who testified that he took the draft on the credit of the prisoner whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; but that, if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods, and have taken the draft from him, and paid him the balance, as he had done when he came under the name of Milward. It was left to the jury to say whether the prisoner had assumed the name Milward in the purchase of the goods, and giving the draft with intent to defraud the prosecutor; and the jury, saying they were so satisfied, found the prisoner guilty, and, upon a case reserved, the judges were of the opinion that, the question of fraud being so left to the jury, and found by them, the conviction was right. So where the person accepting the instrument knew the prisoner only by his assumed name, it appearing that it was assumed for the purpose of fraud. *Rex v. Francis*, Russ. & R. 209. So where the prisoner was unknown to the person in whom the instrument was passed, who had never heard of the name assumed, and would have trusted the prisoner just as readily by his real name. *Rex v. Marshall*, Id. 75. The authorities agree that forging in a false name, assumed for the purpose of concealment, and with an intent to defraud in the particular instance of the forgery, is sufficient to constitute the offense. But when a party signs a name not his own, but one which he has adopted, using it without the intent to

deceive as to the identity of the person signing, it is not a forgery. *Rex v. Bontein*, Id. 260; *Rex v. Peacock*, Id. 278. The question of intent is material in determining the guilt of the party charged, and the falsity of the instrument. It is the false making with an intent to defraud at which our statute is aimed. The term "falsely," as applied to making a promissory note, in order to constitute forgery, has reference not to the contract or tenor of the instrument, or the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the writing is false, not genuine; fictitious, not a true writing; without regard to the truth or falsehood of the statement it contains. The note must in itself be false, not genuine; a counterfeit, and not the true instrument which it purports to be. *State v. Young*, 46 N. H. 270. A person may falsely make a note, yet the note be true in point of fact; or he may make a note which is false in fact. It is the former, the falsely making of the note with the intent to defraud, which is the essential ingredient of the crime here charged. The falsely making of a note in the name of a person, as already shown, is forgery; so is the falsely making of a note under an assumed name. The defendant in this case made the note, and signed a fictitious or an assumed name. He therefore falsely made it, although the fact stated in the note may be true. But the false making, when it was passed to Milner as genuine, indicated an intent to defraud, and brought the offense within the statute. This must logically be so, unless there is something in the facts and circumstances which contradict the intent to injure or defraud. In the case of *Queen v. Martin*, 29 Moak, Eng. R. 154, relied on by defendant, the facts show that the prisoner, in drawing the check, did not do so in the name of, or as representing, any other person, real or fictitious. The check was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of 20 years' standing, and by whom he was seen to sign it. Here, while the prisoner falsely made the check, the circumstances show that it was not falsely made to defraud. The prosecutor relied upon, and gave the credit to, the prisoner, whom he well knew. But when the defendant is an entire stranger to the party to whom the note is passed, as in the case at bar, the credit is the note, for when is there any other element of credit which the party could be supposed to rely upon? Mr. Milner, in dealing with this defendant, and making the loan to him, relied upon the genuineness of the note as one step in the transaction, and a fair and legal inference from all the testimony is that defendant made the note with an intent to defraud, and thereby committed the crime of forgery. It follows, therefore, that the judgment of the court below must be affirmed.

(20 Or. 202)

## FRIENDLY V. LEE.

(Supreme Court of Oregon. Dec. 16, 1890.)

## DOCUMENTARY EVIDENCE—JUDGMENT NON OBSTANTE VEREDICTO.

1. While books of account kept by a party, or known by him to be correct, may be used by him as memoranda for the purpose of refreshing his memory, this question must be kept distinct from the question under what circumstances books of account, shown to have been correctly kept, are admissible as original evidence.

2. A witness will be permitted to refresh his memory by an examination of memoranda reasonably contemporaneous with the transaction to which they relate, regarding dates, figures, results of calculation, and the like.

3. Where the record discloses that, at the time the witness testified, he had, without even looking at the entry in his book, a distinct recollection of the essential fact stated therein, there was no necessity whatever of reading the entry to the jury, and there was no error in refusing it.

4. A judgment *non obstante veredicto* is always upon the merits, and is never granted but in a very clear case, as where it is apparent to the court from the defendant's own plea that he can have no merits.

(Syllabus by the Court.)

Appeal from circuit court, Benton county; R. S. BEAN, Judge.

This was an action to recover \$60. In substance, it arose out of this state of facts: The plaintiff alleges that on the 29th day of May, 1886, he borrowed of the defendant the sum of \$300 at the rate of 10 per cent. interest; that on the 28th day of November, 1887, he paid the plaintiff \$45 on the same; and that on the 7th day of September, 1889, there was due the sum of \$356.22; and that he paid the defendant the said sum of \$356.22, and, by mistake, in addition thereto, paid the defendant \$60; and that he has demanded the payment of the said sum of \$60, which the defendant refused to pay, etc. The defendant, by his answer, after denying the facts as alleged, avers that the said sum of \$300 for which the plaintiff gave his promissory note, with interest, etc., was borrowed on the 29th day of May, 1884, and not otherwise. All the other facts are admitted, and the right to recover the sum of \$60 sued for depends on whether it was borrowed on the 29th day of May, 1886, as alleged by the plaintiff, or on the 29th day of May, 1884, as claimed by the defendant. It appears by the bill of exceptions that the plaintiff testified, in substance, that he received the said sum of \$300 from the defendant on the date as alleged by him, and that it was the only money he had ever borrowed or had of the defendant, and offered in evidence what he called a "cash-book," which had been kept by him, and that the entries therein were made at the time they purport to have been, and that he knew they were correct; and in which book, on page 67 thereof, under date of May 29, 1886, there was an entry in the plaintiff's handwriting of \$300 cash received of the defendant, etc. The defendant objected to the introduction of the same, which the court sustained, except in so far that the witness might be allowed to refresh his memory therefrom, to which exception was taken; and this constitutes the main

ground relied upon to reverse the judgment.

J. W. Rayburn and John M. Somers, for plaintiff. J. R. Bryson and W. S. McFadden, for defendant.

LORD, J., (after stating the facts as above.) Upon this state of facts the only inquiry is, did the trial court err in refusing to permit the entry on the cash-book to be read to the jury as evidence? The issue was whether or not the plaintiff had received from the defendant the sum of \$300 on the 29th day of May, 1886. It was in support of that issue to which his testimony was directed, and the entry was offered as evidence. The record discloses that he had testified that the \$300 was received by him from the defendant on that date, and that it was the only money he had ever borrowed or had from the defendant; that, after testifying to these facts, he offered in evidence the page of his cash-book embracing the entry of the sum of money loaned, to show the date it bore was as he had alleged. Upon objection, the trial court, while excluding the entry as evidence, allowed it to be used for the purpose of refreshing the memory of the plaintiff, to enable him to testify to the fact of his own knowledge. The contention for the plaintiff is that the entry was admissible, but the law cited and relied upon to sustain it relates exclusively to the admission of the account-books of merchants and handicraftsmen in proof of the delivery of goods or the performance of work therein charged. Briefly, it may be said, at common law, the shop-books, or books of account, when the entries therein were made by a clerk, were received in evidence to prove the sale and delivery of the goods; but it was necessary to show that such books were kept for the purpose, and the entries to have been made contemporaneous with the delivery of the goods, and made by the person whose duty it was to make them. 1 Greenl. Ev. § 117, and notes. In this country the rule has been extended so as to admit the books when the entries therein have been made by the party himself; but there is not entire uniformity in regard to the admissibility of books of account in different jurisdictions, except that they all concur in requiring that the entries should be made in the regular course of business, and correctly kept, before they should be received in evidence. Id. § 118; Wood's Pr. Ev. §§ 139-145.

While, however, books of account kept by a party, or known by him to be correct, may be used by him as memoranda, for the purpose of refreshing his memory, this question must be kept distinct from the question under what circumstances books of account, shown to have been correctly kept, are admissible as original evidence. In the case of shop-books, or books of accounts, the entries made therein are admitted to prove the sale and delivery of the goods, or the payment of money, or the performance of work, as the case may be. In the case at bar, no such purpose was contemplated. The entry in the cash-book was not offered to prove the payment of the sum bor-

rowed, for that had already been made, but to prove the date when the money was received, so as to ascertain whether there had not been two years' interest paid more than the transaction authorized. As evidence *ipso facto*, the entry was excluded, but, as a memorandum made contemporaneous with the transaction, the witness was permitted to refresh his memory by an examination of it, and, when his memory was thus refreshed, to testify to the fact of the date of his own knowledge. In *Best on Evidence*, note to section 224, it is said that a witness will be permitted to refresh his memory by an examination of memoranda reasonably contemporaneous with the transactions to which they relate, regarding dates, figures, results of calculation, and the like, whether such memoranda be made by the party himself or by any other person. The admissibility, then, of the entry in the cash-book, to show the date of the transaction, is not to be determined by the legal theory upon which book-accounts, shown to be correct, are admissible as original evidence, but whether, upon the facts, the memorandum made at the time of the transaction in the cash-book was admissible in evidence in connection with the testimony of the plaintiff. That a witness may refer to a memorandum made by him to refresh his memory is a familiar principle. Our Code provides that "a witness is allowed to refresh his memory respecting a fact, by any thing written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in either case the writing must be produced, and may be inspected by the adverse party, who may, if he choose, cross-examine the witness upon it, and read it to the jury. So, also, a witness may testify from such writing, though he retain no recollection of the particular facts, but such evidence shall be received with caution." *Hill, Code, § 836*. Lord *ELLENBOROUGH* said that "it is not the memorandum which is evidence, but the recollection of the witness." *Henry v. Lee*, 2 Chit. 124. And in *Com. v. Jeffs*, 132 Mass. 6, *ENDICOTT, J.*, said: "We are not aware of any case where it has been held that the memorandum could be put in evidence simply because it refreshed the memory of the witness. *Com. v. Ford*, 130 Mass. 64. In that case, and in many of the cases cited therein, it is stated that the memorandum *per se* cannot be used in evidence." In *Field v. Thompson*, 119 Mass. 151, it was held that the memorandum was not competent, and that it could not be put in evidence in confirmation of the recollection of the witness. *Rap. Wit. §§ 280, 284*. Be that as it may, the memorandum itself is not admissible in evidence, except in cases where the witness, at the testifying, has no recollection of what took place further than he accurately reduced the whole transaction to writing. 1 *Greenl. Ev. § 437*; *Wood, Pr. Ev. § 134*. As indispensable to the admission of such testimony, there must be proof that the wit-

ness who made the memorandum had no recollection of the matters stated therein, independent of the written paper. When he has such recollection, the evidence is inadmissible. In *Howard v. McDonough*, 77 N. Y. 593, the court laid down the rule as to the use of memoranda as follows: "(1) A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and, when the memory has been refreshed, he must testify to the facts of his own knowledge, the memorandum itself not being evidence. (2) When a witness has so far forgotten the facts that he cannot recall them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum in his own handwriting may be received as evidence of the facts therein contained, although the witness has no present recollection of them." The rule was thus stated by *CLOPTON, J.*, in *Jaques v. Horton*, 76 Ala. 243: "If the witness, after examining the memorandum, cannot state the facts from independent recollection, but can testify that he knew the contents of the memorandum at or about the time it was made, and knew them to be true, the memorandum and the testimony of the witness are admissible. In other words, the entries or memoranda of transactions made by a witness are admissible only when the memory of the witness is at fault." *Thomp. Trials, § 402, subd. 4*, and note of authorities.

Now, the record of this case discloses that the plaintiff was able to testify directly to the date when he borrowed the money from the defendant of his own personal knowledge, clearly indicating that he did not need the aid of the entry in the cash-book to refresh his recollection of the transaction. His memory of the matter had not become more or less obscure, requiring the aid of the entry to refresh it so as to enable him to testify from his own personal recollection. He had already done that without its aid, and the only purpose the entry could serve was to confirm his statements. He testified that the \$300 was received on the date alleged by him, and that it was the only money that he had ever borrowed or had of the defendant. There was but the single transaction, and his memory was not at fault either in respect to the amount or the date when he borrowed it. These facts plainly show that he did not desire to use the entry for this purpose, but as original evidence of entries made by himself to corroborate his own testimony. In *Weaver v. Bromley*, 65 Mich. 214, 31 N. W. Rep. 839, the court say: "The memorandum should not have been admitted in evidence. The witness had a clear recollection of the date upon which he received the notice, and did not desire or need the memorandum to refresh his recollection, and it was not used or offered for that purpose. It was introduced and received as original evidence in corroboration of his own statement. It was evidence made by himself in corroboration of himself. It was no

more admissible than would have been the oral statement to the same effect made on that day to a third party." The reason for the exclusion of such entries, except when the witness is unable to recollect such facts, is thus stated in *Bank v. Madden*, 114 N. Y. 285, 21 N. E. Rep. 408: "The rule which renders such entries admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which they relate. The primary common-law proof is then furnished, and the necessity for evidence of the lesser degree does not arise. And this right, so qualified, to introduce such secondary evidence, is the better rule, in view of the opportunities which might otherwise exist, to superadd a written memorandum to the evidence of a witness, which it cannot be said might sometimes be improperly made available to strengthen his testimony with the court or jury; and such may be within the reasonable apprehension until the moral infirmity of human nature becomes exceptionally less than it yet has." And finally, to conclude in the language of Mr. Justice HARLAN in *Railroad Co. v. O'Brien*, 119 U. S. 102, 7 Sup. Ct. Rep. 118, "the present case does not require us to enter upon an examination of the numerous authorities upon this general subject, for it does not appear here but that, at the time the witness testified, he had, without even looking at his written statement, a clear, distinct recollection of essential fact stated in it. If he had such present recollection, there was no necessity whatever of reading that paper to the jury, and there was no error."

The next objection is to the refusal of the trial court to grant a motion for the sum alleged upon the ground that the answer set up no valid defense. But this is not wholly true, for the defense set up is valid as far as it goes, and shows that the plaintiff has not overpaid him the sum alleged, but only the sum of three dollars and five cents. It is true that a judgment *non obstante veredicto* is always upon the merits, and is never granted but in a very clear case, as where it is apparent to the court from the defendant's own plea that he can have no merits. 2 Tidd's Pr. 922. It is also true that nothing short of an intentional confession will furnish a ground for such judgment, as it can never be rendered on the confession implied upon a pleading from not answering traversable matter; but here the defendant, by his own answer, directly admits that he has been overpaid the sum of three dollars and five cents, and, as a consequence, that the plaintiff is entitled to recover that sum. The judgment therefore must be reversed, and the case remanded, with directions to enter judgment for the plaintiff for that amount.

(20 Or. 168)

WILLS v. LEVERICH et al.

(Supreme Court of Oregon. Dec. 8, 1890.)

DESCRIPTION IN DEED—EVIDENCE TO EXPLAIN.

Where the description in a deed is not clear and intelligible, the situation of the parties, and the circumstances surrounding the trans-

action, may be considered in connection with its provisions to ascertain the intention, and give it practical effect.

(Syllabus by the Court.)

Appeal from circuit court, Linn county; R. P. Boise, Judge.

J. K. Weatherford, for appellant. J. C. Powell, for respondents.

LORD, J. This is a suit in equity, brought by the plaintiff against the defendants, for an injunction requiring the defendants to remove all the obstructions placed by them, or either of them, upon a certain tract of land therein described, and that they and each of them be perpetually enjoined from interfering with, or placing obstructions upon, said land. The complaint, in substance, alleges that the plaintiff is the owner of a tract of land, describing it, and that he used it for a road-way for himself and the public going to and from his farm, and that he is entitled to the whole thereof; that the defendants have erected a warehouse thereon for the storage of grain, and are threatening to store therein large quantities of grain, and other obstructions, by building platforms, etc.; and that they threaten to further obstruct by piling large quantities of wood thereon, etc. The answer of the defendant Leverich denies specifically all the allegations, and alleges as a separate defense that he is the owner of the strip of land as described, and that the plaintiff is the owner of a right of way for a road over the strip of land, and that he has no other right or title to said strip of land whatever, etc. The reply puts in issue these facts, and, after the issues were thus joined, the case was referred to Hon. D. R. N. Blackburn, as referee, to take the evidence, and report his findings of fact and conclusions of law to the court. The referee made the following findings: "That the plaintiff is the owner of a right of way beginning at the south-west corner of the donation land claim of John McCoy and wife, T. 10 S., R. 4 west, in Linn county, Oregon, and extending down the Willamette river, along the bank thereof, to the north-west corner of the same, or so far as the land of F. D. Leverich extends down said river; (2) that said right of way is only forty feet wide; (3) that the wood-dock, wood-yard, and pig-pen of said defendant Leverich are not on said right of way, and do not interfere with the travel thereon; (4) that the warehouse of the said P. W. Haley is in said right of way, and does obstruct the travel on the same." And, as conclusions of law, finds "that plaintiff's bill should be dismissed as to defendant Leverich, and that said Leverich recover his costs and disbursements; (2) that, as to the defendant P. W. Haley, the plaintiff is entitled to the relief sought in his complaint,—a mandatory injunction for the removal of said warehouse from said right of way, etc., judgment for his costs, and disbursements to be taxed." The plaintiff, by his counsel, moved to set aside the report as to the defendant Leverich, and the defendant Leverich, by his counsel, moved to confirm the report, and the court, after being duly advised, ordered that the report of the



referee, as to said Leverich, be confirmed.

The plaintiff's claim of title is deraigned, through a deed from Leverich and wife to Henry Stumberg, and from Henry Stumberg and wife to the plaintiff. Those deeds describe the tract in dispute as follows: "A strip of land forty feet wide along the bank of the Willamette river, beginning at the south-west corner of the donation land claim of John McCoy and wife in T. 10 S., R. 4 W., of Willamette meridian, etc., and extending down said river to the north-west corner of said claim, or as far as the land of F. D. Leverich extends down said river; to have and to hold for the purpose of a road or right of way unto the said E. Wills, his heirs and assigns, forever." This 40-foot strip of land is described as a tract of land 40 feet wide, along the bank of the river; but the east and west lines are not designated, so that it is uncertain where the west line of the strip is, unless it be placed on top of the bank of the river, which the evidence indicates is the high-water mark. The way to get at what the parties intended by this deed is "to place ourselves," as Mr. Justice SANDERSON said, "in the seats which were occupied by the parties at the time the instrument was executed, then, taking it by the four corners, read it." *Walsh v. Hill*, 38 Cal. 487. This rule requires a consideration of all the provisions of the deed, as well as the situation of the parties, in order to ascertain their intention, and give it practical effect. The evidence indicates that the land now occupied and owned by the plaintiff and the defendant Leverich was once owned in common by the defendant Leverich and Stumberg, and that they agreed to divide the same, and that a surveyor was employed to divide the land equally as to the number of acres, but that, after the land was surveyed and platted, the south half was considered more valuable than the north half, so that it was agreed that the defendant Leverich should take the south half, and Stumberg the north half, and that the defendant pay Stumberg \$125, and give him a deed for a road or a right of way over the south half, along the bank of the Willamette river, and that pursuant to this arrangement, deeds were made, one of which is the deed in evidence from the defendant and wife to Stumberg for a road or a right of way along the bank of said river; that afterwards Stumberg sold the north half to the plaintiff, and thereafter made the deed in evidence to the plaintiff for the strip of land in controversy, for the purposes specified; that, soon after Stumberg and the defendant had effected their deal as to the lands held in common by them, the defendant began improving his river front, and erected a wood-dock and steam-boat landing. It appears also at the time the plaintiff obtained his deed from Stumberg for the north half of said land, and at the time, and long before, he obtained his deed from him for the strip of land in controversy, for the purposes of a road or right of way, that the defendant had made the improvement referred to, and was using the same for the purpose of selling and delivering wood, and shipping grain, and other farm products,

by boats on the Willamette river. The evidence, too, discloses that he used such right of way before he obtained the deed from Stumberg to the strip, and that he used the warehouse built by the defendant for the purposes specified in common with others. Regarding the situation of the parties in the light of surrounding circumstances, it is plain that there was not any intention, other than for the purposes of a right of way, to convey the strip of land in dispute in fee, either to Stumberg, or by Stumberg to the plaintiff. The whole arrangement, all the acts of the parties at the time and subsequent, in dealing and using such strip of land, is only consistent with the purpose. It shows moreover that their mutual convenience, the business in which the defendant was engaged, and the necessity of preserving access to the river as well as the purposes to be subserved by each, was well understood, and that no more land, or for any other purpose than a right of way, was intended to be conveyed, or that the plaintiff could have understood otherwise. His own explanations and statements are only consistent with this view. More, if the strip of land be located along the bank, as the plaintiff claims, it is so steep and declivitous as to render the construction of a road nearly impossible without great expense and labor, and would, in effect, render the deed inoperative; and what is more, it would locate the road not where it is, and understood to be, but where, under the circumstances, it would seem improbable that it was ever intended to be located. But, looking at the deed in view of the situation of these parties, and in the light of the surrounding circumstances and the subject-matter in regard to which the description applies, the intention is plain. It locates the west line on top of the bank, and then goes east for the other line 40 feet, and establishes the right of way where it now is, and has been used. It makes the terms used in the description, which of themselves are not clear, intelligible, and consistent with the rest of the deed. And, where such uncertainty exists in a description, it is competent to show the practical construction which the parties gave to the description of the strip of land in question by their acts, and their treatment of the property, in order to show what was the true line intended to be established by them; so that, if we consider the provisions of the deed in connection with the circumstances of the transaction, and the situation of the parties, and the subject-matter to which they are to be applied, it gives a definite sense and meaning to the language used in the deed, makes it consistent and operative for the purpose specified, and indicates plainly what the parties intended and meant. In this view, it results that the decree must be affirmed.

(87 Cal. 296)

CONKLING v. PACIFIC IMP. CO. (No. 13,872.)  
(*Supreme Court of California*. Dec. 30, 1890.)

RIPARIAN RIGHTS—DIVERSION OF WATER—IN-  
JUNCTION.

1. Under Code Civil Proc. Cal. § 1923, which makes a certificate of purchase of lands, issued

under the laws of the United States, primary evidence of title in the holder, a receipt for the purchase money, issued by the receiver of a United States land-office to an occupant of public lands bordering on a stream, is sufficient *prima facie* evidence of title in the latter to enable him to maintain an action to enjoin an upper riparian proprietor from unlawfully diverting the waters of the stream; and his complaint, which alleges the issuance to him of the receiver's receipt, is not demurrable for its failure to allege that the land is subject to pre-emption, or that plaintiff is a qualified pre-emptor.

2. A grant of the right to divert the waters of a stream, made by a pre-emptor of public lands bordering thereon, is rendered worthless by the latter's abandonment of his claim before procuring a receiver's receipt for the land.

3. The fact that the grantor of the water-right was induced to abandon his claim by the payment of money from plaintiff, and that the latter thereupon entered on the land, does not make his entry fraudulent or illegal as against the grantees of the water-right.

4. The fact that the amended complaint prayed only for an injunction against defendant's threatened diversion of the water, and that at the time of its filing defendant had already begun to do so, will not prevent the issuance of an injunction against the continued wrongful diversion.

5. Where the diversion of the water is wrongful, it is not necessary for plaintiff to prove damages to entitle him to an injunction.

6. Where defendant has a right to divert the water to the full capacity of a  $1\frac{1}{2}$ -inch pipe, he is not injured by an injunction restraining him from using a 6-inch pipe if the  $1\frac{1}{2}$ -inch pipe takes all the water of the stream.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

A. B. Hotchkiss, for appellant. W. C. Stratton, for respondent.

WORKS, J. This action was brought by the respondent against the appellant to enjoin the latter from diverting water from a certain natural stream in the county of Santa Barbara. The defendant owned two tracts of land on the stream. Between these two tracts the plaintiff was in possession of a tract of land, claiming the same as a pre-emptor from the government, and for which he held a receiver's receipt. The court below found for the plaintiff, and enjoined the defendant from diverting and using the water as prayed for in the complaint. No motion for a new trial was made, but the bill of exceptions was filed within 60 days, and specifications are made and errors of law assigned therein. Counsel for appellant makes numerous points in his brief, which we will attempt to notice in their order.

The first point made is that the court below erred in overruling the defendant's demurrer to the amended complaint. The objection made to the complaint is that it does not show that the plaintiff was, at the time the action was brought, or at the time the water was diverted from the stream, the owner of the land, or that the land was subject to pre-emption, or that he was a qualified pre-emptor. The allegations of the complaint, so far as it affects this question, are as follows: "That the plaintiff is and was on the 1st day of October, 1888, the owner of that certain tract of land situate in the county of Santa Barbara, state of California, to-wit:

\* \* \* And he now is, and has been since the month of May, 1887, in the actual possession and occupancy of said land; that, in the month of May, said land was public land of the United States open to settlement, and plaintiff, who was twenty-one years old, and a citizen of the United States, did, in said month, settle upon said land, with the intention of pre-empting the same, and acquiring title thereto, and on the 19th day of May, 1887, he filed his declaratory statement in the United States land-office of the district in which said land is situated, claiming said land under the pre-emption laws, and, on the 14th day of September, 1888, he paid for said land, and received from the receiver of the said land-office his receipt for said payment." These averments are not sufficient to show a compliance with the law relating to pre-emption settlements upon and purchase of government lands. Rev. St. §§ 2259, 2264; Quinn v. Kenyon, 38 Cal. 501; Page v. Hobbs, 27 Cal. 486. But it is contended by the respondent that no allegation of facts necessary to show that the lands were subject to pre-emption, or that the respondent was a qualified pre-emptor, and took the steps necessary to acquire the title from the government, is necessary in a case of this kind; that it was enough to allege that he was the holder of the receiver's receipt, and in possession thereunder. In this contention we must hold with the respondent. This is not a case involving title to the land in which each of the parties is claiming through the government. The appellant makes no claim of title to the land, nor is it shown to be in privity with the paramount source of title, or in the position, for any reason, to question the legality of the respondent's holding, except by an affirmative showing against the *prima facie* case made by the receipt. In such a case, it is sufficient for the occupant of the land to allege and prove the receiver's receipt, which is *prima facie* evidence, in a case of this kind, that he is rightfully in possession. Code Civil Proc. § 1925; Figg v. Handley, 52 Cal. 244; Conlan v. Quinby, 51 Cal. 413. And being so in possession as a pre-emptor, and having complied with the requirements of the statute, which is shown, as we have said, by the receiver's receipt, he had become a riparian owner upon the stream, and, as such, entitled to protect himself against any unlawful diversion of the waters therefrom. Pom. Rip. Rights, §§ 35, 36. There are other objections urged to the complaint, but none of them are well taken. The demurrer to the amended complaint was properly overruled.

A demurrer was sustained to the second defense set up in the defendant's answer, and this is claimed to have been an error. It is alleged in this defense that one Bush entered upon the lands claimed by the plaintiff in this action as a pre-emptor, and filed his declaratory statement in the land-office, and that, while so in pos-  
 session

<sup>1</sup> Code Civil Proc. Cal. § 1925, provides that a certificate of purchase of lands, issued in pursuance of any law of the United States, is primary evidence that the holder of such certificate is the owner of the land described therein.

sion of the lands, said Bush granted to one Underhill the right to construct and maintain a pipe-line over said lands, together with the right to use and divert the waters flowing in said creek; that Underhill conveyed this right to the defendant; that defendant had entered into the occupation of said lands for its said business of water supply, had laid its pipes, at great cost and expense, in such manner as that plaintiff must have had notice of the fact; that plaintiff made his so-called "settlement" with full notice of defendant's claims, rights, appropriations, and expenditures; that Bush relinquished to the United States his claim as a pre-emptor by filing the declaration to that effect, and the lands thereby reverted to the United States, subject to the defendant's occupation for the purposes aforesaid, and were not thereafter subject to any further rights of pre-emption. It is further alleged that the plaintiff entered upon the lands not in good faith as a pre-emptor, but for the purpose of obtaining a technical advantage of defendant, and thereby compelling it to buy his claim, and secretly, and without notice to the defendant, procured the officers of the land department to issue to him a receipt for payment for said lands; that no patent had issued to the plaintiff, and the defendant had protested against the issuance of any such patent; and that the expenditures made by the plaintiff in improving the land were made in bad faith. We are unable to see anything in this pleading which can amount to a defense to the plaintiff's cause of action. It is earnestly contended by the counsel for appellant that the plaintiff obtained no rights in the water flowing through the land by entering upon the land, making payment therefor, and procuring the receiver's receipt, and yet, in support of this answer, he contends that Bush obtained such a right by merely entering upon the land and filing his declaratory statement, without making payment, or receiving a receipt; that by his deed his right passed to Underhill, and from Underhill to the defendant; and that the abandonment of his right of pre-emption by Bush not only did not defeat the defendant's right to divert the water obtained through him, but actually confirmed it, and shut off all other persons from entering upon and acquiring title to the land. The statement of such a proposition is sufficient to refute it. Bush had no right in the water to convey; but, if he had, it was lost by his subsequent abandonment of his claim, and the right, in the hands of the defendant, was no better than if it had remained in Bush. The allegations tending to show that the entry of the plaintiff was made to defraud and take advantage of the defendant add nothing to the pleading. The defendant had no rights in the land, or the water, as appurtenant to the land, and could not, therefore, be defrauded by the plaintiff's entry. There was no error in sustaining the demurrer to this defense. There was no error in refusing to strike out the amended complaint on the defendant's motion.

The appellant contends that the court  
v.25p.no.7—26

below erred in certain rulings upon the evidence. The ground of this contention seems to be that the entry of the respondent upon the land as a pre-emptor was fraudulent and invalid, because it appeared that he had bought the claim of Bush to pre-empt the land, and Bush had abandoned his claim, and the plaintiff had thereupon entered thereon. But the answer to this is that the plaintiff is not claiming under the entry of Bush, but under his own entry, after that of Bush had been abandoned. The fact that Bush had been induced to abandon his claim by the payment of money did not prevent the plaintiff from entering upon and acquiring title to the land. Bush having abandoned his claim in the manner provided by law, the land was open to entry by the plaintiff or any one else, and the entry was not fraudulent or illegal because of Bush's priority and abandonment of his claim. The same contention is made the ground of objection to the introduction of the receiver's receipt, and for the same reasons the objection was properly overruled.

It is insisted by the appellant that the findings of the court do not support the judgment, and are not sustained by the evidence. Both of the parties to this action were riparian owners on the stream, the waters of which are in controversy, and each also claimed to be prior appropriators of such waters, or a part of them. The court below found that the plaintiff was the owner of the land claimed by him; that the same was public land; that he settled upon the same as a pre-emptor, filed his declaratory statement as such, made proof and payment on September 14, 1886, obtained a receiver's duplicate receipt, has ever since occupied and cultivated the lands, and made improvements thereon to the value of \$15,000; that the land lies on both sides of the natural stream known as the "Loma Abaja Creek," and, at the time the plaintiff obtained his receipt, the defendant had appropriated and was diverting a portion of the waters of said creek by means of a 1½-inch pipe, which was not of sufficient capacity to divert all of the waters of the creek, and a part thereof ran down to plaintiff's land; that, when plaintiff settled upon the land, he commenced to use the waters of the creek for domestic and other purposes, and, on the 5th day of August, 1867, he appropriated a portion of the waters of the creek, and diverted the same by means of a 2½-inch pipe, and used the same for irrigation and other purposes, and has so used the same continuously since that time; that the defendant intends to divert all of the waters of said creek from its natural channel by means of a 6-inch pipe at a point thereon above plaintiff's land to a point below the same, and deprive the plaintiff of the use thereof, and that such diversion would render plaintiff's land, and the improvements thereon, of little or no value, and will be of great and irreparable damage to him; and that neither the defendant nor its grantors or predecessors have ever occupied any part of the lands claimed by the plaintiff for any purpose. As to the de-

defendant's right to divert and use the water of the stream, the court found as follows: "That, on the 13th day of August, 1887, A. S. Cooper posted a written notice at a point on said creek above plaintiff's land, claiming the water flowing in said creek to the extent of fifteen inches, measured under a four-inch pressure, which notice was within ten days duly recorded in the office of the recorder of the county of Santa Barbara. That, after the posting and recording of said notice, said Cooper conveyed all of his rights and interests in the waters of said creek to defendant. But said Cooper did not actually divert or use said water for any purpose, and his appropriation was made for the purpose of speculation only, and he did not within sixty days after the posting of his notice commence the excavation or construction of any works in which he intended to divert the water. The defendant, after Cooper's sale to it, which was more than sixty days after he posted his notice, did commence the excavation and construction of works in which he intended to divert the water. That the plaintiff did not post any notice of his intention to appropriate any of the waters of said creek, but he had actually appropriated and diverted the water as set forth in the third finding, and was using it for domestic purposes and irrigation at and before the time when said Cooper posted his appropriation notice. That, on the 13th day of March, 1885, Alexander B. Todd posted a written notice at a point on said creek above plaintiff's land, claiming the water flowing in said creek to the extent of twelve inches, measured under a four-inch pressure, which notice was duly recorded; and he stated in said notice that he intended to divert said water by means of one ten and one-half inch iron pipe, and one one and one-half inch iron pipe, and said Todd did divert water from said creek through a one and one-half inch iron pipe, which pipe is the one mentioned in the second finding. That the defendant is the successor in interest of said Todd. But no actual appropriation or diversion of any water has been made under the said Todd notice, except as to the said one and one-half inch pipe, and no steps have been taken to divert any water under said notice other than as to said pipe, and neither said Todd nor his successors in interest began or prosecuted with diligence the excavation or construction of the works in which it was intended to divert any water from said creek under said notice, except as to said one and one-half inch pipe. And the plaintiff had actually appropriated, diverted, and used the waters of the Loma Abaja creek, as set forth in the third finding, before the defendant, or its grantors, or predecessors in interest, had commenced the excavation or construction of any works in which it was intended to divert any water from said creek, other than through said one and one-half inch pipe. That the defendant is the owner of sections five and six, T. 4 N., R. 27 W., S. B. M., but the said land is below the land of plaintiff's land, and said Loma Abaja creek flows through plaintiff's land before reaching the said land of defendant." As

a conclusion of law from these findings, the court found: "That the plaintiff is entitled to have the said creek flow in its natural channel down to his said land, less the portion thereof diverted by means of a one and one-half inch iron pipe, and that he is entitled to the relief prayed for in his complaint, and it is ordered that judgment be entered accordingly." The court thereupon entered judgment enjoining the defendant from diverting any of the waters of the stream, except that which might be diverted by means of the 1½-inch pipe. These findings were clearly sufficient to sustain the judgment, and after a careful examination of the record we are satisfied that the findings are supported by the evidence.

It is earnestly contended by the counsel for the appellant that the evidence fails to show that at the time the amended complaint was filed the defendant was threatened to divert the waters of the stream; but that, on the contrary, the diversion by the 6-inch pipe was complete, and for that reason injunction could not properly issue. But, conceding that the 6-inch pipe had been put in, and the diversion of the water had taken place at the time that the amended complaint was filed, or at the time the action was commenced, which was the material question, and conceding that the diversion had actually taken place, the act of carrying the water away from its natural channel, if wrongful, was a continuous act against which an injunction might issue. *Moore v. Water-Works*, 68 Cal. 146, 8 Pac. Rep. 816. The continued diversion of the water was the material thing to be enjoined, and not the putting in of the pipe.

It is further insisted that the evidence fails to show that the plaintiff had been or would be damaged by the diversion of the water. We think otherwise; but, if it appeared that the diversion was wrongful, it was not necessary for the plaintiff to prove damages to entitle him to an injunction. *Moore v. Water-Works*, supra, 150.

Again, it is claimed that the plaintiff conceded the defendant's prior right to divert the waters of the stream to the capacity of its 1½-inch pipe, but averred that such pipe was not sufficient to divert all of the waters of the stream; that this averment was denied, and was not supported by the evidence. We think the evidence does show that the 1½-inch pipe would not carry all of the waters of the stream. If it would, it was at least a little remarkable that the defendant should go to the expense of putting in another and much larger pipe to divert water that was not there; and, besides, this claim is hardly consistent with the contention above noticed, that the defendant was, at the time the amended complaint was filed, actually carrying off water with this 6-inch pipe. But this, it seems to us, is not very material. The defendant was not enjoined from diverting the water to the full capacity of the 1½-inch pipe. If this left no other water to divert, the defendant was not injured by the injunction, and has no reason to complain, except it might be as to the costs.

It is contended further that the laches

and acquiescence of the plaintiff, in allowing the defendant to proceed with its improvements, was sufficient to defeat his right to an injunction. But we see nothing in the evidence to support this position.

It is further insisted that the rights of the appellant could not be forfeited by a proceeding of this kind. But this is not an attempt to forfeit any right the appellant had, but to show that it never had any rights. There are other objections to the findings that need not be particularly noticed. There is no error in the record.

Judgment affirmed.

We concur: DEHAVEN, J.; PATERSON, J.

(37 Cal. 209)

FORD *et al.* v. CUNNINGHAM *et al.* (No. 12,044.)

Supreme Court of California. Dec. 20, 1890.)

CONTENTS OF LETTER—SECONDARY EVIDENCE—BOOKS OF ACCOUNT.

1. One of the plaintiffs having stated that he had no personal knowledge that certain communications addressed to defendants were mailed except that copies thereof appeared in plaintiffs' copy-book, and that it was a general custom of their firm to place letters in a box in the store from which they were taken to the post-office, there was no foundation laid for the introduction of secondary evidence as to the contents.

2. If secondary evidence were admissible, the press copies would be the best evidence.

3. One of the defendants having identified their ledger showing their account with plaintiffs, and having stated that it showed the true state of the account between them, and that the items had been entered by him at the time of the several transactions, and it being admitted by plaintiffs that the entries were original entries, it was error to exclude it though it did not contain the item sued for by plaintiffs.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

J. M. Lesser, Spalsbury & Burke, and Garber, Boalt & Bishop, for appellants. A. S. Kittridge, for respondents.

PER CURIAM. The only question litigated in the court below was whether the barley was sold by the plaintiffs to the defendant Cunningham, or to the firm of Cunningham & Co., of which he was a member. The appellants contend that the evidence is insufficient to support the findings, but we think there was sufficient evidence on behalf of the defendants to create a substantial conflict, and under the well-established rule we should not interfere with the findings of fact.

The plaintiffs, to establish their case against the copartnership, relied mainly on documentary evidence, some of which they claimed was in possession of the defendants, who were asked at the trial to produce the same. Mr. Morey, one of the plaintiffs, was permitted by the court to state the contents of certain bills and letters which he claimed had been addressed and sent to Cunningham & Co. Objection was made by the defendants to the introduction of oral testimony as to the contents of the bills and letters, and the objection was overruled. We think the court erred in its ruling. The witness stated that he had no personal knowledge

that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in the plaintiffs' copy-book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the post-office. No foundation, therefore, was laid for the introduction of the evidence. Assuming that secondary evidence could under such circumstances be introduced, the press copies were the best evidence next to the originals themselves. The ruling was on a material matter, because the defendants testified that they never received the communications referred to. *Brallsford v. Williams*, 74 Amer. Dec. 562.

Mr. Middleton, one of the defendants, was called as a witness, and identified the ledger of the copartnership, showing the account of Ford & Co. with Cunningham & Co. from September 1, 1884, to the date of trial. It was admitted by the plaintiffs that the entries therein were original entries, but they objected to the introduction of the same as evidence on the ground that it was irrelevant, immaterial, and incompetent. The objection was sustained by the court, to which ruling the defendants excepted. There was no item of barley in the account offered. The ruling, we think, was error. The witness had stated that the ledger showed the true state of account between plaintiffs and defendants, and that the items had been entered by him at the time of the several transactions therein mentioned. *Landis v. Turner*, 14 Cal. 573. Judgment and order reversed, and cause remanded for a new trial.

KAHN v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 11,765.)

(Supreme Court of California. Dec. 22, 1890.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—MANDAMUS.

1. Act Cal. April 1, 1872, (St. 1871-72, p. 911,) passed to establish a street in San Francisco, provided (section 5) that, on petition to the mayor by the owners of a majority in frontage of the property described in such act, "as said owners are or shall be named in the last preceding annual assessment roll for the state, city, and county taxes," for the opening of said street, the board constituted by the act to carry it into effect should proceed. *Held*, that the signatures to the petition of persons other than those to whom the property was assessed on the last preceding assessment roll could not be counted in order to make up the owners of a majority of the frontage.

2. Nor could the signatures of executors, administrators, and agents be counted, in the absence of evidence of their authority to sign the petition.

3. Nor could the signature of a homestead and railroad corporation, made by its president and secretary, be counted, in the absence of evidence that such officers were authorized to affix the signature, or that that duty appertained to their offices.

4. On application, by a holder of bonds issued for improvements made under the act, for *mandamus* to compel the city to levy a tax for the payment of the bonds, the facts that, on presentation of the petition to the mayor, he certified that it was signed by the requisite property owners, and that the county court affirmed the report of the board of the proceedings taken by it under

the petition, do not esop the city to deny the sufficiency of the petition.

**Affirming 21 Pac. Rep. 849.**

In bank. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

*D. M. Delmas*, for appellant. *George Flournoy, Jr.*, City and County Atty., and *Philip A. Galpin*, for respondent.

**PER CURIAM.** The questions arising herein (which is a motion for a new trial by Kahn) have been fully considered and passed on in this case, the opinion in which will be found in 79 Cal. 392, 21 Pac. Rep. 849. Conceding that the signature of the North San Francisco Homestead & Railroad Association, by its president and secretary, was authorized by the proper corporate authority, the petition would still fail of having the majority required. We see no reason to disturb the rulings formerly made in this case. The motion for a new trial is denied.

13 Cal. Unrep. 351)

**WINDHAUS v. BOOTZ et al.** (No. 12,991.)  
(*Supreme Court of California*. Dec. 30, 1890.)

**FRAUDULENT CONVEYANCES—GIFTS—WHO MAY SET ASIDE.**

1. The transfer of a debt by a creditor to a third person, to whom the debtor afterwards makes a part payment, and executes a note for the balance, constitutes the transferee the "successor in interest" of the creditor, within the meaning of Civil Code Cal. § 8439, which renders all conveyances by a debtor, made with the intent of defrauding any creditor, void as against all creditors and their "successors in interest."

2. A gift of land by a father to his son is not void as against creditors of the father, unless the latter had not, at the time of the gift, sufficient property subject to execution to satisfy his debts.

3. The return of an execution *nulla bona* five years after the making of the gift is not sufficient to establish the father's insolvency when the gift was made.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

*F. J. Castlehun*, for appellant. *H. H. Lowenthal*, for respondents.

**WORKS, J.** This was a suit by a judgment creditor to have declared fraudulent and void certain transfers of real property by the defendant Adam Bootz to his wife and children. The trial court gave judgment for the defendants, and the plaintiff appeals.

The court found that there was no fraudulent intent, and that the grantor was solvent and able to pay his debts at the time the deeds were made. Whether this finding was sustained by the evidence or not is the only question necessary to examine.

It was admitted at the trial that the deeds were deeds of gift; and the evidence shows, without conflict, that at the time of their execution the donor was indebted to one Severin in the sum of \$1,000. Subsequently Severin became in need of money, and borrowed \$1,000 from the plaintiff, and it was agreed between the parties that the indebtedness of the donor to Severin should be transferred to the plaintiff, and that due from Severin to the plaintiff

Rehearing granted.

should be released. This was done, but, instead of the old note being transferred to the plaintiff, the donor made a payment to her of \$200, and gave a new note for the balance, viz., \$800. The form of the indebtedness was changed, and the amount was reduced, but, in substance, it was a continuation of the old debt; and, in our opinion, the plaintiff was "the successor in interest" of an existing creditor within the meaning of section 3439 of the Civil Code. The question of intent was one of fact, (Civil Code, §§ 1227, 3442,) and the burden of proving the fraudulent intent rested upon the plaintiff. The right of a creditor to go upon property conveyed by his debtor to a third party rests upon two foundations, viz., that the conveyance was fraudulent, and that the grantor had no other property at the time suit is brought, subject to execution, out of which his debt can be made. Proof that the debtor made the conveyance without consideration, that he was then indebted, and that he had no other property at the time of the conveyance, subject to execution, to satisfy such indebtedness, would be sufficient *prima facie* to establish the fact that the conveyance was fraudulent as against creditors. If the debtor had other property at the time of the conveyance, sufficient to satisfy his debts, the fraud would not be made out unless there was other evidence. If the debtor has other property at the time suit is brought, sufficient to satisfy his debts, his creditors are not injured, no matter what the original intention in making the conveyance may have been; and the creditor, not being injured, has no cause of action, and no right to subject property in the hands of a third party to the payment of his debt. It would seem to be unnecessary to cite authorities to sustain so plain a proposition, but we refer to *Albertoli v. Branham*, 80 Cal. 632, 22 Pac. Rep. 404, in which this court said: "Where a creditor attacks a transfer of property made by his debtor on the ground that such transfer was made to defraud, hinder, or delay creditors, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to have that effect. Therefore, it must appear that, at the time the conveyance was made, the debtor had no other property subject to execution out of which his debts could be satisfied. *Evans v. Hamilton*, 56 Ind. 34; *Deutsch v. Korsmeyer*, 59 Ind. 373; *Pfeifer v. Snyder*, 72 Ind. 78. This allegation is necessary to show that the conveyance was in fact fraudulent as against the creditors. If the debtor has other property, subject to execution, sufficient to satisfy his indebtedness, the conveyance cannot amount to a fraud on his creditors; and, where the attempt is made to set aside a conveyance on such grounds, it must appear from the complaint that, at the time the action is commenced, the debtor had no other property sufficient to satisfy his debts. *Braker v. Kelsey*, 72 Ind. 51; *Sherman v. Hogland*, 54 Ind. 578. This is for the reason that the conveyance, although made for the purpose of defrauding creditors, is valid as between the parties, and cannot be set aside, un-

less it appears to be necessary for the protection of the creditor, and no such necessity exists if, at the time he commences his action, there is other property of the debtor out of which his debt can be made."

The complaint in the case at bar contained these necessary allegations, and was sufficient. But there was no evidence even tending to show that, at the time the conveyances were made, the grantor was not possessed of other property amply sufficient to satisfy his debts. The declarations of the grantor, relied upon by the appellant as establishing the fact, do not relate to the time of the conveyance. An execution was issued and returned *nulla bona*, but this was several years after the conveyances were made; and, while this was sufficient *prima facie* to prove his insolvency at that time, it could not be held to establish the fact that he had no property nearly five years before. Judgment and order affirmed.

We concur: DEHAVEN, J.; PATERSON, J.

(86 Cal. 483; 3 Cal. Unrep. 350)

**BARKLY v. COPELAND.** (No. 13,520.)

(*Supreme Court of California.* Dec. 26, 1890.)

**SLANDER—EVIDENCE OF DEFENDANT'S WEALTH—DECLARATION OF CO-CONSPIRATOR.**

In an action for slander in charging plaintiff with associating with another in a theft of certain cattle, declarations made by such other after the alleged transaction was completed are inadmissible to show that plaintiff was associated with him. Reversing ante, 1.

On rehearing. For former reports, see ante, 1, and 15 Pac. Rep. 307.

*Clay W. Taylor, Jackson Hatch, and A. M. McCoy*, for appellant. *Chipman & Garter, John F. Ellison, and L. V. Hitchcock*, for respondent.

**PER CURIAM.** Respondent's petition for a rehearing is denied. A re-examination of the record has not only confirmed us in the opinion that our decision was correct as to the ground upon which the judgment and order appealed from were reversed, but has satisfied us that we erred in sustaining the ruling of the superior court last noticed in the opinion of Commissioner FOOTE. Mrs. Mandeville's testimony, in regard to statements of Speegle, to the effect that plaintiff was his confederate in the proposed larceny of Polk's cattle, was clearly incompetent as hearsay, and not within the rule of *People v. Collins*, 64 Cal. 295. The decision in that case was merely that, after competent evidence of a conspiracy to commit a crime, the declaration of one conspirator accompanying an act done in furtherance of the common design, while the conspiracy is ripe, is competent evidence against his confederate. This is no doubt correct, but it is not the law that a conspiracy between A. and B. can be proved as to either by the declarations of the other, as was allowed in this case, and our decision sustaining the ruling of the superior court on this point should not become the law of this case, or a precedent for others.

**In re BABY'S ESTATE.** (No. 13,092.)

(*Supreme Court of California.* Dec. 20, 1890.)

**APPEAL—SATISFACTION OF JUDGMENT.**

Where one has taken payment in full satisfaction of a judgment, he cannot thereafter appeal from the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; *J. V. Correy*, Judge.

*Galpin & Zeigler*, for appellants. *Pillsbury & Blanding* and *Page & Eells*, for respondents.

**PER CURIAM.** The respondents have moved to dismiss the appeal herein on two grounds, viz.: (1) The judgment was satisfied by the appellants before the appeal was taken. (2) Notice of appeal was not served on Gibbs, one of the distributees. The decree of distribution was entered March 24, 1890, and the notice of appeal was served May 12, 1890. On the 11th day of April, 1890, there were filed in the court below two receipts, signed by the appellants, in which they respectively acknowledged that they had received from the administrator certain sums of money and personal property in full of the distributive shares of the said estate allotted to them in and by the decree of distribution therein entered March 14, 1890. When a judgment has been satisfied, it has passed beyond review, for the satisfaction thereof is the last act and end of the proceeding. *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. Rep. 489; *People v. Burns*, 78 Cal. 645, 21 Pac. Rep. 540. "Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements." *Freem. Judgm.* § 466; *Moore v. Floyd*, 4 Or. 260; *Cassell v. Fagin*, 11 Mo. 208. We are unable to say from the record that the rights of Gibbs would not be affected by a reversal of the decree, and, in view of what has been said upon the first ground of the motion, it is unnecessary for us to pass upon the question whether it was necessary that he should be served with a notice of appeal. The motion to dismiss is granted.

(87 Cal. 221)

**SCOTT v. GLENN.** (No. 13,973.)

(*Supreme Court of California.* Dec. 20, 1890.)

**VENDOR AND VENDEE—ACTION TO RECOVER PRICE PAID.**

Plaintiff sued to recover \$600, had and received for his benefit. It appeared that the money was paid by himself and others to defendant and another by virtue of the following paper: "Received of \* \* \* \$600, one third of purchase price of lots, \* \* \* leaving a balance due on said purchase, which by the terms of this sale is to be paid in two equal payments. \* \* \* If paid as above stated," the vendees "will be entitled to a deed of the above-described lots, and otherwise this agreement becomes void, and all payments made hereon shall be forfeited." Defendant signed his name and that of his co-vendor, but the latter afterwards ratified it. The vendors had good title and tendered a deed. Defendant's co-vendor assigned his right to defendant, and the co-vendees, their rights to plaintiff. Held, that there was no right of recovery.



Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

*Meux & Edwards, (Thompson & King, of counsel,)* for appellant. *T. P. Ryan,* for respondent.

MCFARLAND, J. This is an appeal by defendant from a judgment against him for \$600, and from an order denying a new trial. The complaint merely avers that on April 4, 1888, defendant was indebted to plaintiff and certain other named persons in the sum of \$600, for money had and received for the use and benefit of said persons; that the others assigned said indebtedness to plaintiff; and that no part of the same has been paid. The answer specifically denies all the averments of the complaint. There is also a cross-complaint in which defendant avers that on said April 4, 1888, he and one Meux, being the owners of certain described lots of land, contracted in writing with plaintiff and certain other persons to sell them the said lands for \$1,800, \$600 in cash, and the balance in two equal payments, in 6 and 12 months; that the \$600 sued for was the first cash payment on said contract; that plaintiff and said other persons went into possession of the land under said contract; that, when the other payments became due, defendant and said Meux demanded payment, and tendered a good and sufficient deed of conveyance of said land, but that plaintiff and said other persons refused to pay or to accept the deed; and that said Meux assigned all his right to defendant. The prayer of the cross-complaint is that he recover judgment against plaintiff and said other parties for said deferred payments, and for the enforcement of a lien on said land. The answer of the plaintiff, Scott, and others to the cross-complaint first denies, in terms, that there was any such contract in writing, but it admits that there was such a verbal contract, that the \$600 was paid thereon, and that "then and there" the said Glenn and Meux executed, in writing, a receipt and memorandum of said contract in words and figures as follows: "Received of Scott, Cutten, [and others named] six hundred dollars, one-third of purchase price of lots Nos. \* \* \* leaving a balance due on said purchase, which, by the terms of this sale, is to be paid in two equal payments, together with interest, at the rate of ten per cent. per annum, on the whole of said unpaid purchase price, at the maturity of each installment, till paid, in like coin, within six and twelve months from date hereof. If paid as above stated, the above-named Scott, Cutten, \* \* \* will be entitled to a deed of the above-described lots; otherwise, this agreement becomes void, and all payments made hereon shall be forfeited. [Signed] J. T. MEUX & G. R. G. GLENN." The answer denies that they went into possession. It does not contain any sufficient denial of the tender of a deed as averred in the cross-complaint. Neither does it aver that Glenn and Meux had no title, or could not make a valid conveyance of the lots; the only averment on that subject being that "at no time have

the said Meux and Glenn shown to defendants, or either of them, that they, the said Meux and Glenn, had good title to said lots." In an amendment to the answer they aver that Meux did not actually sign the above memorandum, but that Glenn signed his own name and also that of Meux without written authority from the latter to do so. The only findings of fact are (1) "that all the allegations and averments of the plaintiff's complaint are true, and the allegations and denials of the defendant's answer are untrue;" and (2) that the contract mentioned in the cross-complaint "if any such was made," was not reduced to writing and signed by the defendants to said cross-complaint, or by either of them, and that they did not take possession of the land.

Waiving the question as to what right the defendant may have for affirmative relief, we cannot see how the first finding is justified by the evidence, or upon what theory the judgment in favor of plaintiff for the \$600 can be maintained. The evidence shows that the money was paid in accordance with the written instrument set forth in full in the answer to the cross-complaint. Indeed, the only evidence introduced by plaintiff at the trial was that instrument, and proof by a witness that the \$600 was paid "under and by virtue of that paper." He then rested, and defendant made a motion for a nonsuit, which was denied. Meux then testified for defendant that, while he did not sign his name to the instrument, it was signed by his agent, and that he ratified it, and joined afterwards in executing and tendering a deed in compliance with it. Defendant's evidence also showed that Meux and Glenn owned the land and could have given a perfect title; that plaintiff and his assignors made no objection to the title, or to the contract, when the deferred payments became due, but merely asked further time in which to pay, and were granted such time, until finally they concluded to repudiate the entire contract. How can it be said, therefore, that "all the allegations and averment of the plaintiff's complaint are true,"—that is, that "on the 4th day of April, 1888, said defendant was indebted to" plaintiff and his assignors in the sum of \$600, gold coin of the United States, for money had and received by said defendant upon said 4th of April, 1888, for the use and benefit and on account of said plaintiff and his assignors? The plaintiff introduces in evidence a certain written instrument, which he is shown to have received and accepted, and proves that the money sued for was paid "under and by virtue of that paper." But that instrument shows that plaintiff paid the money upon the express understanding and condition that it was not to be returned to him; that it was money "had and received by defendant for the use and benefit of himself," and not for use and benefit of plaintiff or his assignors. There was no necessity for the vendees to sign the written memorandum. *Vassault v. Edwards*, 43 Cal. 458. Moreover, they did sign it by indorsing on it an assignment to plaintiff. The court does not find whether or not Meux signed the contract

or was a party to it; but the evidence clearly shows that he ratified it as soon as his co-vendor informed him of it, and soon afterwards, when he came to Fresno, "again ratified the sale between the parties, and talked with the purchasers about it." Again, when the deferred payments became due, he asked the vendees for the money, and they, making no objection of any kind, simply asked for some delay until they could make arrangements to pay. They proposed at one time to give a mortgage, and then concluded not to do so. And finally Meux united with Glenn in executing and tendering a deed. This was a complete ratification; and he would have been estopped from making a defense for himself, which plaintiff seeks to suggest for him. Moreover, so far as plaintiff's alleged cause of action for the \$600 paid by him is concerned, he is endeavoring to undermine an executed contract; while the principle which he invokes applies to actions for the enforcement of executory contracts. We see no grounds upon which the judgment in his favor can rest. The nonsuit should have been granted. It is not necessary to discuss the defendant's claim for affirmative relief for the findings on that subject are clearly insufficient. The judgment and order are reversed and the cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(87 Cal. 256)

WINTER *et al.* v. McMILLAN. (No. 12,340.)  
(Supreme Court of California. Dec. 22, 1890.)

NOTICE OF APPEAL—QUIETING TITLE—CROSS-COMPLAINT.

1. An appeal from a judgment by several parties, and from an order denying a motion for a new trial by one of the parties, may be taken by one notice.

2. In an action to quiet title, there is no error in excluding plaintiff's evidence that his grantor had declared a homestead on the property, though defendant claims title through an execution sale under a judgment against said grantor.

3. Under Code Civil Proc. Cal. § 442, providing that, whenever defendant seeks affirmative relief against any party affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint, there was no error in allowing defendant, in an action to quiet title, to file a cross-complaint alleging that the property was conveyed to plaintiff merely to secure him against liability on a bond, but that no liability was incurred by plaintiff; that the grantor was still in possession, and claimed some interest; and that defendant had title through an execution sale on a judgment against said grantor.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

R. Percy Wright, for appellants. W. R. Tyler, (D. H. Whittemore, of counsel,) for respondent.

PATERSON, J. This action was brought against the defendant, McMillan, to quiet the title of the plaintiffs Winter and Wright to a lot of land in San Francisco. The defendant answered, denying that the plaintiffs were the owners of or had any in-

terest in the land, and at the same time filed a cross-complaint, which alleges, in substance, that plaintiffs never had any interest in the property, except the naked legal title which was conveyed to them by Louis and Louise Helbing, on June 3, 1881, without consideration, and with intent to hinder, delay, and defraud the creditors of said grantors; that G. Henninger and wife recovered judgment against the said Louis Helbing for the sum of \$3,500, and costs, November 11, 1881, in an action for damages, commenced April 30, 1881; that, thereafter, the property in controversy was sold to defendant on execution issued on said judgment, and in due time the sheriff executed and delivered to him a deed therefor; that the deed of the Helbings to plaintiffs was given to secure the latter against any damages they might sustain by reason of their becoming sureties on a penal bond given by said Louis Helbing, but no liability was incurred by plaintiffs on said bond; that the title still stands on the records in the name of the plaintiffs, but the said Helbings have continued to hold, and are now in possession of, the land, claiming some interest therein; that the controversy as to the title to the land cannot be settled without having the said Helbings before the court; that defendant is the owner of the property, and entitled to the possession of the same. The prayer of the cross-complaint is that the Helbings may be brought in by summons, and required to show what right, if any, they have to the property, and for a judgment that neither plaintiffs nor the Helbings have any right, title, or interest in or to the land in controversy. By order of the court, a summons was issued and served on the Helbings, but it seems that they made no appearance. The plaintiffs filed a demurrer, which was overruled. They then filed an answer denying all the allegations of the cross-complaint, and alleging that Louis Helbing had never had any right, title, or interest in the property, except such as he derived from a claim of homestead, which interest was exempt from execution and forced sale. The court found that plaintiffs were not the owners of or entitled to the possession of the property; that the Helbings were the owners of the property on June 3, 1881, when they deeded the same to plaintiffs simply to secure them against any liability as sureties, and that no liability had been incurred on the bond; that defendant purchased the property at execution sale, as alleged by him, and is the owner thereof. Judgment was entered in accordance with the findings. Plaintiffs moved for a new trial, which motion was denied. Thereupon the Helbings united with the plaintiffs in a notice of appeal from the judgment, which notice included also a notice of appeal by the plaintiffs from the order denying their motion for a new trial.

The respondents have moved to dismiss the appeal, on the ground that the appellants could not properly unite in two separate and distinct appeals in one notice, and in one undertaking. An appeal from a judgment, and from an order denying a motion for a new trial, may be taken by

one notice. The notice states who are appellants, and what they respectively appeal from. This is sufficient. The clerk certifies that "sufficient undertakings on appeal in due form were properly filed." There is nothing to contradict the fact stated. The motion to dismiss is denied.

It does not clearly appear what is the basis of plaintiffs' claim of title. They did not trace it back to any paramount source. The burden of showing title in themselves rested upon the plaintiffs, and they failed to make out a case. They showed that on November 10, 1879, Beta Gade gave Louis Helbing a power of attorney authorizing him to sell her real estate, and that on June 15, 1880, A. Hensler and his wife, Mary, made a quitclaim deed of the property to Beta, who was a sister of Mrs. Helbing. What connection, if any, Mary had with the title does not appear, except that she had employed Helbing to put buildings on the land in February, 1878, and the only evidence that Beta ever owned or had possession of the property is that "she walked over it," and "looked at it." Both Beta and Mary were in San Francisco at the time of the trial in the court below, but neither was called as a witness. On June 28, 1880, Louis Helbing, acting as attorney in fact for Beta Gade, for a nominal consideration sold and conveyed the property to himself and wife. On June 3, 1881, Beta and her husband made and delivered to plaintiff a deed of the property, which was absolute in form, and on the same day Helbing and wife executed to plaintiffs a similar instrument. A few days later, plaintiffs and the Helbings exchanged documents, acknowledging that plaintiffs held the property in trust for two purposes, viz., "to secure them against any loss which they might sustain by reason of their having become sureties on the bond above referred to, and to secure to plaintiff Wright payment for professional services which he had rendered, and should thereafter render, in certain proceedings. Plaintiff Wright did not prove what, if any, fees were due to him for services rendered. One of the bonds has been exonerated, and it does not appear that any liability has accrued on the other. The basis of the defendant's claim of title is quite as uncertain as the plaintiffs.' The judgment under which he purchased the property at execution sale, on June 9, 1884, was entered November 11, 1881. Under that purchase, he took whatever right, title, and interest the Helbings had in the property at the date of the judgment. Helbing's deed of July 28, 1880, to himself and wife, is void. The power of attorney did not authorize him to give away the property, or to convey it to himself for a nominal consideration. His act was a fraud on the principal, and the conveyance is a nullity. Section 2306, Civil Code; Dupont v. Wertheman, 10 Cal. 368; Randall v. Duff, 79 Cal. 115, 19 Pac. Rep. 532, and 21 Pac. Rep. 610. It is true the evidence tends to show that Helbing was the real owner of the property, and that the conveyances were made to mislead somebody, probably creditors. He received but a few hundred dollars for two three-story houses. Soon after the

houses were built, the Helbings went into possession of the property, and have ever since occupied the same. The plaintiffs promised to reconvey to the Helbings, not to Beta. The Helbings then filed a homestead declaration on the property. They were heavily in debt. There are many circumstances connected with the transaction, tending to show an attempt on the part of all parties to conceal the identity of the real owner. But the defendant himself offered a lease from Beta Gade to Mary Hensler, dated March 1, 1878, by the terms of which the premises were leased to the latter for a term of five years. He also offered in evidence the power of attorney from Beta Gade to Helbing, and the deed executed by the latter to himself and wife, insisting that the latter was not void. The defendant could not thus affirm title in Beta Gade, in support of his own title, and deny it in answer to plaintiffs' claim of title under the same source. He could not do so consistently at least. If Beta was the owner of the property, the title passed to the plaintiffs herein by her deed of June 3, 1881, several months prior to the entry of the judgment against the Helbings. But, as stated before, it is impossible to tell from the evidence offered by the respective parties what is the basis of the claim of either. The most that plaintiffs can claim, under the evidence introduced by them, is a lien for the value of services rendered by the plaintiff Wright, and for any liability which may have accrued on the bond which has not been exonerated. If Helbing was the beneficial owner at the time defendant purchased at execution sale, the latter took all his right, title, and interest, and is entitled to have the same adjudged to him. To do this it will be necessary for the defendant to amend his cross-complaint, so as to state the facts more fully,—as fully as they are required in a bill in equity. *Kreichbaum v. Melton*, 49 Cal. 50; *Brodrick v. Brodrick*, 56 Cal. 563.

Plaintiffs offered to prove that Mrs. Helbing had declared a homestead on the property June 29, 1880, but the evidence was excluded. We do not think the court erred in its ruling. The fact that the Helbings claimed a homestead could not aid the plaintiffs as against the defendant. The Helbings had, by their failure to answer defendant's cross-complaint, waived, as against the defendant, any claim under the homestead declaration, and their conveyance to the plaintiffs did not give to the latter any homestead right in the property.

Appellants contend that the demurrer to the cross-complaint ought to have been sustained; that a cross-complaint is improper in actions of this kind. In support of this contention, they cite *Wilson v. Madison*, 55 Cal. 8. All that case decides is that where the relief demanded by defendant can be had upon the denials and averments of his answer, a cross-complaint is unnecessary. But there may be cases in which full relief cannot be given the defendant upon answer, and, as in ejectment, a cross-complaint in such cases is recognized as a proper pleading, so that the whole controversy may be settled in

one action; so, here, we see no objection to a cross-complaint upon the allegations of which, supported by proof, the defendant may take from plaintiff that which he would recover in equity, viz., the legal title. Section 442 of the Code of Civil Procedure provides that: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." Here, the affirmative relief which the defendant is seeking certainly affects the property to which the action relates, and we think that the cross-complaint was a proper pleading. The plaintiffs claim the whole title. They could not maintain the action by showing simply a lien without possession, or right of possession. But, if the court denied their prayer because they showed at most only a lien, the validity of the lien could be determined in another action. Why not allow the defendant, upon proper averments in his cross-complaint, to test in this action the validity of the lien claimed by plaintiffs? In other states, it is held that cross-complaints in these actions are proper pleadings. *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. Rep. 769, and cases cited; *Venable v. Dutch*, 37 Kan. 515, 15 Pac. Rep. 520; *Allen v. Tritch*, 5 Colo. 228; *Greenwalt v. Duncan*, 16 Fed. Rep. 612. But it is claimed that, if it be conceded that a cross-complaint is a proper pleading in actions of this nature, new parties cannot be brought in by it. Whether this could be done under the old chancery practice is a question upon which the authorities are not agreed; but our Code system is much broader and more liberal in this regard. The defendant is not, under our practice, confined in his cross-complaint to matters charged in the complaint. Thus in ejectment, as stated before, he may plead matters purely equitable, and secure equitable relief. Besides this, our statute provides that, "when a complete determination of the controversy cannot be had, without the presence of other parties, the court must order them brought in." Code Civil Proc. § 389. A complete determination of this controversy, if the allegations of the defendant and the findings of the court are correct, could not be had without making the Helbings parties. The plaintiffs appeared to be, and claimed to be, the owners in fee. The Helbings were in possession. The defendant was entitled to the possession if the Helbings owned the property when the judgment was entered. A trial between the plaintiffs and defendant would have settled only half of the controversy, and it would have become the duty of the court, we think, when the facts appeared in evidence, to order the Helbings brought in as parties to the action. *O'Connor v. Irvine*, 74 Cal. 443, 16 Pac. Rep. 236. In other states it is held that in a proper case

third parties may be brought in to answer the defendant's cross-complaint. *Allen v. Tritch*, supra; *Bunce v. Bunce*, 59 Iowa, 534, 13 N. W. Rep. 705. Appellants rely upon the case of *Harrison v. McCormick*, 69 Cal. 618, 11 Pac. Rep. 456. In that case there was no necessity for a cross-complaint. The claim was for damages, purely a counter-claim, in which case, of course, the demand "must be one existing in favor of defendant, and against a plaintiff, between whom a several judgment might be had in the action." Code Civil Proc. § 438. In this case a cross-complaint is proper to determine the question as to the validity of plaintiffs' lien. If the obligations of the bond have ceased, and no money is due Wright for professional services, the defendant is entitled to have those facts determined, and to receive whatever affirmative relief he may prove himself, inequity, entitled to. If the Helbings claim a homestead upon the property, it is proper that they should be given an opportunity to present the same, so that the rights of all parties interested, or claiming an interest, may be settled in one suit. The record shows that the summons issued on the cross-complaint was duly served on the Helbings, but is silent as to whether any appearance was made by them. We presume, of course, that no answer was filed; but, if they failed to appear and demur or answer within the time allowed by law, their default therefore ought to have been entered, and a memorandum of such default indorsed on the cross-complaint. Id. § 670. The judgment is reversed, and the cause is remanded for a new trial, with directions to the court below to permit the parties to amend their pleadings in any respect consistent with the nature of the action.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.

BEATTY, C. J. I concur in the judgment.

(87 Cal. 306)

BOWMAN v. MOORE. (No. 13,251.)

(Supreme Court of California. Dec. 30, 1890.)

MUTUAL BENEFIT INSURANCE — CHANGE OF BENEFICIARY.

1. A provision in a certificate of membership in a mutual benefit association, empowering the member to change the beneficiary by "writing filed with the association," is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate, and an indorsement by the secretary on the certificate making the change.

2. The fact that the executors were not named in the request does not render the substitution invalid, as they can be identified by the will to which the member referred in his request for the change.

3. The fact that the substitution indorsed on the certificate was made by the secretary of the association, in compliance with the written request of the member, does not render the substitution invalid, as the member had the right to employ an agent to make the change if he so desired.

Department 2. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

*D. W. Herrington*, for appellant. *J. H. Campbell*, for respondent.

THORNTON, J. Joseph Bowman became on the 13th day of June, 1885, a member of the California Life & Accident Association, a corporation and mutual benefit association, and there was issued to him a certificate of membership therein, numbered 893. This certificate purported to be an insurance on his life for \$5,000, payable after his death to the plaintiff, Jennie Bowman, his wife, "unless," as provided in the certificate, "said member shall, in writing filed with this association, substitute some other beneficiary, in which case said amount shall be paid to said substituted beneficiary." On June 4, 1886, Joseph Bowman executed his last will, naming therein the defendants as executors thereof. In this will he inserted the following provision: "*Thirdly*. I direct that my executors hereinafter named shall, as soon after my death as possible, collect the amount due on a certain policy, issued by the California Life and Accident Association, said policy numbered 893, made payable to Jennie Bowman, bearing date June 13, (thirteenth,) 1885, said policy to be transferred for the purposes hereinafter expressed, viz., in full payment of all my debts owing at the time of my death, or in part payment of the same if my debts exceed the amount of said policy, to-wit, \$5,000." After the execution of his will, Joseph Bowman filed with the secretary of the association this writing: "Gilroy, June 4, 1886. Secretary Cala. Life and Acc't Ass'n, San Francisco—Dear Sir: Enclosed herewith I hand you my cert. of insurance in your company. Please do favor to change the beneficiary from the name now embraced in the said certificate, to the executors named in my will, which bears even date herewith, viz., June 4, 1886, and for the purposes therein expressed. Thus oblige, JOSEPH BOWMAN. Return policy to Geo. T. Dunlap, Gilroy, Cal." Indorsed on this direction on file in said secretary's office are the following words and figures: "Change made June 9, 1886," and upon the certificate of membership, partly in print and partly in writing, is indorsed the following: "The beneficiary under this certificate of membership, pursuant to the rules of this association, is hereby changed from Jennie Bowman, wife of the person named in the within certificate, to the executors named in his will, which bears date of June 4, 1886, or their legal representatives, said change being made at the written request of Joseph Bowman, dated Gilroy, June 4, 1886. W. H. PERRIS, Secretary. San Francisco, June 9, 1886." Joseph Bowman died at the county of Santa Clara, on the 29th of August, 1886, leaving the plaintiff his widow. After Bowman's death his will was duly admitted to probate, and the defendants, S. T. Moore and Theodore Bowman, were regularly appointed and qualified as executors thereof, and since the 9th of October, 1886, they have administered on the estate of their testator. In due time the money due on the certificate, to the amount of \$2,000, was paid by the association on the joint receipt of the plaintiff

and defendants, the defendants signing the receipt as executors. The joint receipt was demanded by the association before it would pay. This money passed into the hands of defendants, who claimed the same as the substituted beneficiary in virtue of the written direction of a change of beneficiary made by their testator, Joseph Bowman. This payment was indorsed on the certificate No. 893. Subsequently the plaintiff notified in writing the executors of Joseph Bowman that she would not accept the terms of the will of her deceased husband, and demanded of them the payment to her of the \$2,000 above mentioned, claiming to be the beneficiary of the policy on which the money was paid to them. This demand was refused, and plaintiff brought this action against the defendants to recover the money paid them. The court rendered judgment in favor of defendants. Plaintiff prosecutes this appeal.

The above are the facts found by the court below, on which this appeal is to be determined. The contention is here made on behalf of plaintiff that the judgment is not sustained by the findings of fact, and that judgment should be entered in her favor. It is argued that the provision made in certificate No. 893 for "Jennie Bowman, wife," is a trust, subject to be defeated under the power reserved in these words, "unless said member [Joseph Bowman] shall, in writing filed with said association, substitute some other beneficiary, in which case said amount shall be paid to said substituted beneficiary." Let it be conceded that, by the provisions contained in the certificate or policy, a trust was created for the benefit of the wife, still the trust, as is conceded, can be defeated by substituting another beneficiary. Jennie Bowman's right was contingent. If the change was regularly done, the right of the first-named beneficiary is at an end. Was the substitution here made in accordance with the provisions of the certificate? That is the question to be determined. Joseph Bowman was authorized, by the terms of the certificate as above stated, to substitute another beneficiary by writing filed with the association. This, in our judgment, he did do. The writing to that effect was communicated to and filed with the association. The intention to substitute is so clear on the face of the paper that we see no room for construction. That must be considered as done which it was the intention of the assured to do. The form in which the substitution is made is immaterial. It would be a strained construction to hold that the assured did not intend to substitute another beneficiary instead of the one first named. The request to the secretary was to make the substitution desired by the assured appear on the books of the association. Nor was the consent of the wife (plaintiff in this action) necessary to the making of the substitution. It was a part of the contract, as entered into in the beginning, that the assured of his own free unrestrained will might at any time make the substitution he desired. The wife, though named as beneficiary, could not in any way control the will of the as-

sured. Whatever rights she had under the certificate, she could not in any way restrain or control her husband, the assured, in making the subsequent substitution. Nor do we see any reason why the assured could not name his executors as beneficiaries. This is not an attempt to devise by will the proceeds of the policy. This, it may be conceded, he could not do. But designating in the requisite mode his executors, as beneficiaries, was within his power. The beneficiary is but the recipient of the policy or its proceeds, and why the assured could not make his executors, or administrators, or his children, or his daughters, beneficiaries, without naming them, we cannot perceive. No one is injured by it. There is no rule or policy of law forbidding it. It is not contrary to good morals. The association is not called on to pay until after the death of the assured. Then the persons named as executors would become known. At any rate the association could not be called on to pay the amount due on the policy until the executors made themselves known to it.

Further we do not see why the assured could not make the secretary of the association the medium through which the writing might be made changing and substituting the beneficiary. All that was done was done in the life-time of the member. The change was to be made in writing, and filed with the association. It was not requisite that the writing should be actually made by the assured member, in his own proper handwriting. It could be made in the handwriting of another, provided it was done by his authority, and for him. This was done through the agency of the secretary. We see no reason why this is not a compliance with the member's contract made in the beginning with the association. In substance and in fact the change was made in writing, and filed as required. The views above expressed are in accordance with sound legal principles. The contentions on behalf of plaintiff are not so sustained. To uphold them would be to put form above substance, and unsubstantial technicalities above substantial legal rules. We find no error in the record. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(3 Cal. Unrep. 343)

WRIGHT v. WRIGHT. (No. 13,749.)

(Supreme Court of California. Dec. 20, 1890.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The findings of the court founded on conflicting testimony will not be disturbed on appeal.

Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Albert M. Stephens, for appellant.  
Wells, Guthrie & Lee, for respondent.

PER CURIAM. There is a clean-cut conflict in the evidence. The plaintiff testified that defendant left him, in 1885, without cause and against his wishes, and had ever since, without reason, refused to re-

turn and live with him. There was sufficient corroboration. Letters introduced in evidence, and the testimony of friends and members of the family, tended to show that plaintiff was happy with his wife, and treated her kindly; and his father testified that defendant told him, in 1885, she would not live with the plaintiff any longer. That she has not in fact lived with him is undisputed. The court heard the conflicting statements of the parties, weighed the evidence, and we are not at liberty to set our judgment against this conclusion, even though our conviction should be that the defendant's evidence preponderates. The court did not err in its ruling as to the admissibility of certain evidence. Judgment and order affirmed.

(87 Cal. 241)

PERKINS v. COOPER *et al.* (No. 13,179.)

(Supreme Court of California. Dec. 20, 1890.)

FILING OF APPEAL—BOND—WAIVER.

1. Under the direct provisions of Code Civil Proc. Cal. § 940, an appeal is "ineffectual for any purpose" where, within five days after service of notice of appeal, an undertaking is not filed or waived.

2. Filing of an undertaking must be waived within the time for filing, otherwise it will be ineffectual.

Reversing 24 Pac. Rep. 377.

On rehearing. For former report, see 24 Pac. Rep. 377.

PER CURIAM. Attention was called to the fact so briefly, and in such an incidental way, at the original hearing, that it escaped our notice, but, upon rehearing, it is made manifest to us that there is nothing before us in this cause which we have jurisdiction to hear and determine. A money judgment was rendered in the cause October 31, 1888. Notice of appeal was served and filed December 26th of the same year. No undertaking on appeal was ever filed or waived. The appeal was therefore "ineffectual for any purpose." Code Civil Proc. § 940; *Holcomb v. Sawyer*, 51 Cal. 417; *Boyd v. Burrell*, 60 Cal. 281; *Biagi v. Howes*, 63 Cal. 384; *Brown v. Green*, 65 Cal. 222, 3 Pac. Rep. 811; *Stratton v. Graham*, 68 Cal. 168, 8 Pac. Rep. 710; *Little v. Jacks*, 68 Cal. 344, 345, 8 Pac. Rep. 856, 9 Pac. Rep. 264, and 11 Pac. Rep. 128; *Duffy v. Greenebaum*, 72 Cal. 159, 12 Pac. Rep. 74, and 13 Pac. Rep. 323; *In re Skerrett*, 80 Cal. 63, 22 Pac. Rep. 85; *Schurtz v. Romer*, 81 Cal. 245, 22 Pac. Rep. 657. The appeal being ineffectual for any purpose, there has been and is no case here for our determination.

Attached to the transcript which has been filed herein there is a stipulation, entitled in this court, agreeing to the correctness of the transcript, and stating that a good and sufficient undertaking on appeal has been duly executed and filed. It is both proved and conceded that this statement is untrue, and the attorney for respondent says that he signed it without actual knowledge of the fact, and relying upon the statement of the counsel on the other side that such an undertaking had been filed, coupled with the fact that he knew the counsel to be per-

fectly familiar with the requirements of the statute and a careful practitioner, and also that the parties were amply able to file the undertaking. There is possibly some doubt as to just what was said on the subject when that stipulation was signed, but there is no doubt about the fact that the statement contained in it on the subject of undertaking was untrue. From that fact it follows (1) that there was then no case in this court in which counsel could bind a client by such a stipulation; (2) that, if the language of the stipulation could possibly be construed as a waiver of undertaking, (which we very much doubt,) it could only operate as a waiver as of and from the date of the stipulation, March 28, 1889, and there was at that date no appeal pending in which to waive an undertaking, and no cause pending in this court in which to make the stipulation. In *Re Skerrett*, 80 Cal. 63, 22 Pac. Rep. 85, it was held that in order to entitle certain parties to appeal without filing an undertaking, under section 946, Code Civil Proc., the order dispensing with the undertaking must be made within the time prescribed by law for filing the undertaking. So, if the filing of an undertaking is to be waived, it must be done within the time for filing; otherwise the appeal is lost, and the party has acquired a right of which he cannot be deprived by that attempt to appeal. The order heretofore entered in this cause must be set aside, and the attempted appeal dismissed. So ordered.

(87 Cal. 236)

**VORWERK v. NOLTE. (No. 13,470.)**

(*Supreme Court of California.* Dec. 20, 1890.)

**VENDOR AND VENDEE—CONTRACT—FAILURE TO CONVEY.**

Civil Code Cal. § 1651, provides that, where a contract is partly written and partly printed, the written parts shall control the printed part, and, if the two are absolutely repugnant, the latter must be disregarded. Defendant sold land to plaintiff, and in a contract to convey, partly written and partly printed, it was written that the money paid was to be returned in case he failed to execute and deliver a deed "after one year from date." The printed part declared that time should be of the essence of the contract. Held that, since this stipulation is generally used to prevent the tying up of the vendor's property while awaiting payment, it was here repugnant to the written part, and plaintiff could not recover the money paid when a good deed was tendered nine days after the end of the year. Reversing 24 Pac. Rep. 840.

On rehearing. For former report, see 24 Pac. Rep. 840.

Civil Code Cal. § 1651, provides that "where a contract is partly written and partly printed, or where part of it is written or printed under the special direction of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared, without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form; and, if the two are absolutely repugnant, the latter must be so far disregarded."

*J. W. Mitchell, (Chapman & Hendrick, of counsel,) for appellant. J. D. Bicknell and R. H. F. Variel, for respondent*

Fox, J. Upon rehearing and reargument of this case a fact is conceded, which was before sufficiently apparent to be suspected, but not sufficiently so, from the record as printed here, to justify action upon it as a fact proved, viz.: That the original contract between the parties was partly written and partly printed; that in preparing it the parties had used a form printed in blank, in common use in the preparation of contracts for the sale of real property, where deferred payments were to be made; and that the words "time is of the essence of this contract," as found therein, was a portion of the printed, and not of the written, matter. If, therefore, there is any doubt about how the contract is to be construed, the rule prescribed in section 1651, Civil Code, is to be applied in the construction thereof. Applying this rule, and it appearing not only that the contract was partly written and partly printed, but that the printed part was prepared without special reference to these particular parties or this particular contract, the question is whether these words so found in the printed part are repugnant to the general scope and purpose of the contract, as the same appears from the original or written parts thereof. Of this we think there can be no doubt. It is a matter of common understanding that when these words—"time is of the essence of this contract"—are used, it is with reference to future payments; that their purpose is to protect the vendor against delays in payment of the purchase price, and the tying up of his estate beyond the fixed period, without the payment of the agreed compensation therefor; and that they have no place in the contract after the full price is paid, and when nothing remains to be done but to make the conveyance. Even where there are future payments to be made, if the time of payment is not fixed, time is not of the essence of the contract. *Day v. Cohn*, 65 Cal. 508, 4 Pac. Rep. 511. It is evident that, in the blank used in this case, the words were inserted and used solely with reference to the duties of the vendee, the party of the second part, for immediately after them, and in the same connection, we find the following: "In event of a failure to comply with the time hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law and equity to convey said property," etc. Then in another part of the instrument, the written part thereof, it is provided that the vendor, the party of the first part, shall have one year in which to make the conveyance, and it is alleged and found that this was done to enable him first to secure the cancellation of an existing mortgage, which was not then mature. By the subsequent writing, made on the same day, it was provided that, if the vendor failed to execute and deliver a deed "after one year from the date hereof," he should return the purchase price, with 3 per cent. per month interest thereon.



Meantime the vendee went into immediate possession, and received the rents of the premises. The year expired June 24th. On the 29th the purchaser demanded his deed, and three days later, which defendant testifies was as soon as he could have it prepared, he tendered the deed, duly executed. No objection was made to it that it was not properly executed, or did not convey good title. The vendee was still in possession, and had collected the rents up to a time even beyond that of the date of the tender. We think the deed was tendered in time, and that the defendant was not liable to an action for the return of the purchase money, with the 36 per cent. interest money thereon, or any part thereof. The order heretofore made in this court in this cause is vacated and set aside, and the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; THORNTON, J.

(87 Cal. 292)

*In re McMANUS' ESTATE.* (No. 13,724.)

(Supreme Court of California. Dec. 30, 1890.)

EXEMPTIONS—INSOLVENCY—JEWELER'S SAFE.

On a question whether a safe used by a jeweler and watch-repairer should be set off to him in insolvency proceedings as exempt under Code Civil Proc. Cal. § 690, subd. 4, exempting from execution "the tools or implements of a mechanic or artisan necessary to carry on his trade," he and another practical watch-maker and jeweler testified that such a safe was necessary to the profitable conduct of his business, and that customers would not leave their watches to be repaired unless one were used. *Held*, that the safe was properly set off to him.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

*Blackstock & Shepherd and George A. Rankin*, for appellants. *Barnes & Selby*, for respondent.

BELCHER, C. C. The respondent, L. M. McManus, was engaged in the business of a jeweler and watch-repairer, and while so engaged was adjudged to be an insolvent debtor. He owned and used in his business a "jeweler's safe," which the court, against the objections of certain creditors, set apart to him as property exempt from execution. The objecting creditors and the assignee of the estate appeal from the order, and contend that it was not authorized by law, and should, therefore, be reversed. At the hearing the respondent was called as a witness and testified in substance that he is a jeweler and watch-repairer, and is engaged in that trade or business as a means of support for himself and family; and that without the use of said safe, said business cannot be prosecuted by him to any profitable end; that it is a necessary and useful article in conducting said business; that without the use of said safe his customers would not leave their jewelry and watches with him to be repaired." Another witness was also called, and testified "that he is a practical watch-maker and jeweler; that a safe similar to the one mentioned is an article without which the business of jeweler and

watch-maker and watch-repairer cannot be prosecuted to any profitable end, and that such a safe is a necessary and useful article in carrying on the business of a jeweler and watch-repairer; that without the use of such a safe very few customers will leave their jewelry or watches with the artisan to be repaired." This was all the testimony offered, and upon it the court made its findings and order as follows: "That the said safe is an article without the aid of which the business of petitioner, as jeweler and watch-maker, cannot be prosecuted to any profitable end, and that said safe is necessary to and in actual use by the petitioner in prosecuting his said business. Wherefore it is hereby ordered that the said safe be set apart, and that the same is hereby set apart, for the use of said insolvent debtor, and that the same shall not be subject to be applied to the payment of his debts." Section 60 of the insolvent act makes it the duty of the court having jurisdiction of insolvency proceedings to exempt and set apart for the use and benefit of the insolvent such real and personal property as is by law exempt from execution; and section 690, subd. 4, of the Code of Civil Procedure, provides that "the tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution.

Statutes exempting personal property from forced sale are remedial in character, and are evidently intended to protect the debtor, and enable him to follow his vocation, and thus earn a support for himself and family. The general rule now is that such statutes are to be liberally construed, so as to effectuate the humane purpose designed by the law-makers, and our Code of Civil Procedure declares that all of its provisions are to be so construed, "with a view to effect its objects and to promote justice." It is difficult to define accurately the word "implements," and the courts, so far as we are advised, have never attempted to define it. Webster gives as the meaning of the word, "whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end, as the implements of trade, of husbandry, or of war;" and "utensil" he defines as "that which is used; an instrument; an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business." By the courts, these words are accorded a broad signification, and under them many things have been exempted which are not tools. Thus, in the state of Kansas, under a statute exempting "the necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," it has been held that an insurance agent and abstractor of titles could claim as exempt an iron safe and set of abstracts, which were used and kept by him for the purpose of carrying on his business. *Davidson v. Sechrist*, 28 Kan. 324. And the same rule has been applied to a printing-press, type, and other articles used in publishing a newspaper. *Bliss v. Vedder*, 34 Kan. 59, 7 Pac. Rep. 599. In Illinois, it has been held that a piano, used by a music-

teacher, and upon which she relied for support, was, within the law exempting "furniture, tools, or implements necessary to carry on his or her trade or business." *Amend v. Murphy*, 69 Ill. 337. In Massachusetts, a clock, stove, screen, pitcher, and table-cover, used and necessary to carry on the business of a milliner, have been held to be included in "tools, implements, and fixtures." *Woods v. Keyes*, 14 Allen, 236. So, also, a sewing-machine. *Rayner v. Whicher*, 6 Allen, 294. In Vermont, a barber's chair has been held exempt as a tool. *Allen v. Thompson*, 45 Vt. 472. In this state it has been held that an expensive threshing outfit was not exempt, under the statute exempting "the farming utensils or implements of husbandry of the judgment debtor;" but this was upon the ground that the outfit was principally used in threshing grain raised by other persons for hire. In *re Baldwin*, 71 Cal. 74, 12 Pac. Rep. 44. Other cases bearing upon the question might be cited, but we think it sufficient to refer to *Freeman on Executions*, (2d Ed.) §§ 226, 226a, and to 7 Amer. & Eng. Enc. Law, 135, in both of which works the authorities are very fully collated and reviewed. In view of the testimony submitted in this case, and the authorities above cited, we see no error in the ruling of the court below, and we therefore advise that the order appealed from be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(87 Cal. 249)

GUERNSEY V. WEST COAST LUMBER CO.  
(No. 13,643.)

(Supreme Court of California. Dec. 22, 1890.)

#### BREACH OF CONTRACT—WAIVER.

Defendant contracted to buy all the lumber manufactured by plaintiff during a certain season; the lumber to be of the sizes usually required for market, to be designated by plaintiff, subject to the right of defendant to give orders for any sizes usually cut. *Held*, in an action for breach of the contract that defendant could not set up as a reason for refusing to receive more lumber, any objection to the size of lumber theretofore accepted and paid for by him without reserving the right to object to it subsequently, and which he retained without any offer to return it.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

C. J. Perkins, for appellant. T. J. Fording, for respondent.

HAYNE, C. This was an action for damages for the breach of a contract to buy lumber. The contract provided that the defendant should buy all the lumber "of good merchantable quality" which should be manufactured by the plaintiff during the year 1888, at his mill in San Bernardino county, and contained the following clause: "Said lumber shall be of such sizes as are usually required for the market, and shall be designated by Guernsey, regard being had to a due variety of sizes so as to meet the general requirements of the market, except that the company may

give orders for any required sizes usually cut." Under this contract the plaintiff delivered lumber to the defendant until the middle of August, and, with certain unimportant exceptions, the defendant received and paid for the lumber so delivered. About that time the employes of the defendant informed its general manager that some of the lumber which was being delivered was not thick enough, and he instructed them "to have it remedied." No order for any particular size was given to the plaintiff, but he was informed that the lumber he was sending was too thin. He promised to attend to the matter, and his men continued to deliver lumber to the defendant, and the latter to receive and pay for it, until September 20th, when the plaintiff was notified that no more lumber would be received. The plaintiff thereupon sold the remaining lumber to other parties and brought this action to recover the difference in price. The trial court found that the defendant's refusal to receive further lumber was without excuse, and gave judgment for the plaintiff, and the defendant appeals.

We think that since the defendant accepted and paid for the lumber delivered up to September 20th without reserving the right to object to it subsequently, and does not offer to return it, but still retains it, any ground of objection to it which may have existed could not be a reason for refusing to accept subsequent lumber which was in accordance with the contract. The ultimate question upon which the case must turn, therefore, is whether the subsequent lumber was in accordance with the contract. As we have seen, the contract provided that the lumber was to be of good merchantable quality, and of such sizes as were usually required for the market, which sizes were to be designated by the plaintiff, subject to the right of the defendant to give orders for any sizes usually cut. Most of the evidence taken at the trial related to the question whether the lumber delivered by the plaintiff was "merchantable" within the meaning of the contract. But this seems to have been understood by everybody as having reference not to the quality but to the size of the lumber. Thus the local manager of the company testified as follows: "This Guernsey lumber was different from any other lumber that I have handled as merchantable lumber only as to thickness. I objected on account of its being thin. It wasn't good merchantable lumber by reason of its being thin." All the witnesses use the term in this sense, and there is no pretense that there was any other ground of objection. The question litigated, therefore, related to the size of the lumber usually required in the market. The position of the plaintiff was that lumber seven-eighths of an inch thick was sufficient, and there was evidence in support of this view. The position of the defendant was that it was necessary that the lumber should be what was known as inch lumber. The evidence shows, however, that there was not much exactness in the use of these terms. Owing to the character of the timber of the locality, and to the usual method of manufacturers, there was con-

siderable difference in the size of the boards sawed at the same time from the same log. In this regard one witness testified as follows: "There is never a load that comes into the market that were you to put your rule to it every board would show the same thickness. There never was a log on this mountain yet, all the boards cut from which were of the same thickness." Another witness said: "My experience has been that lumber which is cut as inch lumber very seldom comes an inch thick. It would be probably a sixteenth less, and when it dries out it would be more than a sixteenth less. In fact if you take dry lumber it is sometimes three quarters of an inch or a little more." In most loads there would be a few very thin boards which it was customary to reject when delivered at the yard, and this course was pursued in this case. Understanding the terms in the above sense we think that, even if the standard of the defendant be adopted as the true one, the preponderance of the evidence is to the effect that, after the complaint made in August, the plaintiff complied with his contract. In sawing inch lumber the usual way was to "move the set works an inch and a third." After the complaint mentioned the plaintiff's works were so moved. In relation to this the plaintiff says: "I changed my head blocks, and after that the lumber came out a full inch." The lumberman to whom the plaintiff sold his lumber after the defendant refused to receive it testified as follows in relation to it: "I consider this lumber to have been fully as good as any that I ever handled; in fact better than some I have been handling in the last two years, that is, the average of it,—better timber. I mean by this both the quality of the lumber and its manufactured condition. It was cut well and it was good timber." Another person from the same yard testified as follows: "What we received from Mr. Guernsey compared in thickness with the rest. If anything his lumber was a little thicker than the other lumber that we received. I have applied the rule to measure the lumber. I can't say exactly just what it measured, but it was about as near an inch as any lumber we have received." Another lumberman who had seen the lumber testified that the plaintiff's lumber compared favorably with that manufactured in the locality, and said: "I call it good inch lumber." One of the plaintiff's employees, who handled the lumber at the mill, testified as follows: "The lumber that was cut in September was full inch. I saw nothing below an inch but what was thrown across the track. No thin lumber that I know of came down at all." And the teamster who hauled the lumber to the defendant's yard testified that the last load, delivered before September 20th, "was good average thickness. It was inch lumber." It was also in evidence that the price of lumber had fallen below the contract price at the time of the refusal to go on with the contract, and that the defendant had engaged in a kind of work for which "they had to have extra thick lumber." We think that the evidence is amply sufficient to sustain the decision, and we

therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

(3 Cal. Unrep. 344)

ALEXANDER v. JACKSON *et al.* (No. 13,489.)  
(*Supreme Court of California*. Dec. 23, 1890.)

EJECTMENT—HOMESTEAD—LAND BOUGHT ON CONTRACT—SATISFACTION OF JUDGMENT—APPEAL.

1. A married man bought certain lots, terms part cash, balance on time, deed to be given on payment of balance, lots to be forfeited on failure to meet payments. He then built a house on the lots, and moved into it with his family. The payments on the lots and the house were made with the community property. The wife executed and filed a declaration of homestead on the lots. Before final payments on the lots had been made, the husband assigned the contract and sold the house to plaintiff, who had knowledge of the homestead declaration, and who paid the balance of the purchase money and received a deed of the lots. Prior to the assignment to plaintiff, the wife offered to pay the vendor the amount due on the lots on condition that he would convey them to her or to her and her husband jointly. *Held* that, as at the time the declaration of homestead was filed the title was in the vendor, the wife acquired no rights in the property.

2. Where in ejectment there is coupled with a judgment for defendant an order that a certain sum be paid plaintiff, the leaving of this sum by defendant with plaintiff's attorney, which he refuses to accept, is not a satisfaction of the judgment so as to prevent an appeal by plaintiff.

BEATTY, C. J., and FOX and MCFARLAND, JJ., dissenting.

In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Wright & Huxen, for appellant. L. J. Maddux, for respondents.

THORNTON, J. This is an action of ejectment for lots 27 and 28 in block 86 in the town of Modesto, in which judgment passed for defendant Mary Jackson. Plaintiff appeals from the judgment on the judgment roll. There is a motion to dismiss the appeal, which will be hereafter considered. The complaint is in the form usual in the action of ejectment. The allegations of the complaint are denied by defendant Mary Jackson, except as to possession when suit was brought. In her answer she sets up a defense that in April, 1869, she and W. A. Jackson intermarried in this state, and have since been husband and wife; that some time in 1881 her husband entered into a contract in writing with Charles Crocker for the purchase of the lots of land above mentioned; that about September, 1884, her husband, W. A. Jackson, erected on these lots a residence of about the value of \$1,500; that the money paid for the lots in suit and the house was the joint earnings of herself and husband, since their marriage; that defendant and her husband and children have, since it was built, made this house their home; that on the 12th day of August, 1885, defendant duly executed and filed in the proper office a declaration of homestead on these lots; that by virtue

<sup>1</sup> Rehearing granted.

of the contract entered into between Crocker and her husband, the latter was to pay Crocker the sum of \$75 for each lot in installments, with interest, etc.; that on the 26th of October, 1885, there was not to exceed \$35 due Crocker on the purchase price of these lots, on the payment of which her husband was entitled to a deed from Crocker; that he (her husband) had abundant means to pay the purchase price; that he fraudulently refused to do so to prevent the conveyance of these lots to him, and that he might fraudulently prevent her from acquiring a homestead in the property; that in October, 1887, her husband made a pretended assignment of the contract of purchase to the plaintiff, and on the same day pretended to enter into a contract by which he was to sell and transfer to the plaintiff the house above mentioned; that this contract and assignment were entered into by the plaintiff and her husband for the purpose of cheating and defrauding her of her homestead; that at the time plaintiff accepted the assignment and contract he well knew that the purpose of the same was to cheat and defraud her of her homestead right; that in October, 1887, plaintiff presented the assignment to Crocker, and obtained a deed for the property; that this deed is the only title by which plaintiff claims the ownership of the property in controversy, and that it is void. It appears from the decision that the court found that W. A. Jackson, in 1884, purchased from Crocker, who then owned them, the lots in suit. The contract for the purchase of lot 28 was executed on the 28th of April, 1884, and that for lot 27 on the 7th of August, 1884. Other lots, including lot 29, were embraced in the contract of April, 1884. The contracts are similar in their terms. The purchase price of each lot was \$75. Twenty-five dollars on each lot was paid when the contract was executed. The remaining \$100 (\$50 for each lot, 27 and 28) was to be afterwards paid in two equal installments. The installments were to bear interest at the rate of 10 per cent. per annum. In each contract it is stipulated that if the purchase price is paid as set forth in it, with cost of conveyances, then W. A. Jackson will be entitled to a deed for the lots, otherwise the contract is null and void, and the amounts paid forfeited. If forfeited Jackson thereafter to be the tenant of Crocker, liable to be dispossessed upon three days' notice, and to be liable to pay a rent of \$15 per month for any term he may remain in possession after forfeiture. A payment was made on the 26th of October, 1885, for which a receipt was given by Crocker, in which the same provisions were inserted as to forfeiture on failure to pay, tenancy, liability to dispossession and the payment of rent, but at \$5 per month for possession after forfeiture. After the purchase, W. A. Jackson and Mary Jackson entered into possession of the lots, and have ever since been in possession. In September, 1884, W. A. Jackson erected a dwelling-house and other improvements on lots 27, 28, and 29, at a cost of about \$1,300. The marriage of defendants is found as set forth in the an-

swer, and stated above. Upon the completion of these buildings, defendants and their children entered into the dwelling-house and have ever since made it their home. The execution of the declaration of homestead is found as above stated from the answer. On or about the 6th of October, 1887, plaintiff and W. A. Jackson entered into an agreement for the purchase and sale of the dwelling-house and improvements, by which plaintiff was to pay W. A. Jackson therefor the sum of \$1,500 less such sum as plaintiff should be compelled to pay Crocker for the lots 27, 28, and 29. W. A. Jackson at the same time made and delivered to plaintiff a writing by which the former surrendered and relinquished to the latter all claims to receive a conveyance for the lots just mentioned, and authorized the plaintiff to take and demand a conveyance there or in his own name. At the same time, plaintiff paid to his vendor the sum of \$100 as part payment for the improvements on the lots. On the 15th of October, 1887, plaintiff paid to Crocker the balance due on these lots, and Crocker then executed to him a conveyance thereof. The balance due on the lots described in complaint (27 and 28) was \$35.35 principal, and \$5.86 interest. Plaintiff on the 3d of November, 1887, paid to Jackson the further sum of \$335.20, and executed to him his promissory notes in writing for \$1,000, and also executed to him a mortgage on the three lots to secure their payment. It is also found that the money, notes, and mortgage were the full purchase money of these lots, and that Jackson thereafter sold, assigned, and delivered the notes to one T. W. Drullard as security for money borrowed of him, of which notes and the mortgage Drullard is now the holder as security for this money. On the 6th of October, 1887, and long prior thereto, plaintiff had full actual knowledge of the declaration of homestead above stated, and that Mary Jackson claimed and occupied the premises as a homestead. The plaintiff, immediately after the 3d of November, 1887, demanded possession of the lots sued for of Mary Jackson, which she refused to deliver, and threatened him with violence if he attempted to take or have possession of them. All the charges of fraud on the part of W. A. Jackson and of the plaintiff are negatived by the findings. It is further found that Mary Jackson offered to pay Crocker the balance due him on the lots sued for in December, 1886, upon the condition that Crocker would convey them to her, or to her and her husband jointly; that she had full notice and knowledge of the right and title of the plaintiff to the premises ever since the 3d of November, 1887; that Mary Jackson and her husband have each had, since the date last mentioned, (she of her separate property,) sufficient means to pay the balance of the purchase money due on the lots in litigation, and that Mary Jackson is entitled to the judgment of the court. Judgment was accordingly entered in her favor, and it was by the judgment further ordered that "defendant Mary Jackson pay to the plaintiff the sum of forty-seven and twenty-one one-hundredths dollars,

balance of the purchase price paid on the lots mentioned, with the interest on the same at seven per cent. per annum from date hereof."

We cannot see that Mary Jackson derived any right by her execution and filing of the declaration of homestead. Conceding that her husband had some equitable interest in the premises, still whatever he had he was competent to sell and transfer it. This is so, though the payments made by her husband were the earnings of the joint labors of herself and husband. Whatever interest was thus acquired was community property, of which the law invests the husband with the like absolute power of disposition (other than testamentary) as he has of his separate property. Civil Code, § 172. The husband sold and transferred his interest in the land involved herein to the plaintiff, as he had a right to do. The vendor (Jackson) did not have the legal title to the property, but only the right to get it from his vendor, Crocker, on payment of the purchase money. The sale and assignment to the plaintiff transferred to him the right to have the legal title conveyed to him on payment of the unpaid balance of the purchase money. The purchase was fair in all respects. The court below expressly found that there was no fraud in any of these transactions between W. A. Jackson and plaintiff in regard to the rights of Mary Jackson. The question of fraud may then be laid out of the case. As the case is presented in the record, the law imposed no obligation on the husband to the wife to complete the purchase and procure a deed so as to make possible the acquisition of a homestead by her. Granting that *in foro conscientie* there was an obligation binding the husband to pay the balance, and procure from Crocker a conveyance, such obligation was of the class styled "imperfect," for the breach of which no redress can be had in a court of justice. The husband had lawful right to refuse to complete his purchase, (*Hicks v. Lovell*, 64 Cal. 14; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. Rep. 429.) and the wife cannot be heard to complain of it. When the declaration of homestead was executed and filed by Mary Jackson, the legal title was in Crocker, and he could not have been compelled to convey the land at the time of the transfer of the contract by Jackson to the plaintiff. The whole purchase money had not then been paid, and Crocker was entitled to hold onto the legal title, until he was paid the sum agreed on. Surely Mary Jackson could not, by executing and filing a declaration of homestead, affect Crocker's right to the land or the right of the plaintiff to whom Crocker might, under the facts of this case, have lawfully conveyed and did lawfully convey it. A right cannot be acquired by filing a declaration of homestead on the land of another. This point, if ever open to contention, is no longer debatable in this state. See *Snodgrass v. Parks*, supra. Crocker conveyed the legal title to the plaintiff. The filing of the homestead declaration invested Mary Jackson with no title to the land in suit, and did not detract from or affect in any way the potency of this

title acquired by plaintiff by Crocker's conveyance to him.

The motion to dismiss the appeal is made on the ground that the judgment had been satisfied. The court gave judgment in favor of Mary Jackson, thus holding that she was entitled to the possession of the lots in controversy, and that plaintiff was not, and then ordered and adjudged that she pay to plaintiff a sum of money "because of the purchase money paid on the lots involved." This was done without any appropriate pleadings. She did not offer to pay any money, nor did she set forth in her answer any state of facts calling for any such judgment. The matter set up in the answer was pleaded merely as a defense to the action, which turned on the issue of right to the possession of the land sued for. There was no pleading on her part in which a demand was made for relief on payment of any sum of money. The portion of the judgment referred to (quoted above) was entirely outside of any issue joined in the cause before the court. It was entirely foreign to anything set forth in either complaint or answer. There was nothing in the case on which to base it. It is suspended as it were in mid air, without support of any kind or description, and is entirely irregular and erroneous. The record shows this state of facts in regard to this alleged satisfaction: that Mary Jackson's counsel on the 31st of August, 1888, after the appeal was taken, left on the desk of one of the attorneys for plaintiff the sum of \$45.86, thus tendering it to plaintiff as payment of the sum adjudged by the court to be paid to plaintiff by defendant; that the counsel for plaintiff refused to accept it, and still holds it for defendant. There is no ground for holding such a tender or payment a satisfaction of the judgment. The motion to dismiss the appeal is denied, and the judgment is reversed with directions to the court below to enter judgment on the findings for the plaintiff, with a judgment for rents and profits at the rate of \$15 per month from the 31st of October, 1887, to the date of the judgment. So ordered.

We concur: PATERSON, J.; SHARPSTEIN, J.

Fox, J. I concur in the order reversing the judgment of the court below on the ground that said judgment as entered is not supported, either by the pleadings or the findings. But I am not prepared to say that the defendant Mary Jackson has not a homestead interest in the premises which she is entitled to have protected, under proper pleadings.

I dissent: MCFARLAND, J.

I dissent: BEATTY, C. J.

(87 Cal. 281)

PEOPLE v. DOUGLASS. (No. 20,695.)

(Supreme Court of California. Dec. 23, 1890.)

ASSAULT WITH DEADLY WEAPON—RECORD—INFORMATION—PRIOR CONVICTION—JUDGMENT.

1. Defendant, accused by information of assault with a deadly weapon, and of a prior con-

viction for manslaughter, pleaded not guilty of the former, and guilty of the latter. The minutes of the trial stated that after the jury were sworn "the information is read, and the plea of not guilty stated to the jury by the clerk." *Held*, that this means that only the charge to which defendant pleaded not guilty was read.

2. Where the record shows that an information charged an assault upon Daniel Aueson, and that the evidence proved an assault on Daniel Aueson, but it also appears that the court told the jury that he was accused of assaulting Daniel Aueson, it will be presumed that the court read the information aright, and that in copying for printing the clerk had mistaken the letter "u" for the letter "n."

3. A person who, when a train is about to start, passes from a railroad depot across the steps of a sleeper, and goes forward on the opposite side, and gets upon the platform of a mail-car situated several cars from the passenger coaches, and two cars from the nearest sleeper, will not be presumed to be a passenger, but, on the contrary, a brakeman is justified in taking him to be a trespasser.

4. Pen. Code Cal. § 666, provides that if the subsequent offense of which a person, who was formerly convicted of a felony, is convicted, is such that upon a first conviction he could be punishable by imprisonment in the state-prison for less than 5 years, then, on such subsequent conviction, he can be punished by imprisonment not exceeding 10 years. *Held* that, since one first convicted of an assault with a deadly weapon may be imprisoned 2 years, he may, when it appears that he was formerly convicted of a felony, be imprisoned not exceeding 10 years.

5. A judgment which states the crime of which defendant was convicted, and the sentence of the court, is sufficiently definite and certain.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

John Aherns and P. Reddy, for appellant. W. Ed. Tupper and S. J. Hinds, for the People.

THORNTON, J. The defendant was convicted of the crime of assault with a deadly weapon. This appeal is by him from the judgment, and an order denying his motion for a new trial. Several points are presented and argued on behalf of appellant, which we will proceed to consider. The defendant was accused by the information of assault with a deadly weapon, and of a prior conviction of a felony, viz., manslaughter. On his arraignment he pleaded guilty to the prior conviction of manslaughter, and not guilty as to the charge of assault with a deadly weapon. When the jury had been impaneled and sworn, it is stated in the minutes of the trial that "the information is read, and the plea of not guilty stated to the jury by the clerk." It is urged on behalf of defendant that it was error to read the information to the jury. The counsel for defendant construes the statement above quoted as a statement that the whole information was read, including both charges made in it, to one of which, as above stated, defendant had pleaded guilty. We do not so construe the statement taken from the minutes of the trial. We understand it as a statement that the charge in the information as to the assault only was read. It would be entirely unnecessary to read that portion of it in which the prior conviction, to which he had pleaded guilty, was set forth. At any

rate it does not clearly appear that the whole information was read. If it was read, it was done in the presence of defendant and his counsel, and no objection was made to it. Further, the record shows distinctly that the charge as to the assault only was submitted to and passed on by the jury.

The verdict is in accordance with law (Pen. Code, § 1151,) and is free from uncertainty. See *People v. McCarty*, 48 Cal. 557. The same is true of the judgment. See *In re Ring*, 28 Cal. 248. The judgment as entered states the crime of which the defendant had been convicted, and the sentence of the court. This is all that is required by law. There is no uncertainty in these statements.

It is argued that there is a fatal variance between the information and the proof, inasmuch as the information sets forth that the assault was made on Daniel Aueson, and the proof is that it was made on Daniel Aueson. The court in its charge told the jury that the defendant is accused of the crime of an assault on Daniel Aueson. The only accusation in this case is that set forth in the information. The direction of the court to the jury is as to what is contained in the information. Whether the question as to what is contained in the information is one of law or fact, it is to be determined by the court below; and when the court below has determined it, unless it clearly appears to be error, this court will not disturb it. Many persons in writing the letter "u" sometimes form it very like the letter "n," and *e converso*, so that one letter is frequently mistaken for the other. We have no doubt such is the case here,—that in giving shape to "u" it was formed in such a manner as to resemble the letter "n." The only evidence that we have that "n" was the letter instead of "u," is that of the clerk who copies it to be printed as "n." But the court below differed from the clerk as to this, and between the two it is the duty of this court to follow the judgment of the court below. The foregoing considerations induce us to conclude that it is not clear that the court below fell into an error in this matter, but, on the contrary, that the court below read the information aright, and that in this regard there is no error in the record. We have considered the points in regard to the directions given by the court below, and the refusal by the court of the requests to direct the jury made by defendant, and find no error in them.

There is no presumption of law or fact that a person found anywhere on the passenger train of a railway is a passenger. Such a presumption is opposed to all principle. If a person is found in or on a passenger-car, on a train for carrying passengers, such a fact will justify the conclusion *prima facie* that he is a passenger; but if seen to go on the platform of a mail-car, or of some other car not run for the accommodation or use of passengers, no such conclusion as that he was a passenger could be legitimately drawn. The rule seems to be laid down with a significant limitation in *Railway Co. v. Thompson*, 9 N. E. Rep. 357, cited and relied on

by defendant. The rule as there stated is that "a person on a train used for carrying passengers is, in the absence of countervailing circumstances, presumed to be a passenger, and rightfully there." By the language here used, the presumption is allowable "in the absence of countervailing circumstances," which is equivalent to saying that the "presumption," admitting it to exist, "belongs to the class of disputable presumptions, and may be rebutted." The rebutting evidence is spoken of in the opinion as countervailing circumstances, which are nothing more than rebutting circumstances. The circumstances which rebut the presumption that defendant was a passenger are abundant. Evidence was introduced which tended to show that the defendant was not a passenger on the train. A witness testified that he was a brakeman on the night passenger train No. 18, on the morning of the 20th of April, 1889, when the shooting occurred of which defendant is accused. On the morning of that day, before daylight, when it was dark, the train being stopped at Madera, in Fresno county, the witness saw two men (one of whom was defendant) coming up from the rear end of the depot to where he stood. These men crossed the platform of a sleeper, and went up on the opposite side of the train from the depot. They went up towards the engine. He saw them attempt to get on the train behind the mail-car, between the mail-car and the express-car, and he hallooed to them not to get on, to keep off, but they paid no attention to his hallooing. Witness went to where they were, the defendant standing on the platform of the mail-car, and the other on the platform of the express-car. He drove one off the train; the other (defendant) refused to go, and, in the effort to get him off, the witness was shot by the defendant. The platforms of the cars on which the two men got were several cars distant from the regular passenger-car, and two cars from the nearest sleeper. These men did not go to the passenger-car at all, nor did they speak to any one connected with the management of the train to procure a passage, or pay fare, and, when the witness (brakeman) ordered them off the train, they did not say, or pretend in any way or manner, that they were passengers on the train. Evidence of these circumstances was before the jury. The court in its instructions left it to the jury to find whether they were passengers or intruders or trespassers on the train. The objection on behalf of the defendant is that there was no evidence on which this question could be left to the jury. In this the learned counsel for defendant is mistaken. The evidence is detailed above, and, in our view, was sufficient, and the court committed no error in submitting the point to the jury whether the defendant was a trespasser or a passenger on the train.

Another point made is that the court erred in telling the jury that the defendant, a trespasser on the train, was not justified in using his pistol and shooting, if the train was running at a rate of speed when he (the defendant) could with safety get off it or descend from it. We cannot con-

cur in this view. If wrongly on the train, no law would justify him in shooting, when he could with safety get off it, and avoid the shooting. It was his duty to get off when told to do so. If he did not, he could not urge it as a defense rendering the shooting justifiable, if he could have gotten away from the train with safety to himself. This is too plain to require argument to establish it. The statement of the proposition is a refutation of it. We are of opinion that the court fairly put the case to the jury in its directions, and refused no request which it was not proper in law to refuse.

The point as to the term of punishment is not well taken. By the provisions of subdivision 2, § 686, Pen. Code, if the subsequent offense of which a person is convicted is such that upon a first conviction he could be punishable by imprisonment in the state-prison for any term less than 5 years, then, on such subsequent conviction, he can be punished by imprisonment in the state-prison not exceeding 10 years. Here defendant, if he had been first convicted for the offense for which he was subsequently convicted, could have been punished by imprisonment in the state-prison for 2 years, *i. e.* a term less than 5 years. For the subsequent conviction, then, he could have been sentenced to the state-prison for a term not exceeding 10 years. The sentence was for 8 years, 2 years short of the time for which he could have been sentenced. After an examination of all the points made and discussed, we are of opinion that there is no error disclosed by the record, and that the judgment and order should be and are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(87 Cal. 290)

CAMPE v. MEIERDIERCKS. (No. 12,951.)

(Supreme Court of California. Dec. 24, 1890.)

REVIEW—FINDINGS—CONFLICTING EVIDENCE.

A finding of fact by the court upon conflicting evidence will not be reviewed upon appeal.

Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

W. B. Tyler, for appellant. Henry H. Reid, for respondent.

THORNTON, J. In this case, the whole question is as to an issue of fact which was determined by the court below in favor of plaintiff. Whether the money sued for was a gift or not, part of it to the defendant and a part of it to his daughter, depends on evidence in the cause. The evidence was on all material points conflicting. The court below decided that the money was not a gift, and rendered judgment for plaintiff. It is no use to review the evidence, but as it was conflicting on the issue above mentioned, according to the long-established rule of this court, the decision of the court below will not be disturbed. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.



(3 Cal. Unrep. 343)

**VITORENO v. COREA.** (No. 14,055.)

(Supreme Court of California. Dec. 20, 1890.)

**APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.**

Where no transcript on appeal is filed within 40 days as required by the rule of the court, and no showing made to take the case out of that rule, the appeal will be dismissed on motion of respondent.

In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Thomas Scott, for appellant. Chase, Chase & Miller, for respondent.

PER CURIAM. Appeal was perfected in this case March 5, 1890. No transcript has been filed, and no showing is made taking the case out of the operation of the rule requiring transcripts to be filed within 40 days after the perfection of appeal. On motion of respondent, it is ordered that the appeal be dismissed.

(87 Cal. 253)

**DRINKHOUSE v. SPRING VALLEY WATERWORKS.** (No. 12,823.)

(Supreme Court of California. Dec. 22, 1890.)

**RES ADJUDICATA.**

Under Code Civil Proc. Cal. § 1246, providing that in actions to condemn land any person claiming any interest in the land, though not named in the proceedings, may appear, plead, and defend his interest "in like manner as if named in the complaint," where one takes a written lease of land with notice of the pendency of an action to condemn it, and then fails to appear and defend his interest, he is estopped by the judgment in that proceeding from claiming anything under his lease.

In bank. Appeal from superior court, city and county of San Francisco; E. F. HEAD, Judge.

Ben Morgan, for appellant. Wm. F. Herrin and C. N. Fox, for respondent.

PATERSON, J. This action was commenced on July 29, 1887, to enjoin the defendant from building a dam across San Mateo creek. Plaintiff alleged that on January 1, 1887, Mary Drinkhouse, the owner of the premises, leased them to him for the period of one year, with the privilege of five years from the expiration thereof; that he went into possession, and on the 19th day of April, 1887, a written lease was entered into, by the terms of which he was to have the possession and use of the property for the term of five years from said 19th day of April; that defendant was constructing a dam below said premises, which, when completed, would throw water back upon them and permanently deprive him of the use thereof. The court found that the verbal lease, made as alleged by plaintiff, was by mutual consent canceled on April 19, 1887, and the written lease entered into as alleged, but that no change was made in the possession or use of the property; that said Mary Drinkhouse is the mother of plaintiff, and continued to occupy and use the premises, and he continued to live with her as he had theretofore done from his birth; that on February 28, 1887, and while said Mary Drinkhouse was the owner of a tract of land including the premises described in

the complaint, defendant herein commenced an action against her and J. A. Drinkhouse, her husband, for the condemnation of said tract of land to public use, and duly filed in the recorder's office a notice of the pendency thereof, and that a decree in its favor was entered July 27, 1888; that during the trial of said action plaintiff herein was present as a witness, and acting on behalf of the defendants therein, but never until after the entry of the decree therein made any claim to any interest in the property.

We think that the evidence supports these findings, and that the conclusions of law drawn by the court below are warranted by the facts found. The plaintiff lived in San Francisco with his parents, and testified that he lived "six days of the week in San Francisco, and one day in San Mateo;" that he never fitted up the place as a lodging-house, but put in a few tables, chairs, and blankets; that he had no servants or employes there, and that the foreman who had been in the employ of his mother continued to live in the building. He admits that when he entered into the written lease he knew that a suit was pending in which the water company was seeking to condemn the land. His verbal lease for one year was canceled six weeks before the condemnation suit was commenced. He knew that such a suit was pending,—was in fact an active participant on behalf of his parents against the claim of the company. Under section 1246, Code Civil Proc., the plaintiff herein was authorized, though not named as a party to the condemnation proceedings, to appear, plead, and defend his interest as a lessee, if any such he held, "in like manner as if named in the complaint," and, having failed to do so, although he had notice of the proceeding,—assuming that he was a lessee in good faith, which the court evidently did not believe,—he is now estopped by the judgment in that proceeding from claiming anything by virtue of his written lease entered into subsequent to the filing of the *lis pendens*. Roach v. Water Co., 74 Cal. 263, 15 Pac. Rep. 776; Civil Code, § 3529; Miller v. White, 80 Ill. 580; Wells, Res. Adj. § 32. The court did not err in its ruling against the objections of plaintiff to the admission of the judgment roll and *lis pendens*. The court found on all the material issues. Some of the material allegations of the complaint were not denied. It was not necessary, therefore, to find in relation to them. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

(87 Cal. 245)

**WHITE v. ALIATT et ux.** (No. 13,772.)

(Supreme Court of California. Dec. 20, 1890.)

**MORTGAGE FORECLOSURE—PLEADING—REPUGNANCE—AMBIGUITY—UNCERTAINTY.**

1. In an action to foreclose a mortgage, where the notes and mortgage set out in the complaint show that they were made to plaintiff as "trustees of the estate of W., deceased," an averment in the complaint that plaintiff sues as "trustee for the heirs at law of W." is immaterial and redundant, and must be disregarded.

2. In such action, therefore, a judgment in favor of plaintiff as "trustee of the estate of W., deceased," is supported by the pleadings.

3. An averment in the complaint as to attorney's fees is not ambiguous and uncertain on the ground that it cannot be determined whether fees are demanded for foreclosure of the mortgage as to two of the notes only, or as to all three, where it appears that, when the action was commenced, but two of them were due, and hence that the recovery must be confined to those two.

4. A demurrer to a complaint on the ground of ambiguity and uncertainty cannot be sustained if the complaint be either ambiguous or uncertain, but is not both.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge. *W. J. McIntyre and H. Goodcell, Jr.*, for appellant. *E. B. Stanton*, for respondent.

GIBSON, C. This action was brought to foreclose a mortgage. The demurrer to the complaint was overruled, and, upon defendants' failure to answer, judgment was rendered against them. From that judgment they bring this appeal, and claim—*First*, that the demurrer should have been sustained upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and, that it is ambiguous and uncertain; and, *second*, that the judgment is not sustained by the pleadings.

1. It is urged that the facts are insufficient for the reason that the plaintiff sues as trustee for seven designated persons, described as "heirs at law of B. F. White, deceased," and there is no allegation that he is a trustee for any purpose for any of the beneficiaries, or that the notes in suit were made in his name for their benefit, and therefore the persons named as beneficiaries are the real parties in interest, and not the plaintiff. The complaint alleges that the three notes set out in it were made and delivered to the plaintiff by the defendants, together with the mortgage in suit, to secure their payment, and that the plaintiff is the owner and holder of the notes and mortgage as trustee for the beneficiaries, "all the heirs at law of B. F. White, deceased;" while the notes themselves show that they were made to the plaintiff, "as trustee of the estate of B. F. White, deceased." These two allegations are said to be inconsistent with each other, because the identity of the plaintiff as trustee for seven particular persons, described as heirs at law of B. F. White, deceased, is different from that of trustee of the estate of the same decedent. But this inconsistency is more apparent than real. It is true that in the latter capacity, if he were trustee of the whole estate, he would not only represent the heirs, but the legatees, devisees, and creditors, if any, as well; while, in the first-mentioned capacity, he would simply represent the persons named as beneficiaries. This makes it appear that the first is more extensive in scope than the second, and that it is not repugnant to the latter. The notes sued on are, however, the principal contract, to which the mortgage is but an incident, and, as it clearly appears from the notes themselves that they were made to the plaintiff for the benefit of "the estate of B. F. White,"

deceased, he must be regarded as a trustee for that estate. These facts are material and controlling, in view of which the averment of ownership of the notes and mortgage, as trustee of the heirs of said decedent, becomes immaterial and redundant matter, and as such must be disregarded. By taking the notes and mortgage in his own name for the benefit of the estate of the decedent above named, he became the trustee of an express trust, and as such may maintain this suit, without joining with him the persons for whose benefit the action is prosecuted. Code Civil Proc. § 369; Bliss, Code Pl. § 262; Shouler, Ex'rs, § 292; Pom. Rem. § 175. This is one of the exceptions to the rule declared in section 367 of the Code of Civil Procedure, that every action must be prosecuted in the name of the real party in interest. The complaint is therefore not objectionable upon the first ground of demurrer.

2. On the grounds of ambiguity and uncertainty, the first point made is that the averment respecting the attorney's fee is uncertain because it cannot be determined from the complaint whether the amount demanded is reasonable or not, because it does not appear whether the amount is demanded for the foreclosure of the mortgage as to two or all three of the notes. Of the three notes set up in the complaint, two were due when the action was commenced, and, as these two were the only ones that could be recovered upon, it seems clear enough to us that the amount demanded as an attorney's fee related to the foreclosure of the mortgage as to those two; hence it cannot be said that the complaint is, in that respect, either ambiguous or uncertain. But, even if it were uncertain, such an averment is unnecessary; for, as was said in *Carrier v. Minturn*, 5 Cal. 435, "the counsel fees stipulated to be paid were not the cause of action, but, like the costs, a mere incident to it, and may be fixed by the chancellor at his discretion, not exceeding the amount stipulated." This rule has not since been departed from. *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514; *Rapp v. Gold Co.*, 74 Cal. 532, 16 Pac. Rep. 325. See, also, *Association v. Clark*, 84 Cal. 201, 23 Pac. Rep. 1081. What has been said regarding the objection urged upon the general ground of demurrer disposes of the remaining objections as to the uncertainty and ambiguity of the complaint, as they are based upon the averment of trusteeship for the heirs of B. F. White, deceased, and the fact that the notes show they were made to the plaintiff as trustee for the estate of B. F. White, deceased. Again, if the complaint were either ambiguous or uncertain, but not both, the demurrer being in the conjunctive as to these two grounds, it could not be sustained. *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. Rep. 1137.

3. It is claimed that the judgment is not sustained by the pleadings because of the averment to the effect that the plaintiff is the trustee of the persons named as heirs of the decedent, and the judgment is in favor of the plaintiff as trustee for the estate of the same decedent. But as the averment mentioned is, as above shown,

immaterial, and as the notes and mortgage were made and delivered to the plaintiff "as trustee of the estate of B. F. White, deceased," the judgment is in accordance with and supported by the complaint. We therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(87 Cal. 211)

GRAY v. SABIN. (No. 11,740.)

(Supreme Court of California. Dec. 20, 1890.)

VACATING JUDGMENT—ABSENCE OF COUNSEL.

By consent, a cause was set for trial November 25th, but on that day plaintiff's counsel was at L., and, a continuance being refused, the case was set for November 30th. On that and the following day the court was engaged in another trial. The next day a clerk of plaintiff's counsel stated that he had returned and had gone to M. to try a case, but the court, on defendant's demand, ordered the case to proceed. No evidence was offered by plaintiff, and verdict and judgment were rendered against him. Afterwards the judgment was vacated on an affidavit of merits, and affidavit of counsel that he had engaged to attend the trial at M. several months before, and on his return from L. he was informed that this case could not be reached for several days; that the court was accustomed to continue cases for the convenience of counsel engaged in other courts. There were counter-affidavits denying this custom, and showing that plaintiff's counsel had before agreed to dismiss the case. On a subsequent motion to set aside the order vacating the judgment, it appeared that plaintiff's counsel had attended the trial at M. as a witness, and voluntarily, without a subpoena. *Held*, that there was no sufficient ground for vacating the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

*Pillsbury & Blanding*, for appellant.  
*Robert Ash*, for respondent.

PER CURIAM. This cause came regularly on for trial, having been set by consent of all parties on November 25, 1885. Counsel for plaintiff was absent. His clerk stated that he was unavoidably detained in Los Angeles, and asked for a continuance. The defendant objected to a continuance, but, as there was another cause on trial, and as the next day was Thanksgiving day, the court put the case over until Monday, November 30th. On the latter day, and the day following, the cause was called for trial, and the defendant answered, "Ready." On December 2d, other business having been disposed of, the court ordered the case to proceed. The clerk again appeared on behalf of the attorney for plaintiff, and stated that said attorney was in Modesto trying a case, although he had returned from Los Angeles to San Francisco since November 25th. Defendant objecting to a continuance, the court ordered the trial to proceed. A jury was impaneled, and, no evidence having been offered on behalf of the plaintiff, a verdict was rendered for the defendant. On De-

cember 10, 1885, the plaintiff served notice of motion to vacate judgment on the ground that it was taken against him through his mistake and excusable neglect. In support of his motion he presented an affidavit of merits, which also alleged that he expected his attorney to be present at the trial; that he was too poor to employ other counsel to take his place; and that he believed his attorney was actually engaged in another court in the trial of a cause. His counsel made affidavit that, although he had returned to San Francisco on November 29th, he had several months prior engaged to be in Modesto to attend the trial of a cause there, set for November 23d, and afterwards continued to November 30th; that he was informed on his return to San Francisco, November 30th, this cause could not be reached for several days on account of other business before the court, and that it was a custom of this court to continue causes for the convenience of counsel engaged in other courts. Counter-affidavits were filed on behalf of the defendant, alleging that there was no custom under which causes were continued for the convenience of counsel engaged in the courts of outside counties; that counsel for plaintiff had long before agreed to dismiss this cause. J. L. Boone, a partner of the attorney for plaintiff, who was absent in Modesto at the time of the trial, corroborated the defendant in his statement as to the promise of a dismissal. A clerk in the office of the attorneys for defendant stated that he had informed the attorney for plaintiff as to the day of the trial, and said attorney stated that he would not be present, that he was going to Los Angeles, and asked for a continuance, which the clerk said he had no authority to grant. The court granted the motion of the plaintiff and set aside the judgment. Thereafter the defendant moved the court to set aside its order vacating the judgment, on the ground that it had been deceived in matters of fact by the affidavits filed on the application to vacate the judgment, which motion was denied, and defendant has appealed. It was made to appear—indeed, the fact was not disputed—that the attorney of the plaintiff attended a trial at Modesto, not in the capacity of an attorney, but as a witness; that he was not subpoenaed, but attended voluntarily; that he left Modesto before the trial of the said cause was completed, having been permitted to give his testimony out of the regular order, so that he might return to San Francisco. We think that, under the showing made on the first application, the motion to set aside the judgment ought to have been denied; and, certainly, on the showing made to vacate the order the defendant was entitled to have it set aside, and to have the judgment stand on the verdict of the jury. If such excuses as were offered in this case were held sufficient to set aside judgments, there would be no end to delays and annoying expedients. The orders appealed from are reversed.

(3 Cal. Unrep. 354)

DIETZ v. MISSION TRANSFER CO. (No. 13, 915.)<sup>1</sup>

[Supreme Court of California. Dec. 31, 1890.]

DEED—RESERVATION—EJECTMENT—RES ADJUDICATA—ADVERSE POSSESSION—ESTOPPEL.

1. The owners of land conveyed a part of it to plaintiff, with a reservation to them and their assigns of "the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances," and the right to do whatever was necessary to obtain and transport such minerals, including the erection of proper machinery, and the laying of pipes. The rest of the original tract was conveyed in parcels to other persons, with the same reservation, and finally the reserved rights and interests in the whole were granted to defendants. Held, that defendants have no right to the possession of plaintiff's land further than is necessary to the exercise of the rights reserved in that tract alone.

2. Where, in ejectment, it is shown that defendants have taken possession of a part of plaintiff's land, to enable them to exercise the rights reserved in the rest of the original tract by their grantors, and that they are not seeking the minerals in question on plaintiff's land, and that none exist there, plaintiff is entitled to recover the possession of the land occupied by them.

3. A judgment in a former action determining that a lease to plaintiff, granted before he obtained his deed, of the right to take such minerals in the entire tract had expired, and enjoining him from interference with defendants' right to take such minerals, they having purchased it from his grantors, is no bar to such action of ejectment.

4. Plaintiff's recovery cannot be defeated on the ground of defendants' adverse possession, where the evidence shows that before the statute had run the structures by which defendants held possession were carried away by flood, and rebuilt in a different place on plaintiff's land; for, as defendants were trespassers, their possession was adverse only to the extent of the land actually occupied by them.

5. Plaintiff's deed to defendants of all structures erected by him on the land, for the purpose of exploring for, obtaining, and transporting such mineral, will not estop him to claim title to, and the right of possession of, the land on which such structures stand.

In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

*Noble Hamilton and Joseph A. Joyce*, for appellant. *Charles Fernald and John J. Boyce*, for respondent.

**WORKS J.** This is an action of ejectment. The common grantors of the plaintiff and defendant were the owners of a large tract of land, including the land in controversy in this action. They subdivided the land, and sold it in several tracts. One of these tracts, being the one now in litigation, was conveyed to the plaintiff. The deed conveying the land contained this reservation or exception: "Excepting and reserving to the parties of the first part, and their servants, agents, and assigns, the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances, and the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the said premises, together with the right of way over and through any and all parts of said premises, for the purpose of going to and coming from said works, and transporting machinery, tools, implements, and supplies for said works, and of transporting said substances to a

market, and the right to lay pipes to conduct oil, and the right to dispose of said substances, and of transferring to their grantees thereof the same rights as are herein reserved to the parties of the first part; but not to destroy or injure any crops growing upon, or any improvements on, said premises, such as buildings, trees, vines, roads, inclosures, without making just compensation for such injury or destruction, reserving, also, to the parties of the first part the right of way for a road or roads over and across said premises, for the use of tenants or vendees of adjoining and other lands of said rancho." A like reservation or exception was contained in conveyances of other parts of this larger tract to other parties. Subsequently, said grantors conveyed to the defendant in this action the estate or interest in the whole tract reserved or excepted by these conveyances. The complaint is in the ordinary form. The answer, in one defense, sets up these conveyances; that the defendant was entitled to all of the rights reserved or excepted by said conveyances, and alleged further. "That prior to the commencement of this action, and on or about the 2d day of July, 1883, this defendant entered into the possession of its estate in said lands, as hereinabove particularly described, and then at once began, in good faith, to exercise open and notorious acts of ownership over the same, under claim of right and title thereto, and then, at great expense, began the exploration for, and the development of, said oil interests, and the erection of costly machinery, derricks, rigs, buildings, storage-tanks, and pipe-lines upon said premises, and defendant has thence, hitherto, continued, in good faith, the progress thereof, and the development of said territory for said oils; that the respective estates of the plaintiff and the defendant in the premises described in said amended complaint are of such a kind and character that the possession of the surface of the soil thereof has been held and enjoyed by each separately, to the extent and for the benefit of their said several, respective, separate estates, freeholds, and property therein, and not otherwise, ever since plaintiff and defendant acquired their said several, respective, separate interests and estates in said real property; and that this defendant is now the owner, seised and possessed in fee-simple absolute, and in the actual occupation and possession of the said estate and interest in said real property described in the amended complaint of plaintiff herein, as particularly, and specifically, and at large set forth and described in this answer." The answer also pleaded the statute of limitations, a former adjudication, and an estoppel by deed, which will be further noticed hereafter.

The court below found the interests in the land in the plaintiff and defendant, as above stated, and, among other things, found "that the plaintiff in this action has been, since said 23d day of November, 1882, continuously, to the present time, in the possession and enjoyment of the estate so conveyed to him by the said Carpenter and Steinbach, but has not held, occupied,

<sup>1</sup> Rehearing granted.

or enjoyed any part or portion of the excepted estate, reservations, rights, or privileges excepted and reserved by his deed of that date, and the defendant has never ousted or ejected plaintiff from any portion of his said estate, and the defendant does not now withhold the possession thereof from the plaintiff. That thereafter, and in the month of May, 1883, this defendant entered upon said land and premises, as hereinabove, and in said amended complaint, described, and took possession and the actual occupation of all of its separate estate therein, and exercised and enjoyed the entire and exclusive use of, in, and to said excepted estate and reservations, rights, and privileges, and that said defendant has continuously, from said date to the present time, so exclusively occupied, used, enjoyed, and controlled said excepted estate, and said reservations, rights, and privileges. That the entry of the defendant in this action upon said described tract of land was under and by virtue of said instrument in writing, made by the said Steinbach and Carpenter to the said Whaley, by which the said excepted estate and interest in said tract of land, and the reservations, rights, and privileges in, over, and upon the same were sold and conveyed to the said Whaley, and under and by virtue of the transfer, sale, assignment, and conveyance thereof by the said Whaley to the said defendant. And the said defendant never did at any time enter upon the separate estate of the plaintiff in said premises, nor in any manner oust or eject the plaintiff therefrom; but said entry was made, and said occupation and possession taken and acquired, by defendant, and held and enjoyed solely and exclusively for the rightful occupation and enjoyment of said excepted estate, and said reservations, rights, and privileges. That the said several respective estates, interests, rights, and privileges of the plaintiff and the defendant in, over, and upon the particular tract of land hereinabove, and in said amended complaint, described are separate, distinct, entire, and complete in themselves, and that the possession of the plaintiff and the defendant of the surface of the soil of said tract is for the benefit, advantage, use, and enjoyment of the respective and separate estates resting and being in each. And that said respective and separate estates are of such a kind and character that the possession of the surface of the soil of said tract of land can be held and enjoyed by each separately, to the extent and for the benefit of each of said several, respective, separate estates, freeholds, and property, for the respective uses, and purposes, and rights of each resting and being in plaintiff and defendant; and that the possession has been so held and enjoyed by the respective parties hereto ever since the acquisition by each of their respective interests and estates in said real property. That the defendant, in the month of May, 1883, entered upon said land and premises hereinabove, and in the amended complaint of plaintiff, and in the answer thereto of defendant herein described, and took possession and actual occupation of

its estate therein, in the same manner, and to the same extent, as it now occupies and enjoys the same; and that, continuously from said date, its possession has been by an actual, open, and notorious occupation, under claim of right and title to said estate, founded upon said various written agreements and conveyances, made by the said Steinbach and Carpenter, to it and to its predecessor, the said Whaley, and it has held, occupied, and enjoyed said possession as the owner of said excepted estate, reservations, rights, and privileges, as its own absolute property, and in hostility to the plaintiff's title, and to the whole world. That said possession and occupation have been continuous, open, notorious, and uninterrupted from said month of May, 1883, to the present time, and said defendant has paid, during said time, all state, county, and municipal taxes levied and assessed upon the same." The court also found in favor of the defendant on the defenses of former adjudication, the statute of limitations, and estoppel by deed, and, that no question might arise as to the findings covering the issues, there was also a general finding that all of the allegations of the defendant's answer were true. Upon these findings, the court concluded as follows: "(1) That defendant, the Mission Transfer Company, a corporation in this state, was, at the time of the commencement of this action, and now is, the sole owner in fee-simple of the excepted estate, with the reservations, rights, and privileges set forth in the answer of the defendant herein, and in the deed of Steinbach and Carpenter to plaintiff, A. C. Dietz, dated November 23, 1882, excepted and reserved, and subsequently conveyed by Steinbach and Carpenter to the defendant herein, with the right to perpetually use said premises in the manner, and to the extent, in said deed, and hereinabove in these findings set forth; (2) that plaintiff has no right, title, or interest, or any estate whatever in or to, such excepted estate, or the reservations contained in said deed, and that no estate therein passed to plaintiff by said deed of November 23, 1882, or otherwise; (3) that the plaintiff is not entitled to recover against defendant in this action, by reason of defendant's occupation of the tract of land and premises described in the amended complaint and answer herein, and in these findings; (4) that defendant is entitled to his costs and disbursements in this action." It must be evident, at a glance, that some of these findings are entirely inconsistent with each other, and that the findings and conclusions of law have left the case in utter confusion. The court below, as appears from its conclusions of law, seems to have been laboring under the impression that the plaintiff was attempting to recover the interest or rights reserved or excepted by the original grantors, and subsequently conveyed to the defendant. The findings and conclusions seem to be based upon this theory, and, so treating the case, the decision was against the plaintiff. Viewing the case in this light, no doubt the conclusion reached by the court was right. But

such was not the question presented, and the conclusions of law are almost entirely aside from the real question in the case. It was not a question whether the plaintiff or defendant, or either of them, owned the interests claimed by them respectively, but which of them was entitled to the possession of the property, conceding their titles or interests to be as claimed by each.

Counsel on both sides discuss in their briefs, at great length, whether the clause in the deeds above referred to, and set out, was a reservation, or an exception; but we think it is entirely immaterial to this controversy whether it was one or the other. The same may be said of the controversy in the briefs, as to whether the interest of the defendant was a corporeal hereditament, or estate in the land, or a mere incorporeal hereditament or easement. As we construe the deed to the plaintiff, it conveyed to him the fee-simple title to the land, subject to the right of the grantors and the defendants, as their successors in interest, to enter upon the land, and occupy it for the purposes mentioned in the deed. For those purposes, and none other, the defendant was entitled to the possession of the land, or so much thereof as was necessary for such purposes, and for such a length of time as it was necessary for it to occupy it for such purposes, and no longer. It makes no difference, therefore, whether its interest in the land constituted a title to a part of the land itself or not. If it did, it was only entitled to go upon the land for the purpose of severing its part of the land from that of the plaintiff, and removing it therefrom. It had no right to enter upon and hold its part of the land, where situated, to the exclusion of the plaintiff. The plaintiff was entitled, under his deed, to the possession of the surface of the land. The defendant was entitled to take possession of and occupy the plaintiff's land, for the purpose of extracting therefrom the mineral substances contained therein, if any, to explore and excavate the lands, for the purpose of ascertaining whether it contained such substances or not, and, if found, to erect the necessary buildings and machinery, put down pipes, and to make and use such roads as were necessary to remove the oils or other substances from the land. The deed also gives the defendant the right of way for a road, or roads, over and across the premises, for the use of tenants or vendees of adjoining and other lands. This clause in the deed has no connection with the defendant's interest in the land, which is only a right to enter upon this and other tracts of land for a temporary purpose, but applies to tenants and vendees of the other tracts, to whom the original grantors or their grantees might sell or lease the property. Therefore, this last clause in the reservation, or exception, need not be further noticed.

It will be observed that the defendant alleged in its answer, and the court found, that it went into possession of the land, and began, in good faith, to exercise notorious acts of ownership over the same, and at great expense began the explora-

tion for, and development of, said oil interests, and the erection of costly machinery, derricks, rigs, buildings, storage-tanks, and pipe-lines upon said premises, and that it has continued in good faith the progress thereof, and the development of said territory for said oils. This allegation in the answer is defective, in not alleging directly that the entry of the defendant, and other acts done, were for the purpose of developing and extracting oil from this land. It seems, however, to have been treated as such an allegation at the trial, and found upon as such by the court. It is insisted by the appellant that the finding of the court that the defendant was in possession for the purpose of developing or extracting oil from the land in controversy is not sustained by the evidence, and that the evidence shows, beyond any controversy, that the buildings placed upon the plaintiff's lands, and the pipes put down, and roads made and used thereon, were placed thereon and used for the sole purpose of extracting and removing oil from other and different lands, and that the evidence shows that no attempt had ever been made by the defendant to explore the plaintiff's land for oil, or other substances mentioned in the reservation or exception, and that, in fact, the evidence shows that no such substances existed in or upon this land. We have examined the evidence carefully, and find the appellant to be right in this contention. The evidence not only fails to show that the respondent's possession was taken for the purpose of developing and extracting oils or other substances from the appellant's land; but the respondent's own testimony shows affirmatively and conclusively that it took possession, and constructed buildings, and other structures, and put down pipes on the plaintiff's land solely for the purpose of developing, extracting, and removing oils from other and different lands, and that it had made no effort to develop oil on the plaintiff's land. Not only so, but the evidence failed to show that the land contained any oil, or other substances, included in the defendant's right in the land, and tended strongly to show that it did not contain any such substances. It was contended by the respondent that it had the right, under the exceptions and reservations in the several deeds made to the plaintiff and others, to occupy and use all of the land for the purpose of developing and extracting oil from any part of it. But there is nothing in the plaintiff's deed giving any such right. On the contrary, the reservation or exception contained in the deed, so far as it gives the right to enter upon and occupy the land, is confined in plain and unambiguous terms to the development and removal of oil, and other substances, from the land described in the deed. To hold that the defendant could enter upon, occupy, and use the land for its convenience in extracting and removing oils from another and different tract of land, would be to vary the terms of the deed in a material respect, and make for the parties a new and different contract. This the courts have no power to do. What we have said is applicable to the right to put

down pipes to convey the oil. This provision, although not limited in express terms to oil taken from the land, must be construed in connection with the other rights granted, and be limited in the same way. For these reasons, the finding of the court that the defendant was rightfully in possession of the land, occupying its own estate therein, and other findings based upon this theory of the defendant's rights, are not sustained by the evidence, and the conclusions of law founded upon these findings rest upon an erroneous view of the law.

The respondent attempts to justify the decision of the court below on the ground that the plaintiff's cause of action was barred by a former judgment. But we are quite clear that the questions adjudicated and determined in the former action, and the one now before us, are not the same. It appears from the pleadings in the former action that the appellant had, prior to the execution of the deed to him, leased from the owners of the entire tract above mentioned the right to take oil and other substances from the same, and the lease gave him the option to purchase the perpetual right to take such oil, and other substances mentioned, from the whole tract, on certain conditions, and bound him to give up possession at a certain time, in case such perpetual right was sold to other parties; that the appellant had failed to buy said right; that it had been sold to the respondent who had made improvements, and expended large sums of money in making the improvements necessary for developing the oils and other substances taken from said lands; that the appellant had refused to surrender the possession of the property, and was claiming the right to still extract oils from the land, and refused to permit the respondent to enter upon the same for the purpose of exploring for, developing, and extracting the oils and other substances from the land. The judgment of the court in that case was against the appellant, that his lease or license had expired; that the respondent was entitled to the possession of the land for the purposes before mentioned, and enjoined the appellant from asserting or exercising any rights under said lease or license, and also enjoined him from preventing the respondent from entering upon the land for the purposes mentioned. It will be observed that the case relied upon as a bar to this action presented an entirely different question from the one now before us. There the question was as to the right of the appellant to hold possession of the whole tract of land, and extract oil from it under a lease. Here there is no question as to the right of the appellant to hold the land under a lease, or to extract oil from it, nor is such a right on the part of the respondent involved in this case. Here, the appellant asserts the right to the possession as owner of the soil of a part of the tract, and not the right to extract oil from it. He does not dispute the right of the respondent to enter upon and occupy the land for the purpose of exploring for, developing, and extracting from his land,

oils or other substances mentioned in his deed. His claim is that the respondent is in possession of the land for other and different purposes, and is therefore a mere trespasser. This claim is fully substantiated by the evidence, and it is not covered by the former judgment.

Again, it is contended by the respondent that the appellant's cause of action was barred by its adverse possession. But this position is effectually answered by the findings of the court below. It is directly found by the court that the plaintiff was never ousted of his possession, but that he and the defendant were both in possession, and were both entitled to the possession. It is true that the court found generally that the answer of the defendant, which included the defense of the statute of limitations, was true, but the other finding referred to is inconsistent with and contradictory of this. Besides, both the evidence and the findings show that the defendant made no claim of title to the land as against the plaintiff, and that it never paid any taxes upon it. It merely asserted the right to occupy a part of the land, temporarily, in conjunction with the plaintiff, and not adverse to his claim of ownership, and paid taxes for a part of the time, not on the land, but upon the structures it had placed upon it. A holding without disputing the plaintiff's rights, and without asserting any claim opposed to his rights, could not be adverse to him. *Unger v. Mooney*, 63 Cal. 595; *Oneto v. Restano*, 78 Cal. 377, 20 Pac. Rep. 743. Besides, the evidence fails to show that the possession of the defendant was continuous. Its occupation was of a part of the land by certain structures erected upon it. The evidence shows that before the statute had run its full time these structures were washed away by high water. It is not shown when they were replaced. But it is shown that, when the structures were rebuilt, they were put up on a different part of the plaintiff's land. As the defendant was a mere trespasser, it could only obtain title to the land actually occupied by it, and as its possession was changed, and neither part of the land was in actual possession by it for the requisite time, there was no bar as to either tract.

As to the claim that the plaintiff is estopped by deed to deny the defendant's right to possession, we find that there is nothing in the deed inconsistent with the plaintiff's claim in the action. The deed was by the appellant and one Hill, and granted, bargained, sold, assigned, and transferred to the respondent all of their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe-lines, fixtures, and all other personal property whatsoever that now is, or are, or ever hereafter has or have been, on or upon any portion of the rancho, known as the 'Ex-Mission of San Buena-ventura,' in the county of Ventura, state of California." This was nothing more than a transfer of an interest in personal property. But counsel for respondent seem to think that, because, at the time the transfer was made, a part of the property was on the lands of the appellant,



now in controversy, the appellant is in some way estopped to claim title and possession to his land. But, as we have said, we see nothing in the deed which should estop the appellant from asserting and maintaining his present claim. Judgment and order reversed, and cause remanded.

We concur: SHARPSTEIN, J.; McFARLAND, J.; DE HAVEN, J.; PATERSON, J.

SCHULTZ *et al.* v. McLEAN *et al.* (No. 13-991.)<sup>1</sup>

(Supreme Court of California. Dec. 20, 1899.)

EQUITY—PLEADING—RESULTING TRUSTS—FRAUD—RESCISSIION.

1. In a suit to declare a resulting trust in plaintiffs' favor arising out of fraud in the procurement of a conveyance of land, the complaint alleged that the title was vested in defendant by a conveyance from one who held the legal title as trustee and agent for plaintiffs, in which conveyance plaintiffs joined; that the consideration for the deed, which was absolute on its face, was \$26,000, but that defendant agreed to pay \$5,000 more thereafter, and to hold the land in trust, and at a future time sell it for a price satisfactory to both parties, under plaintiffs' supervision and control, and to divide the profits with them. It was alleged, however, the plaintiffs' agent and trustee told them that such was defendant's agreement, and it was not alleged that defendant ever made such agreement with plaintiffs, or that he authorized their said agent to do so. *Held*, that the complaint does not show facts sufficient to establish a trust on the ground of fraud.

2. Even had such trust been established by the allegations of the complaint, it could not be enforced in this suit where the complaint fails to allege that an opportunity had ever occurred to sell for a satisfactory price, or that plaintiffs had ever exercised their supervision and control with a view to effect a sale.

3. Such complaint shows no cause of action entitling plaintiffs to a decree that they are owners of the land, and that defendant's interest therein is that of a mortgagee, subject to their right to redeem, as it fails to show any obligation assumed by plaintiffs which the mortgage was given to secure.

4. Nor is it sufficient as a complaint for the rescission of the sale on the ground of fraud, as the only fraud alleged is not shown to be that of defendant, but of plaintiffs' agent.

5. Though the complaint alleges the intention and understanding of plaintiffs in the transaction, and the findings of the court are that such was in fact their intention and understanding, this does not entitle them to any relief, where it was not communicated to defendant, and his intention and understanding was different.

In bank. Appeal from superior court, San Luis Obispo county; JAMES F. BREEN, Judge.

*D. M. Delmas, (T. M. Osment, W. F. Herrin, and H. L. Gear, of counsel,)* for appellant. *E. W. McKinstry, John J. Roche, Jas. J. Waymire, and Graves, Turner & Graves, (Haggin & Van Ness, of counsel,)* for respondents.

Fox, J. 1. The complaint does not state facts sufficient to constitute a cause of action against the appellant for the relief demanded, or for the relief granted, or for any relief permissible under the allegations or within the prayer of the complaint. So far as the allegations of the complaint tend to show a cause of action against the appellant, it is in the form and nature of a bill in equity to declare and

enforce a resulting trust, one claimed to have resulted by reason of fraud in the securing of a conveyance of real estate, but in the nature of an express trust, the object and purpose of which is definite and fixed, and one under which the rights of all the parties are alleged to have been made fixed and absolute by contract. The prayer is not either to declare or enforce the alleged trust, but to disregard it, and for a decree adjudging, in legal effect, that the appellant's title to the land is in the nature of a mortgage, and granting plaintiffs the right to redeem, and for such further conjunctive, not for such alternative, relief, as may be agreeable to equity. The relief granted disregards the allegations of the complaint, and follows the prayer.

(a) The complaint fails to show a case of resulting trust. It shows that the conveyance or instrument under which the title became vested in appellant is a deed absolute upon its face, for which appellant paid at the time a money consideration, amounting to nearly \$26,000; that it was made, executed, and delivered by the holder of the legal title, who held it as trustee and agent of plaintiffs, and who, in executing it, was acting in pursuance of his trust, and within the scope of both his apparent and his actual authority as agent, and also by the plaintiffs themselves, the owners of the equitable title, and sole beneficiaries under the trust. They thereby attested, certified, and affirmed to the appellant the authority and power of their agent and trustee, and by the joint act of themselves and their trustee united and vested both the legal and the equitable title in the appellant. That trust was extinguished, and the entire estate in the lands became vested in the appellant. *Welton v. Palmer*, 39 Cal. 458. Was a new trust created? That is a question to be determined from the allegations of this complaint. When a deed is absolute in form, the intention appearing on its face ought to prevail, unless a different intention is made to appear so clearly as to leave no doubt upon the subject. *Henley v. Hotelling*, 41 Cal. 26, 27. This deed is attempted to be avoided by an effort to show that it was obtained by fraud, and under an express promise that the grantee would advance a further sum of \$5,000, which he has not done, and would then hold the lands in trust, and at some future time, under the supervision and control of plaintiffs, would sell the same, and after deducting from the proceeds of the sale the sum of \$25,906.77, the sum which he actually did pay, with interest at 7 per cent. per annum, would pay to them one-half the remainder, less the said sum of \$5,000, retaining the balance for his own use and benefit. But the complaint fails to show that the appellant and alleged trustee made any such promise or agreement, or accepted the deed under such or any trust. It shows that their own agent and trustee told the plaintiffs that such was the bargain, and that they acted on the faith of what he said, and trusting upon his honesty and fidelity in the premises; but it does not show that the grantee in the deed made any promise or agreement whatever, either of trust or for future ad-

<sup>1</sup>Rehearing granted.

vances, or that he had any knowledge of what their agent told them in the premises. The grantors in such a deed cannot avoid it on the ground that a third person practiced a fraud upon them, of which the grantee was ignorant, and more particularly so if, as in this case, that third person was their own agent. *Deputy v. Stapleford*, 19 Cal. 302; *Insurance Co. v. McCormick*, 45 Cal. 583; *Stewart v. Whitlock*, 58 Cal. 2; *De Arnaz v. Escandon*, 59 Cal. 486. If a fraud was committed upon the plaintiffs, it was committed, as shown by this complaint, by their own agent, and not by this appellant, and they (the plaintiffs) must suffer the consequences. *Salter v. Baker*, 54 Cal. 143. If deceived by their own agent, and loss results, it is theirs. *Overacre v. Blake*, 82 Cal. 77, 22 Pac. Rep. 979. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civil Code, § 3543. If there was fraud or wrong, it was the fraud or wrong of the agent of plaintiffs, and not of the defendant, (appellant here,) and the latter cannot be held responsible for it in the absence of any knowledge on his part that it was being committed. *Overacre v. Blake*, supra. Even if it be true, as alleged in the complaint, that the law firm of which Robinson, the trustee and agent of plaintiffs, was a member, were attorneys of appellant, it does not follow that he is chargeable with knowledge of the deceit practiced by Robinson upon his principals, if any, for he was not dealing with Robinson as an attorney at law, but as the holder of a title which he was buying, and who had full power to sell; and that he had such power was affirmed by the plaintiffs themselves. It is not claimed or pretended that Robinson was authorized by McLean to make any such representations as it is said he did make to plaintiffs; so that, even if Robinson was acting as attorney at law for McLean, and in that sense his agent, the latter can be chargeable with constructive notice only of such acts as were done within the scope of his apparent authority. There is nothing in the employment of a law firm which would give to one who was not acting as a lawyer in a given transaction of purchase and sale, but as the trustee, personal representative, and agent of another, even apparent authority to represent to his principal that the purchaser in that transaction was doing, or had promised to do, other or different from that which appeared upon the face of the papers as demanded by him to be done; and statements made by him *in pais* which would tend to show a transaction other or different from that shown by the papers would not be binding upon the purchaser. *Wilson v. Railroad Co.*, 53 Cal. 736. The complaint, therefore, fails to show facts constituting a trust.

(b) If there is such a trust as declared upon, the complaint fails to show a present right of action to declare or enforce it, or that there ever can be a right of action to extinguish it in the manner prayed in the complaint, and attempted in the decree. If there is a trust such as declared,

it is one which has vested the whole title, legal and equitable, in the appellant. Civil Code, § 863; *Ward v. Waterman*, 24 Pac. Rep. 930, (No. 12,662, filed September 5, 1890.) In the trust property, the plaintiffs have reserved no right whatever, present or future. No provision is made by which the property, or any part thereof, is ever to be returned to the plaintiffs. The only manner of executing the trust is to convert the property into money. When so converted, the plaintiffs will be interested in the net proceeds only, after first deducting the whole amount invested by appellant therein, with interest, and then only to the extent of one-half, the remaining half being still the property of appellant. The relief prayed, and the relief granted, would be in direct violation of the terms of the trust itself, as it is alleged to have been agreed upon by the parties. This trust, if enforced at all, must be enforced according to its terms. *Hidden v. Jordan*, 21 Cal. 93, 28 Cal. 316; *Cowing v. Rogers*, 34 Cal. 653; *Sandloss v. Jones*, 35 Cal. 489; *Pujol v. McKinlay*, 42 Cal. 559. Equity will furnish alternative relief where, and when only, the terms of the trust cannot be specifically enforced, as in the case of *Adams v. Lambard*, 80 Cal. 426, 22 Pac. Rep. 180. In this case there is no attempt to show that the trust cannot be executed according to its terms. To disregard those terms, and grant the relief prayed, and attempted to be given, would be to deprive the appellant, who is himself a beneficiary under the alleged trust, of all the benefits thereby guaranteed to him, and to work a forfeiture of all his beneficial interest in the estate. This would not be equity but oppression, and a court of equity cannot lend itself to such a proceeding. Nor does the complaint show the plaintiffs entitled to any present relief under the alleged trust. The power and duty of the appellant was to sell, not to reconvey at any time or upon any terms. He was bound to sell only when he could realize a price satisfactory to both parties, and had power to sell only with the consent and under the supervision and control of plaintiffs. There is no averment that an opportunity has ever occurred when a satisfactory price could be realized, or that the plaintiffs have ever consented to sale, or that they have ever made an effort to effect a sale under their supervision or control. As to the \$5,000 further advances, there is no allegation bringing home to appellant a promise to make such advance, or that he has ever been asked to make it, and the fact that it remains unpaid furnishes no ground of action in equity, whatever it might do at law.

(c) The complaint fails to show a cause of action for decree in the nature of declaring plaintiffs to be the owners, and the right of appellant that of a mortgagee with right in plaintiffs to redeem, as prayed and decreed. There is not and never has been a relation of debtor and creditor between these parties. There is no obligation of any character resting upon these plaintiffs, secured or to be secured by mortgage. Without such an obligation, there can be no mortgage. *Henley v. Hotaling*, 41 Cal. 28; *Farmer v.*

Grose, 42 Cal. 169; *Montgomery v. Spect*, 55 Cal. 352. There is no pretense that the plaintiffs have ever promised to pay anything, or assumed any obligation whatever.

(d) It is claimed in argument that the action is for rescission, on the ground of fraud. That is not the relief demanded or granted, and the allegations of the complaint are insufficient to entitle plaintiffs to that relief. Rescission can be had in those cases only which are mentioned in section 1689, Civil Code, and in the manner prescribed in section 1691 of said Code. The fraud must be that of the party against whom the rescission is had, not that of him who seeks rescission, or of his agent or personal representative. As already shown, whatever of fraud or deceit is shown by this complaint was the fraud of the agent of plaintiffs. And, even if it be true that there was a failure to pay a part of the purchase price, that would not entitle the vendor to rescind the contract, and recover back the land. *Lawrence v. Gayetty*, 78 Cal. 134, 20 Pac. Rep. 382.

It follows from these conclusions that the demurrer to the complaints should have been sustained on the ground that it did not state sufficient facts, and it further follows that the complaint does not support the judgment.

2. It is also claimed by appellant that the plaintiffs' cause of action, if any they ever had, is barred by the statute of limitations. As we have held that no cause of action is stated, this point is, perhaps, at the present time unimportant. But, as it is possible that an attempt may be made to state a cause of action, we deem it best, without dwelling upon the point, to say that, in our judgment, the ruling of the court below upon this point was correct. The action was commenced within eight months after the date of the conveyance under which appellant claims. Three complaints have been filed, all based upon the same transaction, all praying for substantially the same relief, differing slightly in stating the terms of the alleged trust, the last one differing from the others mainly in being more specific in charging fraud, and stating the acts constituting the alleged fraud. But we do not think that it presents another and different cause of action, although it presents it in a somewhat different form.

3. The facts as found differ materially from those alleged in the complaint, only in this: The court expressly finds that McLean never did make to Robinson, or authorize Robinson to make to plaintiffs, the representations alleged in the complaint, or the promise to pay other or more than he did, or that he would take or hold the land in trust for any purpose whatever, or that he promised or intended to deal with the land in any other way than as an absolute purchase, but that each and every of such representations was made by Robinson to plaintiffs without the knowledge, consent, approval, or sanction of said McLean; that McLean was willing and anxious to purchase the lands absolutely, and pay the price therefor which he did pay, but was not willing,

and never did intend, to deal with them in any other way, or to pay any greater price therefor, and that he intended, when he made the purchase, to hold and claim the lands absolutely; further, that Robinson has not now, and never has had, any interest in the said lands, by virtue of any contract between himself and McLean. Some of the other findings are not responsive to the issues in the cause, and as to them they must be disregarded. Counsel for respondents discuss with much force the inferences to be drawn from the finding of the court as to the relations existing between McLean and the law firm of Robinson, Olney & Byrne. That argument might with propriety be addressed to the court below, but it is too late to ask this court to draw inferences in direct conflict with the positive finding, the substance of which is given above. The court below had before it the evidence, such as it was, of the relations of those parties, and found on it, and still found positively and affirmatively, as a fact, that McLean never made any representations or promises as charged, and never authorized the making of any such representations or promises, or knew that such were made; and also found that the man who did make them was the agent and trustee of plaintiffs, and acting for them and on their behalf. It does say, in the third finding, that Robinson acted for and on behalf of McLean, as his agent, "as herein-after stated," but it does not "hereinafter," or anywhere, find or state any particular in which Robinson acted for or on behalf of McLean, or as his agent, and this simple expression in the third finding cannot be held to defeat the positive findings found in 15 and 16, the substance of which is above stated. There is nothing in *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689, or *Newman v. Smith*, 77 Cal. 26, 18 Pac. Rep. 791, cited by respondents, to conflict with this view. For the reasons which we have given in point 1, if the findings had been in full accord with the allegations of the complaint, they would have been insufficient to support the judgment. With findings 15 and 16 so at variance with the allegations of the complaint, and so directly in favor of the appellant as they are, there seems to be nothing left for the judgment to stand upon. It is urged that the allegations of the complaint are in accordance with the intention and understanding of the plaintiffs at the time that they executed the deed, and that the findings accord with the complaint in that regard. Concede that to be true; it is still found that such was not the intention or understanding of the defendant McLean, against whom this judgment is rendered, and whose deed is here attempted to be set at naught. The mere intention of the plaintiffs, uncommunicated and unknown to the defendant, cannot control the plain letter of his deed, executed with all the formalities required by law. *Stewart v. Whitlock*, 58 Cal. 2. The court found, as alleged in the complaint, that the land was worth at the time of the conveyance the sum of \$45,000, and it is urged that the inadequacy of consideration is itself evidence of fraud, for which the conveyance

should be annulled, and the relief granted. This point is not well taken. Where a sale is made by a trustee, as was done in this case, and the approbation of the *cestui que trust* is manifested by his joining in the execution and acknowledgment of the deed, he cannot thereafter complain that there was no consideration for the conveyance. *Welton v. Palmer*, 39 Cal. 456. If he cannot complain that there was no consideration, much less can he do so for inadequacy of consideration. Want or insufficiency of consideration will not establish fraud *per se*. *Gillan v. Metcalf*, 7 Cal. 138; *Horn v. Water Co.*, 13 Cal. 62; *Thornton v. Hook*, 36 Cal. 229, 230; *Welton v. Palmer*, supra; *Goad v. Moulton*, 67 Cal. 536, 8 Pac. Rep. 63. The plaintiffs have failed to allege, and the court has failed to find, facts constituting a fraud against which equity can relieve. Eliminating the allegations of fraud, plaintiffs have alleged, or attempted to allege, a contract which the court finds was never made. The court cannot make or enforce any other contract than the one declared upon. *Congdon v. Chapman*, 63 Cal. 359.

4. It is claimed that the evidence is insufficient to justify the findings. The conclusion we have reached on points 1 and 3 have rendered it unnecessary to consider this question. But we have looked into the evidence, and find that it fully justifies findings 15 and 16, above referred to, except that we see nothing to justify the sentence to the effect that, for the purpose of avoiding any notice of Robinson's trust and the equities of plaintiffs in the lands, defendant McLean refused to have any meeting or interview with plaintiffs, or either of them. And we find nothing in the evidence or in the findings to justify the conclusion "that the plaintiffs are the owners of the lands described in the complaint, and that the defendant McLean holds the legal title thereto in trust for the plaintiffs." The relief granted is not warranted by anything in the case, except the prayer of the complaint, and the prayer will not warrant any relief except such as is warranted by the allegations of the complaint, supported by the evidence and the findings. Judgment and order reversed, and cause remanded.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

PATERSON, J. I concur in the judgment, on the ground that the relief granted by the decree goes beyond the allegations of the complaint. According to those allegations, the whole title was vested in the appellant. The respondents reserved no right in the real estate, present or future. Appellant was to sell the property, and, after repayment of the moneys expended and advanced by him, the profits arising from the proceeds were to be divided. There is nothing to show that the trust alleged cannot be enforced, the property sold, and the net proceeds divided. The property may have greatly appreciated in value since it was conveyed to appellant. If so, he is entitled to the benefit of a sale, which, under this decree, he would not receive.

SCHULTZ et al. v. McLEAN. (No. 14,039.)<sup>1</sup>

(Supreme Court of California. Dec. 20, 1890.)

In bank. Appeal from superior court, San Luis Obispo county; JAMES F. BRENN, Judge.

D. M. Dalmas, (T. M. Osmont, W. F. Herrin, and H. L. Gear, of counsel,) for appellants. E. W. McKinstry, John J. Roche, Jas. J. Waymire, and Graves, Turner & Graves, (Haggin & Van Ness, of counsel,) for respondent.

PER CURIAM. This is an appeal from so much of the judgment rendered in the above-entitled cause, and considered in No. 13,991, this day decided, (ante, 427,) as requires the plaintiffs, as a condition of redeeming, to pay interest upon the amount determined in and by the said judgment to be due to said McLean. The terms of the contract and trust declared upon in the complaint cannot be complied with, without the payment of such interest, except it be by a sale of the land with the approval and consent of plaintiffs, for an amount which shall be found insufficient to pay both principal and interest. But as the entire judgment is reversed and set aside, by the decision in said case, No. 13,991, filed this day, there is nothing left to be determined upon this appeal, and the same is dismissed.

(87 Cal. 313.)

FISKE et al. v. SOULE. (No. 13,314.)

(Supreme Court of California. Dec. 31, 1890.)

REAL-ESTATE BROKERS—COMMISSIONS.

1. In an action by real-estate brokers for commissions, it appeared that defendant placed with them for sale certain lands to be sold at \$45 per acre net without the crops, or \$47.50 per acre net with the crops, the brokers to have as commission any sum they could get above these figures. A written contract of sale, without reservation of crops, was made for a gross sum equal to \$48.50 per acre, but the court found that the actual contract was a sale at \$45 per acre without the crops, and it was so reported to defendant. The money was tendered, and a deed presented for execution, which, however, contained no reservation of the crops. Defendant made no objection on this account, and it was apparently taken for granted by all that the crops would not pass; but he absolutely refused to execute the deed, or pay the commission. Held, that plaintiffs were entitled to recover \$3.50 per acre as commissions.

2. Whether plaintiff's exceeded their authority in making a contract of sale, instead of merely securing a purchaser, was immaterial in an action to recover their commission.

3. That the contract of sale called for a conveyance "free of all incumbrances" did not require a deed of general warranty against incumbrances, and, if it did, defendant cannot object on that ground, when the deed presented to him was only an ordinary grant deed, and he then made no objection either to the form of the contract or the deed.

4. The fact that the contract bound the purchaser to the payment of the price only by forfeiting a cash payment of \$500 is immaterial, when it appears that a tender of the whole price was made.

5. The fact that cash was tendered obviates any objection on the ground that the contract of sale did not require cash payment.

6. The fact that cash was tendered prevents any defense on the ground that plaintiffs were not entitled to commissions until the price was paid.

7. The fact that the land belonged to defendant's wife is immaterial, since he gave it in for sale as his own, and plaintiffs were ignorant that it was not his.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Thomas & Hurst, for appellant. Baker & Grant, for respondents.

WORKS, J. Plaintiffs are real estate and

<sup>1</sup> Rehearing granted.

insurance agents. They claim that the defendant employed them to sell for him certain real estate, on certain terms and conditions, which they fulfilled; but that, notwithstanding defendant's agreement to pay their commissions for making the sale which he authorized, he has refused to pay them, and, to recover what is due them, they have brought this suit. They recovered a judgment for the sum of \$2,103.50, with interest thereon from the 5th day of May, 1887, and costs, from which, and an order refusing a new trial, this appeal is taken by the defendant. The contract, or agreement, under which the plaintiffs undertook to sell the land for the defendant, is as follows: "This writing, made this 15th day of April, A. D. 1887, witnesseth: That I, W. H. Soule, of the county of Yolo, in the state of California, have this day placed with Geo. D. Fiske & Co., for sale, the following property, of which I am the owner in fee, situate in section —, township —, range —, (see plat,) county of Yolo, and state of California, to-wit: Consisting of about 600 acres of land, being the southerly half of the tract known as the 'John M. Rhodes Rancho' in Capay valley. Price, \$45.00 per acre (net) without crops, or \$47.50 per acre (net) with the crop. Terms of payment as buyer and seller may agree. The said property to remain in the hands of Geo. D. Fiske & Co., for sale or exchange for thirty days from the date hereof, and I hereby agree that if, at the expiration of that time, five days' notice by me in writing of the withdrawal has not been given them, this agreement shall continue in full force until I give such notice, hereby authorizing Geo. D. Fiske & Co. to sell the aforesaid property and article, with purchaser for the same, as my agents, according to price and terms of payment above written, or any price or terms of payment which I may agree to take other than the above, and agreeing with them that, if the same be sold or exchanged during the time it is in their hands, no matter by whom, I will pay them a commission of all I receive over and above the price above mentioned on amount of said sale or exchange. And I further authorize Geo. D. Fiske & Co. to advertise the said property to the amount of \$——. It is further understood by me, before signing this agreement, that Geo. D. Fiske & Co. will pay out of their commission all expenses of advertising done by them. W. H. SOULE. [Seal.] [Endorsed:] We hereby accept and agree to the terms of the within instrument this 15th day of April, A. D. 1887. GEO. D. FISKE & CO." The contract of sale which plaintiffs made with the purchaser is as follows: "\$500.00. Received of John D. Stephens the sum of five hundred dollars, (\$500,) the same being a part of the purchase money for the following described piece or parcel of land situate, lying, and being in Capay valley, Yolo county, Cal., formerly known as part of the 'John M. Rhodes Tract,' being the same land bought by me from John M. Rhodes, said land being bounded on the north and east by H. Hammel and Cache creek; on the south by Winters and Palm-

er; and on the west by the west line of the Rancho Canada De Capay,—containing 500 acres of land. The remaining portion of the purchase money, to-wit, the sum of \$23,600.00, to be paid on or before the 12th day of May, 1887, by John D. Stephens or his assigns. In consideration of which the said land is to be conveyed free of all incumbrances to the said John D. Stephens or his assigns. Dated, Woodland, Cal., April 23, 1887. W. H. SOULE. By Geo. D. FISKE & Co., his agents." The defendant refused to convey the property, after a tender of the money specified in this agreement, and also refused to pay the plaintiffs their commissions.

It is contended by the appellant that the plaintiffs were not entitled to recover because the contract of sale was for \$45 per acre with the crops, when the limit of their authority to sell was for that price without the crops, and \$47.50 per acre with the crops; but the sale was made for a sum in gross which amounted to more than \$47.50 per acre. There was 601 acres of land, and it was sold for \$29,100, which amounted to \$48.41 per acre; so that, conceding that the contract of sale included the crops growing on the land, the sale was for more than the highest amount the plaintiffs were required to sell for, and the sale was not beyond their authority. The sale agreed upon was for \$48.50 per acre, supposing that there were 600 acres of the land, but it turned out that there were 601 acres. And when a tender was made to the defendant, it was for \$48.50 more than the written agreement called for, so as to cover the agreed price for the additional one acre. The court below found, however, that the sale was for \$45 per acre without the crops, and there was evidence to support this finding so far as the verbal agreement between the plaintiffs and the purchaser was concerned, but not as to the written contract between them. The contract bound the defendant to convey the land without any reservation of the crops. This written contract was binding on the defendant, if the plaintiffs had the power to make it, unless corrected on the ground that by mistake it was not in accordance with the agreement actually made. Under its finding that the land was sold for \$45 per acre without the crops, the court allowed the plaintiffs, as commissions, the difference between that sum and the sum of \$29,148.50. The plaintiffs were bound by their agreement to account to the defendant for \$47.50 per acre, if the crops went with the land, and were only entitled to the balance of the purchase price over and above that sum as their commissions, unless the defendant waived the form in which the agreement to sell and the deed tendered to him were made. We have seen that, by the terms of the written agreement, the crops must go with the land. Therefore, the amount found in favor of the plaintiffs was excessive to the amount of \$2.50 per acre upon the 601 acres of the land, if this written agreement was to be looked to alone. It may be that, if the actual agreement was as claimed by the plaintiffs, and a tender and

a demand for a deed containing a reservation of the growing crops had been made, the plaintiffs could recover the full amount claimed in any event, but this does not appear to have been done. But there is another ground upon which we think the plaintiffs were entitled to recover the whole amount of their commissions. The sale was reported to the defendant as a sale at \$45 per acre without the crops. He asked the plaintiffs to sell the crops to the parties for \$2.50 per acre if possible. The plaintiffs consented, and attempted to do so, but the purchasers stated that they did not want the crops, and refused to buy them. The form of deed presented to the defendant, when a conveyance was demanded of him, was an ordinary grant deed without any reservation of the crops. But the defendant did not refuse to consummate the trade on the ground that the deed was not in proper form, or on the ground that the sale was not in accordance with the written authority given by him. The evidence shows clearly that it was the understanding of all the parties, the purchaser included, that the crops were not to pass. If any such objection had been made, there can be no doubt that a deed containing the necessary reservation would have been accepted. It seems not to have been observed by any of the parties at the time that the contract of sale or the deed proffered were not in the form necessary to carry out the agreement of the parties. The defendant refused absolutely to consummate the sale or to negotiate with reference to it. It is perfectly apparent that the fact that the contract and deed were not in proper form had nothing whatever to do with his refusal to execute the deed. This being the case, he should not be allowed to offer that as an excuse for not complying with his contract by way of defense to this action.

It is contended by the appellant that the contract given by the defendant to the plaintiffs did not authorize the plaintiffs to sell the land or to bind the defendant by their agreement to sell it, but only to secure a purchaser. This might be material if the action were by the purchaser to enforce a specific performance of the agreement to convey, but it is wholly immaterial in this case whether the power of the plaintiffs was to sell or merely to procure a purchaser. They complied with their part of the contract. If the defendant did not see proper to convey to the purchaser they had procured, this was no reason why he should not pay their commissions. It is immaterial that the plaintiffs in their complaint construed and treated this as a power to sell, even conceding that it was not. The contract was set out and made a part of the complaint, and entitled them to whatever was authorized by its terms and the facts proved. The allegations were sufficient to entitle them to recover as mere brokers. *Dolan v. Scanlan*, 57 Cal. 261. It is claimed by the appellant that the authority given by the contract was revoked before the sale was made; but the court found to the

contrary, and there was evidence to support the finding.

It is further contended that the contract of sale was not within the power of the plaintiffs because it required the defendant to convey by general warranty against all incumbrances. But the evidence shows that, when the tender was made, no such deed was demanded, nor do we think the contract required any such deed. The deed demanded was, as we have said, an ordinary grant deed, and its form was not objected to, nor was there any claim that the property was incumbered, or that there was any reason why the plaintiff could not or should not execute such a deed. It is also insisted that the contract was unfair and not mutual, because the purchaser was not bound, in any way, to pay the purchase money, except by a forfeiture of the \$500 cash payment. But this, if so, is immaterial. The whole purchase money was tendered to the defendant when a deed was demanded of him, and before this commission was demanded. It is further claimed that the sale was not made within the time limited by the contract. This is based upon the assumption that payment of the purchase money was necessary to constitute a sale, which is not necessarily so. The purchaser could not be expected to pay the purchase money before receiving a conveyance. Counsel say that the contract required a sale for cash. This we think is not so. By the terms of the contract the terms of payment were to be "as buyer and seller may agree." If this is to be construed as reserving to the defendant the right to agree in person upon the terms of payment, it is still clear that it did not impose upon the plaintiffs the duty of selling for cash. Besides, there could be no reasonable objection to the terms of payment when cash was tendered, and no such objection was made to the consummation of the sale.

Again, it is contended that the plaintiffs were not entitled to recover until the purchase money was paid. It may be conceded that this would be so if the purchaser had failed to pay the purchase money, but the defendant could hardly defend on this ground when the purchase money was not paid, solely because he refused to accept it. It appears from the evidence that the title to the property was not in the defendant, but in his wife. This was not material. He gave it to the plaintiffs to sell as his property, so stated in his contract, and the evidence is to the effect and the court found that the plaintiffs had no knowledge, until after they had made the sale, that the title was not in him. Under such circumstances his want of title could not affect the plaintiffs' right to recover their commissions. The court found on all the material issues. All of the findings necessary to a recovery are sustained by the evidence, and they support the judgment. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.; THORNTON, J.

(87 Cal. 267)

HAVEMEYER *et al.* v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 13,709.)

(Supreme Court of California. Dec. 22, 1890.)

CONTEMPT—WRIT OF PROHIBITION—RECEIVERS.

1. Under a writ of prohibition to a judge enjoining him from interfering with petitioners' possession of certain property, either through a certain receiver appointed by him or otherwise, the judge is guilty of contempt if the receiver acts in violation of the writ, and the judge, with knowledge of the receiver's proceedings, refrains from exercising his power to control them.

2. Where the appointment of a receiver is void as being in excess of the jurisdiction of the court, and the receiver is advised by a preliminary writ of prohibition that the validity of the proceedings in the matter of the receivership are challenged on jurisdictional grounds, the receiver, having at the time of the service of such writ at most only a mixed or scrambling possession of the property, will be guilty of contempt in thereafter interfering with the possession of petitioners contrary to the terms of the writ.

THORNTON, J., dissenting.

In bank. Proceedings to punish for contempt. For decision on application for writ of prohibition, see 24 Pac. Rep. 121.

BEATTY, C. J. The application for a peremptory writ of prohibition herein, and the charge that the judge of the superior court and his receiver had violated the injunction contained in the preliminary or alternative writ, and had thereby committed a contempt, were heard and submitted together. In our opinion filed at the time of deciding the cause, (see 84 Cal. 327, 24 Pac. Rep. 121,) we stated very fully all the facts necessary to be considered in deciding upon the charge of contempt, excepting only those relating to the character and extent of Mr. Reddy's possession of the refinery, etc., at the time he was served with the alternative writ. Avoiding, as far as possible, any repetition of that statement, we proceed to consider whether the charge of contempt has been made out. That Mr. Reddy did interfere with the possession and control by petitioners of the refinery and other property claimed by them in their own right, and described in our writ; that he did interfere with the conduct and business of the same; and that he did continue to exercise with respect thereto all the powers granted in the order appointing him receiver, after service of our writ,—is conceded; and it is also conceded that the judge of the superior court, after like notice, entirely and purposely abstained from any interference with his proceedings. But it is contended in behalf of the receiver that before he had any notice of our order he was in complete and absolute possession of all the property claimed by the respondents, and that his subsequent dealings with it were only such as were necessarily incumbent upon him by reason of such possession. In behalf of the judge it is claimed that the effect of our writ was to deprive him of all control and direction of the receiver, and, consequently, to absolve him from any responsibility for his acts. This claim of exemption from responsibility on the part of

the judge cannot be allowed. The object and purpose of our order and writ, expressed in the plainest terms, (84 Cal. 351, 24 Pac. Rep. 121,) was to restrain the action of the court. It was addressed directly to the judge, and only indirectly, through him, to the receiver. Both were bound by it, but it was nevertheless the duty of the principal to see that the agent obeyed it, and, whatever the receiver did in violation of its terms, the judge must answer for, if, with knowledge of his agent's proceedings, he refrained from exercising his undoubted power to control them. And such, as we have seen, is the case. The whole matter to be determined, therefore, is the correctness of the receiver's position; i. e., that he was in full possession before he had any notice of the injunction, and that he did nothing thereafter except to preserve things *in statu quo*. He contends that from the afternoon of February 17th he was in full, complete, and absolute possession of the refinery, shops, and offices, and was only impeded and interrupted in his control of some of the personal property therein. The assumption, however, upon which he builds his entire argument is that he was acting under a valid appointment, and had a lawful right to do everything that he attempted to do; and, since its basis is swept away, there is little left of the argument. We have decided—and we have no doubt of the correctness of that decision—that the appointment of Mr. Reddy, and all the proceedings in the matter of the receivership, were void. Therefore, when he entered into the refinery, shops, and offices, he did so as a mere trespasser, without any lawful warrant whatsoever, and all his acts in attempting to obtain possession must be viewed in that light.

We do not wish to be understood as conceding that Mr. Reddy's acts, even if his appointment had been valid, would have been entirely justifiable. We are not called upon to decide how summarily a receiver lawfully appointed may proceed in wresting the possession of property, specifically described in the order appointing him, out of the hands of strangers to the action claiming it in their own right. We had supposed that in such case it would be his duty to abstain from the exercise of anything like force; that, if he found the claim of ownership and possession by a third party to be made in good faith, he would report the matter to the court, and, if he proceeded further, do so only by an action for the recovery of the property, if he was satisfied that such claim was a sham, and the possession by such stranger held by collusion with (or as a mere agent or servant of) a party bound by the order, that he would still report the facts to the court, and have the persons resisting his authority cited to answer for contempt; and that after a hearing upon the citation the court would not, unless in a plain case, order a writ of assistance to dispossess such parties, but would direct an action to be brought so that their rights might be fully and fairly litigated. But, as we have said, these are matters which we are not called upon to decide here, and we have



given this very general expression of our views only in order not to seem to acquiesce in the proposition so strenuously urged by counsel to the effect that in the case supposed it is the right and duty of the receiver to take the property regardless of the claims and possession of third parties; that it is their duty to yield unquestioning obedience to his commands, surrender possession of the property, and petition the court for leave to sue for its recovery. The question here is much simpler. It is whether Mr. Reddy and his men, regarded as mere naked trespassers, entering without any sort of lawful warrant, had, prior to the hour of 3 o'clock P. M., on February 18th, succeeded in ousting the petitioners from their lawful possession of the refinery, shops, etc., and in gaining so full and complete a possession themselves as to justify their subsequent proceedings. The testimony bearing upon this point is quite voluminous, and to some extent conflicting, though not more so than might naturally have been expected, considering the opposite points of view from which the occurrences at the refinery were viewed by those who participated in and have testified regarding them. It appears that Mr. Reddy, armed with the commission from the superior court, and attended by a number of men, acting in obedience to his orders, entered the refinery on the afternoon of February 17th, stated the authority under which he assumed to act, declared himself in possession, ordered the superintendent of the works to shut them down, disposed his men about the building, and stopped the delivery of sugar then in progress. The superintendent, however, refused to take any orders from Mr. Reddy, referred him to Mr. Mott, the general agent of the petitioners, and asserted their claims to the property. There is no doubt that the superintendent and his foreman were, to some extent, intimidated by the sudden irruption of Mr. Reddy and his men, and the threat of arrest and punishment if they refused to submit, and, no doubt, they did make use of various temporizing expedients in order to maintain their ground without resorting to open and violent resistance, but they neither left the building nor acknowledged Mr. Reddy's authority. The dispute ended at last in a sort of truce for the night, both parties remaining on the ground, the superintendent being allowed until next day to take legal advice and determine whether he would yield the possession or not. Acting upon the advice he received, the superintendent notified Mr. Reddy the next day that he would continue to resist him by all means short of force, whereupon Mr. Reddy applied to the court for the assistance of the sheriff. In the affidavit which he presented to the court for that purpose, and which was, as is evident, framed upon his theory as to the validity of his appointment, and the entire regularity of his proceedings, he states that he has entered into possession of the refinery, but that H. C. Mott and R. H. Sprague (the general agent and superintendent of petitioners) are impeding, hindering, and delaying him in the discharge of his duties as receiver, and are refusing

to allow him to take into his possession and control certain property situate on the premises. This affidavit, as an assertion of possession, is almost *felo de se* in itself, and would have been quite so if it had disclosed the further and undisputed fact that Mott and Sprague were really impeding and hindering the receiver by their assertion of and their attempt to uphold the possession and right of the petitioners. Evidently, too, the superior judge attached less importance to the legal conclusion stated in the affidavit than to the facts by which it was qualified; for, by the terms of his order to the sheriff, that officer was commanded to do what was necessary to place Mr. Reddy in exclusive, full, and complete possession. The sheriff, in the return which he subsequently made of this order, seems to have fallen back on the theory of the affidavit, that Mr. Reddy was in possession of the refinery, though impeded and interfered with by certain persons whom he found on the premises, and who at his request retired therefrom, leaving Mr. Reddy in peaceful, undisputed, and undisputed possession. He does not disclose who these persons were, but the testimony shows that the superintendent and foreman of the refinery were meant. When Mr. Reddy and the sheriff came back on the 18th, armed with a new order, Mr. Sprague and his foreman did retire from the building in obedience to their demand, but almost immediately returned. There is a conflict of testimony as to the terms upon which they re-entered. Mr. Reddy's testimony, in which he is corroborated by others, is that they came back at his request to take care of the large amount of sugar then in solution, under a promise to obey his orders, and shut down the works as speedily as that could be done without too serious loss. They, on the other hand, claimed that they only promised not to oppose Mr. Reddy's orders, and declared their purpose to remain on the premises in the interest of the petitioners, and in their pay. It is not necessary, in our opinion, to reconcile this conflict in the testimony, which in all probability is mainly due to the different construction given by the two parties to what was actually said. We will assume that the arrangement was such as Mr. Reddy states it to have been, for even then he did not get complete possession. The only two persons removed from the premises, or who acknowledged Mr. Reddy's authority, were Mr. Sprague and his foreman. Mr. Mott, the general agent, was in a position of authority over them, and over more than a hundred other employes then on the premises, none of whom were removed, and none of whom ever received or obeyed any order from Mr. Reddy before he was enjoined, and all of whom continued thereafter in the pay and service of the petitioners. Mr. Mott, it is true, was not at the refinery while the sheriff was there, but he had been there before, resisting Mr. Reddy, and he returned afterwards, and renewed his resistance, so that Mr. Reddy was compelled to remove him by force,—a very gentle force, it is true, but it would no doubt have been greater if there had been great-

er resistance. In the meantime Mr. Reddy had been served with our writ, and Mr. Sprague had disclaimed his authority, and contrary to his orders had put a large additional amount of sugar in solution. This being the facts, it is clear that there was, in the best view for the respondents, a mixed and scrambling possession of the refinery, in which case the legal seisin, as it always does, attached itself to the right of possession. The result was that Mr. Reddy found himself in the position of being obliged to decide, at his peril, whether his authority was valid or not, and, as soon as service was made upon the superior judge, at a later hour on the same day, he was placed in the same position. A copy of the petition for the writ of prohibition, our order for the writ, and the writ itself, were all served together, and by them the respondents were fully advised that the validity of their proceedings was challenged upon jurisdictional grounds, and that until our further order they must suspend their proceedings against the property described in the writ. Their claim to be in possession of the refinery, and especially their right to discharge the superintendent of the petitioners, and put another in his place, stop the delivery of sugar, and close down the works, depended upon the jurisdiction to appoint a receiver. If that proceeding was void, they were bound to withdraw from the refinery, shops, office, etc., and leave the petitioners unmolested. If, on the other hand, the appointment of the receiver was valid, they might maintain the *status quo*, and perhaps were justified in doing the other things above mentioned. Being in this situation, they did right in taking legal advice, but the fact that they did so, and acted upon it in good faith, does not wholly relieve them from the consequences of the actual disobedience of which they were guilty. They were advised that the possession of the receiver was lawful and complete, and that he must do all that he subsequently did. They were also advised that the superior judge could not interfere with or control the acts of the receiver pending the hearing of the cause. This advice was erroneous, but we have no doubt that it was given, accepted, and acted upon in good faith, and, therefore, that the respondents, though technically guilty of contempt, did not intend any disrespect to the court, or any infraction of its orders, and that they should not be punished otherwise than by a nominal fine. The finding of the court is that William T. Wallace, judge of the superior court, and Patrick Reddy, Esq., did on the 18th day of February, 1890, and on various days thereafter, violate our injunction herein issued and served on said 18th day of February, 1890, by continuing in and about the refinery and other property in said writ described, and by interfering with the petitioners in the conduct of their business therein, and did thereby disobey our lawful order and writ, and were therein guilty of a contempt of this court. Wherefore it is ordered that said William T. Wallace and Patrick Reddy be, and each of them is, hereby fined in the sum of \$10.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

THORNTON, J. I dissent. There is no evidence of contempt committed by either party in this case.

(87 Cal. 226)

BISHOP v. MCKINLEY, Judge. (No. 13,845.)

(Supreme Court of California. Dec. 20, 1890.)

EMINENT DOMAIN—JURISDICTION—PROHIBITION—SEWERS.

1. Code Civil Proc. Cal. pt. 8, tit. 7, regulating proceedings had in the exercise of eminent domain, provides, in section 1243, that "all proceedings under this title must be brought in the superior court of the county in which the property is situated;" and section 1238 provides that the power may be exercised for the sewerage of any incorporated city, among other purposes. The municipal corporation act of March 13, 1883, c. 7, § 870, provides that when it is necessary that the city shall take private property for a sewer, "and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be had," etc. *Held*, that the authority of the superior court to entertain such proceedings is derived from the Code and not from the municipal corporation act, and hence the absence of the circumstances under which that act authorizes such proceedings to be had goes to the right of the trustees to maintain them, and not to the jurisdiction of the court.

2. In such proceedings to condemn the right of way for a sewer, the fact that inability to agree with the owner of the land as to the price, and an order from the trustees to begin the proceedings, are not alleged, or are not proved, is no ground for application for the writ of prohibition, but its effect is for the determination of the trial court on demurrer or plea.

In bank.

Garber, Boalt & Bishop, (Stephen M. White, of counsel,) for appellant. John Haynes and Thomas Mitchell, for respondent.

FOX, J. This is a petition for a writ of prohibition to restrain the superior court of the county of Los Angeles, McKinley, Judge, from further proceedings against the petitioner, in a certain action pending in that court, wherein the city of Pasadena, is plaintiff, and the petitioner herein, and several other persons, including the county of Los Angeles, are defendants, brought for the purpose of acquiring by condemnation a right of way for a sewer along and in certain of the county roads of said county of Los Angeles. The city of Pasadena is a municipal corporation of the sixth class, organized and existing under the provisions of chapter 7 of the act of the legislature, entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883. For the purpose of providing drainage for the city, and protecting the health of the inhabitants thereof, she has devised and adopted a system of sewerage, and secured a considerable tract of land situate outside of, and a considerable distance from, the corporation, as a place for the discharge of the sewage of the city, called the "Sewer Farm," and has commenced the construction of a main sewer through certain streets of the city, and contemplates continuing the same through

certain of the public highways of the county, from the city to said sewer farm. The right of way has been granted by the board of supervisors of the county for said sewer, through the necessary highways, for a portion of the distance, but there is one highway through which the city authorities declare that it is necessary to construct the same, the fee of which is not vested in the county, but the county has a grant of the same "for the purposes of a highway, but for no other purpose;" or in other words, a mere easement, and to secure the right of way for this sewer in that highway, which constitutes a part of the route of the sewer, the action was brought, the further prosecution of which it is now sought to prohibit. It is claimed on the part of the petitioner here, who is the owner of a tract of land situate on the east side of the road or highway along which the right of way is sought to be secured by condemnation, and who owns the fee to the center of the road, and covering that part of the road-way in front of her lot under which the sewer is to be laid, that the court has no jurisdiction to entertain the case, or to render or enforce any judgment therein, because it is not alleged or shown that the city authorities were unable to agree with her for the right of way, and because it does not appear from the record of the proceedings of the city council that it ever authorized the commencement of the action.

The question then is whether the absence of the existence, or the want of averment or proof, of these two facts, or either of them, deprives the court below, respondent here, of all jurisdiction to entertain, hear, or determine the action, or whether they simply go to the question of the right of the plaintiff in the action to institute and maintain the same, and to recover therein. If they deprive the court of jurisdiction to entertain the action, and to hear and determine the rights of the parties therein, so that it is acting upon the complaint filed therein wholly without jurisdiction, then it would seem that the petitioner here might be entitled to relief by prohibition; but if, on the other hand, it has jurisdiction to entertain the action for condemnation so commenced before it, and these are merely questions, upon which, among others, it may be called upon to adjudicate in the course of the proceeding before it, then the mere fact that it reaches an erroneous conclusion upon these questions, or either of them, will not entitle plaintiff to the writ of prohibition, but the error, if it be one, will be subject to review upon appeal. Chapter 7 of the municipal incorporation act referred to is the one which provides for the organization, powers, and government of municipalities of the sixth class. Section 862 of that act, found in that chapter, (St. 1883, p. 269,) gives to the board of trustees power \* \* \* to construct, establish, and maintain drains and sewers. Section 870, (page 273,) so far as it relates to the subject-matter of this question, reads as follows: "Whenever it shall become necessary for the city or town to take or damage private property for the purpose of \* \* \* rights of

way for drains, sewers, and aqueducts, \* \* \* and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be taken, under section one thousand two hundred and thirty-seven and following sections, to and including section one thousand two hundred and sixty-three of the Code of Civil Procedure, to procure the same." Petitioner insists most strenuously that it is from this section that the court derives its jurisdiction to entertain a proceeding for condemnation, for such a purpose, at the suit of such a corporation, and that if the complaint fails to show, or, showing it, upon the trial, the plaintiff fails to prove an attempt and inability to agree, and an order of the trustees to prosecute the action, the court is entirely without jurisdiction in the premises. We cannot accede to this proposition. The superior court is a court of general jurisdiction. By section 5 of article 6 of the constitution, it is specially provided that it shall have jurisdiction "of all such special cases and proceedings as are not otherwise provided for." Part 3 of the Code of Civil Procedure provides for "special proceedings of a civil nature." Title 7 of that part is devoted specially to the making of provision for proceedings had in the exercise "of eminent domain." It constitutes the general law of the state upon that subject, and expressly provides that the right of the people or government to take private property for public use may be exercised in the manner provided in that title. Section 1243, found in that title, provides that "all proceedings under this title must be brought in the superior court of the county in which the property is situate." They must be commenced by the filing of a complaint, and issuing a summons thereon. Section 1238 defines the purposes for which the power may be exercised, and among these is "sewerage of any incorporated city." It is from the constitution, the provisions of which are repeated in section 76, Code Civil Proc., and from title 7, pt. 3, of said Code, and not from any section or provision of the municipal government act, that the superior court derives its jurisdiction in and over proceedings had in the exercise of the power of eminent domain. The provisions of the last-named act may affect the question of the right of the municipality to maintain its action, and secure in the court the relief demanded; but they do not affect the jurisdiction of the court to hear and determine all questions that may arise between the parties in such proceeding.

Counsel have cited very many cases in support of the proposition that the fact of inability to agree, and express authorization to institute the proceeding, are jurisdictional, and go to the power of the court itself to hear and determine the case. But most of them are cases where the proceeding was not only special, and not according to the usual course of civil procedure, as it is here, but also before tribunals which were themselves special, and of limited jurisdiction. Not one of them, so far as we have been able to find, challenges the power of a court of general

jurisdiction to hear and determine, in such a proceeding, the question of the right of parties to maintain the action, and secure the relief, under statutory provisions like that above quoted from the municipal government act. The rulings made in the cases cited were made, not upon application for prohibition, but upon appeal, or, when the proceeding was before a tribunal of special and limited jurisdiction, upon *certiorari*. The complaint in the condemnation proceeding here sought to be prohibited is in strict conformity with the provisions of section 1244, Code Civil Proc., and contains everything that is there required. If it be true, that the absence of either averment or proof of attempt and inability to agree, or of express direction by the local board to institute and prosecute the proceeding, bars the right of the plaintiff to maintain the action, or to recover the relief sought, that would seem to be a matter of defense, either by demurrer or by plea, and in such case the court before which the proceeding is prosecuted would be the one to pass upon the question so raised, in the first instance. Error in such determination would be subject to review upon appeal, but it would be merely error in the exercise of jurisdiction, and would not entitle the party aggrieved to prohibition. We are not called upon, or authorized, in this proceeding, to determine whether a ruling either way upon such a question would be error; that must be determined when the case comes here in proper form. All that we need now determine is that, if error, it does not furnish ground for prohibition. Upon this proposition, the case of *State v. Valliant*, 13 S. W. Rep. 398, seems to be much in point. We quote the statement as to what the case was, and as to what the court said on the subject, from petitioner's reply brief: "A certain railroad company sought to condemn part of the track of another by proceedings taken in the circuit court of St. Louis. The defendant company applied for a writ of prohibition, on the ground that the statutes and ordinances of St. Louis did not authorize the exercise of jurisdiction in eminent domain there invoked in favor of the company invoking it." Upon the application for prohibition the court held: "That the circuit court of St. Louis had jurisdiction of proceedings to appropriate property to public use, in the exercise of the right of eminent domain, in a proper case, is unquestioned and unquestionable; but the substance of the petitioner's contention here, as well as the ground on which they, as defendants, resisted the proceedings in the circuit court, is that the statutes and ordinances do not authorize the exercise of such jurisdiction in behalf of the Southern Railroad Company. We are of opinion that the question thus raised is not a proper one for our decision upon this application. Where the action or course which the court is about to adopt, is such as it has lawful power to take, it should not ordinarily be prohibited from taking it. Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction is a ques-

tion of law, the solution of which, either way, cannot impair the court's right to apply its judicial power in the premises according to its view of the law, and of the facts before it." This quotation, taken from the petitioner's own brief, would seem to be conclusive against her in this proceeding. Nor is there anything in any of the cases cited from this court in conflict with this view. We have examined them all, and in every case but one, where the court has discussed the point here contended for by petitioner, it was upon appeal, and the question was whether the court below had erred in its determination of this question of law, not in exercising jurisdiction to determine upon it. In the one case of *Mahoney v. Supervisors*, 53 Cal. 384, the proceeding was for a writ of mandate to compel the board of supervisors to act upon the appointment of commissioners made by the mayor and others to condemn certain water-rights. The petitioner, who claimed to be the owner of the property which was to be condemned, failed to show that he had ever offered to sell at any price. The statute and the tribunal were both special and local, and the act provided for the appointment of commissioners only in case the municipal authorities, who had not only the authority to purchase, but to select the commissioners in case the property could not be acquired by negotiation. The court refused to grant the writ. We do not see that the case is at all in point. Petitioner relies upon the decision of this court recently made in the case of *Havemeyer v. Superior Court*, 24 Pac. Rep. 121, as decisive of the question of her right to the writ of prohibition in this case. The cases are not at all parallel. In the *Havemeyer* Case, the proceeding in the court below was one taken on behalf of the state to secure a decree declaring the corporate franchise of a private corporation forfeited, and for a statutory penalty for violation of its charter. Upon the application for prohibition in this court, no question was made as to the jurisdiction of the court below to hear and determine the action which was brought before it, and in it to determine every question that was raised affecting the rights of the parties to the action, in the subject-matter thereof. And this court, in passing upon the application, expressly declared, in substance, that it did not pass upon the jurisdiction, or the regularity of the proceedings of the court below, in hearing and determining the case before it, or in enforcing the judgment which it had rendered. The proceeding to which the judgment of, and the writ granted by, this court was directed was one had after judgment in the matter of appointing a receiver with express direction to seize and take into his possession certain property not involved in the action in which the court had pronounced its judgment, and which was at the time in the possession of, and claimed to be owned by, persons who were not parties to that action, and who consequently had no day in court, and no right of appeal. In this case the petitioner is a party defendant in the action pending in the court below, and is actively

prosecuting her defense, with a right to have any ruling which may be made in that court reviewed here on appeal. In the view we take of the case, she is not entitled to the relief here demanded. The writ must be denied, and the order heretofore made herein, staying proceedings in the court below, vacated. So ordered.

We concur: THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

(10 Mont. 281)

*In re HALDORN et al.*

(Supreme Court of Montana. Dec. 1, 1890.)

FEEES OF REFEREE.

1. A referee will not be permitted to exact exorbitant fees under color of a contract, under Code Civil Proc. Mont. § 501, providing that the fees of referees shall be eight dollars a day to each, "but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed."

2. The parties having agreed to pay the referee \$18 for each day's attendance, and \$.20 for each folio of transcript, and \$.10 for each folio of copy, his compensation is reduced to \$8 per day.

Motion of contestant to retax costs of referee. For opinion on the merits, see ante, 101.

Chas. O'Donnell, for contestant. McCutcheon & McIntire and B. Platt Carpenter, for respondents.

BLAKE, C. J. A motion has been filed to retax the fees claimed by the referee in these proceedings. This officer, who was also a stenographer, has been paid for his services, under an agreement entered into by the parties hereto, the following sums: For each day's attendance, \$18; each folio of the transcript, \$.20; each folio of copies, \$.10. The statute which regulates this matter is as follows: "The fees of referees shall be eight dollars to each for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed." Code Civil Proc. § 501. The charges for each folio of the transcript and copies are in excess of what is allowed by law for the same work by other persons. The statute under consideration should be construed to give an officer of this court the right to demand and receive a reasonable compensation, and he should not be permitted to take advantage of his trust, and obtain an exorbitant amount, under the color of a contract. A referee does not render more valuable services than the judges of the courts of the state. The compensation of the referee should be fixed at the sum of eight dollars for each day's attendance, which is sufficient under the circumstances; and it is so ordered.

HARWOOD, J., concurs.

(10 Mont. 280)

STATE V. CHANDONETTE.

(Supreme Court of Montana. Dec. 1, 1890.)

APPEAL IN CRIMINAL CASES—REVIEW—SODOMY—INDICTMENT.

1. On an appeal from a conviction for felony, this court will strike from the transcript evidence not contained in a bill of exceptions, nor in any

way identified as the minutes of the court, and it not appearing that the evidence in the transcript was before the court on the motion for a new trial.

2. The ordinary common-law indictment for the infamous offense against nature is sufficient.

Appeal from district court, Silver Bow county; JOHN J. McHATTON, Judge.

Chas. O'Donnell, for appellant. Henri J. Haskell, Atty. Gen., for the State.

DE WITT, J. The defendant appeals from a judgment of conviction for the infamous crime against nature, and thereby as well from an order denying a motion for a new trial. The evidence was brought here in the transcript, but that evidence was not contained in a bill of exceptions, nor is it in any way identified or authenticated as the minutes of the court, nor does it appear that it was before the district court on the motion for a new trial, nor is it before this court in any manner provided by the law or practice in this state. The evidence was therefore ordered stricken out, on the motion of the attorney general. This order practically emasculates the appeal, as the only point pressed by appellant in his brief in which there was the appearance of merit is an alleged fatal variance between the indictment and the proof, or rather, perhaps, that there was no evidence of the crime charged in the indictment. As we have not the evidence, we cannot consider this point.

All that remains of the appeal are objections to the indictment. That pleading is the ordinary common-law indictment, which is approved by all the writers and precedents, and against the validity of which no authorities are cited or argument made. It is our opinion that the indictment is good. The defendant was sentenced to five years' imprisonment in the penitentiary, the minimum term under the statute. With a sentence of this severity, and with the moral infamy involved in the conviction, it is a matter of regret to this court that the appeal was not so prosecuted that the court could inquire into the merits of the conviction.

The judgment is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 201)

PETERS V. VAWTER et al.

(Supreme Court of Montana. Oct. 27, 1890.)

ISSUANCE OF EXECUTION—MOTION FOR LEAVE—CONSTRUCTION OF STATUTES.

1. Code Civil Proc. Mont. § 312, provides that "the party in whose favor a judgment is given may, at any time within 6 years after the entry thereof, issue a writ of execution, as prescribed in this chapter." This section originally read "5 years" after and was amended to read "6 years" after the adoption of section 349, which provides that, "after 5 years from the entry of the judgment, an execution can only be issued by leave of court on motion," "but the leave shall not be necessary when execution has been issued within the 5 years." Section 307 provides that a judgment shall be a lien for six years after its docketing, and section 41 limits to six years an action on a judgment. Section 410 abolishes the writ of *scire facias*, and provides that "the remedies obtainable in that form may hereafter be obtained by civil action." Held that, after six years from

the entry of a judgment, no leave to issue execution could be granted.

2. The motion for leave to issue execution must be called to the attention of the court within the six years. It is not sufficient merely to file the written motion, with affidavits in support thereof, within the time limited. Following *Wallace v. Lewis*, 24 Pac. Rep. 22.

3. An amended statute is to be construed as if it had read from the beginning as it does as amended.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

This is an appeal from a special order made after final judgment refusing plaintiff leave to issue execution upon a judgment. The following are the facts: On December 8, 1883, judgment was duly entered against defendants, in favor of plaintiff, for \$1,161.40, costs, etc. January 15, 1884, execution was issued, and on August 6, 1884, was returned wholly unsatisfied. On December 2, 1889, an affidavit was filed by plaintiff showing that the judgment remained unsatisfied, and other facts, as required by section 349, Code Civil Proc., cited below, and therewith, on the same day, a written motion "for leave to issue execution against the defendants, said motion being based upon the affidavit herewith filed." Nothing further was done until December 16, 1889, when the following was filed: "To Cornelius L. Vawter, etc.: You, and each of you, will please take notice that ten days after the service of this notice upon you, or as soon thereafter as counsel can be heard, the undersigned, the attorneys for plaintiff in the above-entitled action, will move the court for an order granting plaintiff leave to issue an execution upon the said defendants." Signed by plaintiff's attorneys. This notice was served on defendant Vawter, December 16th. It is not apparent when this motion was brought to the attention of the court. It was denied March 20, 1890. It does, however, appear from the record that the court was not moved, the application to the court was not made, prior to December 8, 1889, the day upon which six years from the entering of the judgment expired. The motion being denied, plaintiff appeals. Section 421, subd. 3, Code Civil Proc. The question upon the appeal is the construction of the following statutes: Section 410, Code Civil Proc.: "The writ of *scire facias* \* \* \* is abolished. The remedies obtainable in that form may hereafter be obtained by civil actions." On February 13, 1874, the following section was a portion of the codified laws, (Civil Practice Act, § 250:) "The party in whose favor judgment is given may, at any time within five years from the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter." The above law being upon the statute-book, the act of February 13, 1874, provided as follows: "Sec. 7. After the lapse of five years from the entry of judgment, an execution can only be issued by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent, or non-resident, or cannot be found to make such service, in which case service may be made by publication, or in such other manner as the court may direct.

Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due; but the leave shall not be necessary when the execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part." Section 7, just cited, now appears in Comp. St. (Code Civil Proc.) as section 349. In Code Civil Proc. 1887, § 301, section 250 of the Civil Practice Act (codified statutes, supra) was changed so that "five years" read "six years," and in that form it became section 312 of the present Code of Civil Procedure. Therefore this case has to do with the construction of section 312, Code Civil Proc., as follows: "The party in whose favor the judgment is given may, at any time within six years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter," and section 349, Id., which is in the words as set forth above as section 7, Act Feb. 13, 1874. Section 307, Code Civil Proc., provides that a judgment shall be a lien for six years from the day of its docketing. By section 41, Id., (the amendment to that law, 16th Sess. p. 172, being not material to this inquiry,) an action upon a judgment is barred in six years.

*Toole & Wallace*, for appellant. *Shober & Rowe*, for respondents.

DE WITT, J., (after stating the facts as above.) The recent decision of this court in *Wallace v. Lewis*, 24 Pac. Rep. 22, restricts the inquiry herein to narrow limits. That case holds that a motion is an application to the court for an order; that the court must be moved to grant the order; and, when so moved, the proceeding is a motion. In this view, no motion was made for leave to issue execution in the case at bar until after December 8, 1889, which was after the expiration of six years from the entering of the judgment, and after the expiration of the period respectively limited in sections 41, 307, 312, Code Civil Proc. We are therefore left only the inquiry whether the court may grant leave to issue execution after the expiration of the period within which section 312 seems to limit its issuance; and incidentally after an action upon the judgment is barred, (section 41, Id.,) and after the lien of the judgment is lost, (section 307, Id.) These two latter sections we mention only as statutory suggestions, *in pari materia*, as to the length of life of a judgment. In other words, are these laws an absolute limitation of the life of a judgment, as is contended by the respondents, and held by the district court, or is the appellant's position correct that not only may execution issue of course within five years, and by motion in the sixth year, but also upon motion, under section 349, at any time after six years? If appellant's construction of the statutes be correct, then a judgment becoming dormant at the end of the fifth year may, after that time, and also for all time in the future, be vitalized sufficiently to support an execution, by motion; that is to say that, even after six years, the judgment only sleeps, but lives forever. Appellant's position is based up-

on the ancient doctrine of *scire facias* to revive a judgment. But that writ is abolished. The remedy formerly obtained thereby is now provided by the statutes heretofore cited, and the rights of the judgment creditor must be ascertained by a construction of these statutes, rather than by the authority or reason of the cases decided under the practice of *scire facias*.

Appellant calls our attention to the fact that when section 349 was enacted, on February 13, 1874, the limitation of section 312 was five years, and that section 349 was meaningless at the date of its enactment, unless it intended that execution might be obtained by motion even after the expiration of its life, as limited by section 312, which was then five years. Then he argues that, such intent being granted, when section 312 was made to read "six years," in 1877, the original intent of section 349, to the effect that execution might be obtained by motion, after the expiration of the apparent five years' life of the judgment, should also be applied to the effect that execution might be obtained after the expiration of this newly-created six years' life. For the purposes of this decision, we may grant that appellant's construction of section 349 correctly sets forth the intent of the act when passed in 1874. See *Mason v. Cronise*, 20 Cal. 211. But a later act (section 312, as amended in 1877) must operate upon the construction of section 349 of 1874. Chief Justice COOLEY, in *People v. Circuit Judge*, 37 Mich. 287, says that it is true, as a rule of construction, that "a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does as amended." Of course there are apparent exceptions to this rule, which, however, are not here of interest. Apply this rule to section 312, as amended in 1877, to read "six years" instead of "five," then to section 312 apply section 349, and there is no reason to hold that the two sections, *in pari materia*, do not mean just what they say, viz., that execution may issue at any time within six years in the manner prescribed by law; that is to say, within five years of course, and in the sixth year upon motion, and not otherwise, or at a later period. Again, in 1877, when the legislature enacted section 312 as it now stands, they had before them on the statute-book the provisions of section 349, allowing execution upon motion after five years, and they deliberately, by section 312, limited all executions to six years. The legislature had the power to do this. They did it in the light of section 349, and we cannot doubt that they intended what their words declare. We are of opinion that the judgment in the case before us was dormant from December 8, 1888, until December 8, 1889, and that on December 8, 1889, it died in its sleep, without experiencing the vivifying treatment of a motion for execution or an action at law. See 1 Freem. Ex'ns, § 27a, citing *George v. Middough*, 62 Mo. 549; *Lyon v. Russ*, 84 N. C. 588; *Jerome v. Williams*, 13 Mich. 521; *McDonald v. Dickson*, 85 N. C. 248; *McGrew v. Reasons*, 3 Lea, 485; *Cannon v. Laman*, 7 Lea, 513. The New York author-

ities cited in the text of that author are not in point by reason of the difference in the statutes. See, also, *Bowers v. Crary*, 30 Cal. 622; *Mason v. Cronise*, 20 Cal. 211; and *Stout v. Macy*, 22 Cal. 647. The judgment of the district court is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 162)

STATE ex rel. NARCROSS v. BOARD OF MEDICAL EXAMINERS.

(Supreme Court of Montana. Oct. 15, 1890.)

MANDAMUS—REMEDY BY APPEAL.

Under Act Mont. Feb. 23, 1889, § 4, providing that in all cases where the board of medical examiners refuses or revokes a certificate authorizing the applicant to practice medicine the applicant may appeal to the district court of the county in which he applied for a certificate, *mandamus* will not lie to compel the board to grant a certificate.

Application for an alternative writ of mandate.

Elbert D. Weed, for applicant *Henri J. Haskell*, Atty. Gen., for respondent.

HARWOOD, J. This proceeding is an application for a writ of *mandamus*. The relator filed his affidavit herein setting forth the following averments: "That he, Carlton V. Norcross, is a citizen of the United States, and is over the age of twenty-one years. That he is now, and for more than seven years last past has been, a resident of the territory and state of Montana, and of the county of Silver Bow. That he is a graduate of the medical department of the State University of Iowa, situate at Iowa City, in said state. That said medical department of the university aforesaid is a legally organized medical school, within the meaning of section three (3) of an act of the territorial legislature of Montana, approved February 28, 1889, entitled 'An act to regulate the practice of medicine in the territory of Montana, and to provide for the examination and issuing of certificates to persons desirous of practicing the same, and for the punishment of persons violating the provisions of this act.' That the fact that said medical department of the State University of Iowa aforesaid was, on the 7th day of October, 1890, and for a long time prior thereto, and on the 1st day of March, 1887, when affiant graduated therefrom, a legally organized medical school in good standing, whose teachers were at the time of such graduation of affiant graduates of a legally organized school, which fact had at the time and in the manner aforesaid been determined by said board of medical examiners provided for by said act of February 28, 1889. That affiant graduated from said school on the 1st day of March, 1887, and received a certificate or diploma therefrom as of said date, which certificate or diploma is in words and figures as follows, to-wit: [Here follows a copy of said diploma; and affiant recites further facts as follows:] That affiant is the same person to whom said diploma was originally issued. That on the 4th day of March, 1887, affiant began



the practice of medicine in the city of Butte, county of Silver Bow, and state (then territory) of Montana, and has been in the continuous practice of his profession within said territory and state of Montana, except when temporarily absent, since said 4th day of March, 1887. That on the 18th day of November, 1889, affiant presented his said diploma above set forth to one E. D. Leavitt, a member of said medical board of examiners, at Butte city, county of Silver Bow, state of Montana. That thereupon said E. D. Leavitt issued to affiant a certificate or permit to practice medicine until the next regular meeting of said board, which said certificate is in words and figures as follows." [Here affiant sets forth a copy of said certificate, and recites further facts as follows:] "That said board held its next regular meeting thereafter on the 4th day of April, 1890. That no certificate from said board was issued to this affiant at said April meeting thereof, but affiant was verbally notified by a member of said board that he might continue the practice of his profession until the next regular meeting of said board, in October, 1890. That at the regular meeting of board held in the city of Helena, in said state, in the month of October, 1890, affiant, on the 7th day of said month, duly presented his said diploma hereinbefore described to said board of medical examiners, and then and there duly demanded that said board issue to him a certificate executed under the seal of said board, and signed by the president and secretary thereof, according to law. That thereupon, on the 7th day of October, 1890, as aforesaid, the said board denied affiant's said request and demand, and then and there refused to issue to him such certificate. Affiant further says that he has never been guilty of any unprofessional, dishonorable, or immoral conduct, and that he has never publicly professed to cure or treat disease, injury, or deformity in such a manner as to deceive the public. That no charge against affiant of such unprofessional, dishonorable, or immoral conduct, or of such deceptive business method, was made to said board, and that said board made no such charge against affiant. Affiant further says that he has paid to said board the fee of fifteen dollars, required by law to be paid, and that said board still retains said fee. Affiant further says, that he is the party beneficially interested; that he has complied with all the requirements of the law on his part; and that said board had no just reason, or any legal cause or right, to refuse to issue their certificate to this affiant as aforesaid, and that he has no plain, speedy, and adequate remedy in the ordinary course of law. Upon this affidavit affiant prayed for an alternative writ of mandate commanding said board of medical examiners to issue to affiant the certificate provided for by law in such cases, authorizing and empowering affiant to practice medicine within this state, or that said board show cause why the same was not done. The writ of mandate was issued accordingly. The respondent board appeared by its president, and moves the court to quash the writ, on the ground that the relator

has a plain, speedy, and adequate remedy at law.

If the relator has a plain, speedy, and adequate remedy in the ordinary course of law, he cannot invoke the aid of this extraordinary writ. This is not only the doctrine uniformly held by the courts, but it is so declared by our statute. "The writ shall be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Section 567, Code Civil Proc. The act creating said board of medical examiners, and defining their powers and duties, provides—*First*, that all persons wishing to practice medicine or surgery in the state of Montana shall comply with the requirements thereof; *secondly*, that all persons practicing medicine in the territory of Montana at the time said act became a law, who were graduates in medicine from a medical school found by said board to be legally organized and in good standing, whose teachers were graduates of a legally organized school, should be admitted to practice medicine on presenting to said board a diploma from such school, if such diploma was found to be genuine, and had been issued to the person presenting the same; *thirdly*, said act provides for an examination by said board of those wishing to practice medicine in this state who were not graduates of such a school as the act describes, and also of graduates of such schools who commence to practice medicine in this state after the passage of said act. It is further provided in section 4 of said act as follows: "And such board may refuse or revoke a certificate for unprofessional, dishonorable, or immoral conduct, or refuse a certificate to any one who may publicly profess to cure or treat disease, injury, or deformity in such a manner as to deceive the public. In all cases of refusal or revocation the applicant, if he or she feels aggrieved, may appeal to the district court of the county where such applicant may have applied for a certificate." Now, it is clear that the legislatures in creating this board of medical examiners, contemplated the subjection of its final acts in refusing to grant the certificate authorizing the applicant to practice medicine, as well as its acts of revocation of such certificate, to the supervising control of the district courts. The remedy for the wrongful denial or revocation of a certificate by this board is provided in the act to be an appeal to the district court. It is the final action of the board in refusing relator a certificate entitling him to pursue the practice of his profession which he complains of. This question is ably expounded, in the light of numerous authorities cited, by Mr. High, in his work on Extraordinary Remedies, §§ 15, 16, and notes. In summing up his review of authorities, the author says: "Wherever, therefore, an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, *mandamus* will not lie." We are of the opinion that the relator has a plain, speedy, and adequate remedy in the course provided by statute to correct the wrongs complained of, and is therefore not en-

titled to the writ of mandate. Respondent's motion to quash the writ sustained.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 146)

MCCUNE v. TOWN OF MISSOULA.

(Supreme Court of Montana. Oct. 9, 1890.)

Appeal from district court, Missoula county; STEPHEN DE WOLFE, Judge.

Walter M. Bickford, for appellant. Woody & Webster, for respondent.

BLAKE, C. J. Upon the authority of Sullivan v. City of Helena, ante, 94, the judgment is affirmed, with costs.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 147)

In re DURBON.

(Supreme Court of Montana. Oct. 8, 1890.)

PROCEDURE BY INFORMATION.

Procedure by information having been unknown in the criminal practice of the territory, and Const. Mont. having provided that "all criminal actions shall be procured by information after examination and commitment by a magistrate, or after leave granted by the court, or by indictment," the provision for proceeding by information is not self-executing, and, in the absence of a statute authorizing it, a conviction for felony on a prosecution by information is void, and the accused will be discharged on *habeas corpus*.

*Habeas corpus.*

S. A. Balliett, for petitioner. Henri J. Haskell, Atty. Gen., for the State.

DE WITT, J. On December 18, 1889, the petitioner was convicted of the felony of burglary, in the eighth judicial district court in and for Fergus county. He was sentenced to imprisonment in the penitentiary, from which he now seeks a discharge, on the ground that he was presented and tried on information, and not by indictment. These facts appear by the return upon the writ of *certiorari* issued in aid of the writ of *habeas corpus*. The state was admitted to the Union November 8, 1889, on which date the constitution went into effect. The constitution provides that "all criminal actions in the district court, except those on appeal, shall be prosecuted by information after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court." There are further provisions as to the constitution of the grand jury. At the time the case before us was tried, the legislature of the state had not met, and there was no legislation in aid of the constitution in any manner defining the procedure by information, which procedure, as set forth in the constitution, was unknown in the criminal practice of the late territory. It is a matter of common knowledge that difference of opinion existed among the district judges and the profession as to whether the provisions in regard to information were self-executing, or whether they required legislation. In this transition period, the case now before us ap-

pears to have been tried. Afterwards, on January 14, 1890, the case of State v. Ah Jim, 9 Mont. 167, 23 Pac. Rep. 76, was decided in this court, in which it was held that a prosecution by information for a felony could not be had, until legislation had set in motion the provisions of the constitution. It follows that the petitioner was therefore not tried by process of law; that his imprisonment under the commitment before us is illegal; and that he must be discharged. It appears by statement of counsel for the state, assented to by petitioner's counsel, that petitioner is confined in the penitentiary also upon another commitment, upon a sentence on conviction for an offense other than the one set forth in the petition and return. It is ordered that he be discharged from imprisonment under the commitment in the case before us, but that this discharge shall in no way effect his imprisonment upon any commitment not before this court on this petition.

BLAKE, C. J., and HARWOOD, J., concur.

(21 Nev. 94)

STATE v. CENTRAL PAC. RY. CO. (No. 1,331.)

(Supreme Court of Nevada. Dec. 27, 1890.)

TAXATION—UNSURVEYED PUBLIC LANDS—PLEADING—PAYMENT OF TAXES.

1. Unsurveyed lands acquired by the C. P. Ry. Co., under the acts of congress of July 1, 1862, and July 2, 1864, are exempt from taxation by the state, the latter act providing that, before the lands shall be conveyed to any company entitled thereto, there shall be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same, and U. S. St. at Large 1886, p. 143, providing that no lands granted to any railroad company shall be exempt from taxation on account of the lien of the United States for the surveying, selecting, and conveying the same, "but this provision shall not apply to lands unsurveyed."

2. Unsurveyed lands are part of the public domain, and the company has no right to the possession of any particular tracts, and it has therefore no possessory interest subject to taxation.

3. A description of lands as certain odd-numbered sections, "as their designation will appear when the surveys of the government are extended over them," is not such a description as to show a possessory interest liable to taxation as is required by Gen. St. Nev. § 1088, providing that possessory claims shall be assessed as real estate, and described by metes and bounds, or by common designation or name.

4. A tax-payer has the right to pay on some of several subdivisions of his property entered on the assessment rolls, without paying on all, under Gen. St. Nev. § 1096, providing that "no tax receiver shall receive any taxes for any portion less than the least subdivision entered upon the assessment rolls."

Appeal from district court, Lander county; A. L. FITZGERALD, Judge.

Baker & Wines, for appellant. The Attorney General, W. D. Jones, Dist. Atty., and H. Mayenbaum, for the state.

BELKNAP, C. J. This is an action for the recovery of delinquent taxes assessed against the real and personal property of the defendant, situated in Lander county. Included in the list of assessed property is a large quantity of unsurveyed lands. The principal question in the case is whether land of this character is taxable

or not. These lands were acquired by the railroad company under acts of congress of July 1, 1862, and July 2, 1864. The act of July 2, 1864, provides as follows: "Sec. 21. That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest, as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be used by the commissioner of the general land-office for the prosecution of the survey of the public lands along the line of railroad, and so from year to year until the whole shall be completed, as provided under the provisions of this act." 13 U. S. St. at Large, 365. In the case of *Railway Co. v. McShane*, 22 Wall. 462, the court, in considering this provision, said "that the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done, without which the company is not entitled to a patent. The case clearly is not within the rule which authorizes state taxation of lands, the title of which is in the United States. The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose. But, when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing the payment of these costs. It is by retaining the title that the payment of costs of survey is to be enforced. And, so far as the right of the state to tax the land is concerned, we are of opinion that, where the original grant has been perfected by the issuance of the patent, the right of the state to tax, like the right of the company to sell, the lands, has become perfect." Again, in the case of *Railroad Co. v. Traill Co.*, 115 U. S. 607, 6 Sup. Ct. Rep. 201, these principles were reaffirmed. Said the court: "In the case of *Railway Co. v. Prescott*, [16 Wall. 603,] which was a writ of error to the supreme court of Kansas, this court held these lands could not be assessed and sold for taxes under state laws until this cost of surveying them was paid to the United States, because the government retained the legal title to the same to compel this payment. This case was decided in 1872. In 1874 the case of *Railway Co. v. McShane* came before us, involving the same question, and because it also involved some other

points decided in *Railway Co. v. Prescott*, which the court reconsidered and overruled, it necessarily received full consideration, the result of which was to reaffirm the proposition that, until the United States was reimbursed for the expenses of the survey of those lands, they were not subject to state taxation." Advantage was taken of this interpretation of the law to escape taxation by neglecting to pay the costs of surveys. To obviate the difficulty, congress enacted "that no lands granted to any railroad corporation by any act of congress shall be exempt from taxation by states, territories, and municipal corporations, on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed." U. S. St. at Large, 1886, p. 143.

This is the only enactment of congress waiving the lien of the government upon railroad lands for the purpose of state taxation. A reason for withholding the right to tax unsurveyed lands may be found in the fact that it is impracticable to assess them. It is a well-established principle of law that land assessed for the purpose of taxation must be so described that it may be identified. The purposes of this requirement, as stated by Judge Cooley, are—"First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and, third, that the purchaser may be enabled to obtain a sufficient conveyance." Cooley, Tax'n 284. The lands granted to the railroad company were the odd-numbered sections within the limits of 20 miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States, or to which a homestead or pre-emption claim had attached, or mineral lands. Until the surveys are made it cannot be known what parts of the lands are within the enumerated exceptions, nor what sections or parts of sections will belong to the company, nor until then can the locality of the lands be determined so that a description may identify them. The exemption enforces the principle that lands may not be assessed for taxation unless described so that they may be found. It is said, however, that the possessory interest of the defendant is taxable under the revenue laws of the state, independently of the land itself, or the title to it. It must be borne in mind that the unsurveyed lands are not described by metes and bounds, or by common designation or name, but as sections and parts of sections, and, as alleged by the complaint, "as their designation will appear when the surveys of the United States are extended over them." It is plain that this is not a description by which the identity of the lands can be established, and it is equally plain that possession of lands so described cannot be established until the surveys are made. The reasons suggested as having induced congress to exempt unsurveyed lands from taxation will exclude

a possessory interest in such lands from taxation when described only "as their designation will appear when the surveys of the government are extended over them."

The answer of defendant alleges tender and payment of the tax imposed upon all of the assessed property described in the complaint other than lands. Defendant had the right, under the statute, (Gen. St. § 1096,) to pay the taxes upon any subdivision of its property entered upon the assessment roll. And no judgment for taxes or penalties should be entered against it by reason of its ownership of property, the taxes upon which have been paid in conformity with this provision of the statute. A motion has been made in this court to amend the record by striking out a pleading entitled "Amendment to Answer." The motion is denied upon the authority of the following cases: *Satterlee v. Bliss*, 36 Cal. 521; *People v. Romero*, 18 Cal. 93; *Boston v. Haynes*, 31 Cal. 107; *Bonds v. Hickman*, 29 Cal. 464; *Boyd v. Burrell*, 60 Cal. 280. A similar answer was considered insufficient in the case of *People v. Pearis*, 37 Cal. 259. It is unnecessary for us, however, to rule upon the point, as the complaint states the facts upon which our decision is based. Judgment reversed, and cause remanded.

**BIGELOW, J.** I concur. The plaintiff obtained judgment in the court below, upon the pleadings. This judgment must, of course, be reversed, if the complaint does not state facts sufficient to support it, or if the answer presents any defense to the action. We are therefore confined upon this appeal to a consideration of the pleadings.

1. Included in the property assessed to the defendant is the possessory claim to certain unsurveyed lands, which are not described further than that they will, when the United States surveys are extended over them, be designated as certain congressional subdivisions. A possessory claim to land is to be assessed as real estate, and Gen. St. § 1088, requires that it shall be described by metes and bounds, or by common designation or name. If not so described, the assessment is void. *People v. Mahoney*, 55 Cal. 286; *Keane v. Cannovan*, 21 Cal. 302. The description here does not comply with this statute. The statement that land will, some time in the future, be designated as a "certain section" does not sufficiently describe it for the purposes of taxation. It does not show its present location, nor identify it as it now exists. And further, we know that it is impossible to tell, in advance of the official surveys, how any particular piece of land will finally be designated. Says the court, in *Robinson v. Forrest*, 29 Cal. 325: "Neither a private survey nor one made under the authority of the state will answer the purpose." And again: "The lines are not ascertained by the survey, but they are created, and although a surveyor may, in advance of the making of the subdivision of the township by the deputy of the United States surveyor general, run lines with the greatest practicable exactness from the corners established on the exte-

rior lines of the township, to ascertain the bounds of any given quarter-quarter section, still, when the survey comes to be made under the direction of the surveyor general, the difference between the two surveys may be such that the 40-acre lot, which, under the private, and, theoretically, the more accurate, survey, appeared to fall within the lands listed to the state, will be excluded from the list, or *vice versa*." In *Middleton v. Low*, 30 Cal. 605, it is again said: "There is, in fact, no such tract of land as that described in the petition, until it has been located within the congressional township by an actual survey and establishment of the lines, under the authority of the United States, and the survey has been approved by the proper United States surveyor general." See, also, *Bullock v. Rouse*, 31 Cal. 590. 22 Pac. Rep. 919. It follows that the complaint does not state facts sufficient to support the judgment as to the taxes upon the land.

2. This is sufficient to dispose of the appeal, but as there are other important questions in the case which have been fully argued, are fairly raised, and are likely to arise again, it is proper to consider them. The motion to strike out the amendment to the answer, upon the ground that it was filed without leave, should be denied, because not made in the court below, where, had it been sustained, the proper leave to file it might have been obtained. *Clarke v. Lyon Co.*, 7 Nev. 76; *Longabaugh v. Railroad Co.*, 9 Nev. 271.

3. It is claimed that the answer is insufficient because it does not deny "all claim, title, or interest in the property assessed, at the time of the assessment," in the language of section 1108, Gen. St. It seems to me, however, that, taken altogether, it states a good defense. An attempt was made to assess a possessory claim to lands which, it was alleged, would some time be designated as certain odd sections, and which, we know, had been granted to the defendant by the United States. It could not truthfully deny all claim to the land, but it denied any possessory claim thereto, and stated facts showing that the right which it did have was not subject to taxation. This must be held sufficient, or else, under the guise of regulating the pleadings, a party may be debarred from stating facts which constitute a complete defense to an action, simply because the truth will not permit him to state them in a particular form of words. This cannot be done. *Wright v. Cradlebaugh*, 3 Nev. 349; *Bronson v. Kinzie*, 1 How. 328; *Green v. Biddle*, 8 Wheat. 1.

4. Under the facts stated in the answer, the defendant had no taxable interest in the land, nor was it subject to state taxation.

(a) It is therein alleged that the lands are unsurveyed; that the defendant has no possessory claim to them; and that the only claim it has is under the land-grant acts of congress, of July 1, 1862, and July 2, 1864. Several attempts have been made to tax some of the lands granted by these acts after they were surveyed, but it was finally settled that this was not permissible before patents had

issued, upon the ground that congress had made the payment of the cost of surveying a condition of the grant, and that, until the patents issued, the government held a lien thereon as security therefor. *Railroad Co. v. Traill Co.*, 115 U. S. 607, 6 Sup. Ct. Rep. 201. By the act of July 10, 1886, congress, however, authorized such taxation, notwithstanding this lien, (*State v. Railroad Co.*, 22 Pac. Rep. 237;) but it was specially provided that this authorization should not apply to lands unsurveyed, (U. S. St. at Large 1886, p. 143.) So, if the government ever had a lien upon those unsurveyed, if the payment of these costs was ever a condition precedent to the passage of the title, it still exists, and they are consequently exempt from taxation. It is argued, however, that there can be no cost of surveying, and consequently no lien, until the surveys are made. This is ingenious, but I think not tenable. The most of the land was unsurveyed at the time of the grant, and it was certain that some time the United States must incur the expense of segregating it from the mass of the public domain. The language of the act is that none of the lands granted shall be conveyed until after the cost of surveying is paid. This has been construed, so far as surveyed lands are concerned, to mean that thereby congress intended to attach a condition to the grant, to hold a lien on the land for such costs. If so, why does it not also mean that it intended to attach the same condition, to hold the same lien, upon unsurveyed lands, for the cost that must certainly some time accrue? Congress could attach any condition to the grant that it saw fit. Until surveyed, and its character and status determined, no patents could be issued. When this was done, then the cost would be incurred, and it seems clear that the land was to be all the time holden for it, as well before as after surveys.

(b) Upon another ground unsurveyed lands are not subject to state taxation, although granted *in present*, where surveys are necessary to the issuance of the patents. Lands for which no patent has issued, are sometimes subject to such taxation, but it is only under peculiar circumstances, which are quite clearly stated in *Railroad Co. v. Price Co.*, 133 U. S. 505, 10 Sup. Ct. Rep. 341. It is there said: "It follows that all the public domain of the United States within the state of Wisconsin was, in 1883, exempt from state taxation. Usually the possession of the legal title by the government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is that where congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the mean time is not excluded from

the use of the property; in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property,—then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property."

In several respects, this case does not come within the rules here laid down. The donee is not entitled to the patent until the land is surveyed, and the fact also ascertained in some manner that it is not within some of the excepted tracts that are not included in the grant. This certainly cannot be done until its boundaries are clearly defined. Again, under the act of congress, entitled "An act to prevent the unlawful occupancy of public lands," approved February 25, 1885, it seems that the donee is also excluded from the beneficial use or possession of unsurveyed land, because, until surveyed, it is all a part of the public domain, and the defendant, no more than any one else, has any right to the possession of any particular tract or portion of it.

5. *Tender*. The complaint describes the property assessed in nine different subdivisions, and then alleges that certain taxes were levied upon the whole thereof. It is in the statutory form and is not required to state the details of the assessment. It consequently does not follow from this either that the property was or was not assessed in such subdivisions. But it was the assessor's duty to enter it upon the assessment roll in at least that number of parcels, and value each division separately. In the absence of allegation or proof to the contrary, we must presume that he did his duty. *Lawson, Pres. Ev. 53*. It has been decided that adjoining town lots, owned by the same person, may be assessed as one tract, but never under any statute similar to ours that entirely separate and distinct pieces of real estate and personality can be thrown together in one general statement and valued as one piece of property. Such an assessment is void. *Cooley, Tax'n*, 279; *People v. Hollister*, 47 Cal. 408. The answer alleges that, prior to the time the taxes became delinquent, the defendant unconditionally tendered to the tax receiver of Lander county all the taxes due upon a number of these subdivisions or parcels of property, amounting, in all, to \$15,645.66; that he refused to receive it, but subsequently to the commencement of this action it was demanded by the district attorney, and paid to the county. The court held the plea of tender insufficient, and gave judgment for the full amount of tax and penalties, less the sum paid. The question is, can a taxpayer pay the taxes upon some subdivisions of his property, and not on all? It may be admitted that, except under statutory authority, he cannot. Several apparently conflicting provisions of our statutes can be cited which seem to indicate that the legislature did not understand it had authorized it; and yet the language of Gen. St. § 1096, "but no tax receiver shall receive any taxes for any portion less

than the least subdivision entered upon the assessment roll," seems to clearly answer the question in the affirmative. If he is not to receive the tax on anything less than the least subdivision, then certainly the manifest implication is that he can receive it on anything more than that. Words of a statute are never to be construed as unmeaning, if it is possible to avoid it; but if the tax receiver must not receive the tax on anything less than the whole property, then certainly it is meaningless to forbid him receiving it on less than a subdivision. As the defendant tendered the taxes on what was certainly a subdivision of its property, it is unnecessary to consider whether anything less would also have been a subdivision; for instance, whether it could pay on each 40 acres of its land, and demand a receipt therefor. It is argued that it is a matter of discretion with the tax receiver whether he will receive the taxes so tendered or not; but this cannot be. Where a public officer has been clothed by statute with power to do an act which concerns the rights of third persons, the execution of the power may be insisted on, though the phraseology of the statute be permissive merely, and not peremptory. *Mayor v. Furze*, 3 Hill, 614. Nor was the amendment to section 1111, Gen. St., made a year later, a repeal of this provision, because—*First*, there is no necessary conflict between them; and, *secondly*, so far as any bearing upon this question is concerned, the amendment was merely a re-enactment of the section as it originally stood. It cannot be supposed that the legislature, in one section of a statute, intended to repeal another section of the same act.

6. The question of removal to the United States circuit court seems to have been virtually abandoned by the appellant upon the argument, and therefore requires no particular consideration.

(21 Nev. 80)

WEST V. HUMPHREY *et al.* (No. 1,326.)

(Supreme Court of Nevada. Dec. 18, 1890.)

SALE—DELIVERY—WHEN TITLE PASSES.

An agent bought for his principals all the ores produced at a mine, to be delivered when loaded on the wagon at the mine. Ores were loaded and delivered to a carrier, consigned to the agent, and a bill of lading to him in his own name was sent him. *Held*, that the title passed to the principals when the ores were delivered to the carrier.

Appeal from district court, Nye county; THOMAS H. WELLS, Judge.

D. S. Truman, for appellant. Benjamin Carter, for respondents.

MURPHY, J. This action was brought to recover certain personal property, consisting of concentrates, or their value. The defendants had judgment of nonsuit. It appears from the record that W. J. Chamberlain and Frank Dillingham, of Denver, Colo., were partners doing business in buying and smelting ores and concentrates in this state, under the firm name of W. J. Chamberlain & Co.; that W. E. West was their agent in this state, and that as such agent, in the month of September, 1889, he entered into an agreement with

J. E. Severance to purchase all the ores and concentrates for Chamberlain & Co. that Severance could produce from the Barcelona mine, which mine Severance was working under a lease. The ores and concentrates were to be delivered to Chamberlain & Co. when loaded on the wagon at the Barcelona mine. Some ores and concentrates had been delivered under the agreement to West. On or about the 20th day of November, 1889, Robert Scott, a teamster and freighter, loaded seven or eight tons, more or less, of concentrates from the Barcelona mine, at the request of Severance, to be by Scott delivered to West at Ledlie; West to pay the freight charges. On the 23d day of November, 1889, West paid Severance \$1,200 on the concentrates. On the 25th of November, 1889, and after the said concentrates had been loaded and in transit on Scott's wagons to West, and while Scott was at the town of Belmont, seven miles from where the concentrates had been loaded, the defendant Brougher, as sheriff of the county of Nye, under and by virtue of a writ of attachment sued out in the case of W. C. Humphrey against J. E. Severance, seized the property in dispute as the property of J. E. Severance. The following exhibits were put in evidence by plaintiff:

"A. Belmont, Nev., Nov. 20, '89. This certifies that I have this day sold to W. E. West, manager of the Ledlie Sampling Works, (11) eleven tons of concentrates and ore, (more or less,) now being loaded on Scott's team; consideration (\$1,200) twelve hundred dollars. J. E. SEVERANCE.

"Friend West: I think the above is all that is necessary, and all that you require as a bill of sale. I shall leave for Austin on next stage, so you may hold money until my arrival. Yours, truly, J. E. SEVERANCE."

"B. Austin, Nev., Nov. 23, '89. Received of W. E. West, Mgr., acc't concentrates in transit, the sum of \$1,275 for 11 tons, more or less. J. E. SEVERANCE."

Exhibit C is a bill of sale and assignment from Chamberlain & Co. to West, the plaintiff.

We will not in this opinion consider the errors assigned by the counsel for plaintiff to the refusal of the judge to sustain his objections to questions asked the several witnesses. We shall confine ourselves, therefore, to the other error alleged, to-wit, the question of nonsuit, for the reason, as assigned by the judge, "that the testimony of the plaintiff did not show that Chamberlain & Co. were the owners of the property in controversy at the time of the levying of the attachment. The bill of exceptions shows that the motion for nonsuit, which the judge sustained, was founded upon the theory that the sale of the property under the contract made in the month of September, 1889, between West, acting as the agent for Chamberlain & Co., and Severance, was not a *bona fide* sale of the property, and the bill of sale in evidence, marked 'Exhibit A,' shows that the property in dispute was sold by J. E. Severance to W. E. West November 20, 1889, and that the property was in transit at the time of the sale, and that a portion of the concentrates were

not in existence at the time of the pretended sale." We think the nonsuit should not have been granted. The testimony of the plaintiff shows that there was an agreement between Severance and the agent of Chamberlain & Co. in the month of September, 1889, whereby all the ore and concentrates produced from the Barcelona mine were sold to Chamberlain & Co., and were to be delivered to them when loaded on the teams at the Barcelona mines. There had been one or more loads delivered under that agreement, and West testified that all his acts during the entire transaction were for and on behalf of his principals, Chamberlain & Co., and not for himself. Upon this state of facts, and no testimony in the record to contradict them, the mere fact that Severance wrote upon a piece of paper what purported to be a bill of sale to West could not change the original agreement without the consent of West or Chamberlain & Co. The right to rescind was neither exercised nor claimed by either of the parties to the agreement, nor is West's right to act as agent for Chamberlain & Co. questioned; and when he received the paper purporting to be a bill of sale, made in his name, in law it was for the use and benefit of Chamberlain & Co. A person who agrees to act for another is not allowed to deal in the business of the agency for his own benefit; and, if he takes a conveyance in his own name of property which he agrees to purchase for another, he will be considered as holding the property in trust for his principal. The fact that the property was in transit at the date of the paper purporting to be a bill of sale, or that a portion of the property was not in existence at the date of the sale, is of no avail to the respondents.

It appears from the evidence adduced at the hearing that the property was in the possession of the carrier seven miles from the Barcelona mine, and that it had been paid for by West before the levying of the attachment. Such being the case, Severance did not own the property at the date of the levy, without it could be made to appear that he had parted with the property to hinder, delay, or defraud his creditors, which question is not before us. The ownership of the property was to pass when loaded on the wagons at the Barcelona mine. The vesting of the title to property always depends on the intention of the parties, to be derived from the agreement and its circumstances. As long as the ore remained at the Barcelona mine, Chamberlain & Co. had no interest in it; but when the ore was put into sacks, placed in the wagon, delivered to the carrier, and he directed to deliver the property to West, what was up to that time a mere executory contract of sale became an actual or executed sale, and the title to whatever ore was placed in the wagon passed to Chamberlain & Co. "Where the buyer had purchased, in advance, all the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him." *Langton v. Higgins*,

4 Hurl. & N. 400. In the case of *Aldridge v. Johnson*, reported in 7 El. & Bl. 885, "plaintiff agreed with K. to purchase from K. 100 out of 200 quarters of barley, which plaintiff had seen in bulk and approved of, and he paid part of the price. It was agreed that plaintiff should send sacks for the barley, and that K. should fill the sacks with the barley, take them to a railway, place them upon trucks free of charge and send them to plaintiff. Plaintiff sent sacks enough for a part only of the 100 quarters. These K. filled, and also endeavored to find trucks for them, but was unable to do so. K. finally detained the barley, and emptied it from the sacks back into the bulk. K. having become bankrupt after he had emptied the barley from the sacks into the bulk, and the defendant, his assignee, having removed the whole together, held, by the whole court, that this was a conversion by the assignee as to the part put into the sacks, and the plaintiff should recover that quantity." In cases like the one under consideration, the carrier is the bailee of the person to whom, not by whom, the goods are sent; the latter, in employing the carrier, being considered as the agent of the former for that purpose. *Benj. Sales*, §§ 181, 693; *Burton v. Baird*, 44 Ark. 556; *State v. Carl*, 43 Ark. 353; *Herron v. State*, 10 N. W. Rep. 26; *Kline v. Baker*, 99 Mass. 254; *Schmidt v. Nunan*, 63 Cal. 373. The judgment will be reversed and cause remanded.

*BIGELOW, J., (concurring.)* I concur. The plaintiff's evidence shows that the sale of the concentrates was made to Chamberlain & Co., and not to West. West was acting merely as their agent, and, even if the contract of sale had been made in his name, which it was not, it is always permissible to show that it was for the use and benefit of his principals. This was shown here. *Ruiz v. Norton*, 4 Cal. 355; *Huntington v. Knox*, 7 Cush. 371. As West is the plaintiff, and the one to whom the defendants claim the concentrates were sold, it would make no difference whether sold directly to him, or first to Chamberlain & Co., and then by them to him, were it not that the complaint has specially alleged the deraignment of title through them.

The plaintiff's evidence tended to prove that J. E. Severance had been the owner of the concentrates; that he had made an agreement to sell them to Chamberlain & Co. before they were extracted from the mine; that after they were extracted he made a bill of sale to them, and they had fully paid him for them. This was certainly sufficient to vest the title in them, and authorize them to maintain an action for their possession as against a trespasser or stranger, without regard to whether there was any fraud in the sale or had been any delivery, want of delivery being also one of the grounds upon which the motion for nonsuit was made and granted. These questions are only material when the contest is between a purchaser and a creditor of the vendor having a lien by attachment or otherwise. *Thornburgh v. Hand*, 7 Cal. 554; *Bump, Fraud. Conv.* 443, 511. As the defendants



had not yet come to their side of the case, there was of course no proof that either of them was a creditor of the vendor, or that any attachment had been issued, or any attempt made to levy the writ upon the property in dispute. When the motion was made, it only appeared that the title to the property had vested in the plaintiff; that he was consequently entitled to its possession, and that the defendants detained it from him. This certainly made *prima facie* case. As the case then stood, the defendants were merely strangers and trespassers. Until they had shown some right or interest in the property, it was no concern of theirs whether there was fraud in the sale or had been any delivery, nor could the questions be raised. Packard v. Wood, 4 Gray, 307; Benj. Sales, § 675.

(21 Nev. 36)

**STATE v. DIAMOND VALLEY LIVE-STOCK & LAND CO. (No. 1,327.)**

(Supreme Court of Nevada. Dec. 22, 1890.)

**ASSESSMENT OF TAXES—NAME OF OWNER—EXCESSIVE VALUATION.**

1. An assessment of taxes against the property of "The Diamond Valley Live-Stock & Land Company," is not void because made against "The Diamond Valley Stock Company," the company having returned no statement of its property, and its vice-president and general agent having seen the list prepared by the assessor, observed the mistake in the name, and failed to call attention to it.

2. In an action to recover taxes assessed against one who has neglected to return a statement of his property, and refused to sign the one prepared by the assessor, evidence is not admissible that an excessive valuation was placed on the property, Gen. St. Nev. § 1091, providing that "where the person complaining of the assessment has refused to give the assessor his list under oath, as required by this act, no reduction shall be made by the board of equalization in the assessment made by the assessor."

Appeal from district court, Eureka county; A. L. FITZGERALD, Judge.

*Rives & Beatty* and *J. R. Judge*, for appellant. *The Attorney General*, *Peter Breen*, Dist. Atty., and *A. E. Cheney*, for the State.

MURPHY, J. This a suit against the above-named defendant and certain real estate and improvements, described in the complaint, to recover state and county taxes assessed against the corporation in Eureka county for the year 1888, and to enforce against the property the lien created by law. The plaintiff had judgment against the corporation, which appealed, and seeks a reversal of the judgment upon two grounds.

The first defense set up is that there was no valid assessment of the property described in the complaint made against the defendant, "The Diamond Valley Live-Stock & Land Company," but that the same was made and the property assessed against the "Diamond Valley Stock Company, R. Sadler, Agent," and that the true name of the corporation is "The Diamond Valley Live Stock & Land Company." The question to be determined from the facts in this case is whether the defendant should be required to pay the taxes, notwithstanding the mistake in the name of the corporation, or whether the

corporation was injured thereby, and the omitting of the words "Live" and "Land" from the name of the company is such an error as vitiates the assessment as made by the assessor, and relieves the corporation from the payment of its just proportion of taxes to the support of the state and county governments for the year 1888. While, on the other hand, it is important to the security of the tax-payer that as much regularity and uniformity as is practicable should be maintained in the naming of the owners of property, and the listing of the same for the purpose of taxation, it is also important that, as far as practicable, all persons and corporations liable to taxation should pay their or its just proportion of the public taxes, and not be permitted to escape by means of slight mistakes or frivolous objections. We think this is the plain intent of the law. Section 1080, Gen. St., reads: "All property of every kind and nature whatsoever within this state, shall be subject to taxation, except." And the property of the defendant does not fall within the excepted class. Section 1082 reads: "Between the first Monday in March and the first Monday in September, in each year, the county assessor \* \* \* shall ascertain, by diligent inquiry and examination, all property in his county, real or personal, subject to taxation, and also the names of all persons, corporations, associations, companies, or firms owning the same. \* \* \* He shall then list and assess the same to the person, firm, corporation, etc. He shall also demand from each person and firm, and from the president, cashier, treasurer, or managing agent of each corporation, \* \* \* a statement, under oath or affirmation, of all property within his county owned or claimed by him, it, or them. If any person, officer, or agent shall refuse to furnish such list, or shall give a false name, or shall refuse to give his other name, or shall refuse to swear or affirm, he or she shall be guilty of a misdemeanor. If the owner of the property shall fail or refuse to make out and swear to the statement as required by the statute, the assessor shall make an estimate of the value of such property and assess the same. \* \* \* If the name of the owner be known, the property shall be assessed in his or her name. If unknown to the assessor, the property shall be assessed to unknown owners. From the foregoing, we are of the opinion that where there is a slight error in the name of the person or corporation taxed, when the property is correctly described, and the owners are not misled by such name or description, the tax assessed to him or it may, notwithstanding such error, be collected of the person or corporation intended to be taxed, provided the person or corporation can be identified by competent evidence. In this case the omission of a part of the name of the defendant was the fault of the vice-president and managing agent of the corporation.

On the trial in the district court, C. C. Wallace, assessor of Eureka county, testified: "The Diamond Valley property, as I had always understood, belonged to Sadler before it was sold to the company.

I got my idea of the name of the company in 1888, of Sadler. He and I sat down together. When we got through, he refused to sign the statement, and went away. I had understood always that the name was 'Diamond Valley Stock Company.' The dispute between Sadler and me was on the value of the land. I had never heard that this was property of any other than the Diamond Valley Stock Company, and never heard that it was the property of the Diamond Valley Live-Stock & Land Company; nor did I inquire until after this action was commenced. Nine out of every ten persons that one would hear speak about the property would speak of it as the property of the Diamond Valley Stock Company. I never heard it called any other name. The company was commonly and generally known as the 'Diamond Valley Stock Company.' I asked Sadler to come into my office and fix up the statement of his property for 1888, including the property of this company. We sat down to my desk together with the statement partially prepared before us. The name 'Diamond Valley Stock Company' had been written in the statement in two places before he came in,—once near the top of the sheet, and the other near the middle of it. In each place the name is written in large, plain letters, much larger than the rest of the writing, and the name is so conspicuous that I do not see how it was possible that Sadler could help seeing it. We discussed the amount of personal property of the company, and I wrote it in the statement. We agreed as to the value of the personal property, but not as to the value of some of the real estate. Mr. Sadler refused to sign the statement, and the company never furnished me with any other statement of their taxable property for that year." Defendant admitted that the statutory notice of the commencement of the action had been published as required by law. It was also admitted that the summons had been served upon the defendant corporation and upon the real estate described in the complaint. Defendant called R. Sadler as a witness on its behalf, who testified that he was the agent and vice-president of the Diamond Valley Live-Stock & Land Company, named as defendant in this action, and so was during all the fiscal year 1888. Knew Wallace as assessor of Eureka county for a number of years. "In June, July, or August, 1888, Wallace made Exhibit A. and showed it to me; all the real estate made out as it is now; valuation set down. He consulted me only as to the personal property. I never told him the name, or talked to him at all about the name, of the corporation owning the property named in the complaint, and sued in this action, in 1888. I went before the board of equalization in 1888 concerning this and other assessments against myself and companies, but the board refused to act on my protests. I know that the personal property, and the description of the real estate, were written in the statement before it was shown to me, because I saw

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it at the time the statement was before Mr. Wallace and myself at his office." At this point the witness was asked the following question: "If you then saw that the description of the personal property and real estate written in the statement, how is it that you did not also see the name 'Diamond Valley Stock Company,' which was written in large letters on the same sheet as that which you said you did see written there? Answer. I did not say that I did not see the name. That was his lookout, and not mine. I did not go there to correct the assessor's mistakes. I represented to the board that this assessment was too high. I signed no statement or assessment of any property in which I was interested for the year 1888, because Mr. Wallace had assessed it all too high." It was admitted that all the property described in the complaint was owned by, and in the possession of, the corporation defendant herein, under recorded deeds. Here we have a corporation defendant, which, by its vice-president and managing agent, appeared before the assessor to give in the name, list, and statement of his company's assessable property. He sees that there is a mistake in the name of the corporation as written by the assessor, and he fails to correct the mistake, and upon the trial he says: "I did not go there to correct the mistakes of the assessor." That is just what he did go there for, and it was his duty to have called the attention of the assessor to any error or mistake that might have appeared upon the face of the statement. He not having done so, he will not now be permitted to take advantage of his own wrong, for it is, not to be overlooked that such errors will, in most cases, arise from the default of the taxpayer himself, who fails to perform the duty required of him by law of giving in his name and list of property to the assessor.

The second error assigned by the appellant is the refusal of the court to permit the defendant to show that an excessive valuation was placed upon the property by the assessor. An answer to that objection is that the agent of the defendant failed and refused to swear to the statement as made by the assessor, and made no statement of his own listing the company's property for the year 1888. Section 1091, Gen. St., reads: "Where the person complaining of the assessment has refused to give the assessor his list under oath, as required by this act, no reduction shall be made by the board of equalization in the assessment made by the assessor." And the same rule will be enforced in a court of law, and the answer does not raise the issue. See *State v. Sadler*, 23 Pac. Rep. 799. Section 1112, Gen. St., makes the civil practice act applicable in tax-suits. Section 4903 means that interest shall be allowed at the legal rate on all moneys after they become due, on any judgment recovered before any court in this state. *Himmelman v. Oliver*, 34 Cal. 247. The judgment of the district court is affirmed.

115 Colo. 512)

ABBOTT *et al.* v. WILLIAMS.

(Supreme Court of Colorado. Dec. 5, 1890.)

## VOLUNTARY BOND—ENFORCEMENT—AUTHORITY OF ATTORNEY.

1. As a general rule, a voluntary obligation founded upon a valid consideration is enforceable according to its terms and provisions, unless the same be against public policy, or forbidden by statute.

2. The sheriff has no authority to accept an undertaking for the release of money garnished, nor to execute a release for money in the hands of a garnishee, such property not being "in the hands of the sheriff." Code, §§ 111, 112. Nevertheless, where parties, through the instrumentality of an undertaking executed by them, procure money from the garnishee, they, having thus received the benefit of the undertaking, cannot be heard to deny its binding obligation upon themselves upon the happening of the contingencies therein provided for.

3. The authority of an attorney to appear for a party in a court of record must be questioned, if at all, in proper time and manner.

(Syllabus by the Court.)

## Error to superior court of Denver.

The facts necessary to an understanding of the opinion may be stated, in substance, as follows: Williams, the defendant in error, commenced suit against Given and Abbott, and caused the Denver & Rio Grande Railway Company to be garnished in the sum of \$485. To obtain a release of this money, an undertaking, in substance, like a redelivery undertaking in attachment was executed by Abbott, Longinetti, and Mazza, whereby, in consideration of the releasing of the money, they undertook and promised to the effect that in case the plaintiff recovered judgment in the action and the attachment was not dissolved, the defendant would, on demand, redeliver the money to the proper officer, or, in default thereof, that said defendant and his sureties would pay, or cause to be paid, to the plaintiff, the full amount of money so released. Upon receipt of the undertaking by the sheriff, he executed a writing to the garnishee, reciting that the money garnished in its hands was released, and thereupon the same was paid over to Abbott. Williams subsequently obtained judgment in the action for the sum of \$480, including costs, and the attachment was sustained. Abbott, on demand from the sheriff for a redelivery of the money so released to be applied in satisfaction of the judgment, made default. Williams thereupon brought an action upon the undertaking, and recovered judgment thereon against Abbott and his sureties. This writ of error is prosecuted to reverse the latter judgment.

*John A. Deweese and Ross & Deweese*, for plaintiffs in error. *L. B. France*, for defendant in error.

ELLIOTT, J., (after stating the facts as above.) It is contended by counsel for plaintiffs in error that the sheriff has no authority to accept an undertaking for the release of money garnished, nor to execute a release for money in the hands of a garnishee; that the authority of the sheriff to accept an undertaking, and release attached property, is expressly limited to property "in the hands of the sheriff." Code, §§ 111, 112. Conceding that

counsel have properly construed the Code provisions above cited, and that the sheriff did not have the power or authority, as a matter of law, to release the money in the hands of the garnishee, nevertheless, as a matter of fact, plaintiffs in error, through the instrumentality of the undertaking executed by them, did procure the money from the garnishee, and, having thus received the full benefit of the undertaking, they cannot be heard to deny its binding obligation upon themselves upon the happening of the contingencies therein provided for. It is a general rule that a voluntary obligation founded upon a valid consideration is enforceable according to its terms and provisions, unless the same be against public policy, or forbidden by statute. *Hardesty v. Price*, 3 Colo. 556, and cases there cited; *Edwards v. Pomeroy*, 8 Colo. 254, 6 Pac. Rep. 829; *Johnson v. Weatherwax*, 9 Kan. 75; *Gartson v. Reeder*, 23 Iowa, 21.

From the record, it appears that the undertaking sued on was entered into voluntarily by plaintiffs in error, with full knowledge of its purposes. The release of the money from the process of garnishment, and the delivery thereof to Abbott, was a good consideration for the promise to redeliver to the sheriff, or to pay the same to plaintiff, in case his attachment against Abbott should be sustained. The giving of the undertaking for the release of the money in the hands of the garnishee, though not provided for by the Code, was not against public policy; nor was it forbidden by statute. It was at most an unwarranted extension of the provisions of the attachment act, of which the plaintiff might justly complain, and which, if done without his consent, might be no protection to the sheriff, or the garnishee. But the plaintiff is not here complaining. On the contrary, he is asking the enforcement of the undertaking, and so, in a certain sense, may be said to have ratified the same *ab initio*. The cases cited by counsel for plaintiffs in error do not militate against the views above expressed. In the case of *People v. Meigham*, 1 Hill, 298, the action on the bond was defeated because the same was not in conformity to the statute; but the reasons given for the decision fully support our conclusions. Mr. Justice COWEN says: "At the common law, we might have saved the good, while we rejected the bad, part of the bond; or perhaps it might have been valid for the whole. Of this, it is not necessary to inquire; for 2 Rev. St. p. 214, § 60, (2d Ed.) absolutely destroys all and every part of any bond, taken by any officer by color of his office, in any other case or manner than such as are provided by law." As above stated, we have no such statute. The decision in the case of *Henry v. Mining Co.*, 10 Fed. Rep. 11, seems to have been based upon an application to the court to discharge the garnishee upon giving the undertaking provided by the Code. While the court refused to order the money in the hands of the garnishee to be released, it does not by any means follow that, if the money had been so released, the parties executing the undertaking could have avoided their

obligation, on the ground that the court was without authority to make the order.

A demurrer was sustained to the second defense of the answer; and this ruling is assigned for error. The defense consisted mainly of legal argument. The averment to the effect that, at the time of answering, an action was pending, in which Williams was seeking to recover of the Denver & Rio Grande Railway Company the money garnished in its hands as due to Abbott, was clearly insufficient. It did not show that any judgment or satisfaction had been obtained thereon. The averment that "no money was ever received by said defendant Abbott, or either of said defendants, in consideration of executing said writing, and that said sheriff could not release the Denver & Rio Grande Railway Company," was evidently regarded by the trial court as nothing more than a denial of the allegations of the complaint. It is clear that no substantial right was affected by sustaining the demurrer. The proof at the trial was positive and uncontradicted that the money garnished was actually paid over to Abbott upon the execution of the undertaking. The offer to show on the trial that Mr. France was representing the plaintiff, Williams, as his attorney, without authority, was properly refused. It was not the proper time nor manner of questioning the authority of an attorney to appear for another. *Williams v. Canal Co.*, 13 Colo. 469, 22 Pac. Rep. 806; *Dillon v. Rand*, 15 Colo. —, ante, 185.

The remaining assignments of error do not require consideration. The judgment of the superior court is affirmed.

(1 Wash. St. 404)

#### KING COUNTY v. HILL et al.

(*Supreme Court of Washington*. Dec. 8, 1890.)

#### FINDINGS BY COURT.

The court sustained defendants' exceptions to the report of a referee to whom a case had been referred for trial on questions of fact and law, ordered them set aside, and by the same order concluded that "it is the decision of the court that there is not sufficient evidence to support the allegations of the plaintiff's complaint in this action, and that the defendants' allegations are true, and the judgment should be rendered in favor of the defendants for their costs and disbursements herein." Held that, some of the allegations of the complaint not having been denied, and many of plaintiff's most important allegations being contained in the reply, the recitals of the order were not a sufficient compliance with Code Wash. § 246, providing that the court, on the trial of an issue of fact, shall state the facts found, and the conclusions of law.

#### Appeal from superior court, King county.

*Ronald & Piles and W. S. Bush*, for appellant. *C. H. Hanford, Thomas Burke, Eben Smith, and Struve, Haines & McMicken*, for appellees.

**STILES, J.** This cause involves the examination of the accounts of the appellee Hill, as treasurer of King county for a considerable period, and was referred by stipulation to a referee, under section 246 of the Code, to be tried upon questions of fact and law. The referee reported his findings of fact and conclusions of law in admirable form, together with the testi-

mony and exhibits, and the cause then came before the court upon exceptions to the report filed by both parties. The plaintiff merely objected to the conclusions of law, which resulted in a smaller judgment in its favor than it deemed itself entitled to; but the defendants, by their objections, attacked the findings of fact as well, and sought to set aside the entire report and findings, including the testimony. The court, after argument, overruled the motion of the plaintiff, and at the same time, by an order, sustained certain of the exceptions of the defendants. The language of the order was: "The court sustains each and all of the exceptions [of the defendants.]" But further along it ordered "that the findings and conclusions of said referee be, and the same are, set aside," which, we take it, left the testimony intact, inasmuch as the subsequent decision of the court purported to be based on the evidence, for which there was no other resort than the testimony reported. This left the cause before the court for disposition, under section 256 of the Code, either to again refer or to "find the facts and determine the law itself, and give judgment accordingly." The latter course was chosen, and instantly acted upon; the same order which set aside the referee's report concluding with the following: "And it is the decision of the court that there is not sufficient evidence to support the allegations of the plaintiff's complaint in this action, and that the defendants' allegations are true, and the judgment should be rendered in favor of the defendants for their costs and disbursements herein." Then followed a judgment for defendants. The case was brought here upon several grounds, which were disposed of under the order of this court heretofore made, striking out appellant's statement.

The single ground now to be decided is whether the court erred in rendering a judgment against the plaintiff without finding the facts and determining the law thereon, appellant maintaining that the order of the court reciting that it is its decision "that there is not sufficient evidence to support the allegations of the plaintiff's complaint in this action, and that the defendants' allegations are true," is not a finding of facts at all, and that therefore there was no trial as required by the statute. With this view we are entirely in accord. The sections of the statute cited, taken together with section 246, are perfectly clear as to the duty of the court in such cases. We are not prepared to say that, where the pleadings make clear and simple issues, the allegations of the complaint and answer may not be referred to as findings, if the facts are found to be as laid in the one or the other, with the concise statement that the facts in each are true or untrue, as the case may be. But no such thing presents itself here, at least as to the complaint, of which it is said "there is not sufficient evidence to support the allegations." We know as a fact that some of the important allegations of the complaint were not denied by the answer, and many of the most important of the plaintiff's allegations were

contained in its reply, wherein certain settlements alleged in the answer to have been made by defendant Hill with the county commissioners were shown to have been made under a mistake of facts, and these are not touched by the court's decision. From the language the court used, one reading its decision would be unable to say whether it found any particular controverted allegation sustained, and some others not; or whether all but one of the material allegations of the complaint may not have been fully sustained, and one equally material totally unsupported; or whether there was simply a general weakness of proof all along the line. If any fact material to the plaintiff's case was proven, it had a right to have it found, as though the cause had been submitted to a jury upon special issues. There was no waiver of findings. Even were there a statute similar to that providing for the waiver of a jury, mere silence would not constitute a waiver. *Meeker v. Gilbert*, 3 Wash. T. 369, 19 Pac. Rep. 18. The judgment is reversed, and the cause remanded to the superior court of King county, to be disposed of under section 256 of the Code.

ANDERS, C. J., and SCOTT and DUNBAR, JJ., concur. HOYT J., did not sit at the hearing of the cause.

(1 Wash. St. 336)

LINBECK V. STATE.

(*Supreme Court of Washington*. Oct. 28, 1890.)

BURGLARY—INFORMATION—INSTRUCTIONS.

1. Under Code Wash. T. § 828, providing that "every person who shall be guilty of any such unlawful entry or unlawful breaking and entry, as described in the next preceding section, shall be deemed to have made such entry, or breaking and entry, with intent to commit a misdemeanor or a felony, unless such entry, or breaking and entry, shall be explained by testimony satisfactory to the jury \* \* \* to have been made for some purpose without criminal intent," it is unnecessary for the prosecution to show the intent of the entry, and the information need not state the particular misdemeanor which defendant intended to commit. ANDERS, C. J., dissenting.

2. Under the statute making it the duty of the court to instruct the jury that no inference of defendant's guilt is to be drawn from the fact of his not testifying, it is error to omit such instruction where defendant simply remains silent.

3. Where the court, at the request of the jury, and in the absence of defendant, (he being confined in jail,) repeats certain of the instructions to the jury, and explains them, this is prejudicial error, though defendant's counsel is present and makes no objection.

Error to superior court, Chehalis county. *Austin E. Griffiths*, for plaintiff in error. *George J. Moody*, Pros. Atty., for the State.

HOYT, J. This action was commenced in the superior court of Chehalis county, by the filing of an information therein in substance as follows: "George J. Moody, prosecuting attorney of the state of Washington for the district comprising the counties of Wahkiakum, Chehalis, and Pacific, in said state, on oath accuse John Linbeck by this information of the crime of burglary committed as follows, to-wit: The said John Linbeck, on the 25th day of

February, A. D. one thousand eight hundred and ninety, and within one year next preceding the date hereof, in the county of Chehalis, aforesaid, in the state of Washington, did then and there, in the night-time of said day, unlawfully break and unlawfully enter the dwelling-house of one James Arland, there situated, with the intent then and there to commit a misdemeanor therein, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington." Defendant pleaded thereto not guilty. Trial was had, a verdict of guilty rendered, and judgment and sentence imposed; whereupon defendant has brought the case to this court for review.

The first ground of reversal relied upon is that the information does not state facts constituting a public offense; the contention in this regard being that it is not only necessary to charge that the entering was with an intent to commit a misdemeanor, but that the particular misdemeanor which he intended to commit must be set out. This contention is borne out by numerous authorities which the diligence of counsel has gathered for the information of this court; and we believe it to be the law in most of the states, and that it would clearly be the law here were it not for section 828 of our Code. Said section is as follows: "Sec. 828. Every person who shall be guilty of any such unlawful entry or unlawful breaking and entry as described in the next preceding section shall be deemed to have made such entry, or breaking and entry, with intent to commit a misdemeanor or a felony, unless such entry, or breaking and entry, shall be explained by testimony satisfactory to the jury trying the case to have been made for some purpose without criminal intent." And by virtue of its provisions the prosecution is no longer compelled to prove with what intent the defendant enters, but, on the contrary, the unlawful entering having been proved, the intent to commit a crime or misdemeanor is presumed; and, this being so, we are unable to see how the accuracy required before such section was enacted can now aid the defendant. The burden of showing the intent with which he entered is by said section cast upon him, and he can show such an intent to have been an innocent one as well without the details as to his specific intent as with it. Aided by the section above quoted, the information was sufficient.

The defendant was not sworn as a witness in his own behalf, and the court failed to instruct the jury, as required by statute, that from such fact no inference of guilt should be drawn. We think this was error. The statute in question makes it the duty of the court to give such instruction irrespective of the action of the defendant in relation thereto; and while we do not now hold that the right to have this instruction given may not be waived by some express act of the defendant to that end, we do hold that the simple fact that he remained silent did not amount to such waiver.

The court, upon the request of the jury,

and in the absence of the defendant, (he being then confined in jail,) repeated certain of the instructions which he had given to the jury, and orally explained the meaning thereof, and we think this was error; and we do not think this error was cured by the fact that defendant's attorney was present and made no objection. Some other errors are founded upon the manner in which the instructions were given; but as these errors, if errors they were, are not likely to occur on a retrial of the cause, we do not think it necessary to discuss them. The judgment and sentence of the lower court must be reversed, and a new trial granted; and it will be so ordered.

SCOTT and STILES, JJ., concur. DUNBAR, J., not sitting.

ANDERS, C. J. I fully concur in the opinion of my associates that the judgment of the court below in this case should be reversed; but I am unable to concede that the information is sufficient to sustain the judgment pronounced against the defendant. The substance of our statute defining burglary is as follows: "Every person who shall unlawfully enter in the nighttime, or shall unlawfully break or enter in the day-time, any dwelling-house, etc., \* \* \* within the body of any county, with intent to commit any felony or a misdemeanor, shall be deemed guilty of burglary." And it will be observed that the only difference, so far as the intent of the party charged is concerned, between the definition of the crime as above set forth and that at common law is that the former makes it burglary to enter or break a house with intent to commit a misdemeanor as well as a felony. Now the word "misdemeanor" comprehends and includes, in this state, all crimes not punishable by imprisonment in the penitentiary. It specifies no particular crime, but a class of crimes; and to charge one with having intended to commit a misdemeanor is simply to charge him with having intended some one of the many offenses included in the term, without specifying which, and without stating any facts from which any particular intent can be inferred. At common law, no indictment for burglary was sufficient which failed to state the facts necessary to show the particular felony intended to be committed, and the same rule should obtain under our statute. The defendant in this case had a right to be informed of the very nature and cause of the accusation against him, and not to be left wholly in the dark as to the particular facts he would be called upon to meet at the trial. And it seems to me that this information does not state any fact whatever as to his intent, but only a conclusion of law. Under our statute, which has gone, perhaps, as far as any in eliminating and discarding the useless forms and technicalities found in common-law indictments, the indictment or information must still be direct and certain as to the particular facts and circumstances constituting the crime charged; and these facts and circumstances must be clearly and distinctly set forth in ordinary and concise language, so that a per-

son of ordinary understanding may know what is intended. Tested by this rule, this information is radically deficient. Nor am I able to understand how section 82<sup>nd</sup> of the Code can in any way supply the want of allegations in the information which would otherwise be necessary. It only purports to change or modify the rules of evidence, and not those of pleading. But in that respect it certainly goes to the very verge of legislative power, if not beyond it. It not only overrides the presumption of innocence which has hitherto been supposed to accompany the defendant through every stage of the trial, but it may also, under certain circumstances, completely nullify that provision of the statute which requires the trial judge to charge the jury not to draw any inference of guilt from the fact that the defendant may have failed or refused to testify in his own behalf. The court below neglected so to charge the jury, and that was one of the grounds on which the judgment was reversed. Of what avail could such a charge have been to the defendant if he was "deemed" guilty because he did not testify or show to the "satisfaction of the jury" that he entered the house for a lawful purpose?

(1 Wash. St. 345)

#### McCLAIN v. TERRITORY.

(Supreme Court of Washington. Oct. 29, 1890.)

##### ARSON—MURDER—INSTRUCTIONS.

1. Code Wash. T. § 323, as amended by Sess. Laws 1885-86, p. 77, provides that "every person who shall willfully and maliciously set fire to the dwelling-house, [tent, cabin, or any structure, no matter of what material constructed, used and occupied as a place of abode by any person or persons,] any barn, stable, outhouse, \* \* \* of the value of five dollars, [or any stack of grain, hay, or straw of another of the value of five dollars,] shall be deemed guilty of arson, \* \* \* and should the death of any person ensue therefrom, known to be occupying or present in said premises at the time such premises are willfully and maliciously set fire to, the offender, upon conviction thereof, shall be deemed guilty of murder in the first degree;" the words within the brackets being the amendments. *Held*, that an indictment for burning a dwelling-house which alleged that it was property of a certain person, and did not allege that it was used and occupied as a place of abode by anybody, was sufficient.

2. The allegation of the indictment that by the setting fire to and burning of the dwelling-house "one C., [deceased,] who was then and there known by M. [defendant] to be occupying one of the rooms in said dwelling-house, and known by said M. to be present in said room," etc., is a sufficiently direct statement that defendant knew that deceased was occupying the premises when they were fired.

3. The court, for the state, charged: "You must find from the evidence that C. was in the house at the time of the fire; that the defendant knew that he was there; and that C. came to his death in said house by reason of the burning of the house." *Held* error, in that it should have limited the knowledge of defendant that C. was in the house to the time the house was "set fire to."

4. The court of its own motion charged that "the prosecution must make out its case beyond a reasonable doubt; that is to say, must prove the house, of five dollars at least in value, was burned at or about the date charged; that the defendant did this purposely; that C. \* \* \* was in the house when he purposely set fire to it." *Held*, that the instruction was misleading, as not containing all the elements constituting the crime.

Error to district court, Thurston county. *Ballard & Metcalf, (Eddy & Gordon, of counsel,)* for plaintiff in error. *W. C. Jones, Atty. Gen.,* for the Territory.

DUNBAR, J. The record discloses that, at a regular term of the district court of the counties of Thurston and Mason held at the city of Olympia, at the December term of said court, an indictment was returned against the plaintiff in error, which indictment, omitting the entitling of the cause, reads as follows: "Angus McClaine is accused by the grand jury of the territory of Washington for the counties of Mason and Thurston, of the crime of murder in the first degree, committed as follows: The said Angus McClaine, at the county of Mason, territory of Washington, on the 10th day of November, 1887, feloniously, willfully, and maliciously did set fire to a certain dwelling-house, the property of one W. H. Kneeland, of the value of six thousand dollars, and used and occupied as an hotel by the said Angus McClaine and his family, and then and there feloniously, willfully, and maliciously burned said dwelling-house. That by means of said setting fire to and burning of said dwelling-house as aforesaid, one Harry Connor, who was then and there known by the said Angus McClaine to be occupying one of the rooms in said dwelling-house, and known by said McClaine to be present in said room, was then and there in said room, within said dwelling-house, burned and consumed, and of the burning and consuming then and there died. And the grand jury aforesaid, by force of the statute in such cases made and provided, say that said Angus McClaine, in manner and form aforesaid, did feloniously, willfully, and of his malice aforethought, at said county and territory, kill and murder Harry Connor. [Properly signed and dated.]" The defendant having entered his plea of not guilty to said indictment, the trial of said cause was begun on the 9th day of December, 1887, and resulted in a verdict of "Guilty as charged in the indictment;" and on the 5th day of January, 1888, the plaintiff in error was sentenced by the court to suffer the death penalty. A stay of proceedings and writ of error were thereafter granted by the supreme court of the territory of Washington. Many errors were alleged in the assignment, but all the points mentioned in the supplemental brief of plaintiff in error or presented to the court by his counsel were the following: "(1) That the indictment in this case does not state facts sufficient to constitute the crime of murder, or any felony; (2) that it was error to permit the introduction of any evidence under the indictment; (3) that the court erred in giving the instructions asked by the prosecuting attorney; (4) that the court erred in instructing the jury upon its own motion." The indictment is based upon section 823 of the Code, as amended by the Session Laws of 1885-86, on page 77, which reads as follows: "Every person who shall willfully and maliciously set fire to the dwelling-house, [tent, cabin, or any structure, no matter of what material constructed, used and occupied as a place

of abode by any person or persons,] any barn, stable, outhouse, ship, steam-boat, or other vessel, or any water-craft, mill, milk-house, banking-house, distillery, manufactory, mechanics' or artificers' shop, structure, building, or room occupied as a shop or an office for professional business, or printing-office of another, any public bridge, court-house, jail, market-house, seminary or college edifice, or building thereto belonging, or other public buildings of the value of five dollars, [or any stack of grain, hay, or straw of another, of the value of five dollars,] shall be deemed guilty of arson, and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year, or in the county jail not more than six months nor less than one month, and be fined in any sum not exceeding one thousand dollars; and should the death of any person ensue therefrom, known to be occupying or present in said premises at the time such premises are willfully and maliciously set fire to, the offender, upon conviction thereof, shall be deemed guilty of murder in the first degree;" the words within the brackets being the amendments made in 1885-86 to section 823 of the Code. It is contended by plaintiff in error that the indictment in this case nowhere states that the dwelling-house burned was used and occupied as a place of abode by anybody, and that the allegation that it was used and occupied as an hotel by the said Angus McClaine and his family is not sufficient under this statute; that it is not the kind of occupancy contemplated by the statute where the building burned is alleged to be a "dwelling-house;" that, so far as the indictment alleging that the dwelling house was the property of one W. H. Kneeland is concerned, the word "property" is not used in the statute in connection with the burning of a dwelling-house; that it is not the burning of a dwelling-house the property of another that is included in the statute, but that it is the burning of the dwelling-house of another that the statute defines as arson; that our statute in reference to the burning of a dwelling-house is substantially the same as arson at the common law.

Were we to concede this last proposition, we should be compelled to pronounce the indictment insufficient, for at common law arson was the malicious and willful burning of the dwelling-house of another; the gist of the offense being the danger to the life of persons who were dwelling in the house. It was an offense against the habitation, and regarded the possession rather than the property; and when the burning of any other house than a dwelling-house was included within the offense, as the burning of barns and other outhouses, it was on the theory that the flames would extend to the dwelling and endanger the habitation. Hence the burning of many structures which is arson under our statutes was simply a misdemeanor at the common law. At the common law there was no question of value. It mattered not whether the house burned was worth thousands of dollars or but a few shillings; whether



it was a palace or a hovel. It was the safety of the inhabitants of the structure that the law sought to protect. But a careful reading of our statute leads us to the conclusion that the legislature had in contemplation the protection of property as well as the preservation of life; for in every instance, including even a dwelling-house, a moneyed value is attached, and to secure a conviction for arson under the statute, value would have to be alleged and proven. The statutory crime and the common-law crime are radically different, and we can but adopt the view of the attorney general, that the legislature intended to define and punish the crime of arson upon an entirely different principle from that in which the common law made it belong; that they have intended to define a new crime, and the common-law definition cannot be resorted to, even for the purpose of aiding in the construction of this law, because it is manifest that the legislature used words in an entirely different sense from the sense in which they were used at common law. From the number of buildings and structures made the subject of arson in section 823 of the Code, the burning of many of which could in no wise ordinarily endanger life, it is evident that the main idea of the legislature was the protection of property; and this is confirmed by the fact that the legislature afterwards added, "any stack of grain, hay, or straw, of another of the value of five dollars," thereby carrying the provisions of the statute beyond the realm of habitation, although the question of valuation is never lost sight of. Under the provisions of section 823, it would not have been arson to have burned a stack of grain, hay, or straw of another; but the experience of the people soon after that enactment taught them that this was a class of property which needed protection from incendiaries, and the legislature, doubtless in response to their demands, incorporated this further protection to property under this section. The qualifying words "of another," are evidently used in the sense of ownership or property. "A stack of grain of another," or "a stack of straw of another," means nothing more or less than a stack of grain or straw belonging to another, or the property of another; and as the words "of another" are used in reference to a dwelling-house in the same sense, and qualify it in the same manner as they do all the succeeding words to which they apply, we must conclude, by all admissible rules of construction, that it is there to be construed to mean a dwelling-house the property of another, and not a dwelling-house inhabited by another.

It is urged again that the indictment is defective because it does not charge that the dwelling-house was used and occupied as a place of abode by any person or persons. Whether the allegation that "the dwelling-house was used and occupied as an hotel by the said Angus McClaine and his family" is a sufficient allegation, where an allegation of occupancy as a place of abode is required by the statute, we will not now discuss; for we are clearly

of the opinion that, under our statute, no such an allegation is necessary, as the words "used and occupied as a place of abode by any person" were not intended to qualify the words "dwelling-house," "tent," or "cabin." These words are not found in section 823, although the word "dwelling-house" is in said section; the word "dwelling-house" being unqualified excepting by the words "of another." Afterwards, during the session of 1885-86, the words "tent or cabin" were added, because it was questioned whether the word dwelling-house" was comprehensive enough to include these mean habitations; and so that there might be no question about any manner of dwelling being included in the statute, after the words "tent," "cabin," were added the words, "or any other structure, no matter of what material constructed, used and occupied as a place of abode by any person or persons," the words "used and occupied as a place of abode by any person or persons" plainly qualifying the words "or any structure, no matter of what material constructed." Any other construction of this sentence would force us to conclude that the legislature intended to punish, under the provisions of this chapter, the malicious burning of a water-craft, though it may not have been used for months, and yet not punish the malicious burning of a dwelling-house unless it was used and occupied as a place of abode. We do not think that such is a fair or sensible construction of the statute. The plain intention of the legislature, gathered from the act and the history of its amendments, was to punish the malicious burning of any property mentioned in the act.

We do not think there is any force in the objection that the indictment does not charge by direct statement that the plaintiff in error knew that Connor, the deceased, was occupying or present in said premises at the time they were fired, but that it only appeared by way of recital. The language of the indictment is "that, by means of said setting fire to and the burning of said dwelling-house as aforesaid, one Harry Connor, who was then and there known by said Angus McClaine to be occupying one of the rooms in said dwelling-house, and known by said Angus McClaine to be present in said room," etc. We cannot understand how an averment could be more directly stated than this. It would make it no stronger and no more direct to transpose the words and say, "the said McClaine did know," etc. It is simply a choice of expression and arrangement of words. We are of the opinion that the indictment contains every averment necessary to charge the statutory crime of arson.

We now pass to the third and fourth grounds of objection urged by plaintiff in error,—objections which are more serious, in our opinion, and which are fatal to the prosecution in this case. At the instance of the prosecuting attorney the court gave the jury the following instruction: "You must find from the evidence that Harry Connor was in the house at the time of the fire; that the defendant knew that he

was there; and that said Connor came to his death in said house by reason of the burning of the house;" and in no other part of the charge is the subject of the defendant's knowledge of Connor's presence at the time of the fire mentioned. It will be observed that the court here does not instruct the jury that they must find that the defendant knew that Connor was in the house at the time he set fire to it, "but at the time of the fire." This would embrace any time between the setting of the fire and the entire destruction of the house. Under such an instruction, if it had been proven that Connor was not there at the time of the setting of the fire, but that he afterwards came, and defendant knew of his being there, and in attempting to extinguish the flames, or through any accident, he lost his life in the flames, the jury would have been justified in convicting McClaine of murder. The language of the statute is: "And should the death of any person ensue therefrom, known to be occupying or present in said premises at the time such premises are willfully set fire to," etc. Were this instruction cured or explained by any other instruction, it might possibly be overlooked; but the following instruction, given by the court on its own motion, lays down a still looser rule for the guidance of the jury. The court says: "The prosecution must make out its case beyond a reasonable doubt; that is to say, must prove the house, of five dollars at least in value, was burned at or about the date charged; that the defendant did this purposely; that Connor, or Connors, was in the house when he purposely set fire to it; and if about any of these essential facts there is any reasonable doubt you must acquit." Here it is not even hinted at that defendant need have any knowledge whatever of Connor's whereabouts at the time the fire was set or any time during the fire; but the jury is charged in substance that the essential facts are that the house burned was of the value of five dollars; that defendant burned it purposely, and that Connor was in the house at the time it was purposely set fire to; and that if these essential facts are proven beyond a reasonable doubt they must convict. It is too obvious to admit of discussion that all the elements of the crime necessary to be proven were not presented to the jury in this instruction; and the question now to be considered is whether this particular instruction was so segregated from the rest of the charge, and made so distinct and impressive, that it would be likely to mislead the jury as to what were the essential elements of the crime.

It is urged by the attorney general that "the omission to state all the law in a particular paragraph, if the law is correctly stated in the charge as a whole, is not error." We think the authorities uniformly hold that if, in defining the crime, any of the essential elements of the crime be omitted, or any legal defense to which the defendant is entitled, such omission cannot be cured by reason of any other portion of the charge correctly stating the law. In the case of *People v. Wong Ah Ngow*, 54 Cal. 151, where it was alleged

that the court in one paragraph had wrongfully instructed the jury on the law governing the subject of flight, the court, in reversing the judgment, says: "But it is claimed in behalf of the prosecution that the charge as a whole is correct, and therefore the judgment should stand. There is no doubt that in one part of the charge the law on this subject [flight] was correctly given to the jury; but the charge was contradictory; and that which was bad cannot be aided by that which was good;" and the court cited as in point the case of *People v. Valencia*, 43 Cal. 552, and that case is certainly in point here. In that case the court said: "It is not doubted that part of the charge is erroneous, as it omits from the definition of murder in the first degree the essential qualities of deliberation and premeditation; but it is contended by the prosecution that the court had correctly defined murder in the first degree; and, as the jury would consider together all the parts or propositions of the charge, the error in the part above cited is cured by the correct definition which had already been given. The two parts of the charge are contradictory; and the jury would not be able to say that the former rather than the latter should be received by them as the correct definition of murder in the first degree." In *People v. Bush*, 65 Cal. 129, 3 Pac. Rep. 590, the court says: "It is no answer to the objection that an erroneous instruction was given for the prosecution to show that in another part of the charge another instruction was given in which the law was correctly stated." So, to the same effect, *Rice v. Com.*, 100 Pa. St. 28; *People v. Anderson*, 44 Cal. 69; *State v. Ferguson*, 9 Nev. 113; *Holmes v. State*, 23 Ala. 23. In *People v. Campbell*, 30 Cal. 313, where the court in its general charge omitted one of the grounds of self-defense, but afterwards gave the instruction at the request of the defendant, the supreme court held that the instruction was somewhat modified by the portion of the charge before given, and the judgment was reversed. It seems to us that the case at bar is a much more extreme case than any above cited; for the instruction of the court on its own motion, to which the objection is raised, was evidently an attempt to group the essential elements of the crime together, and present them thus condensed for the consideration of the jury. And the jury, always anxious to ascertain the opinion of the court, are more inclined to give consideration to its voluntary instructions than to instructions given by request by either the prosecution or defense, and would be liable, if indeed not actually justified, in this case, in concluding that the essential facts necessary to be proven to insure a conviction were the identical essential facts mentioned by the court on its own motion; and, even if all the instructions in this case were considered together, without misleading or causing any embarrassment from omissions from any particular paragraph of the instructions, the law is not correctly stated, and the rights of the defendant were not wholly protected. This is a capital case; the defendant's life is at stake; and he had

a right to have the law governing his case plainly, explicitly, and correctly stated. This was not done. It follows that the judgment must be reversed and the case remanded for a new trial. And it is so ordered.

SCOTT, STILES, and HOYT, JJ., concur.

ANDERS, C. J. I concur in the judgment, but not entirely in the view of my brothers as to the construction of the statutes defining arson.

(1 Wash. St. 341)

STEWART v. LOHR.

(*Supreme Court of Washington*. Oct. 28, 1890.)

PROBATE COURT—JURISDICTION—ADVERSE CLAIM—APPEAL—REVERSAL.

1. The probate court has no jurisdiction of a suit to determine the right to real estate as between the administrator of an estate and the husband of the decedent, who sets up an adverse claim.

2. Where, on motion to dismiss an appeal, it is decided that the judgment below is void because the court had no jurisdiction, the supreme court will order the judgment reversed, to avoid the evils which an apparently regular, though void, judgment may entail.

Appeal from superior court, Skagit county; J. R. WINN, Judge.

McBride, Preston, Carr & Preston and W. S. Bush, for appellant. Ronald & Piles, for appellee.

HOYT, J. Upon the motion to dismiss the appeal in this cause, it was made to appear to this court that the action was instituted in the probate court, and was there a contest between the executor of an estate and one claiming adversely as to whether or not certain real estate should be included in the inventory of the property of said estate. When this fact appeared, suggestion was made to counsel that the question of the jurisdiction of the probate court to hear and determine such a controversy was the material inquiry which the court would enter upon in deciding the motion to dismiss, and upon such suggestion argument was had and authorities cited, and we shall therefore examine the question.

It is conceded that if the probate court had no authority to institute the action, by reason of want of jurisdiction of the subject-matter, then the superior court and this court could get no jurisdiction by way of appeal therefrom. That the probate court is without jurisdiction to try the title to property as between the representatives of an estate and strangers thereto is too well established by the authorities to require argument. See Schouler, Ex'rs, § 236; Lynch v. Divan, 66 Wis. 493, 29 N. W. Rep. 213; Budd v. Hiller, 27 N. J. Law, 54; Snodgrass v. Andrews, 30 Miss. 472; Theller v. Such, 57 Cal. 447. In the case at bar the person claiming adversely to the estate was the husband of the deceased party, and it appears that this fact was thought to affect the question. We, however, do not think so; for, while it is true that the probate court has jurisdiction to determine the claims of property as between those interested in the estate, this authority only goes to the

extent of determining their relative interests as derived from the estate, and not to an interest claimed adversely thereto. In the case before us the husband, though interested in the estate of his deceased wife, was, so far as the claim he was attempting to assert, an entire stranger thereto. See Budd v. Hiller, above cited. The probate court had no jurisdiction of the subject-matter of the action, from which it follows that the higher courts could get no jurisdiction on appeal.

It only remains to determine the character of the order to be entered. In the appellate courts of some of the states it is the practice, in cases like this, to simply dismiss the appeal and leave the judgment of the court below to stand in form as a judgment in force. These say that, as the judgments are upon their face absolutely void, they will not take jurisdiction even to reverse them. Other appellate courts, however, take the ground that as they have the power to clear their own records of objectionable entries, even though as standing thereon they are absolutely void, they have like power to set aside like void entries in the inferior courts, when the form of removing such void entries to such appellate courts has been complied with. We think the latter practice the better one. See Lynch v. Divan, above cited. A judgment unreversed, though void upon its face, may seriously embarrass the person against whom it is in form rendered, though it can, of course, be of no benefit to the person who has secured it. This being so, such judgment should not be allowed to stand. The appeal in this case must be dismissed, and the judgments in the superior court and in the probate court reversed; and such probate court must proceed in the administration of the estate in question in accordance with law. The appellant will recover costs of this court, and the appellee the costs in the superior court.

ANDERS, C. J., and SCOTT and STILES, JJ., concur. DUNBAR, J., not sitting.

(1 Wash. St. 401)

CADE v. BROWN.

(*Supreme Court of Washington*. Nov. 21, 1890.)

LAND CONTRACT—BREACH—DAMAGES.

Where plaintiff has bought land, and made improvements on it, and bought lumber, and hauled it on the land for the erection of a building, the measure of damages for breach of contract to convey the land is the value of the land, including improvements made by plaintiff at the time of the breach, less the price plaintiff was to pay, together with any special damages in the purchase of the lumber.

Error to superior court, King county.

Ronald & Piles, for plaintiff in error. Jacobs & Jenner and Lewis & Gilman, for defendant in error.

SCOTT, J. Plaintiff claims he entered into a parol agreement with defendant for the purchase of a tract of land, being part of a larger tract owned by defendant. He also claims the defendant took him upon the premises, traced the boundaries of the land in question, and placed him in the possession thereof; that, in pursuance of the agreement, plaintiff kept possession

of the premises, and made valuable improvements thereon with the knowledge and consent of defendant, and also purchased and placed upon the land certain lumber to be used by him in erecting a building thereon, which lumber subsequently became valueless to him through the breach of the defendant; and, further, that he tendered full compliance with the contract upon his part; that the defendant refused to comply therewith, and sold the land to another person; whereupon plaintiff brought this action at law to recover his damages. Upon the trial plaintiff asked the court to instruct the jury that the measure of damages he was entitled to was the value of the land at the date of defendant's breach of the contract, together with the amount expended by plaintiff in making said improvements, less the purchase price plaintiff was to pay for the land. The court refused to give the instructions, but directed the jury, if they found for the plaintiff, to assess as his damages an amount equal to the reasonable value of the improvements made by him, to which plaintiff excepted.

It fairly appears from the whole case that the proof tended to show the land had greatly increased in value; and while the instructions asked by plaintiff were not correct in asking pay for his improvements in addition to the value of the land at the time of defendant's breach, as the value of the land at that time would include the improvements made thereon, and would have resulted in giving plaintiff pay twice for his improvements, which was properly refused, yet the instruction given by the court was also erroneous. The measure of the damages was the value of the land at the time of the breach, less the price plaintiff was to pay therefor, together with any special damage plaintiff might prove in purchasing lumber to erect a building upon the premises, which could not be considered an improvement before its erection. It is urged by appellee that an action at law will not lie in such a case; that the plaintiff's remedy, if he had any, was an action for specific performance of the contract, it not having been put in writing, and the purchase price not having been actually paid, but only tendered by plaintiff and refused by defendant; and where a specific performance cannot be had because of the inability of the defendant to convey, he having previously parted with the title, and where the action cannot be maintained against the vendee by reason of his not having had actual notice of plaintiff's rights, or where the possession of plaintiff was not sufficiently open and notorious to be held a constructive notice, that the plaintiff would be without a remedy, although a specific enforcement in consequence of a part performance by plaintiff might have been decreed against the defendant, had he retained the title. We think otherwise, and hold that in such a case an action at law for damages can be maintained. The judgment is reversed, and the cause remanded.

STILES, HOYT, and DUNBAR, JJ., concur.  
ANDERS, C. J., not sitting.

COWIE *et al.* v. AHRENSTEDT *et al.*

(Supreme Court of Washington. Dec. 3, 1890.)

MECHANICS' LIENS—DESCRIPTION OF PREMISES—  
PLEADING—PROOF—APPEAL.

1. Under the rules of the supreme court of Washington, where there is no motion to strike from the files an improperly settled statement of facts, objection to it is waived, though the point is made in the brief of the objecting party.

2. In an action against two as partners for the price of brick, the partnership is not established by evidence that defendant, who denies his liability, was working on the building with the other defendant, and that he wrote out the receipt for the brick, which was signed by his co-defendant only, and that he had stated something about his being as much a contractor on the building as any one.

3. In an action to enforce a mechanic's lien, defendant may deny, on information and belief, the recording of the notice of lien.

4. Where defendant holds under a lease the property sought to be subjected to the lien, plaintiff cannot show defendant's interest by oral testimony.

5. Where the claim of lien is upon the whole of a lot, but the proof shows that it is only upon a part of it, 36 feet in width, nearer the center than either side of the 60-foot lot, the description proved is too indefinite to support a judgment, even though the latter adds to the description the name of the building on the land.

Appeal from superior court, King county.

Richard Osborn, for appellant. N. Sod, erberg, for appellees.

HOYT, J. Plaintiffs obtained a judgment against C. Kavanaugh and Charles Roberts for certain brick alleged to have been sold and delivered to them, and also obtained a decree of foreclosure of a lien alleged to have been claimed and filed upon the leasehold interest of the defendant W. H. Cowie, in a certain brick building, in the construction of which, it was alleged, said bricks were used. From the judgment and decree thus entered defendants, Cowie and Roberts, have appealed, and the case is before us on a transcript of the record, and a statement of facts settled therein. As to this statement of facts, the record shows that the appellees objected to its settlement, and, in their brief filed here, they say it should be stricken from the record because not properly settled. But, as no motion to strike the statement was made and filed, as required by the rules of this court, we must consider the point made in the brief waived, and cannot enter upon an examination thereof.

Plaintiffs introduced evidence tending to show a sale of the brick to defendant Kavanaugh alone, and the only evidence tending to show that defendant Roberts had any connection with the sale, either as a partner of Kavanaugh or otherwise, was the fact that he was at work with Kavanaugh on the building into which the brick went, and the further fact that he wrote an acknowledgment of the receipt of the brick, and of the amount still due thereon; but as this paper, though written out by Roberts, was signed by Kavanaugh only in his own name, and not by Roberts at all, neither the fact of his writing it out, nor the fact that he was working with Kavanaugh, would establish even *prima facie* the partnership

alleged. It is true that, in addition to the above circumstances, one of plaintiffs' witnesses testified that defendant Roberts said something about his being as much a contractor on the building as any one; but this alleged conversation was too indefinite to prove anything, and could not aid the plaintiffs.

A notice of lien was introduced in evidence, but there was no proof tending to show that it had been recorded, as required by law. Not even the file-marks of the auditor appear upon the copy of the lien contained in the transcript. That the lien notice must be filed before the lien attaches, so that there can be a foreclosure thereof, is too plain for argument; and we do not understand that counsel for appellees contend to the contrary. The appellees, however, claim that there was no sufficient denial of such filing in the answer of defendant Cowie, and that for that reason they were not required to prove such fact. The language of the denial of the paragraph alleging the recording of the lien is as follows: "Defendant denies any knowledge or information sufficient to form a belief, and therefore denies each and every allegation contained therein." And it is not claimed that it is not sufficient in form. It is however contended that a denial of knowledge or information, as to a fact the truth or falsity of which can be ascertained by reference to a public record of which every person has constructive notice, is sham, and frivolous, and of no effect. We think the rule thus stated is too broad. To hold that a defendant must, at his peril, obtain positive knowledge of every fact shown by the public records of which he by law is required to take notice would be contrary to the provisions of our Code, as it has been interpreted by a uniform course of practice for a series of years. It would likewise be against the weight of authority. See *Vassault v. Austin*, 32 Cal. 597; also, *Brown v. Scott*, 25 Cal. 190. The true rule we believe to be that as to all facts that are presumptively in the actual personal knowledge of the defendant, or as to which it is his duty to have or obtain such personal actual knowledge, he must answer positively, or, by direct averments, show why he cannot so answer, and that, as to all other facts, he may answer that he has no knowledge or information sufficient to form a belief. From the fact that the law makes a record constructive notice, it does not follow that every one has any actual personal knowledge of such record, nor does it impose upon them the duty of acquiring such knowledge. The claim of lien was upon the whole of lot 3 in a certain block in Seattle, whereas the proof tended to show that a portion of said lot was not only not owned or leased by the defendant, but was in the actual and open possession of other owners or lessees, and upon such proof plaintiffs sought a foreclosure on a portion only of said lot. Whether or not such a course could be sustained in any case we shall not now decide, as, in this case, the particular part of the lot upon which it was claimed that the lien could be maintained was not made sufficiently

definite and certain to sustain a judgment. The proofs showed that it was a part of said lot 3, 36 feet wide, nearer the center than either side of said lot, and that said lot was 60 by 120 feet.

In the judgment, there is an attempt to improve upon the proofs, by adding to such description an allegation that the building thereon situated was known as the "Cowie Block;" but this addition was unwarranted by the proofs, and, even when thus aided, we think the description so indefinite that a sale thereof could not be intelligently had. It is an easy matter to have these descriptions accurate, and fair dealing, as well as public policy, requires that they shall be, in substance, so complete and certain that an officer charged with the sale of the property would have no doubt as to just what he is called upon to sell.

Plaintiffs were allowed to show, by oral testimony, facts in regard to the ownership of the lot in question, and as to defendants' interest therein as lessees of said owner, though it affirmatively appeared that the lease in question was in writing, and within the convenient reach of the parties. This was error, and should be corrected on a retrial of the cause. The court found that \$60 was a reasonable attorney's fee in the proceeding, for which finding we are unable to find any warrant in the proofs. The judgment and decree must be reversed as to defendants Cowie and Roberts, and a retrial had in accordance with this opinion.

DUNBAR, SCOTT, and STILES, JJ., concur.

(1 Wash. St. 411)  
FOSTER v. STATE.

(Supreme Court of Washington. Dec. 3, 1890.)

GAMING—DEFINITION—INDICTMENT—JUDGMENT.

1. Code Wash. § 1253, providing that every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct either as owner, proprietor, or employe, any game of faro, monte, etc., shall be guilty of a misdemeanor; and section 1258, providing that any person who shall suffer or permit any of the acts or things forbidden or made punishable by sections 1253, and 1256 to be done or carried on in any house, room, or other place, of which he is the owner, or in the possession of which he is entitled under this act, shall be guilty of a misdemeanor,—state with sufficient clearness that the act of dealing faro or suffering or permitting the same to be done on one's premises is a crime.

2. An indictment charging one with permitting faro to be dealt on his premises is sufficient without specifying with whom the game was played, or in what particular manner it was conducted.

3. Under the provisions of section 1258, imposing a fine not exceeding \$500 on conviction, and declaring that defendant shall stand committed until the same is paid, it is no valid objection to a judgment that the court included costs in its sentence, and that it did not fix a definite period of imprisonment in case of non-payment of the fine, as the section should be construed in connection with section 2105, providing that on conviction the defendant shall be liable to costs in all cases, and section 1125, providing that in default of payment of fine and costs a warrant shall be issued for defendant's commitment, specifying that he be imprisoned one day for every \$2 of such fine and costs.

Appeal from district court, King county;  
THOMAS BURKE, Judge.

Code Wash. § 1253, provides that "each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor, or employe, whether for hire or not, any game of faro, monte," etc., "whether the same be played for money, checks, credits, or other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and all costs are paid: provided, that such person so convicted shall be imprisoned one day for every two dollars of such fine and costs, and that such imprisonment shall not exceed one year." Section 1258 provides that "any person who shall suffer or permit any of the acts or things forbidden by or made punishable by sections 1253 and 1256, this act, to be done, or carried on in any house, room, shop, or other building whatsoever, or any boat, booth, garden, or other place, of which he is the owner, or in the possession of which he is entitled under this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and imprisoned in the county jail until such fine is paid."

*Robinson & Farwell*, for appellants. *E. M. Carr*, Pros. Atty., for the State.

ANDERS, C. J. The grand jury of King county returned an indictment into the district court charging appellant with the crime of permitting the game of faro to be dealt upon his premises, the body of which is as follows: "J. H. Foster is accused by the grand jury of the territory of Washington, for the county of King, in the third judicial district of said territory, by this indictment, of the crime of permitting faro to be dealt on his premises, committed as follows: The said J. H. Foster, on the 12th day of January, 1889, in the county of King, in the district aforesaid, then and there being in the lawful possession of a certain room, then and there situate, and being in a certain building known as the 'Grotto,' then and there situate, and being on the south side of Yesler Avenue, between Commercial and South Second street, in the city of Seattle, in said King county, unlawfully, knowingly, and willfully did permit one J. Bachele, then and there and therein to unlawfully, knowingly, and willfully deal a game of faro then and there played with cards for money." To this indictment appellant caused a plea of guilty to be entered, and subsequently filed a motion in arrest of judgment on the ground that the indictment did not state facts sufficient to constitute a crime. The motion was denied, and the defendant was sentenced, by the court, to pay a fine of \$500 and costs amounting to \$20, and stand committed to the county jail of King county until said fine and costs should be paid or the defendant discharged according to law, and remanded the defendant into the custody of the sheriff to carry the sentence into effect. The defendant appeals, and asks this court to reverse the judgment of the court below for the following reasons: (1) That

section 1258 of the Code is void for uncertainty, and because it does not describe the offense; (2) that section 1253 is also void; (3) that, even if the statute is valid, the indictment does not state facts constituting an offense; and (4) that the judgment and sentence of the court is void because it exceeds the limitations of the statute and the jurisdiction of the court.

The objection to the validity of the statute is not tenable. The language is sufficiently explicit to enable the court, with reasonable certainty, to discover what the legislature intended, and the statute cannot therefore be held void for ambiguity or uncertainty. Mere inaccuracies of expressions, or faulty arrangement of words and phrases, if the meaning is intelligible, are insufficient to warrant the court in declaring a statute void. *Bish. St. Crimes*, (2d Ed.) § 41. And we are of the opinion that the objection that the sections of the Code above mentioned do not describe an offense is equally untenable. Counsel claims that the statute does not explicitly point out or describe the acts constituting the crime; but we think otherwise. It states clearly enough, as we read it, that the act of dealing faro, or suffering or permitting the same to be done on one's premises, is a crime. Similar statutes exist elsewhere, and, so far as we are advised, have seldom been questioned. *People v. Beatty*, 14 Cal. 567; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. Rep. 673.

The indictment is sufficient. The *gravamen* of the offense consists in permitting the game to be dealt in prohibited places, and it was not necessary to specify with whom the game was played, or in what particular manner it was conducted. The definition itself sets for the constituent elements of the crime, and the indictment being in substantially the same language fulfills all the requirements of the law. *People v. Saviers*, 14 Cal. 30; *Rice v. State*, 3 Kan. 141; *Bish. St. Crimes*, (2d Ed.) §§ 890, 891; *Romp v. State*, 3 G. Greene, (Iowa,) 276; *People v. Carroll*, 80 Cal. 153, 22 Pac. Rep. 129.

That the judgment in this case exceeds the limitations of the statute or the jurisdiction of the court we cannot concede. Section 1258 of the Code imposes a fine not exceeding \$500 upon conviction, and provides that the defendant shall stand committed until the same is paid, but is silent as to costs; and it is therefore claimed that the court had no right or authority to include the costs in its sentence, and thereby really impose a fine of \$520. It is also contended that the judgment is void for the further reason that the court did not fix a definite period of imprisonment in the event of the non-payment of the fine. But we think these objections cannot be sustained. This section ought, in our opinion, to be construed in connection with the general provisions of the Code upon the subject of costs in criminal cases, and of imprisonment for non-payment of fines. Section 2105 provides that on conviction the defendant shall be liable to pay the costs in all cases, and section 1125 (amended in Laws of 1883, p. 38) provides that when a defendant is sentenced to pay a fine and costs, and is remanded into the

custody of the sheriff, the clerk of the court, in default of payment or security of payment, shall issue a warrant for his commitment, specifying that the defendant shall be imprisoned one day for every two dollars of such fine and costs. We see no error in the judgment and sentence of the court in this action. The only exception to the general rule that the defendant on conviction must pay the costs, of which we are aware, are found in section 1104 of the Code, which provides that, if the court or jury trying the cause expressly finds otherwise, the defendant shall not be liable. For the foregoing reasons the judgment of the court below must be sustained.

HOYT, DUNBAR, SCOTT, and STILES, JJ., concur.

(1 Wash. St. 415)

#### WAY v. STATE.

(Supreme Court of Washington. Dec. 3, 1890.)

#### GAMING—APPEAL—REVIEW—PRESUMPTIONS.

Under a statute permitting the destruction of gambling apparatus seized and held as evidence, on the conviction of defendant, where the record is silent as to how the apparatus came into the sheriff's hands, it cannot be presumed that such possession was wrongful, or that the recitals and order of the court directing the destruction were unauthorized.

Appeal from district court, King county; THOMAS BURKE, Judge.

*Robinson & Farwell*, for appellants. *E. M. Carr*, Pros. Atty., for the State.

ANDERS, C. J. The facts in this case are similar in all respects to those of the case of *Foster v. State*, ante, 459, (just decided by this court,) except that in this action the court ordered the destruction by the sheriff of certain gambling apparatus which was seized in the possession of the defendant and held as evidence upon the trial. Appellant claims that the statute permits the destruction of such gambling implements only as have been seized under the authority of a search warrant and retained as evidence, and that the property destroyed was not so obtained. It is difficult to see how the method of obtaining the possession of things liable to destruction on account of their character and the purposes for which they are used could affect the power of the court over them; but it is not necessary to determine that question in this instance, for the reason that the record is silent upon the question of how this "gambling apparatus" came into the possession of the sheriff, and we cannot presume that such possession was wrongfully obtained, or that the recitals and order of the court were unauthorized. And, besides, the record fails to show that any objection or exception was made or taken to the order, and the assignment of errors fails to mention it. For the foregoing reasons, and those given in the case of *Foster v. State*, above mentioned, the judgment of the court below must be sustained.

DUNBAR, HOYT, SCOTT, and STILES, JJ., concur.

#### KELLOGG et al. v. LITTELL & SMYTHE MANUF'G CO. et al.

(Supreme Court of Washington. Dec. 3, 1890.)

#### MECHANIC'S LIEN—NOTICE OF CLAIM—DESCRIPTION OF LAND—SUFFICIENCY.

1. A notice of claim of mechanic's lien describing the land on which the building is situate as a certain lot specifically bounded "excepting a space of 22 feet, more or less, wide on Pike street, by about 25 feet deep," is insufficient, because too indefinite, it not appearing where, in the larger piece, this excepted smaller piece is located.

2. In Washington there can be no lien on the building alone separate from the land.

Appeal from superior court, King county.

*P. P. Carroll*, for appellants. *Smith & Littell*, for appellee.

HOYT, J. *Opinion on Motion to Dismiss.* The objections to the appeal herein urged by the appellee are as to irregularities not going to the jurisdiction of the court, and, in view of the uncertainty existing at the time the appeal was taken, growing out of the change of the rules of this court, and the unsettled practice thereunder, we do not think that they are such as should deprive the appellants of the right to be heard. The motion to dismiss the appeal is therefore denied.

*Opinion on Merits.* Appellee sought to obtain a judgment for material furnished by it for the erection of a certain frame building, and to foreclose a lien thereon for the material so furnished. Many questions have been argued here by counsel for the respective parties, but the view we take of the law of the case makes it unnecessary for us to consider more than one. The notice of the claim of lien was introduced in evidence, and from such notice it appeared that the description of the land upon which the lien was claimed was "all that certain plat of land situated at the south-westerly corner of Pike and Fourth streets, in the city of Seattle, King county, and state of Washington, being seventy feet on Pike street, and on the southerly line thereof, by seventy-five feet front on Fourth street, and on the westerly line thereof, excepting a space of 22 feet, more or less, wide, on Pike street, by about 25 feet deep; the same being a part of the said lots 2 and 3 of said block 21, A. A. Denny's addition, aforesaid;" and was in our opinion so indefinite and uncertain that a decree of foreclosure could not be founded thereon. It is true that the large piece first described is definite and certain, and, if the effect of the continuance of the description had been to except therefrom any certain portion, then the description as a whole would have been good. But such is not the effect of the remainder of the description; on the contrary, its effect is to except from such larger piece a smaller one, the location of which is entirely uncertain. It is true that the area of such smaller piece may be taken as definitely set out by striking from such description the words "more or less," and also the word "about;" and, for the purpose of sustaining the lien, we should not hesitate to treat such words as surplusage. The fact that the area is certain will not, how-



ever, aid the description so long as its location in the larger tract is uncertain. The area in question might be a strip 11 feet wide and 25 feet long on either side of a line drawn at any point from Pike street, not less than 11 feet, nor more than 59 feet, from Fourth street. The description, as a whole, is just as uncertain as to the land covered thereby as would be one covering an entire section of land excepting one quarter thereof, without in any way pointing out which quarter section was so excepted. The question is not here presented as to the effect of such notice if the proofs had been such as to make certain the description intended, and the decree had corresponded to the amended description made by such proofs, for in this case the description in the notice is in no way aided. It follows that there could be no foreclosure of any interest in the land upon which the building was erected because of such insufficient description. The notice of the lien described the building into which the material went so that it might properly be identified; and, if a lien can be maintained upon a building, as such, separate from any interest in the land upon which it is situated, then the decree of foreclosure in this case might be sustained so far as it relates to the building, and would only have to be modified so as to cover that and nothing more. Such a lien can only be maintained when the statute in express terms so provides. Every case which we have been able to find holds that there can be no such lien without a statute expressly providing for a lien on the building separate from the land. *Babbitt v. Condon*, 27 N. J. Law, 154; *Coddington v. Dry-Dock Co.*, 31 N. J. Law, 477; *Tracey v. Rogers*, 69 Ill. 662. In Missouri and Iowa, and perhaps other states, a lien upon the building alone can be maintained; but there, as elsewhere, the courts say that it can only be allowed by force of the positive provision of the statute, which in those states not only provides for a lien upon the building separate from the land, but further provides that the purchaser of such building shall have a reasonable time in which to remove the same from the land upon which it was situated. *Jodd v. Duncan*, 9 Mo. App. 417. Our statute would be capable of such a construction had it provided any way by which a lien established upon a building alone could be made of value to a lienor, but it has not done so, and we are therefore forced to the conclusion that the lien upon the building was only intended to be enforced in connection with some interest or right to the land upon which it was situated. Something has been said about the duty of courts to give a liberal interpretation to our statutes; and that such is the duty of all courts, made so by the statute itself, is very plain. But the most that a liberal interpretation can allow a court to do, is to look with leniency upon the language used, and determine, without regard to technical accuracy of language, what the legislature intended. When the intention of the legislature has been thus ascertained, it is beyond the power of a court to dispose with any of the steps prescribed. To hold that a lien could attach

without a full compliance with the statute, as thus interpreted, would be contrary to the act itself, as well as to the constitution of our state, which provides that no property can be taken without due process of law. Under the circumstances of this case there can be no lien, and the cause will be remanded, with instructions to set aside the judgment and decree, and enter a new judgment against defendant Phillips for the amount found due and unpaid for the material furnished, with interest thereon to date of the judgment. Appellants will recover costs of this court.

ANDERS, C. J., and STILES, DUNBAR, and SCOTT, JJ., concur.

(1 Wash. St. 420)

WADHAMS *et al.* v. PAGE *et al.*

(Supreme Court of Washington. Dec. 3, 1890.)

PARTNERSHIP—LIABILITY OF RETIRING PARTNER—NOVATION.

1. An agreement between partners upon dissolution of the firm that the retiring partner shall not be liable for the previous firm debts, which shall be paid by the one continuing the business, does not relieve the retiring partner from liability to the firm creditors unless they assent to the arrangement, and assent is not given by mere silence after notice of the dissolution and agreement.

2. The retiring partner who relies on this agreement and the assent of the creditors to it as a release, must prove such assent by a preponderance of evidence.

Appeal from superior court, King county; I. J. LICHTENBERG, Judge.

Thomas Burke, (Andrew Woods, of counsel,) for appellants. Lewis & Gilman, for appellees.

DUNBAR, J. This was an action by plaintiffs and appellants to recover a balance alleged to be due from defendants and appellees on account, amounting to \$203.43, with interest thereon at the rate of 10 per cent. per annum from the 3d day of April, A. D. 1884. Service of summons was had only on defendant Joseph Green. The defendant Green, for an affirmative defense, alleged that on the 23d day of February, A. D. 1884, he and one Alfred Page were doing business under the firm name of Page & Green; that on or about the 3d day of April, 1884, they dissolved partnership; that at said time there was due Wadhams & Elliott about the sum of \$203; that the said Page continued to run and manage the said business of the said partnership; that the said Page was to pay the said Wadhams & Elliott the said amount due said firm; that Wadhams & Elliott were notified of said dissolution; that they accepted the said Alfred Page for the said indebtedness due them from said firm of Page & Green, and transferred the account of Page & Green to the said Alfred Page, and held the said Page only for the said amount of indebtedness, and did then and there release the defendant Green from any obligation or indebtedness due to plaintiffs by the said firm of Page & Green. The affirmative matter in defendant's answer was denied in plaintiffs' reply. Payment of the said indebtedness was also alleged in the answer, but no attempt was made to prove the pay-

ment on the trial, except as stated in the affirmative answer. The jury found a verdict in favor of defendants, judgment was rendered in accordance therewith, and from said judgment plaintiffs appeal to this court, also alleging certain errors in the instruction of the court.

While a "novation" was pleaded as an affirmative defense in this action, there was no proof tending to show that Wadhams & Elliott had ever, by express or implied contract, agreed to extinguish defendant Green's liability by substituting or accepting Page as the payor of the debt incurred by the partnership of Page & Green. It is true that the testimony of Green showed that it was agreed between Page and Green that Page should assume this debt, and that Green should be discharged, and that Wadhams & Elliott were notified of the dissolution and of the agreement between Page and Green. But the promise of one partner to pay the debt of another, for which he is already bound, is no consideration for an agreement to release the other partner. *Early v. Burt*, 68 Iowa, 716, 28 N. W. Rep. 35; *Wildes v. Fessenden*, 4 Mete. (Mass.), 12. In order to give any weight to an agreement whereby liabilities are extinguished, it is essential that all parties in interest should be parties to the agreement. It would certainly be a loose and unjust law that would allow obligations to be thrown off or transferred at the will of the obligor. Such is not the law. If one partner transfers his liability to another, and the creditor does not assent to the transfer, his rights are not affected. As stated by Mr. Lindley, in his excellent work on Partnership, it cannot be too often repeated that, merely by retiring, a partner gets rid of no liabilities, as to past transactions unless there is some statutory enactment applicable to his case; and the same observation applies to a total dissolution. To use the words of Mr. Justice HEATH: "When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past the partnership continues." Indeed, so improbable was the idea that a creditor would release a part of his security, and rely on one debtor when he before had two, without taking any other security, that some of the early English courts held that where a partnership had been dissolved, one member retiring and the other continuing the business, and agreeing to pay the debts of the old firm, where the creditors knew of the arrangement, and consented to it, and transferred the debt to the new firm, and where there was strong testimony outside of this fact showing that the creditors had agreed to discharge the defendant, and look to the other partner, the retiring partner was liable; and the fact that no person had become liable to the defendant who was not so originally was relied upon by the court as showing that there was no consideration for the alleged discharge. The most noted cases holding this doctrine were *Lodge v. Dicus*, 3 Barn. & Ald. 611, and *David v. Ellice*, 5 Barn. & C. 196. But, while this doctrine has been modified by the later decisions and authorities, no

court that we know of has gone so far as to hold that the simple agreement between the partners that one of them should be discharged, and notice to the creditors of said agreement, will affect the rights of the creditors, or be construed as any implied promise on the part of the creditor to discharge either partner. But the opposite doctrine has been enunciated by many courts. *Chase v. Vaughan*, 30 Me. 412; *Umbarger v. Plume*, 26 Barb. 461; *Coleman v. O'Neil*, 1 N. W. Rep. 846; *Aiken v. Thompson*, 43 Iowa, 506, and cases cited; *Blew v. Wyatt*, 5 Car. & P. 397; *Harris v. Lindsay*, 4 Wash. C. C. 98; *Heberton v. Jepherson*, 10 Pa. St. 124; *Payne v. Slate*, 39 Barb. 634; *Offutt v. Scott*, 47 Ala. 104.

It is urged by counsel for appellees that the fact of silence, and the long delay in making any demand, is, of itself, evidence of acceptance of the agreement of the partners in this case. Even if the testimony bore out this assumption, silence alone on the part of the creditor is no evidence of a "novation." The failure of a creditor to demand payment for any period of time within the statute of limitations will not discharge the retiring partner. *Harris v. Lindsay*, 4 Wash. C. C. 98; *Jenness v. Lane*, 26 Me. 475; *Hall v. Jones*, 56 Ala. 493. But the testimony does not show silence on the part of Wadhams & Elliott. On the contrary, the defendant Green himself testifies that after he had notified Wadhams & Elliott of the dissolution, and of his arrangement with Page for Page to pay the debts, Wadhams & Elliott expressly insisted that he (Green) should sign a note with Page for the payment of said debt, and that he refused to so sign. This was also sworn to by plaintiffs. This, instead of indicating an acceptance of Page by Wadhams & Elliott, was a direct avowal by them that they would not discharge Green; and that they desired to have their account settled by the joint note of both partners, as is usual in such cases. The testimony of Wadhams also was that he wrote several letters to Green demanding the payment of this account, and the exhibits show that, for some time prior to August, 1886, he had placed the account in the hands of attorneys for collection; and it can easily be gathered from the correspondence that the bill had been presented, and payment thereof refused by the defendants. Neither was there any testimony tending to show that the account of Page & Green had been transferred to the account of Page. The only testimony on this point was the testimony of Wadhams, who testified positively that all the payments that had been made on the account of Page & Green were credited on the account of Page & Green, and that the said account of Page & Green had not been transferred to the account of Page. In fact we are unable to find any testimony in the case tending to show in the least any consent expressed or implied on the part of Wadhams & Elliott to discharge the defendants from their obligations. This being the case, and the amount claimed by the complaint to be due having been proven by the plaintiff to be due, and the correctness of the claim not having been denied by the defendants in their testimony,

the verdict was unwarranted, and the judgment must be reversed. It is also claimed by appellants that the court erred in instructing the jury as follows: "It is not necessary that the defendant Green proves to you beyond a reasonable doubt that the creditors or these plaintiffs accepted Page, nor need he prove the fact by an overwhelming weight of evidence. It is not necessary that he proves it by more testimony than against it." This instruction we think was error. It is almost too elementary to need repeating here that every affirmative allegation must be proven by a preponderance of testimony. This is a general proposition, but the law especially provides that the *onus* of showing an extinguishment lies upon those who allege it. *Davis' Estate v. Desauque*, 5 Whart. 530, and cases cited; *Hall v. Jones*, 66 Ala. 493.

It is urged by the appellees that the charge as a whole was correct, and the jury would not be misled; but we think this particular statement,—"It is not necessary that he proves it by more testimony than against it,"—couched, as it was, in words which could be plainly understood by an unprofessional mind, and a proposition that the jury would probably segregate and remember, would be liable to mislead them as to the amount of testimony necessary to establish an affirmative allegation.

The judgment is reversed, and the case remanded to the lower court, with instructions to grant a new trial; and it is so ordered.

STILES, HOYT, and SCOTT, JJ., concur.

(1 Wash. St. 355)

WILKIE V. CHANDON.

(Supreme Court of Washington. Nov. 18, 1890.)

INDORSEMENT OF NOTE—CONSIDERATION—WAIVER OF PROTEST.

1. One who becomes a party to a note by indorsing the same before delivery to the payee identifies himself with the maker; and the settlement of a pre-existing debt owing from the maker to the payee is a sufficient consideration to uphold, not only the note, but also the contract of indorsement.

2. A waiver of protest on a negotiable instrument executed and indorsed in California also waives presentment and notice under the express provisions of Civil Code Cal. § 3160.

3. Where the undisputed proof shows that defendant signed a note as indorser, a special interrogatory to the jury as to whether defendant signed as maker, surety, or indorser is properly refused.

4. The special interrogatory is also bad for indefiniteness, as the jury might feel called on to answer it either with "yes" or "no," or as to in which capacity defendant signed the note.

Appeal from district court, Chehalis county.

*Bignold & Stinson*, for appellant. *O. V. Linn*, for appellee.

HOYT, J. Defendant was sued as an indorser of a certain promissory note. Judgment was rendered against him, to reverse which he has brought the case here. Several errors are assigned as cause for reversal, but of these it is only necessary that we should examine two, as all the others depend upon and must

be controlled by the decision of those two: (1) That the court erred in overruling appellant's motion for nonsuit; (2) that the court erred in refusing to submit certain questions, requiring a special finding of fact, to the jury. Plaintiff, to maintain his action, introduced proof tending to show that the note in question was given in settlement of an account due him from one John Wilkie, a brother of defendant, and that said note was signed by said John Wilkie as maker, and was payable to the defendant, who before its delivery to plaintiff indorsed it, first causing to be written above his name as such indorser the words, "I hereby waive protest on within;" that plaintiff received the note, and the promised payment of \$35 in cash, as a settlement of his said account against said John Wilkie; and that said note had not been paid. There was proof upon some other points, but the statement thereof is not necessary for the discussion of the questions raised on this appeal. When plaintiff rested, defendant moved the court for a judgment of nonsuit, and urges here two reasons why such motion should have been granted: *First*, that the proof failed to show any consideration for the note sufficient to charge this defendant; *second*, that no demand of payment upon the maker had been proved. That the settlement and satisfaction of a pre-existent debt is sufficient consideration for a note given in such settlement is too well settled to require argument at this day, and we do not understand that appellant contends to the contrary, so far as the original debtor, as the maker of the note, is concerned. He does, however, contend that, as no consideration actually passed from the original creditor—that is, that he parted with nothing of value—at the time of the transaction, there was no such consideration as would sustain defendant's contract as indorser, as he was a stranger to the original indebtedness. We think, however, that, by consenting to become a party to the note and an indorser thereof before delivery, he identified himself with the maker, and became a party to the consideration; and that, as there was a good consideration for the making, there was also, under the circumstances disclosed by this case, a good consideration for the indorsement.

Where the language of the waiver, as in this case, was only of the protest, it would be a question of some importance to determine whether or not in the absence of a statute upon the subject it could, by intentment, be so extended as to be a waiver of demand of the maker; but that case is not now presented, as this note was executed in California, where there is legislation upon this subject. Section 3160 of the Civil Code of California is as follows: "A waiver of protest on any negotiable instrument, other than a foreign bill of exchange, waives presentment and notice;" and, aided by this, the waiver on the note in question was a waiver of demand, and therefore it was not necessary to prove one.

The defendant asked the court to submit two questions to the jury. The first

was as follows, to-wit: "Did the plaintiff in this action ever present the note to the maker thereof, or demand payment of the same from the maker, John Wilkie, before the commencement of this suit?" We have already seen that there was absolutely no proof as to demand, and that under the law of the case no demand was necessary, and hence it would have been worse than idle to have submitted such questions, and the court did only its duty in refusing so to do.

The second question was: "Did the defendant, David Wilkie, sign the note as maker, surety, or indorser?" The court properly refused to submit this question for the reason that the undisputed proofs showed that he signed the same as indorser, as not only the plaintiff's proofs showed this to be the fact, but the same was testified to by defendant himself. Besides, the question was not in such form that the court could properly require the jury to answer it. The jury, from it, might feel called upon to answer as to in which of said capacities he signed, and equally as well might feel called upon to answer "Yes" or "No" as to the entire question. Questions submitted to a jury for a special finding should be carefully drawn, and call for a direct answer, and should be such that all minds would understand them alike; and, if not so framed, the court should refuse to submit them. On the whole record, we see no error, and the judgment must be affirmed, with costs; and it is so ordered.

SCOTT and STILES, JJ., concur.

DUNBAR, J., not sitting in the case.

(1 Wash. St. 359)

MCELWAIN v. HUSTON.

(Supreme Court of Washington. Nov. 13, 1890.)

APPEALABLE ORDER.

An order striking out part of an answer is not an appealable order.

Appeal from superior court, King county.  
Ovid A. Byers, for plaintiff in error.  
Thompson, Edsen & Humphries, for defendant in error.

STILES, J. An order of the superior court striking out a portion of the defendant's answer is not an appealable order. Therefore the appeal must be dismissed, and it is so ordered.

HOYT, SCOTT, and DUNBAR, JJ., concur.

(1 Wash. St. 332)

IN RE RAFFERTY.

(Supreme Court of Washington. Nov. 13, 1890.)

HABEAS CORPUS—PRACTICE—JURISDICTION OF SUPREME COURT—CONSTITUTIONAL LAW.

1. Under Enabling Act Wash. § 24, and Act Wash. Dec. 13, 1889, (Sess. Laws, 1889-90, p. 94,) continuing all laws in force applicable to the state government, and substituting the word "state" for "territory," the provisions of Code Wash. c. 53, in regard to *habeas corpus*, apply to the supreme court of the state.

2. The provisions of Const. Wash. art. 4, § 4, that the supreme court shall have original jurisdiction in *habeas corpus*, is self-executing.

3. Under the authority of the supreme court v. 25P. no. 7—30

to issue writs of *habeas corpus* it can grant an order nisi to show cause why the writ should not issue.

4. The provision of the constitution that "the supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as all to state officers," does not limit the jurisdiction of the court in *habeas corpus* proceedings to cases where state officers are concerned.

5. The provision of Const. Wash. art. 1, § 2 that "the constitution of the United States is the supreme law of the land," relates only to matters wherein the general government assumes to control the states, and does not control the further provision of the constitution relating to prosecutions by information, and to dispensing with grand juries.

6. The title of Laws Wash. 1889-90, p. 100, relates only to proceedings by information. Const. Wash. art. 3, § 19, provides "no act shall embrace more than one subject, and that shall be expressed in the title." Held, that section 7 of the act, dispensing with grand juries, unless ordered by the judge, was within the title, and did not bring another subject into the act.

7. Where an act containing a repealing clause is void, the former act will in all cases be unaffected by the repealing clause.

8. Under Code Wash. § 677, prohibiting inquiry into the legality of a commitment issued on a final judgment of a court of competent jurisdiction, where the court is competent to exercise jurisdiction in the premises, but, by reason of irregular process and proceedings, does not obtain and maintain jurisdiction, the remedy is by appeal, and not by *habeas corpus* after commitment.

*Habeas corpus.*

Henry W. Lueders, for petitioner. W. C. Jones, Atty. Gen., for the State.

SCOTT, J. Defendant was convicted in the superior court of Pierce county of the crime of an attempt to commit rape, and upon June 24, 1890, was sentenced to imprisonment in the penitentiary for a term of 14 years. After his incarceration, application was made to the Honorable THEODORE L. STILES, one of the judges of this court, for a writ of *habeas corpus*, whereupon an order nisi was made by said judge, requiring the warden of the penitentiary to show cause to this court why the writ should not issue. This being the first proceeding of the kind before us, the question arises as to the jurisdiction of the court in such matters, and necessitates a construction of section 4, art. 4, of the state constitution, as to its purport, and as to whether it is self-executing in this particular, and, if not, whether an act passed by the last legislature, (see Sess. Laws 1889-90, p. 321,) re-enacting said section *verbatim*, vivifies the same, no way having been pointed out as to the manner of procedure in such cases; also, as to whether the provisions of the Code found in chapter 53 apply to this court, by virtue of section 24 of the enabling act, and an act of the legislature approved December 13, 1889, (see Sess. Laws 1889-90, p. 94,) continuing all laws in force applicable to our present system of government, and substituting the word "state" for "territory," etc. It is contended that the provisions of the Code are not applicable to us, because it would result in compelling this court or its several members virtually to sit as committing magistrates under Code, § 678, to inquire into the sufficiency of causes, where persons are held for trial

upon criminal charges, and that no such state of affairs could have been intended, in view of its consequential inconveniences and expense. It is further contended that the provision referred to of the constitution is not of force until legislation is had pointing out the manner of carrying the same into effect, and providing some means of preserving the records in such cases, particularly when such a proceeding is had before one of the individual judges of this court; and, if this is true, then the literal re-enactment of said section by the legislature does not help this out, and the constitutional provision is dormant.

In the light of all the law submitted to us bearing upon the subject, we are forced to the conclusion that, notwithstanding the awkward results that might occasionally be brought about in cases where this court should be called upon to review the proceedings of committing magistrates, which would practically amount to an appeal therefrom, and be a rehearing thereof, the provisions of the Code mentioned do apply to this court until the same are changed by legislative enactment. We are also of the opinion that the constitutional provision in question is within those denominated or recognized as self-executing, especially when considered with the general power of the court to regulate its proceedings. It can hardly be supposed it was contemplated or intended so important a right as this should be suspended, as far as the jurisdiction of this court is involved, until such uncertain time as it should be called into life by legislation pointing out the method of procedure. In the absence of such legislation, this court could establish rules defining the course to be pursued, if necessary to enforce it. It is apparent, however, by section 687 of the Code, that in all cases where the writ is directed by the supreme court or a judge thereof, or an order *nisi* made, the same should be issued by the clerk of this court. Where the same is made returnable before a superior court or judge, the subsequent proceedings would be had in such court.

An objection was urged that there was no authority for granting an order to show cause at all; that, as the laws cited speak only of the writ, it must be the writ, if anything. It is the practice in the United States courts to grant an order *nisi*, and section 755 of the Revised Statutes is more imperative than our own in relation to the speedy issuance of the writ. It was also the established practice at the common law to grant a rule *nisi* in the first instance. See Whart. Crim. Pl. § 986. Therefore, in view of the lesser expense and greater simplicity of the proceeding in not requiring the presence of the prisoner, we think it is the better practice, and authorized here.

It is further contended that our constitution only gives the supreme court authority to issue the writ as to state officers, although it gives each one of the judges of said court power to issue on behalf of any person held in custody, and, at the option of such judge, to make the writ or order returnable before the supreme court. The language of that part of the section is as follows: "The supreme

court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers;" and while, perhaps, a literal grammatical construction of this clause, as contended, might not give the court jurisdiction, and might prevent its exercise, except as to where state officers are concerned, yet, if so, the language must yield somewhat to prevent what would apparently approach a legal absurdity. See Potter's Dwar. St. pp. 143-146, as to American rules of construction. 1 Story, Const. par. 400, at page 283. It cannot well be supposed that it was intended to confer greater powers upon the several judges of this court than upon the court itself, and especially to give the single judges power to compel the court to hear and determine such matters in all cases, by making the process returnable before the court. No reason has been pointed out for such a grant, and reliance is had solely upon what is contended to be the correct interpretation of the clause quoted. We are of the opinion that the fair meaning of the whole section gives the court original jurisdiction to issue the writ or make the order *nisi* in all cases.

It is also contended that the lower court had no jurisdiction in this case because the defendant was tried upon an information. In support of this, petitioner argues that as section 2, art. 1, of the state constitution reads, "the constitution of the United States is the supreme law of the land," and as the constitution provides no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, that there is no authority to try persons in this state for such offenses upon information, claiming that the provisions in our constitution, relating to prosecutions by information and to dispensing with grand juries are of lesser force, and must yield to section 2, quoted. In further support of this position he cites section 4 of the enabling act, requiring the constitutional convention to declare on behalf of the people that they adopted the constitution of the United States. It is manifest, however, that section 2 only relates to those matters wherein the general government assumes to control the individual states, and the requirement of a presentment by a grand jury is not one of them. That it was not intended to carry the principle further than this in our constitution is apparent in the light of its other provisions. Nor can it be supposed that congress undertook or intended to impose upon the newer states any restrictions additional to those placed upon the older ones. In fact, section 8 of the enabling act expressly declared that they should be admitted to the Union on an equal footing with the original states. As to construction, see 1 Story, Const. §§ 402-405, Cooley, Const. Lim. (5th Ed.) p. 26; Walker v. Sauvinet, 92 U. S. 90; Twitchell v. Com. 7 Wall. 321.

Petitioner further contends that section 7 of the act found at page 100, Sess. Laws 1889-90, dispensing with grand juries unless ordered by the judge, is void, as not being within the title of the act which only relates to proceedings by informa-

tion, and he also claims it is another and distinct subject. To support this, our attention is called to section 19, art. 2, of our state constitution, which provides, "No act shall embrace more than one subject, and that shall be expressed in the title," and to *Harland v. Territory*, 3 Wash. T. 131,<sup>1</sup> but we are all of the opinion the section of the act referred to is within the title, as in providing for proceedings by information the necessity for a grand jury was dispensed with, and the same act, consequently, could very well provide that grand jurors should not be summoned, except in the contingency there mentioned. Nor does it bring another subject into the act in the sense contemplated by the constitutional provision referred to, it not being within the spirit or reason of the prohibition. The subject being in relation to prosecutions for crimes, the matters there legislated upon were all properly included in the act.

It is further urged that the crime of rape is not a statutory offense in this state; that Code, § 812, was repealed by a subsequent law enacted in 1886. See *Sess. Laws 1885-86*, p. 84, § 1, which, under the decision of the territorial supreme court in *Harland v. Territory*, is void, it having been entitled only as an act to amend section 812 of the Code, but that section 2 of said act, which contains the repealing clause, is valid, as it being in favor of defendants in criminal prosecutions is entitled to a more liberal holding. The weight of authority is entirely against the petitioner. If the act is void as claimed, it is invalid for all purposes, and Code, § 812, is still in force; and even if there was no statute upon the subject rape would still be an offense at common law.

Petitioner claims if the Code provisions relating to *habeas corpus* do apply to this court that we are not prevented from issuing the writ in this case by subdivision 1 of section 677, which prohibits inquiry into the legality of any commitment issued on a final judgment of a court of competent jurisdiction. He claims the lower court, by reason of alleged errors lost jurisdiction of defendant's person, and that the writ can issue in all cases where such jurisdiction is wanting. But we are of the opinion said provision does not mean that the writ will lie where the court did not have and maintain such jurisdiction by regular process and proceedings, but means a court competent to exercise jurisdiction in the premises. In such cases defendants must be left to the remedy by appeal. *Ex parte Williams*, 1 Wash. T. 240. Here the superior court had jurisdiction of the offense charged, and for that matter it appears of defendant's person as well. Were any irregularities found in its proceedings, we could not review them in this way. The authorities cited by petitioner, where a different rule prevails, were founded upon statutory provisions essentially differing from our own. The writ is denied.

ANDERS, C. J., and HOYT, STILES, and DUNBAR, JJ., concur.

BARD et al. v. KLEEB.

(Supreme Court of Washington. Nov. 18, 1890.)

FINDINGS OF FACT—WAIVER.

1. Under the provisions of Code Wash. T. § 246, that on the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk, and that the facts found and the conclusions of law shall be separately stated, and judgment shall be entered accordingly, the recital in the judgment that "the court finds the matters and things set forth in the complaint are true," etc., cannot take the place of findings; especially where one of the allegations of the complaint is admitted to be untrue by the reply.

2. In the absence of an affirmative showing by the record that findings of fact were not waived, there is no presumption of such waiver.

Appeal from superior court, Pierce county; FRANK ALLYN, Judge.

*Town & Likens*, for appellants. *Applegate & Titlow*, for appellee.

STILES, J. This was a bill in equity filed to compel the specific performance of a contract for the sale of standing timber and numerous articles of personal property, the performance involving the payment of the sum of \$302.75 in money, the execution and delivery of certain promissory notes secured by a mortgage, and the procurement of a policy of insurance. An injunction to restrain the sale of the contracted property and the appointment of a receiver were asked pending the litigation. The cause was tried by the court, and a judgment for \$2,199.65 and costs was rendered against the defendants. A motion for a new trial was denied, and the cause appealed to this court.

One of the grounds for a reversal urged by the appellants is that no findings of fact or law were filed by the court as required by section 246 of the Code, and, as we consider the objection well taken, we shall confine our decision to that point in the main. Section 246 is as follows: "Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly." This language is almost precisely the same as that of sections 632 and 633 of the Code of Civil Procedure of California. No findings of fact whatever were made or filed in this case, it is conceded. But the appellee points out that in the judgment there occurs the following: "The court finds the matters and things set forth in the complaint are true, and that, upon the cause of action therein set forth, said defendants, Bard and Patrick, are indebted to the plaintiff in the sum of (\$302.25) three hundred and two dollars and twenty-five cents, with interest thereon, at the rate of ten per cent. per annum, from October 8, 1888, and the further sum of (\$2,000) two thousand dollars, with interest thereon, at the rate of eight per cent. per annum, from the 20th day of October, A. D. 1888, and the further sum of ten dollars for his attorney fee herein; and that, on account of the matters set up in the answer, the defendants are entitled to recover, by way of set-off against plaintiff's demand, the sum of (\$250) two hundred and fifty dollars, to be deducted as

<sup>1</sup> 13 Pac. Rep. 453.

of the date of October 20, 1888." This we are urged to accept as a compliance with the statute, inasmuch as it is there stated that the court "finds the matters and things set forth in the complaint are true," and several cases from the California Reports are cited to sustain this view, or to avoid the effect of the omission should we not agree with the appellee. So far as we are aware, from the Washington Territory Reports, this is the first time this issue has been squarely raised here, and we shall therefore allude to a number of the California cases on the subject. In *McEwen v. Johnson*, 7 Cal. 258, is the first instance where findings of fact made by reference to the pleadings were sustained. But there the findings were "that the facts stated in the plaintiff's complaint are true," and "that the facts stated in the defendants' answer are not true," and the court said: "Under these provisions, we think the findings may well refer to the pleadings for a specification of the facts found and not found; provided, such reference is sufficiently distinct to make it intelligible, and the facts are sufficiently stated in the pleadings. In this case there was a very clear and simple statement of the facts in both the complaint and answer." In *Fralus v. Mining Co.*, 35 Cal. 34, the decision says: "The special findings of fact by the court, as found in the record, cover the material issues in the case, and the general finding that 'all the allegations and averments in plaintiff's complaint are true, and that all in the answer are untrue,' is sufficient and conclusive of the issues made by the pleadings." Citing *McEwen v. Johnson*. In *Williams v. Hill*, 54 Cal. 390, the statement is: "The objection that the findings do not support the judgment, in that the court did not find as to the alleged mistake, is fully answered by the finding of the court 'that all the facts set forth in the complaint are true,' and by the fourth finding." *Carey v. Brown*, 58 Cal. 180, sustains a finding "that all the allegations of the complaint are true, and all the allegations of the answer are untrue," on the authority of *Fralus v. Mining Co.* Likewise in *Davis v. Drew*, 58 Cal. 152, certain findings of the court were objected to, one of them being in the following form: "(4) And all and singular the allegations contained in paragraphs 1, 2, 3, and 4 of defendant's answer are true." But the supreme court sustained the finding, with this exclamation of regret: "This mode of finding facts by reference to the answer or portions of it is not to be commended. It imposes greater labor in this court, both on counsel and court. But our predecessors have accepted such findings as proper and sufficient, and therefore we do not feel disposed to adopt a different course." There are many other cases in the California Reports on this subject, but we do not find a single one in which a total absence of findings was sustained, except for reasons hereafter mentioned, or one in which the recitals of a judgment were taken as a compliance with the law. In every one of the cases mentioned above, findings were filed, and in all but the first there were special as well as general findings.

We now stand where the supreme court of California stood in 1857, when it passed upon the case of *McEwen v. Johnson*, and we deem it better, as we have the opportunity, to shape the practice in this state so that our successors may not have to repeat the helpless plaint of the California supreme court, when deciding *Davis v. Drew*, in 1881. The cases in California, however, hold that, unless it appears affirmatively, by the record, that findings of fact were not waived in the court below, it will be taken that there was a waiver, and therefore no error, and appellees urge a like practice here. But section 634 of the California Code of Civil Procedure expressly provides three methods by which findings of fact may be waived, and the case of *Mulcahy v. Glazier*, 51 Cal. 626, clearly explains the theory upon which the supreme court of that state holds as it does as to waivers. It is enough to say that we have no statutory provision of this sort whatever, and therefore nothing to base such a ruling upon. *Eakin v. McCraith*, 2 Wash. T. 112, 3 Pac. Rep. 838, is cited to sustain the proposition that, if the findings are general, the aggrieved party must move in the court below to have them made more specific. But that was not a case where there were no findings; on the contrary, the findings made and filed are quoted in the opinion, and we do not observe that any point was made in the argument, as reported, against the findings; but, even if there were, we do not dissent from the decision of our predecessors, under the circumstances stated in their decision. The case under consideration is therefore not parallel with any of the cases cited or discussed above. The complaint was long and much involved. The answer, in addition to general denials of almost everything in the complaint, alleged fraudulent misrepresentations, payment, compliance with the contract, and failure of the plaintiff to comply, and his want of ability to comply, besides a paragraph in the nature of a counter-claim for damages. And the reply admitted one very material allegation of the complaint, viz., the ownership of certain timber contracted to be sold, to be untrue. Therefore, were we to admit the recital in the judgment that "the court finds the matters and things set forth in the complaint are true," to be a finding, within the statute, we must hold it to be entirely insufficient. Indeed, the court could not find the allegations of the complaint to be true, in the face of the admissions of the reply as to the ownership of the timber. Again, this "finding" makes no disposition whatever of the allegations of the answer, except that it awards \$250 to the defendants, but whether as damages, or on account of payments alleged, does not appear. And the judgment itself, being for \$2,199.65 in favor of the plaintiff, negatives the idea that the allegations of the complaint were found to be true, since under its allegations the judgment prayed for would have been the only proper judgment, and not a judgment for money. True, we are informed in the course of argument by counsel that the time for the payment of the notes for



\$2,000 had expired at the time of the trial, and that for that reason the money judgment was entered; but that could not be done without the filing of a supplemental complaint, under Code, § 114, when the cause of action would change from that of specific performance to one of money demand or contract, with, perhaps, a foreclosure of the promised mortgage.

Under these circumstances, it is unnecessary for us to revert to or pass upon the numerous errors assigned by the appellants, upon the court's refusal to admit certain testimony of the defendants, and to exclude certain testimony of the plaintiff; except that we may say that there are 27 of these alleged errors requiring the minute examination of the whole mass of short-hand testimony, and the retrial of the entire case, all of which serves to emphasize the necessity of proper findings in this instance. These alleged errors were nearly, if not quite, all connected with the introduction of a certain written contract, which was the basis of the action; and if we had here the view of the trial court expressed in the findings, concerning that contract, there would have been little or no propriety in bringing up the voluminous testimony, as the appeal would, in all probability have been based upon the proposition that the conclusions of law and the judgment were not warranted by the facts found,—a pure question of law, not requiring any statement of facts, or the great expense necessary to its preparation and settlement. As we regard it, section 246 is for the protection of court and parties. To the court it gives an opportunity to place upon record its view of the facts and the law in definite written form, sufficiently at large that there may be no mistake. To parties, it furnishes the means of having their causes reviewed, in many instances, without great expense. The findings of fact are deemed a verdict, and are subject to the same rules as a verdict; and that they be found is a substantial right, as inviolate, under the statute, as that of trial by jury under the constitution, without express waiver. While we are upon this subject, and touching the requisite of proper findings, we cite *Breeze v. Doyle*, 19 Cal. 102, and *Hidden v. Jordan*, 28 Cal. 302, as authorities. The judgment of the court below must be reversed, and a new trial granted, with leave to the plaintiff to file a supplemental complaint, and with further proceedings in accordance with this opinion. And it is so ordered, costs to appellants.

ANDERS, C. J., and HOYT and SCOTT, JJ., concur.

DUNBAR, J., not sitting.

(1 Wash. St. 365).

PENTER v. STAIGHT *et al.*

(*Supreme Court of Washington*. Nov. 14, 1890.)

DEMURRER—MISJOINDER OF CAUSES—APPEAL—PLEADING.

1. Where two causes of action, one for \$200 and the other for \$500, are improperly joined, and defendant demurs for this reason, and because the complaint does not state a cause of action,

the court cannot avoid passing upon the first ground by sustaining the second as to one of the causes of action. The demurrer for misjoinder must be sustained, and plaintiffs allowed to amend by selecting which cause they will stand upon, and dismissing the other.

2. The plaintiffs, having excepted to the sustaining of the demurrer to their cause of action for \$500, could have appealed, and the amount in controversy would have exceeded \$200, and been sufficient to give the supreme court jurisdiction; and, as the right to appeal is reciprocal, defendant's appeal from the judgment against him on the cause of action for \$200 gives jurisdiction.

3. A complaint to recover a real-estate commission is defective when it merely alleges that plaintiffs found a purchaser and made a sale to him at the price fixed in their contract with defendant, without averring that they communicated the fact to defendant, and that the arrangement was either carried out or that defendant refused to carry it out after notice.

4. An averment that defendant "denies generally each and every allegation" of the complaint was a good general denial, and defendant could introduce thereunder all evidence tending to disprove the evidence to sustain the complaint.

5. Where, in addition to a good general denial, defendant pleads other matters which might be proved under the general denial, the fact that the court improperly strikes them out as frivolous and irrelevant is not prejudicial error.

6. The reviewing court cannot consider a statement of facts settled and certified in the absence of the opposite party, and without notice to him.

Appeal from superior court. Whatcom county.

*S. M. Bruce*, for appellant. *Dorr & Finch*, for appellees.

STILES, J. The complaint contained the separate statement of two improperly joined causes of action, in the first of which \$200 was demanded, and in the second \$500. Demurrers were interposed, on the ground—*First*, that two causes of action had been improperly joined; and, *secondly*, that the complaint did not state a cause of action. The court below, on the hearing of these demurrers, disregarded the first ground of demurrer, but ruled on the second, to the effect that the first cause of action, as pleaded, was sufficient, but that the second was not. We presume that the failure to pass upon the demurrer for misjoinder was upon the theory that, as the facts stated in the second cause of action were not sufficient to constitute a ground of complaint, there was no misjoinder, and it was therefore not necessary to rule upon that point. This was clear error. The demurrer upon this ground should have been sustained, and the plaintiffs allowed to amend by selecting which of the causes of action they would stand upon, and dismissing as to the other. The error thus committed would not be very material in this case were it not that the court's action has opened the way to a motion to dismiss this appeal, on the ground that this court has no jurisdiction under that clause of the constitution (article 4, § 4) which restricts it to cases of this class, where the original amount in controversy is above \$200. In this instance, the "original amount in controversy" was the amount demanded,—\$700. But the appellees contend that, inasmuch as the second cause of action contained an allega-

tion of damage in the sum of \$500, and the first cause of action a like allegation of damage in \$200, the act of the court in sustaining the demurrer to the second cause, *ipso facto*, reduced the amount in controversy to exactly \$200. The demand, however, remained \$700, and there was no amendment making it less. Inasmuch as the allegations of the first cause of action tended to show a right in the plaintiffs to compensation for services rendered of the value of \$200, for which demand had been made before suit, the proper judgment would have been \$200, with interest thereon from the date of the demand until the judgment,—something more than \$200. Therefore, it was proper that the prayer of the complaint on that cause of action should be more than the bare principal, which would have given this court jurisdiction.

There is another and an equally important ground, however, upon which we must sustain this appeal. It is claimed in the brief of the appellees that, upon the demurrer to the second cause of action being sustained, that cause of action was abandoned, and no longer formed a part of the controversy. Were that so, and had an amended complaint been filed, demanding only \$200, we should hold with the appellees. But on referring to the record, we find that not only was there no abandonment, but that the order sustaining the demurrer distinctly shows the plaintiffs excepting to the ruling of the court, thus preserving to the plaintiffs the right to appeal from that judgment. True, the trial went on upon the first cause of action, and plaintiffs were apparently satisfied with their recovery; but, had the judgment been against them, it was quite in their power to appeal to this court, giving it jurisdiction of the whole amount of \$700, on account of the alleged error of the court in sustaining the demurrer. If there would be jurisdiction for one side, there must be jurisdiction for the opposite side. The notice of appeal was given in open court, and was in accordance with the act of 1883. No notice whatever appears to have been given to the plaintiffs of the settlement of the statement of facts, nor do they or their attorneys appear to have been present when it was settled or certified. Upon the objection of the appellees, we must therefore disregard it. *Taylor v. Osborn*, 23 Pac. Rep. 858. The appeal is therefore before us upon the judgment roll upon the following points: (1) Error of the court in not sustaining the defendant's demurrer to the first cause of action; (2) for want of findings of fact and conclusions of law; (3) error in striking out portions of the answer. This was an action for a real-estate agent's commission, and the complaint alleged that certain property was placed in the hands of plaintiffs by defendant for sale at a certain price, and the plaintiffs undertook to use their best efforts to find a purchaser at the price named; for which, they being successful, they were to receive the usual commission, alleged to be 5 per cent., and to charge the defend-

ant. The complaint also alleged that plaintiffs had found a purchaser at the price named, and completed the bargain with the purchaser for the sale of the same. But there was no allegation that the plaintiffs had ever communicated knowledge of their action to the defendant, or that he had carried out the arrangement they had made for the sale, or had refused to carry it out after notice of the arrangement; and in these particulars at least it was fatally wanting. *Mechem*, Ag. § 612; *Love v. Miller*, 53 Ind. 294.

A motion for a new trial was made upon several grounds, none of which we can notice, with the exception of the fifth, for the reason that they are dependent upon the statement of facts, which is out of the case. The fifth ground was that the decision was against law, and is argued by reference to the insufficiency of the facts to support the judgment. No findings whatever were filed, the only allusion to the subject being found in the judgment which recites that the court "finds for the plaintiffs." We have discussed this matter of findings at large in *Burd v. Kleeb*, ante, 467, (decided at this session of the court.)

The court below, on motion, struck out all of the defendant's answer excepting the first clause in these words: "*First*. He denies generally each and every allegation thereof;" that is, of the complaint,—which defendant assigns as error. But, although, we do not consider all of the matters stricken out as sham, frivolous, or irrelevant, the error was harmless to the defendant, as everything material was in the nature of evidence which could have been introduced under the general denial. We note, however, in the judgment, that the court seems to have held the first denial above quoted not to be a general denial, and refused to allow the defendant to introduce any testimony under it, although it is recited that "the defendant offered evidence tending to deny the allegations of the complaint." We are at a loss to understand how a better general denial could have been framed. *Gammon v. Dyke*, 2 Wash. T. 266, 5 Pac. Rep. 845, and *Dillon v. Spokane Co.*, 3 Wash. T. 498, 17 Pac. Rep. 889, did not hold otherwise, or even touch the question. Assuming that the plaintiffs had proven facts sustaining every allegation of their complaint, it was then certainly competent for the defendant, under his restricted pleading, to disprove those facts if he could. The judgment must be reversed, and a new trial granted, with instructions to the court below to sustain the demurrer of the defendant on the ground of the misjoinder of causes of action, and also his demurrer to his first cause of action, with leave to the plaintiffs to elect which cause of action they will proceed upon, and to file an amended complaint thereon; after which defendant will have leave to answer the amended pleading. And it is so ordered, with costs to the appellant.

ANDERS, C. J., and DUNBAR, HOYT, and SCOTT, J. J., concur.

(1 Wash. St. 359)

## CARSTENS v. McREAVY.

(Supreme Court of Washington. Nov. 21, 1890.)

REAL-ESTATE AGENTS—AUTHORITY TO SELL—  
APPEAL—REVIEW.

1. A real-estate agent authorized to "sell" land has thereby no authority to execute a contract of sale.

2. The objections that the evidence did not justify the findings, and that the court erred in permitting the witnesses to testify concerning certain matters, cannot be considered, where there is not brought up with the record any statement of witnesses, or any question or answer, or any objection, ruling, or exception.

Appeal from district court, King county.

*Thompson, Edsen & Humphries* and *Rochester, Lewis & Gilman*, for appellant. *Preston, Albertson & Donworth*, for appellee.

STILES, J. A so-called "statement of facts" is brought up with the record in this case, which is merely a slight enlargement of the findings of fact filed by the judge who tried the cause. Presumably this statement was intended to respond to the first and third grounds urged on the motion for a new trial, viz., that the evidence was insufficient to justify the findings, and that the court erred in permitting the agents of the appellant to testify concerning certain matters. When this court is called upon to say whether the evidence fails to sustain any or all of the findings of fact below, the testimony, at least in so far as it touches the objectionable findings, must be included in the statement; and, if objections to the admission of testimony are relied on, the questions asked, the answers returned, and the documents admitted, if any, must appear, with such other of the testimony as may be necessary to explain the connection of the objectionable matter with the case. In this instance, the statement does not contain the name of a single witness, or the statement of any witness; nor any question or answer; nor any objection, ruling, or exception; and it very decidedly sustains the findings in every particular, as might be expected. Therefore, it is useless for the purposes for which it was prepared, and we must confine any examination of the case to the other question raised, which is whether the conclusions of law and the judgment were warranted by the findings, which were in almost the same language as that of the complaint.

The appellant was the owner of certain real property in the city of Seattle, and the court found that, at a certain date, agents named, who were real-estate agents in Seattle, "were the agents of defendant for the sale of the aforesaid real estate, and were then and there duly authorized and empowered by the defendant, by writing under the defendant's hand, to make and negotiate a sale of said real estate." The agents, thus authorized, executed and delivered to the appellee a contract for the sale of the appellant's property, without his knowledge, and in his absence from the state, and received a portion of the purchase money. Appellant refused to recognize the contract thus made, claiming that the authority by him given to "sell" did not include the

authority to execute a contract, or anything more than to find a purchaser. This was the vital point in the case, upon which the court held with the appellee, and directed that the contract thus made be performed. The statute of frauds may be satisfied by the execution of a contract for the sale of lands by the hand of another person than the party to be charged, if that person be thereunto lawfully authorized, and it is well settled that such third person may be thus lawfully authorized orally, by written direction not under seal, and even by a course of conduct amounting to an estoppel. It, therefore, only remains to determine whether the ordinary real-estate agent or broker, authorized to sell land, is thereby empowered to enter into a contract binding upon his principal, in an action for specific performance. A real-estate agent is a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons, upon a commission contingent upon success. He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will, without notice. On the other hand, courts almost unanimously unite in holding that in case of an ordinary employment to sell, when he has procured a party able and willing to buy upon the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended, and he is entitled to his commission. It is not his duty to procure a contract, or to make one, and he is not in default if he fails to do either. Therefore, to our minds, it seems clear that, ordinarily, it is not within the contemplation of the owner and agent, where property of this character is placed in the hands of the latter for sale, that he shall, without consultation with his client, execute a contract. We are aware that courts have held to this extent, basing their decisions upon a distinction between an authority to sell and an authority to find a purchaser, and upon the well-known rule that an authority to an agent to do a thing is presumed to include all the necessary and usual means of executing it with effect. But such holdings do not commend themselves to our judgment, and as this is a new question in this state, and we are satisfied that it is not the general practice of agents to make such contracts, we do not hesitate to dissent from the decisions above mentioned, especially as there is no lack of authority for the position we take. We cannot shut our eyes to the obvious defect in the argument that authority to sell, in this instance, necessarily implies authority to execute a contract. A sale of land "executed with effect" includes the execution of a deed, and the delivery of possession, neither of which the agent can do, unless his authority to sell is supplemented by the delivery of possession to him, and a power of attorney to convey; so that he does not, although in possession of the authority to "sell," have all the necessary means of executing that authority with final effect. He stops short somewhere, and, when we are inquiring

where the probable and proper place of his stoppage is, the evils that would attend the extension of his actual authority, beyond the finding of a purchaser, furnish ample reasons for fixing his limit there. An agency of this kind may be created by the slightest form of words, without any writing, leaving it to litigation to determine whether the substance of the authority is "to sell," or "to find a purchaser," wherein the unscrupulous and dishonest agent would be at once arrayed as the principal witness against his client, with every advantage from some note, "made at the time," of what the instruction was. Perjury would go at a premium in such cases, and the confiding and unlettered would be its victims. Scarcely any man, when listing his property with a real-estate agent, stops to give details, either as to the property itself or as to the arrangements he desires to make, yet no one would sell upon equal terms to a first-class business man, and to an habitual drunkard, or well-known insolvent; and the ordinary owner would not sell at all to a person whose very occupancy would tinge the neighborhood with a bad repute. These are good reasons, and are probably some of the reasons why custom and the law have made it not necessary that real-estate agents should actually procure contracts in order to earn their compensation, and why, in this connection, the common understanding of the phrase "authority to sell" means only authority to find a purchaser, whether the authority be given orally, or by written request.

In considering this case, we have examined the numerous authorities cited by both sides, as well as many others, and find the position we take fully sustained by *Morris v. Ruddy*, 20 N. J. Eq. 236; *Milne v. Kleb*, 44 N. J. Eq. 378;<sup>1</sup> *Duffy v. Hobson*, 40 Cal. 240; *Armstrong v. Lowe*, 76 Cal. 616;<sup>2</sup> *Mechem*, Ag. § 966; *Warvelle*, Vend. 213; 2 *Amer. & Eng. Enc. Law*, p. 573, note 2. The earlier cases in New York were to the same effect, notably *Colman v. Garrigues*, 18 Barb. 60, and *Glentworth v. Luther*, 21 Barb. 145; but they were overthrown by *Haydock v. Stow*, 40 N. Y. 363, without sufficient reason, as it seems to us. We note that in nearly, if not all, the states where the courts at any time held agents to sell real estate authorized to execute contracts of sale, especially in New York and Illinois, the legislatures very soon after amended the statutes of frauds, so as to require the agent's authority to contract to be in writing. *Lyon v. Pollock*, 99 U. S. 668, presents a state of facts not found, to any extent whatever, in the case at bar, and is therefore not applicable, and the same may be remarked of *Rutenberg v. Main*, 47 Cal. 213. What a broker must do to "complete a sale" is well defined in *McGavock v. Woodlief*, 20 How. 227, thus: "The broker must complete the sale; that is, he must find a purchaser in a situation, and ready and willing, to complete the purchase on the terms agreed on, before he is entitled to his commission." *Per contra*, if the broker

has "completed the sale" so as to be entitled to his commissions, by finding a purchaser, without a contract, his duty is thereby performed, and his authority exhausted. The judgment of the court below must be reversed, and the action dismissed; costs to appellants.

HOYT, DUNBAR, SCOTT, and ANDERS, JJ., concur.

(1 Ariz. 507)

#### TERRITORY V. DOE.<sup>3</sup>

(Supreme Court of Arizona. Jan., 1872.)

##### CRIMINAL LAW—MISNOMER—SENTENCE—VENUE.

1. Under an indictment against John Doe, an Indian, whose true name is unknown, where the record does not show any order containing the proceedings against the accused by any other name, nor that the true name was disclosed, no sentence can be pronounced on a verdict of guilty against "the defendant Que Cha Ca."

2. The venue of an offense is not laid by an averment that it was committed "near the town of Arizona City, in said county of Yuma, and territory of Arizona," Arizona City being situate near the boundary of the territory.

Appeal from district court, Yuma county.

TWEED, J. The defendant was convicted in the district court for the county of Yuma, at a term of that court held in November, 1871, of the crime of murder. The appeal is from the judgment. No exceptions seem to have been taken to any of the proceedings, and no motion made for a new trial. The transcript certified by the clerk contains a copy of the indictment, what purports to be the substance of the evidence on the trial, the verdict of the jury, and the judgment and sentence of the court, with some brief and very unsatisfactory memoranda of the minutes of the proceedings.

The indictment describes the accused as "John Doe, a Yuma Mohave Indian, whose true name is to the jury unknown," etc. There is nothing in the record showing that upon the arraignment, or at any subsequent period, the true name of the accused was discovered, nor any order of the court that the proceedings should be continued against him by any other name. The verdict of the jury, however, is against one Que Cha Ca. The verdict, as it is set out in the transcript, reads as follows: "We, the jury, find the defendant, Que Cha Ca, guilty of murder as charged in the indictment." All the proceedings subsequent to the verdict, including the judgment and sentence of the court, refer to and designate the accused by the name given in the verdict. Perhaps the full minutes of the trial would show that the name Que Cha Ca was properly substituted for that of John Doe; but, as the record comes to us, there is nothing to connect the party charged with the person against whom the verdict was rendered and judgment pronounced. No judgment affirming that of the district court could be entered by us upon such a record.

But we pass to the consideration of an

<sup>3</sup>This case, filed January, 1872, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

<sup>1</sup>14 Atl. Rep. 646.

<sup>2</sup>18 Pac. Rep. 738.

objection to the sufficiency of the indictment. It charges "that John Doe, a Yuma Mohave Indian, whose true name is to the grand jury unknown, yeoman, late of the county of Yuma, and territory of Arizona, on the twenty first day of September, A. D. 1871, near the town of Arizona City, in said county of Yuma, and territory of Arizona, with force and arms," etc. If there is uncertainty in the portion of the indictment quoted as to the place where the homicide was committed, whether in the county of Yuma or elsewhere, such uncertainty is nowhere in any other part of the indictment cured. Is there such uncertainty? We are compelled to the conclusion that there is, and that the clause quoted from the indictment may be strictly and literally true, and yet the homicide may have been committed on the side of the Colorado river opposite Arizona City, and in the state of California. We may err in this, but it seems to us that the indictment does not charge the offense to have been committed at a place within the jurisdiction of the court with the accuracy and certainty required in criminal procedure, and by the fourth subdivision of section 222, of proceedings in criminal cases. Comp. Laws, p. 123. The judgment is reversed, and cause remanded for proceedings upon a sufficient indictment.

TITUS, C. J., and REAVIS, J., concur.

(1 Ariz. 510)

TERRITORY v. DUNBAR.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1878.)

CERTIORARI—TO DISTRICT COURT.

The district courts of the territory of Arizona having jurisdiction to hear and determine appeals from justices of the peace in criminal cases, *certiorari* will not lie to review proceedings on appeal in the district court.

*Certiorari.*

FRENCH, C. J. The writ in this cause was ordered dismissed, there being no error in the record. But, if error had occurred, this writ would still have been unauthorized and improper. The district courts of this territory have full jurisdiction to hear and determine appeals from justices' courts in criminal cases, and the writ of *certiorari* cannot be invoked to review errors or mistakes where the court has acted within its jurisdiction. This kind of error can be reviewed and corrected only on appeal.

TWEED and PORTER, JJ., concurred.

(1 Ariz. 74)

TERRITORY v. GERTRUDE.<sup>2</sup>

(Supreme Court of Arizona. Jan., 1872.)

CRIMINAL LAW—INSTRUCTIONS.

Comp. Laws Ariz. § 368, p. 137, providing that the charge to the jury shall be in writing, signed

<sup>1</sup> This case, filed January, 1878, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

<sup>2</sup> This case, filed January, 1872, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

by the judge, and filed with the papers in the case, a conviction for felony will be set aside on appeal unless the record shows that the charge was in writing, and read to the jury, or that the accused consented in open court that the charge should be verbally given. REAVIS, J., dissenting.

Appeal from district court, Yuma county. G. H. Aury, for appellant. J. E. McCaffry, Atty. Gen., for the Territory.

TITUS, C. J. This is an appeal by William Gertrude from a judgment of death pronounced upon him by the district court of the second judicial district of Arizona, on a trial for murder. There was no assignment of error, and the case was submitted on briefs, without oral argument. On inspection of the transcript, however, it does not appear that the charge of the judge before whom the case was tried was in writing and read to the jury; nor does it appear that the defendant consented in open court, or otherwise, that the charge should be given verbally. The law of Arizona (section 368, p. 137, Comp. Laws, "Proceedings in Criminal Cases") is as follows: "The charges of the court to the jury shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally." This court has decided at its present term, in the cases of Territory v. Kennedy, post, —, and Territory v. Duffield, post, 476, felonies not capital, that the record must show on appeal in such cases as these that the charge was in writing, and read to the jury, or that the defendant consented in open court that the charge should be verbally given. It is the opinion of this court in the present case that, if the record must show these things in cases such as those, *a fortiori* it ought to show the same things in cases such as this, whose penal consequences are so much more severe, and that, the record failing to show them in this case, the judgment ought to be reversed. The judgment of the district court is therefore reversed, and the cause remanded for a new trial.

REAVIS, J., (*dissenting.*) The appellant, William Gertrude, was tried and convicted of the crime of murder at the November term, 1871, of the district court of Yuma county. The proceedings at and during the trial, so far as the record shows, were in all respects regular, and the error complained of on the part of the appellant appears, from the statement on appeal, to have occurred after the sentence and judgment were pronounced and entered of record. Therefore, so far as the record of the trial is concerned, no question is presented for our consideration, and our attention will be directed to the action of the court below subsequent thereto.

We are asked to reverse this judgment for the following reasons, to-wit: (1) Because one of the jurors who sat on the trial of this case was not at that time a citizen of the United States; (2) because the court below refused to grant a new trial on motion for that purpose made and filed after the sentence of the law and the judgment of the court thereon had

been pronounced upon the defendant, and entered of record. The facts, as we have been able to gather them from the record, are as follows. Several days after the judgment, and while the court was still in session, Jacob Fisher, one of the jurors who tried the case, presented himself in the United States district court, then also in session in that district, and made application and was admitted to citizenship, under the provisions of an act of congress providing for the naturalization of aliens who had served in, and had received an honorable discharge from, the army of the United States during the late civil war, by a petition in a competent court showing that fact, without further proceedings. The court very soon afterwards adjourned until the fourth Monday of the following December. The facts, as above stated, having come to the knowledge of counsel for appellant, and the presiding judge being temporarily absent from the county, application was in the interim made to a commissioner of the court for leave to file a motion, *nunc pro tunc*, for a new trial, which was granted. It is not our purpose to inquire into the power of a court commissioner to grant such leave, as the determination of that question, in my opinion, can in no way affect the result in the disposition that I think should be made of this cause.

The motion, together with the affidavits of counsel for the defendant, was filed at the assembling of the court in December, and a hearing was had thereon. The court below overruled the motion for a new trial, on the ground that it had come too late, and could not be entertained, to which ruling counsel for appellant excepted, and the case comes here on appeal. Was it error on the part of the court below in overruling the motion? Section 410 of the Criminal Code provides that a motion for a new trial must be made before the judgment is entered, and this I believe to be the settled authority on the subject. I might stop here, but, as the legal status of the juror Fisher has been urged upon our attention with earnestness by counsel for appellant, I am disposed to examine this question, although it is a matter of some doubt whether it is properly before this court for adjudication. In the affidavit of counsel for appellant filed in support of the motion for a new trial, we find, among other things, the following statements of facts: "That Jacob Fisher was regularly sworn in as a juror to try said case; that said Jacob Fisher, upon examination under oath, answered affirmatively that he was a citizen of the United States." This declaration of citizenship seems to have been made by the juror when examined on his oath touching his qualifications to serve as a juror in that case. No challenge for cause could be interposed for that reason, and, so far as the court and counsel were advised, Fisher was a competent juror, and was sworn on the panel.

There is nothing on the record to show, nor are we advised by the affidavits of appellant's counsel, that the juror in question willfully deceived the court in order to sit on the trial as a juror, or that he

was guilty of moral turpitude in connection therewith. But what evidence have we before us that Fisher was not a citizen of the United States at the time of the trial? All that we have been able to gather on that point is the following additional statement in the affidavit of appellant's counsel before mentioned, to-wit: "That subsequently, [to the trial,] to-wit, on the eleventh day of November, 1871, said Jacob Fisher appeared before the clerk of the United States district court for the purpose of naturalization; that trial of the above cause was had upon the seventh day of November, 1871; that the time for filing notice of motion for new trial had elapsed before the knowledge of the foregoing facts, to-wit, the non-naturalization of said Fisher, had come into the possession of the defendant, or his attorneys, or either of them." These are the facts as they appear in the record on the subject as to the citizenship of the juror Fisher. If the determination of that fact were material in this case, would this court be justified in holding that because the juror had appeared in the United States district court for the purpose of naturalization, he was for that reason incompetent to sit upon a jury that had tried a case a few days before? In other words, is that fact itself conclusive of the alienage of the applicant? I do not think so. It is not difficult to see how the ends of justice might be always thwarted if a rule so dangerous as this should obtain. There is nothing in the law to prevent any man who has served in the army of his country, and has an honorable discharge therefrom, from going into any court in the United States of competent jurisdiction, and, in the mode provided by the statute, be admitted to citizenship, no matter whether the place of his birth is beyond the blue water, in another hemisphere, or on the soil of America; and the fact of his having done this is not conclusive evidence that he was not a citizen before. But if we give the appellant the full benefit of the exception, and waive all irregularity in its presentation, both in the court below and in this court, is it ground for the reversal of the judgment? I think not. In the case of *Rex v. Sutton*, 15 E. C. L. 208, it was held that "alienage is ground for challenge, but is not ground for new trial." The same authority may be found in 1 Archb. Crim. Pr. 516. "A juror cannot object to serving on the ground that he is an alien." 1 Brightly's Fed. Dig. 507, tit. "Jury," § 9. "A new trial will not be granted because one of the jurors was an alien." Id. 678, tit. "Practice," § 537. That which is ground for challenge to a juror is not always ground for new trial; for instance, the fact that one of the jurors was an alien or non-resident. 3 Whart. Crim. Law, § 3220. That Fisher was a competent juror, under the circumstances, I have no doubt, both upon reason and authority. I am unable to find on a careful inspection of the record that any substantial right of the defendant has been prejudiced in the trial of this cause in the court below, and am therefore of the opinion that the judgment should have been affirmed.

(1 Ariz. 95)

TERRITORY v. HARGRAVE.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1873.)

ARRAIGNMENT—RIGHT TO COUNSEL—READING INDICTMENT.

1. Counsel having been assigned to the accused two days after his arraignment, and before he pleaded, the failure to inform him, when he was arraigned, of his right to have counsel, is a harmless error, under Comp. Laws Ariz. p. 126, § 247, providing that if the accused appear for arraignment without counsel, he shall be informed of his right to have them before he is arraigned.

2. The record not showing that the clerk read the indictment and stated the plea to the jury, as he is required to do by Comp. Laws Ariz. p. 134, § 331, and it not appearing that the prosecuting officer did not, as is the usual practice, read the indictment in his opening statement, it will be presumed that if the statute was not complied with the error was harmless.

Appeal from third district court.

*John Howard and William J. Berry*, for appellant. *John A. Rush*, for the Territory.

TITUS, C. J. In this case the defendant, Richard M. Hargrave, was convicted of the murder of Ygnacio Rubio, at Prescott, in the county of Yavapai, on the 11th of July last, (1872.) The defendant was sentenced to death by hanging on the 13th of the same month, and on the 16th, notice of this appeal was given by William J. Berry, the defendant's counsel. The want of authority of the judge of the third judicial district to preside and try the cause was the only exception which the record shows to have been made in the court below. This was rightly overruled at the time, and seems since to have been abandoned as worthless. No assignment of errors has been made, no brief has been filed, and no argument, oral or written, had in this court. The case comes here by a futile appeal to baffle justice, and prolong for a few months the life of the doomed defendant.

The case has been submitted on the record alone, with nothing beyond, to aid its examination. On careful inspection, however, the record of this case exhibits no such error as ought to vitiate the verdict in the court below, or disturb the verdict here. The record itself is quite as full as usual, and with an ordinary share of that presumption in favor of the proceedings below, without which no human administration of justice can stand, the present judgment may be maintained. The record of this case, however, exhibits in the proceedings of the court below, as stated, two omissions and one departure from the course of procedure enjoined by our criminal statutes. It does not appear from the record that the defendant was informed that it was his right to have counsel before he was arraigned, nor does it appear that the indictment was read to the jury trying the cause. It does appear, however, from the record that the defend-

ant, on inquiry by the court, was assigned counsel two days after the arraignment, as stated, when he pleaded to the indictment. These harmless errors, however, ought not to disturb the judgment in the present case, for they do not appear to have prejudiced the defendant, and they are mentioned here only to show that they have not been overlooked in the examination of the record, and as a caution in other cases which may be less carefully tried than this one has obviously been. Our statutes provide, (Comp. Laws, p. 126, § 247:) "If the defendant appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before he is arraigned, and shall be asked if he desire the aid of counsel." The same laws provide, (page 134, § 331:) "If the indictment be for felony, the clerk must read the indictment and state the plea to the jury." In this case the arraignment or partial arraignment of the defendant without counsel, as it appears, did not prejudice him, for the plea, which is really the only accompaniment or immediate consequence of the arraignment requiring the aid of counsel, was postponed for two days after such arraignment, when counsel was assigned the defendant, immediately before such plea was made and entered. The usual, and perhaps better, practice is for the prosecuting officer to read the indictment to the jury in his opening and statement of the case for the prosecution. Elsewhere this is so much a matter of course that it is always presumed to be done, and requires no statement in the record. As the reading of the indictment is, by our statute, required to be made in a manner exceptional and peculiar, it would seem that the statement of it ought to be thus made in the record. In the absence of such statement, the presumption is that the indictment was read to the jury in the ordinary way. Legal presumption is always in favor of judicial proceedings, until the contrary appears.

The foregoing conclusions in favor of the proceedings in the present case are corroborated by our statute concerning appeals; for the Compiled Laws, p. 148, provide, (section 468:) "After hearing the appeal, the court shall give judgment, without regard to technical error or defect which does not affect the substantial rights of the parties." The charge of the court in the present case was extremely cautious, and the utmost indulgence seems to have been allowed the defendant throughout the whole case. The judgment and order of this court, therefore, are that the original judgment in the present case shall be carried into execution by, and in pursuance of, an *alias* warrant, such as is required in all cases in which the judgment of death is rendered, and that this judgment be entered in the minutes of this court, and a certified copy of the same, with such entry, forthwith remitted to the clerk of the court from which this appeal was taken.

TWEED and PORTER, JJ., concurred.

<sup>1</sup> This case, filed January, 1873, is now published by request, with others, in order that the Pacific Reporter may cover all the cases in the Arizona Reports from volume 1, p. 1.



(1 Ariz. 239)

THORNE V. BOWERS.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1875.)

## PRINCIPAL AND AGENT.

The plaintiff and the defendant owned adjoining mining claims, and joined in a conveyance of them, the plaintiff receiving \$10 a foot, which he had agreed to take on the representation of the defendant that the purchaser would buy if he could get the two claims, and was willing to pay \$10 a foot for them. The purchaser in fact paid \$20 a foot, the defendant receiving the difference on the plaintiff's claim. *Held*, that defendant was not the agent of plaintiff on the sale, and the latter could not recover the extra \$10 a foot.

Appeal from district court, Yavapai county.

*John A. Rush* and *H. H. Cartter*, for appellant. *Hargrave & McDaniel*, for respondent.

DUNNE, C. J. Action began by Thorne to recover \$666.66 from Bowers. Thorne alleged that Bowers had received this sum in the sale of some mining ground in such a way that it was properly due and owing to Thorne, and had not been paid to him. Defendant denied. On the trial, plaintiff gave in evidence that he and one Hogle and one Cassidy owned a mining claim together, of 200 feet in length, on a certain quartz lode, each owning a one-third interest; that defendant, Bowers, and several other parties owned the adjoining claim of 200 feet on said lode; that on a certain occasion Bowers said to plaintiff that a certain person would buy these claims if he could get all the interests,—that is, the whole 200 feet in each claim, or 400 feet in all,—and that this person was willing to give \$10 a foot for it, and asked plaintiff if he would take that sum; that plaintiff said he would, and ultimately joined all the other parties in a deed for the whole of said 400 feet, and received for his interest \$10 a foot; that he did not notice the consideration in the deed at the time of signing it, but afterwards learned that it was \$4,000, which would have been an average of \$20 a foot, and that he subsequently learned that some of the other vendors got \$20 a foot; that he charged Bowers with having negotiated the sale, and having received from the purchaser \$20 a foot for his (plaintiff's) interest, and that he therefore had \$666.66, which properly belonged to plaintiff; that Bowers neither admitted nor denied having received \$20 a foot for plaintiff's ground, but said, in reply to the demand for the money: "How are you going to get it?" When plaintiff closed his evidence, the court below granted a nonsuit against him, on the ground he had made no case. Plaintiff appealed.

We think the nonsuit was properly granted. It is true the evidence, though not showing the fact, might be considered as tending to show that Bowers received \$20 a foot for plaintiff's ground, but we do not think there is anything in the evidence which tends to show that, if he had received such money, it was any

fraud on the plaintiff. There is nothing tending to show that Bowers acted as agent for plaintiff, or was under any obligation to pay the extra \$10 a foot to plaintiff, even if he had received it from the purchaser. Judgment affirmed, with costs.

(1 Ariz. 58)

TERRITORY V. DUFFIELD.<sup>2</sup>

(Supreme Court of Arizona. Jan., 1872.)

## INDICTMENT—JOINDER OF OFFENSES—CRIMINAL LAW—INSTRUCTIONS.

1. A count for resisting an officer, and one for assault on him, without reference to his official character, cannot be joined, under Crim. Code Ariz. § 217, providing that "the indictment shall charge but one offense, but may set forth that offense in different forms, under different counts."

2. Crim. Code Ariz. § 368, requiring in criminal cases that the charge "shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally," is not complied with by charging orally and filing after verdict what purports to be a copy of the charge given.

Titus, C. J., dissenting.

Appeal from district court, Pima county.

*C. W. C. Rowell*, for appellant. *G. H. Owry*, for respondent.

REAVIS, J. This cause was brought into this court on appeal from the district court of Pima county. There are numerous errors complained of on behalf of appellant, but we do not feel called upon, nor do we deem it necessary, to examine more than the two following points, urged by counsel for appellant, a proper solution of which, in our judgment, will dispose of this whole matter: *First*, it is claimed that the indictment in this case in the court below contains two separate and distinct charges; and, *second*, that the court erred in delivering an oral charge to a jury, when the same should have been in writing, the defendant not having waived his right to have it so given.

There are two counts in the indictment, and the record shows that the jury returned a verdict of guilty as charged in both. The first charges the defendant with an offense against public justice, to-wit, in resisting the sheriff of Pima county in attempting to execute a lawful order of the judge of the district court for said county, issued while sitting in the capacity of a committing magistrate, and directed to such sheriff for execution. Section 94, Crim. Code. The second charges an offense against the person of an individual; that is to say, with an assault with a deadly weapon upon the person of said sheriff, with intent to put him in fear, and, by fear, to compel such sheriff to obey an unlawful command of said defendant. Section 50, Crim. Code. We have no doubt of erroneous joinder of those two offenses in the same indictment. Section 217 of our Criminal Code provides that "the indictment shall charge but one offense, but it may set forth that offense in different

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forms, under different counts." In the case before us, it cannot be claimed, as we think, with any kind of propriety, that the same offense has been set forth in different forms in the several counts therein contained. The offenses are wholly dissimilar and can have no possible connection. The first is a crime against the public justice of the country, without reference to the person of the officer; while the second is a crime against the person of an individual, without reference to his official character.

The other point to which our attention is directed is one of the gravest importance, and demands careful and serious consideration. The Compiled Laws (section 368, Crim. Code) requires the judge in all criminal cases to give his instruction to the jury in writing, unless its being so given shall be expressly waived by the defendant in each particular case in open court. How does the fact stand in this case? The record shows that the presiding judge below charged the jury orally, and that, on the day following the return of the verdict, he filed with the clerk a manuscript purporting to be the charge he had given the jury the day before. Was this a substantial compliance with the statute? We think not. In the case of *People v. Ah Fong*, 12 Cal. 346, the supreme court held that "the fact that the judge told the counsel he would put the instruction in writing, if desired, does not help the error." This was after the charge was given. The mischief intended to be prevented by the act might have been partly done. The court further remarked in that case: "In such trials the exact language used is often forgotten or differently understood by different persons; and in the press of business, with his attention diverted to various matters, it is next to impossible for a judge to remember days after the trial precisely what occurred during its progress." The same principle was decided in *People v. O'Hara* by that court during the same term. It is true that the language of the statute under which the decisions referred to were made, is not identical with that of the statute of this territory on the same subject; yet we are of the opinion that the spirit and intent of the two acts are for all the purposes of justice substantially the same in effect. When the charge of the court to the jury in a criminal case is required to be given in writing, the presiding judge must first reduce it to writing, and deliver its contents to the jury by reading in their hearing from the original manuscript. And it is no answer that the charge of the court was in writing at the time of its delivery to the jury when the judge gives orally from his recollection what purports to be the contents of the written charge. The jury in that case would be left wholly dependent upon the memory of the judge for the accuracy of his statements, however widely they might differ from those he had reduced to writing, and which, when filed, the law makes a part of the record. The true point of inquiry is, what did the judge charge? The defendant in a criminal case has an undoubted right to have every

word uttered by the judge to the jury written at large in the record, and a failure to do so when required, touching the charge to the jury, as the law directs, is error. The substantial requirements of the law in the particulars mentioned not having been complied with on the trial of this cause in the court below, the judgment must be reversed; and, as we are of opinion that no valid conviction can be had upon the indictment herein, no new trial will be ordered. It is therefore directed that the ball of appellant herein be, and it is hereby, exonerated, and the cause remanded for such further proceedings as shall be necessary and proper according to law.

TWEED, J., concurs.

TITUS, C. J., (*dissenting*.) I cannot concur in the opinion of the court read in this case, and, with due respect to those from whom I differ, the reasons of my dissent are thus submitted. The opinion of the court alleges two errors as reasons for reversing the judgment, neither of them, however, in the language of the Code, which we are here sworn to administer. The errors as therein stated are: *First*, it is claimed that the indictment in this case contains two separate and distinct charges; *second*, the court erred in delivering an oral charge to the jury when the same should have been in writing, the defendant not having waived his right to have it so given.

Our Code does not prohibit two charges from being included in the same indictment. It does declare ("Proceedings in Criminal Cases," § 217) that "the indictment shall charge but one offense, but it may set forth that offense in different forms, under different counts." Thus it will be perceived that it is two different offenses, and not two different charges, that are thus excluded from the same indictment. These terms are essential in our law, and, concerning the substitution of one for the other, it may with becoming deference be submitted as a conjecture whether the opinion of the court is not predicated on some other Code, real or imaginary, different from our own. Similar substitution of essential terms is also made in its statement of the second error, as it is declared to be: That statement is "that the court erred in delivering an oral charge," etc., "the defendant not having waived his right to have it given in writing." Our Code declares (Comp. Laws, "Proceedings in Criminal Cases," § 368:) "The charges of the court shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally." As amended in 1867. The difference between the law as thus declared and the error assigned is radical and essential. The law does not say how the charge shall be delivered, nor that it may not be delivered orally. How can the charge be delivered otherwise than orally, except by silently handing it to the jury in writing? Our law certainly does not require this. Even if the judge read it to the jury, it

must be done *viva voce*. It can be made audible in no other way. The law does not say when the charge of the court shall be in writing. In the course of this opinion it will probably appear that there is a constructive difference between the statement of the law in the opinion of the court and the test of which it is made.

The answer to the defendant's first exception is that it is not true in fact, and ought not therefore to avail in law. The law of Arizona on this subject, which deserves recitation, is as follows, (Comp. Laws, c. 11, § 217:) "The indictment shall charge but one offense, but it may set forth that offense in different forms, under different counts." It is not and cannot be pretended that duality of counts in the same indictment, under our law as thus cited, is or can be error. Its very letter thus permits as many counts as there are different forms of the one offense charged in the same indictment. Neither is multiplicity of charges error by the law of Arizona. A charge is an essential and indispensable part of every count in any possible criminal practice, and there must be as many charges as counts in the same indictment. It is duality of offenses that our law declares to be error, when charged in the same indictment. Careful inspection, aided by fair analysis, of the indictment in the present case, will show that it charges but one offense. The one act charged in both is single, simultaneous, indivisible. No judicial scrutiny, however critical, keen, and technical, can find a single element of more than one act in the two counts of the indictment under consideration. The day, the hour, the very instant, the place, the persons concerned, the occasion, the magisterial order which led to the offenses, the weapon drawn, the withdrawal of the defendant, his refusal to deliver his arms, his defiance, each word and incident of all these, however minute, are the same in both counts. So absolutely true is this that each of these incidents in the second count is referred to its own identity in the first count by the word "aforesaid," so potent in criminal pleading for the purpose. The order alone may be taken as the crucial test of this unity and identity. What was it, as described in such count? "To disarm the said Milton B. Duffield." It is so described in both counts. More absolute sameness of description is impossible to the human intellect than is found presented by this one particular of both counts of the indictment. There is no badge, no shade, no *scintilla* of difference. No effort of the human mind can find aught in any act or incident of either count of this indictment different in the slightest degree from the same act or incident of the other count of the same indictment. The judges of this court all know equally well that not on either side was it pretended in the argument of this case that more than one act was charged in the two counts of the indictment. Trace the act to its personal consequences, and we find the same unity, the same identity. Who suffered these consequences? Of the many persons present on the occasion, the indictment describes

Peter R. Brady, sheriff, as the person who was obstructed, resisted, and opposed; in the second count the same Peter R. Brady, sheriff aforesaid, as the person who was put in fear and compelled to obey an unlawful order. The act, the objects, the sufferings, are the same in both counts. Peter R. Brady is the one man in both counts who suffered the same obstruction, resistance, opposition, the same fear, and the same man who was coerced to the same obedience. For the first time in the annals of criminal practice, it is submitted, has this, or anything such as this, been construed into such a difference as constitutes a misjoinder in criminal pleading. It makes crime depend not on the malignity, force, and imprudence of the perpetrator, and the sufferings of the victim, but on the minute shades of difference in the remote consequences of his act.

Something more, it is submitted, than the rendition of a certain statute, or the construction of a doubtful one, will be required to find two offenses in the one act under consideration, single, simultaneous, entire, and indivisible as it is. It is true that this offense, as described in the first count, is punished by a different penalty from the same offense described in the second count of the same indictment. This, however, is no proof of diversity or duplicity. The two parts of the one act which describes this one offense in its two different forms were framed by the same codifier, enacted at the same time, by the same legislature, published in the same Code, and in one and the same chapter. Howell's Code, c. 10, §§ 50, 94. True it is that this one offense is described in its two forms in different divisions of the same chapter noted just above, entitled "Of Crimes and Punishments," in one form in the "Fifth Division," entitled "Offenses against the Persons of Individuals," and in the other form in the "Ninth Division," entitled "Crimes and Offenses against Public Justice." This difference in the division never was intended legitimately to indicate any difference in the degree or character of the crime thus divided. It was copied by Blackstone from Hale's Analysis of the Laws of England, and introduced into our Code for the common purpose of convenience of reference. By no judicial torture, however, it is submitted, can this fact be made a sufficient reason for assuming that to include these two forms of the same offense in one indictment by different counts is misjoinder in criminal pleading. The crime of larceny, as modified by the Arizona statute of 1871, is punished differently from knowingly receiving stolen goods. Comp. Laws, c. 10, §§ 60, 63. They were, too, declared at different times by several legislatures. It will hardly be pretended that these may not be embodied in the same indictment by different counts. In nearly every state of the Union the crime of burglary, and the crime of grand larceny, when perpetrated by the same person or persons, in the same house, and at the same time, are really but one offense, and may be included by different counts in the same indictment, though consecutive acts. In California they are excluded, not by judicial construction, but

by statute. The incendiary, who fires a dwelling-house and burns it with its sleeping inmates, may also be indicted by different counts of the same indictment for murder and arson, and this, though the firing and killing are consecutive in time. The man who commits murder on the highway, and robs his victim, may, in nearly every state of the Union, be indicted in the same indictment by different counts for murder and highway robbery, though these two are consecutive acts, and not like the one under consideration, entire, simultaneous, and indivisible. The meaning of our law above cited, concerning the joinder of charges in different counts of the same indictment, is not left to mere conjecture or judicial decision, under our own or some other Code here or elsewhere.

It was enacted by congress (Act Feb. 26, 1853, § 1, 10 St. at Large, 163) "that whenever there are or shall be several charges against any person for the same act or transaction, or for two or more acts or transactions committed together, and for two or more acts or transactions of the same class of criminal offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and, if two or more indictments shall be found in such cases, the court may order them consolidated." By the same act it is declared that "any person admitted to manage suits in any court of the United States, or any of the territories thereof, who shall multiply indictments to increase expenses, may be mulcted in the costs."

In *Insurance Co. v. Canter*, 1 Pet. 511, it was declared, by MARSHALL, C. J., as the opinion of the supreme court, that, "in legislating for the territories, congress exercised the combined powers of both the federal and state governments." In *Scott v. Sandford*, 19 How. 393, it was declared, by MCLEAN, J., that "the United States, in legislating for the territories, exercised the whole power on the given subject." This was what was meant by MARSHALL, C. J., in *Insurance Co. v. Canter*, and not that the power of congress over the territories is absolute. The same conclusion is supported by *Hunt v. Palao*, 4 How. 589, and *Benner v. Porter*, 9 How. 235. By our organic law, (Sept. 9, 1850, § 17, 9 St. at Large, 452, and Feb. 24, 1863, § 2, 12 St. at Large, 665,) the constitution and laws of the United States, which are not locally inapplicable, shall have the same force and effect in the territory of Arizona as elsewhere in the United States. If applicable at all, they apply, as they are passed, to the territories without any limitation as to time. What more necessarily applicable to the territories than a law to prevent multiplicity of criminal prosecutions, and the anxiety and expense which attend them! This act of congress, and the authorities cited, show us that it must be regarded as a rule of construction in our criminal practice. There appears no trace of any attempt to limit this act, or to repeal it by any adequate power or authority. It applies here in the same manner, and for the same rea-

sons, as the several recent amendments of the constitution of the United States, the act of congress of July 2, 1864, and 18 St. at Large, 374, concerning evidence, and similar acts of congress apply. To the territories, over which congress has the sole power of legislation, it applies absolutely, and without any of the limitations which exist in favor of the states, over which the legislative power of congress is restricted. The recent decision of the supreme court of the United States in *Dunphy v. Kleinsmith*, 11 Wall. 610, places this beyond a doubt. By the statute cited, several charges against any person for the same act or transaction, or for two or more acts or transactions, connected together by time, place, occasion, and other circumstances, as are the charges contained in the indictment under consideration, may and must be joined by different counts in the same indictment. The first exception to the indictment of the present case fails, therefore, by the highest exercise of legislative authority. It fails also by the decisions, which both sides admit to be most instructive, if not authoritative, in the present case.

Where different offenses are joined in the same indictment by different counts, the misjoinder, if there is one, must be presented to the court before trial by demurrer. *People v. Garnett*, 29 Cal. 622. If this is omitted, the verdict on either count will not be disturbed. In the futile demurrer filed, argued, and overruled in the present case, misjoinder of two different offenses in the indictment was not one of the errors specified. In *People v. Garnett*, 29 Cal. 622, already cited, it was declared by the court, SANDERSON, J., "that the objection that two different offenses are included in the same indictment must be made by demurrer before trial. Taken in the present case, on motion in arrest of judgment, it was too late, as held in *People v. Shotwell*, 27 Cal. 394." In the latter case it was ruled that this error, if one, must be presented on demurrer. It cannot properly be considered on motion in arrest of judgment. Such is unquestionably the law of California. Neither on this nor on the other points made by the counsel for the appeal do the cases cited by him from that state sustain him. To the same effect is *Whart. Crim. Law*, §§ 414, 422, referred to in the last case, cited above. Finally, we may cite, as decisive of the present case, from the Code proceedings in criminal cases as follows: "Sec. 569. Neither a departure from the form or mode prescribed by this chapter, in respect to any pleadings or proceeding, nor an error or mistake therein, shall render the same invalid, unless it actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

The second error, as it is alleged to be in the opinion of the court, was "the delivery of an oral charge to the jury when the same should have been in writing, the defendant not having waived his right to have it so given." The departure from the law in the terms of this statement has already been referred to. The record does not show that the charge was not in writing, nor does it show a request on the part

of the defendant to have the charge delivered in writing, or read from a written manuscript. The truth is, the charge was in writing when delivered, and with the evidence was occasionally referred to in its delivery, though neither was read throughout. No exception was made at the time, either to the charge or to the manner of its delivery. The reasons for a new trial were filed by defendant's counsel three days after the delivery of the charge of the judge. The second of these is as follows: "The court erred in not charging the jury, as requested by the defendant, in writing." This, however, is an exception to the charge of the judge in not affirming the written charges of the defendant, as so presented by him, and not a declaration that the charge was not itself in writing, nor the assertion that a request was made that the charge should be delivered in writing, or otherwise than it was. That the charge was in writing when delivered is nowhere denied. No request was made to read it, nor does the record or any contemporaneous act show it. The error assigned was suggested by some cases decided in California under legal provisions radically different from those of Arizona. Our law on this subject has been cited, and may be recited here. It is as follows: "The charges of the court to the jury shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be delivered verbally." The law of California on the same subject is as follows, (Criminal Practice Act, § 362, cl. 6): "The charges shall be reduced to writing before it is given; and in no case shall any charge or instructions be given to the jury otherwise than in writing, unless by the mutual consent of the parties." These two legal provisions are radically different, and they must necessarily give rise to judgments and decisions entirely different; and yet the decisions made in California, under a law thus shown to be wholly different from our own, are all that are invoked in fixing the law of Arizona. Its letter, its contexts, its reason, are all abandoned for judgments made there, under a Code whose mandates are so different from that which prevails here. Are we here to administer law of California or the law of Arizona?

If the law of Arizona is to be administered as a whole, no exception can be made to the charge of the judge, whether oral or written, after it is delivered, and the jury has retired. If the law of Arizona is not to be administered as a whole, what part of it is to be disregarded or expunged by those who have been sworn to its observance as we have been? Section 402 of our Law of Proceedings in Criminal Cases reads as follows: "On the trial of an indictment, exceptions may be taken by the defendant to a decision of the court upon matter of law in any of the following cases: (1) In allowing a challenge to the panel of the jury, or to an individual juror, for an implied bias. (2) On admitting witnesses or testimony. (3) In admitting or rejecting witnesses or testimony, or in declaring any question of law not a matter of discretion, or in

charging or instructing the jury upon the law on the trial of the issue." All these exceptions may be made by the defendant alone. "Exceptions, however, may be taken by the prosecuting officer on behalf of the territory to a decision of the court, upon matter of law, in any of the cases specified in the third division of the preceding section." There is but one other class of exceptions known to our criminal practice arising before the jury retires; and that is the class of exceptions which occur on written charges, presented by either party, to be allowed or disallowed by the judge, and to be by him indorsed. These are made part of the record by section 407 of the title last above cited, and as such they go up on appeal, without being embodied in any bill of exceptions. Returning to section 402 of the same title, what part of it can be disregarded or expunged by this or any other court of Arizona? This court, however, it is submitted, proposes, in its written opinion in the present case, to disregard the first clause of it, which reads, "On the trial of an indictment," and which fixes the time and occasion when exceptions are to be made. Unaided and unexplained by any other rule, this clause would seem to have been embodied in our Code for some purpose, and that the one which it literally expresses. There are two well-known rules, one of construction, and the other of positive practice, which aid us to determine this. One is, that of every law all its parts are to be so construed as to co-operate in its general design. The other is as old, perhaps, as trial by jury, and it is this: Exceptions to the charge of the judge shall be made before the jury leave the box, or not at all, that the error which the exception suggest, if any, may be corrected at the time. Neither party nor counsel is allowed to conceal his exception, and then take advantage of it, if the result of the trial should be against him. Sections 404-406 of the same title support this conclusion, and show for what purpose the charge of the judge is required to be in writing. These sections declare that the bill of exceptions, containing so much of the evidence as is necessary to explain the law, and no more, shall be signed by the judge within 10 days after the trial, and shall be filed with the clerk as soon as signed. This shows that the only reason for requiring the charge to be in writing is to aid counsel and court to settle the bill of exceptions. If the first clause of section 402, which reads, "On the trial of an indictment," and which refers to all of the sections which follow it, especially the taking of exceptions, means anything, it is that by law no exception to the charge of the judge, after the jury has retired, can be allowed. The conclusion, therefore, is that the exception to the manner of delivering the charge was made too late, and cannot avail to disturb the judgment in the present case. In support of the same conclusion are the cases cited. *People v. Chung Lit*, 17 Cal. 320; *People v. Garcia*, 25 Cal. 531; *People v. Shuler*, 28 Cal. 490. The charge was in writing when delivered, and could have been produced to verify the correctness of its delivery, as

well as for the purposes of exception, and settlement of exceptions, then or thereafter. I think the judgment ought not to be reversed.

(87 Cal. 425)

SCRAMM *et al.* v. SOUTHERN PAC. R. CO.  
(No. 14,026.)

(*Supreme Court of California*: Jan. 5, 1891.)

APPEAL—REVIEW—NEW TRIAL.

Where the motion for a new trial sets out, among other grounds, irregularities in the proceedings, and the insufficiency of the evidence, the order of the trial court granting it will not be disturbed on appeal, though no errors of law were committed at the trial.

Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

John D. Ricknell, for appellant. Pepper & Lindenfeld and E. C. Bower, for respondent.

McFARLAND, J. This is an action brought by the widow and children of John Scramm, deceased, to recover damages for his death, which is alleged to have occurred on the railroad track of defendant, and to have been caused by the negligence of defendant and its employees. The jury returned a verdict for defendant, and the court below granted a new trial. From the order granting plaintiff's motion for a new trial defendant appeals. Orders of trial courts granting new trials are not often disturbed, and yet when it appears that such an order was granted through misapprehension of the law, it should be reversed as readily as an order refusing a new trial. But, in the case at bar, it is impossible to know the reasons upon which the order was based. The grounds of the motion were numerous, including alleged errors in ruling upon the admissibility of evidence, and upon instructions to the jury; insufficiency of the evidence to justify the verdict, and that it is against law; and misconduct and irregularity in the proceedings of the court and jury. The order of the court merely grants the motion in general terms. If it could be said that the motion rested entirely on supposed errors in giving or refusing instructions to the jury, it might be well urged that the order should be reversed; for there were certainly no errors committed in that regard against the plaintiffs. They were as favorable (if not more so) to plaintiffs as they could have been reasonably expected under the law as established in this state upon the subjects embraced in the instructions; and, if there was any error committed on this point, there was none of which plaintiffs should complain, and we see no other errors of law sufficient to warrant a new trial. But, if the court granted the motion on the ground of insufficiency of evidence to justify the verdict, (as it may have done,) we are not prepared to say that in so doing it grossly abused its discretion. Moreover, the point as to the irregularity of the proceedings may have had weight with the court. A number of written instructions which had been asked and refused, and had been indorsed by the judge "Not given," went to the jury with

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those that were given. This, of course, was irregular, and wrong; but such an irregularity would not always warrant a court in setting aside a verdict, for it might appear that it probably did no harm. In the case at bar, however, the court might have thought that harm was done. For instance, there was a contested issue of fact, whether or not there was a "crossing" at the place where the accident occurred; and on an instruction referring to that matter, the judge had indorsed "Not given, not shown to be a crossing." And the judge may have thought that this, and also the refusal of other instructions, might have been taken by the jury as the expression of his opinion on questions of fact. He is presumed to have been better acquainted with the whole case than this court, and to have known better what might have influenced the jury. While, therefore, upon the case as we see it, we may not be very strongly impressed with the conviction that it was the duty of the court below to set aside the verdict, still, we do not feel it to be our duty to set aside the order of the court. That course is rarely taken here, except when the questions raised involve issues of law alone. Order appealed from affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(87 Cal. 348)

PEOPLE v. POWELL. (No. 20,698.)

(*Supreme Court of California*: Jan. 4, 1891.)

CONSTITUTIONAL LAW — JURY OF THE VICINAGE — MURDER—EVIDENCE.

1. Pen. Code Cal. § 1033, as amended by Act March 9, 1887, (Sess. Laws Cal. 1887, p. 61,) providing that the state may have a change of venue in a criminal action, "on the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of defendant in the county where the action is pending," is void, being in conflict with Bill of Rights Cal. § 7, providing that "the right of trial by jury shall be secured to all and remain inviolate," the right secured being the right to trial by a jury of the vicinage as it existed at common law.

2. On trial for murder, where there is evidence that defendant believed deceased to be armed at the time he shot him, the prosecution may prove that as a matter of fact deceased was not armed, but it cannot show that he was not in the habit of carrying arms, and had refused to go armed that day.

3. Evidence of conversations not had in defendant's presence, nor in any way brought home to him, is inadmissible.

4. Defendant may show that before the shooting he was told that deceased was a dangerous man, as the evidence tends to substantiate the plea of self-defense, but he cannot show that he was told to "look out" for deceased.

5. Private counsel may, with the consent of the trial court, assist the district attorney in the prosecution, and may make the entire argument, if the district attorney so desires, and the court assents.

6. After the homicide has been established by the state, it does not then devolve on defendant to prove by a preponderance of evidence that the killing was justifiable or only manslaughter. THORNTON, J., dissenting.

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

George C. Ross and George A. Knight,

for appellant. *George A. Johnson, Atty. Gen., E. N. Deuprey, S. M. Shortridge, and E. F. Fitzpatrick, for the People.*

WORKS, J. The appellant was charged by information, in the county of San Mateo, with the crime of murder, alleged to have been committed in that county. He was twice tried in said county, and the jury failed to agree upon a verdict at each trial. Without any effort made to procure a third jury, the district attorney moved the court under section 1033 of the Penal Code for a change of venue to another county. The material part of the application was as follows: "Said district attorney, on behalf of the people of the state of California, hereby makes application to said court for a change of venue from said county of San Mateo, to some convenient county, of the above case of the People of the State of California v. Llewellyn A. Powell, on the grounds and for the reasons that a fair and impartial jury cannot be obtained for the trial of said case in said county of San Mateo, the same being the county where said action is now pending; and hereby states the following facts and causes for making said application, viz.: That the above-named defendant is charged, by information, filed in said superior court of said county of San Mateo, with the crime of murder, alleged to have been committed in the month of November, 1887, in killing, in said county, at said time, one Ralph S. Smith; that said defendant has had two trials in said superior court, on said charge; that the first trial was had in April, 1888, and the second trial in August, 1888; that at said first trial, there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, 72 citizens, and, of said number, 67 were examined before a jury could be obtained in said case; that at said second trial, there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, 184 citizens, and of said number 173 were examined before a jury could be obtained to try said case; that said county is small in size and population, and a large number of its citizens, whose names appear upon its assessment roll, are Italians and Portuguese, and are disqualified from serving as jurors, in consequence of not understanding the English language; that also a large number of those citizens, whose names appear upon the assessment roll of said county, live in the city and county of San Francisco, and are therefore not liable to jury duty in said county of San Mateo; that said case was so horrible in its nature that it attracted the attention of the people of, and has been fully discussed in all parts of, said county of San Mateo; that said case has also been discussed, more or less, by the citizens summoned to appear to serve as jurors, as aforesaid; that there are two local weekly newspapers in said county, having a general circulation therein, and the newspapers of the city and county of San Francisco also have a wide-spread circulation throughout said county of San Mateo, and, by and through the columns

of the newspapers aforesaid, the facts of said case, and the trials thereof, have been fully discussed before the citizens of said county of San Mateo. For the reasons herein set forth said district attorney says that a fair and impartial jury cannot be obtained to try said case in said county of San Mateo, and said district attorney therefore prays that said court make an order transferring said action of the People of the State of California vs. Llewellyn A. Powell, now pending in said court, as aforesaid, to some convenient county free from like objections." This application was supported by the following affidavit of the district attorney: "George H. Buck, being duly sworn, says that he is the district attorney of said county of San Mateo, and is the same person who made and signed the foregoing application; that as such district attorney he makes said application; that he has read said application, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true."

In addition to this affidavit there were others by citizens of said county, in which each of the affiants, after alleging his residence in the county, and acquaintance with the people thereof, alleged that he knew the contents of the affidavit of the district attorney, and that "said affidavit is well founded and true." The assessor of the county also made affidavit that he had examined the last assessment of the county, and that there were about 600 persons among those whose names appeared on the assessment roll who had the necessary qualifications and were competent to serve as jurors of said county. The sheriff of the county also made the following affidavit in support of the application: "W. H. Kinne, being duly sworn, says that he is now, and has been for more than two years past, the sheriff of said county, and that at the two trials of the above case in said county he summoned most of the jury in both of said trials of said case; that in doing so he was obliged to and did go to and visit all parts of said county; that he was a candidate for re-election at the last election, in the fall of 1888, for the office of sheriff of said county, and during the campaign he visited all portions of said county many times; that he also saw many people of and from all parts of said county, at the county-seat, to-wit, at Redwood City, during the past year; that he has had an opportunity to and has discussed the merits of the case of the People of the State of California vs. Llewellyn A. Powell, now pending in said superior court, and that he understands the feeling of the people in regard to said case, and has often heard them express their opinion about said case; that from such expression of the people so interviewed, he says that a fair and impartial jury cannot be obtained to try said case in said county."

The defendant objected to the granting of the change of venue, and in opposition to the application therefor filed the affidavit of one of his attorneys, and 17 other



citizens of the county, to the effect that they were residents of the county, and knew many of the other residents thereof, and that in their opinion a fair and impartial jury could be obtained in said county to try the defendant. The application was granted, and the venue changed to the city and county of San Francisco. When the case reached that county, the defendant objected to being tried therein, on the grounds, in substance, that the offense was charged to have been committed in the county of San Mateo; that the superior court of that county alone had jurisdiction to try the defendant; and that the court of the city and county of San Francisco had no jurisdiction in the matter; and moved that the case be remanded to the county of San Mateo for trial. The objection and motion were overruled, the defendant put upon his trial, convicted of manslaughter, and sentenced to the state-prison for the term of 10 years. He moved for a new trial, which was denied, and now appeals to this court. The change of venue was granted under section 1033 of the Penal Code, as amended, which provides: "A criminal action may be removed from the court in which it is pending. \* \* \* Second. On the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of the defendant, in the county where the action is pending."

The appellant contends, first, that this section of the Code, so far as it authorizes a change of venue on the application of the district attorney without the consent of the defendant, is in conflict with section 7 of the bill of rights contained in the constitution of this state, which provides: "The right of trial by jury shall be secured to all, and remain inviolate." The precise point urged upon us is that the effect of this clause in the bill of rights is to preserve and continue in force the right of trial by jury as it existed at common law, and that the common-law right was to a trial by a jury selected from the vicinage or county. This calls upon us to determine—First, what the common-law right of trial by jury was; and, second, whether or not the right is the same under our constitution. We think the common-law right of trial by jury is clearly and definitely stated by Mr. Blackstone in his Commentaries (book 4, p. 350) as follows: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is, freeholders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed." And Mr. Cooley, in his work on Constitutional Limitation, (5th Ed., p. 392,) says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed." Again, in Story on the Constitution: "By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its

jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to have been committed." Story, Const. §§ 1769, 1779, 1781, 1791. See, also, Swart v. Kimball, 43 Mich. 448, 5 N. W. Rep. 635. There can be no doubt that such was the common-law right of trial by jury. We are led to inquire, therefore, whether the same right is given or preserved by our constitution, and, if so, whether the section of the Penal Code under consideration is in conflict with this constitutional right. Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured and remain inviolate. If the right at common law was as above stated, there can be no question but that an act of legislature, authorizing the trial of a defendant out of the county where the offense is charged to have been committed, is an abridgment of the right, and for that reason void. Such statutes have been almost uniformly condemned as unconstitutional in other states. Kirk v. State, 1 Cal. 344; Wheeler v. State, 24 Wis. 52; Osborn v. State, 24 Ark. 629; State v. Howard, 81 Vt. 414; Ex parte Rivers, 40 Ala. 712; State v. Knapp, 40 Kan. 148, 19 Pac. Rep. 728.

It is contended by the respondent that, in the states in which these cases were decided, the constitution provided in express terms that one charged with crime should be entitled to a trial by a jury selected from the county or district where the offense is charged to have been committed, and therefore the statutes referred to were in direct conflict with the express requirements of the constitution, while in this state the constitution contains no such requirement. As to most of the states, the fact contended for is true, but not as to all of them. But can this make any difference? Does not our constitution confer upon a defendant charged with crime precisely the same right, although not expressed in terms? We have seen that this was the well-understood common-law right. This court has said that it is this same right that is held inviolate by our constitution. In Koppikus v. Commissioners, 16 Cal. 254, in discussing the effect of this constitutional provision, this court said: "The provision of the constitution that 'the right of trial by jury shall be secured to all and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. It is true that the civil law was in force in this state at the time of the adoption of the constitution, but its framers were, with few exceptions, from states where common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common-law sense that the lan-

guage has always been regarded by the courts of this state. It is a right 'secured to all,' and 'inviolable forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several states of the Union." See, also, *Cassidy v. Sullivan*, 64 Cal. 286. It is true, the question before the court, in the cases cited, was as to the class of cases triable by jury; but the language used would have been just as appropriate and applicable if the question now before us had been under consideration. Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says: "Accusations of criminal conduct are tried at the common law, by jury; and wherever the right to this trial is guaranteed by the constitution, without qualification and restriction, it must be understood as retained in all those cases which were triable by jury at common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused."

Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." Cooley, Const. Lim. (5th Ed.) 390-393. This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and judge in the case of *Swart v. Kimball*, 43 Mich. 448, 5 N. W. Rep. 635, in which it is said: "The constitution of the state provides that 'the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law.' Article 6, § 27. The right is to remain. What right? Plainly the right as it existed before,—the right to a trial by jury as it had become known to the previous jurisprudence of the state. *Underwood v. People*, 32 Mich. 1. The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the legislature cannot take them away. The next section of the constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the legislature cannot take away a single one of its substantial and beneficial incidents; (*Opinions of Justices*, 41 N. H. 550;

*Ward v. People*, 30 Mich. 116;) and even the accused cannot waive any one of the essentials. *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Hill v. People*, 16 Mich. 351; *Allen v. State*, 54 Ind. 461. Now that in jury trial it is implied that the trial shall be by a jury of the vicinage is familiar law. Blackstone says that the jurors must be 'of the *visne* or neighborhood, which is interpreted to be of the county where the act is committed.' 4 Comm. 350. This is an old rule of the common law, (2 Hawk. P. C. c. 40; 2 Hale, P. C. 264;) and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all, (2 Hawk. P. C. c. 25; 1 Chit. Crim. Law, 177.) This overnicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that parliament, as the supreme power of the realm, made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law, (volume 1, p. 179,) the chief of these being cases of supposed treason or misprision of treason examined before the privy council, and which under the statute of Hen. VIII. might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written constitutions of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some states whether it was competent even to permit a change of venue on the application of the state, to escape local passion, prejudice, and interest, (*Kirk v. State*, 1 Cold. 34; *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52;) but this may be pressing the principle too far, (*State v. Robinson*, 14 Minn. 447, [Gil. 333;] *Gut v. State*, 9 Wall. 35;) but no one doubts that the right to a trial by a jury of the vicinage is as complete and certain as it ever was, and that in America it is indefeasible, (1 Bish. Crim. Law, 2d Ed., § 552; *Whart. Crim. Law*, § 277; *Paul v. Detroit*, 32 Mich. 108; *Ward v. People*, 30 Mich. 116.)" This case was decided under a constitutional provision the same, in effect, as our own, and is directly in point.

It may be added that the effect of holding this statute to be unconstitutional will be to render it necessary, in a case where no jury can be obtained in the county, that a defendant be discharged or held in confinement for an indefinite time until such changes take place in the county that a jury can be had; but we cannot take away from the defendant a right conferred upon him by the constitution, on the mere ground that such a result may follow in rare cases. The right is one which has always been regarded as of

great importance, and has been preserved and continued in force by the constitution of the United States, and perhaps by the constitutions of every state in the Union. If it be allowed that the legislature can break in upon this right and take it away or abridge it on the ground and for the reason stated in the statute under consideration, it must be admitted that it may do so for other reasons, and thus the right guaranteed by the constitution will be subject to modification at the will of the legislature, and this cannot be conceded. We are convinced that the section of the Penal Code, so far as it authorizes a change of venue on the application of the district attorney, without the consent of the defendant, is unconstitutional and void; that the change of venue in this case was improperly granted; and that the court below had no jurisdiction to try the cause. But if it were conceded that the statute is valid, the result of this appeal must be the same. The application for the change of venue, and the affidavit in support of it, were entirely insufficient to bring this case within the statute, or to authorize a change of the place of trial. The application was not made on the ground that no jury could be obtained in the county, but because a fair and impartial jury could not be obtained. As to what will constitute a fair and impartial jury, there may be many different opinions. The statement that such a jury could not be obtained was the statement of a mere conclusion, and the facts did not show that no jury could be obtained. There are two modes provided by which a defendant, or the people, may avoid a trial by partial or unfair jurors, viz., challenges for cause, which exclude all persons from the jury who are legally incompetent to serve as such, and peremptory challenges, by which a party may relieve himself of jurors whom he believes will not be fair and impartial jurors. This last kind of challenge is limited, and it may happen when a party's right of peremptory challenge is exhausted there may remain on the jury persons who are not, in his estimation, or in fact, fair and impartial, but who are competent jurors. The application and the proof to support it do not show that a jury of such persons as these might not have been obtained. It is perfectly clear that the intention of the legislature was to make a distinction between the grounds upon which the people and the defendant should be entitled to a change of venue. The defendant has only to show that a fair and impartial trial cannot be had in the county. Pen. Code, § 1033. The application before us would have been sufficient under this clause, but it is not sufficient under the clause relating to the right of the district attorney to a change of venue, which provides that the change may be had where no jury can be obtained, which is quite a different thing, as we have attempted to show. A juror is not necessarily incompetent because he is not impartial. He may favor one party or the other, and yet, if he has not formed or expressed an opinion as to the merits of the cause, he cannot be challenged for cause. For this

reason, proof that a fair and impartial jury cannot be obtained is not equivalent to proof that no jury can be obtained. A statute of this kind, if valid, should be strictly construed, and, if it could be enforced at all, in our judgment, the change should not be granted until all legal means to procure a jury had been exhausted, and no jury could be obtained. It should not be allowed to rest upon the mere opinion of persons, however numerous, that a jury could not be procured. The conclusion we have reached on this point is decisive of this appeal, but there are other questions presented which may arise on another trial, and we feel it our duty to decide.

The prosecution was allowed, over the objection of the defendant, to prove in rebuttal that the deceased was not in the habit of carrying arms; that on various occasions he had so stated; and that, on the morning of the shooting, he had refused to go armed when it was suggested that he had better do so. We have looked in the transcript in vain for any evidence on the part of the defendant which could justify or call for any such evidence in rebuttal. There was evidence tending to show that the defendant believed the deceased to have been armed at the time he shot him. This rendered it competent for the prosecution to prove that as a matter of fact he was not armed at that time, but it did not justify the proof as to his general habit with respect to the carrying of weapons, or his declarations with reference to the matter, not made in the presence of the defendant, and not shown to have been communicated to him prior to the shooting. There was no evidence on the part of the defendant going to show that the character of the deceased for peace and quietness was bad; therefore, the evidence cannot be justified on the ground that it tended to show his good character in these respects. Evidence to sustain his character could not be heard unless it was attacked, (*People v. Anderson*, 39 Cal. 704,) and, if it could, it would not have been competent to prove it by evidence that he was not in the habit of carrying arms or that he had refused to do so. On cross examination of one or more of the witnesses for the prosecution, the defendant asked whether the deceased had not had quarrels with several persons named; and it was admitted that the deceased had so stated. There was no objection to this evidence by the prosecution. It was clearly incompetent, and, if it had been objected to, would no doubt have been excluded. It is claimed that this evidence on the part of the defense rendered the above mentioned proof competent. We do not think so. In the first place, the evidence on the part of the defense was incompetent, as we have said; but, if it were not, we do not see how the evidence offered in rebuttal that the deceased was not in the habit of going armed tended to rebut the proof that he had stated to some one that he had quarreled with certain persons. There was also evidence admitted in behalf of the prosecution of conversations between the witness Mrs. Willis and third parties, not in the presence of the defend-

ant, and with which he was in no way connected. This evidence should have been excluded. It was admitted by the court below, upon the assurance of counsel for the prosecution that it would be brought home to the defendant, which was not done. The same may be said of the testimony of the witness Glennon, of a conversation between Mrs. Willis and himself. The prosecution having failed to connect the defendant with the subject-matter of the conversation, the defendant moved to strike out the evidence. The motion was denied. This was error. The evidence should have been stricken out. The same witness, Glennon, was also allowed to testify to a conversation with the defendant. The ill-feeling which resulted in the death of Mr. Smith, at the hands of the defendant, grew out of an article published in a newspaper, of which the deceased was proprietor. The conversation testified to by Glennon was with reference to this article, and tended to show that the defendant believed the witness was the author of the article, and abused him, and threatened to get even with him; that in the same connection he made abusive remarks about one Mrs. Willis; and that subsequently, during the same day, he returned and stated to Glennon that he had learned that he was not the author of the article, and apologized for the language he had used. This evidence was well calculated to prejudice the jury against the defendant, and was immaterial and incompetent. If it had been shown to have been communicated to the deceased, it might have tended in some small degree to excuse his conduct towards the defendant, at the time of the shooting, but it was not shown that it was communicated to him. It could hardly be claimed that the threat of the defendant to "get even" with Glennon was evidence tending to prove that he killed the deceased, or the motive of the killing. And if this was not so that part of the conversation relating to Mrs. Willis, and which the defendant moved specially to strike out, was clearly incompetent.

It is contended by the appellant that the court below excluded evidence offered by him to the effect that he was told before the shooting that the deceased was a dangerous character, and that he had better beware of him, and that this was error. The defendant claimed, and introduced evidence tending to show that, in firing the shot which caused the death of the deceased, he acted in self-defense. In connection with the evidence as to what occurred at the time of the shooting, it would no doubt have been competent for the defendant to show that before the shooting he was informed that the deceased was a dangerous man. *State v. Lull*, 48 Vt. 586. Where a defendant claims to act in self-defense, any evidence tending to show that he acted as a reasonably prudent man would have acted under the circumstances is competent. *People v. Iams*, 57 Cal. 119, 130; *People v. Westlake*, 62 Cal. 307. In this case the evidence tended to show that the defendant was attacked by the deceased, and, in the encounter that followed, wounded him. In

judging whether the defendant acted with reasonable prudence and caution, and in the honest belief that he was in imminent danger of death, or great bodily injury, it was proper that the jury should know, if such were the fact, that he had been informed beforehand that the man who attacked him was a dangerous character, and so believed at the time, as such information and belief might reasonably influence the conduct of a prudent man under such circumstances. Such evidence does not rest upon the necessity of showing that the communication was brought home to the deceased, as counsel for respondent contend. The sole object of it is to show the state of mind of the defendant at the time of the shooting, and for this purpose it was proper and should have been admitted.

There may be some doubt whether the questions put to the witness were such in form as to raise the point, but the question has been presented on its merits here. The form of the questions is not objected to in the court below, nor is it here. In the effort to prove a certain state of facts, either the question put to the witness should disclose clearly what it is supposed to prove, or a proposition to prove certain facts should be submitted to the court below, and refused, in order to present the question in this court. Neither was done here, and we are led to believe, by certain questions put to the defendant, on the same subject, that the communication made to the defendant was not of the kind claimed by the appellant. It certainly was not competent to show that the defendant was warned to "look out" for the deceased, or the like. This would be quite a different thing from proving that the deceased was a dangerous man, and one who might be expected to go to extreme measures if he should attack the defendant. For these reasons, if no other error appeared in the record, the cause would not be reversed on this ground.

The rulings of the court in excluding certain questions asked the witness Mrs. Smith, widow of the deceased, on cross-examination, with reference to certain articles appearing in the paper formerly owned by her husband, after the first trial of this case, and excluding said articles when offered in evidence, were not erroneous. There was no error in allowing private counsel, employed to assist the district attorney in the prosecution of the case, to open and close the argument in the case. The court below must be left to determine upon the propriety of allowing such a course to be taken, and, so long as private counsel conduct the prosecution properly, we see no reason for holding that the entire argument may not be made by them with the consent and acquiescence of the district attorney and the trial court. The court below gave the following instruction, which is complained of by the appellant: "In this case the homicide, having been established by the state, unless the testimony of the state proves that the offense was excusable or justifiable, the burden of the proof is upon the defendant to show by a preponderance of evidence that the crime was only man-

slaughter, or was justifiable." This instruction was erroneous, because, the homicide being established by the state, it cast upon the defendant the burden of proving by a preponderance of the evidence that the killing was justifiable, or only manslaughter. *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549; *People v. Elliott*, 80 Cal. 296, 22 Pac. Rep. 207; *People v. Langan*, 81 Cal. 142, 22 Pac. Rep. 482. Judgment and order reversed, and cause remanded with instruction to the court below to remand the cause to the superior court of the county of San Mateo for further proceedings.

We concur: **SHARPSTEIN, J.**; **McFARLAND, J.**

**DE HAVEN, J.** I concur in the judgment. The second subdivision of section 1033 of the Penal Code is clearly unconstitutional. There was also error in the giving of the instruction referred to in the opinion of Mr. Justice Works. Upon the other points therein discussed, I express no opinion.

**THORNTON, J.** I concur in the above, except as to the instruction described in it. I am of opinion that the instruction is sound law, and that there was no error in giving it.

(86 Cal. 605)

**GRIFFITH v. HAPPEBSBERGER.** (No. 12,644.)  
(*Supreme Court of California*. Jan. 4, 1891.)

In bank. On rehearing. For former report, see ante, 137.

**PER CURIAM.** In this case the petition for a rehearing is denied, but the judgment is modified to this extent: The superior court will compute interest on the amount awarded to respondent from January 1, 1885, as prayed for in the complaint, instead of September 15, 1883, the date of the architect's certificate.

(87 Cal. 410)

**MILLER v. WADE et al.** (No. 12,510.)  
(*Supreme Court of California*. Jan. 4, 1891.)

**APPEAL—PRACTICE—ASSIGNMENTS OF ERROR—NONSUIT.**

Where a nonsuit is granted, it is not necessary that the record show on what ground the motion was made, as the ruling of the court will be upheld, if it can be justified on any ground. *DE HAVEN* and *THORNTON, JJ.*, dissent.

In bank. Appeal from superior court, Alameda county; **NOBLE HAMILTON**, Judge.

Action by Miller against Wade. From a judgment of nonsuit, plaintiff appeals. Affirmed.

**W. W. Allen** and **D. S. Smart**, for appellant. **George F. Hoeffler** and **Moore & Reed**, for respondent.

**WORKS, J.** This is an appeal, by the plaintiff, from a judgment of nonsuit. There is a bill of exceptions which contains the evidence, and from which it appears that a nonsuit was granted, but the ruling of the court is not assigned or specified as error. Such an assignment has been held to be necessary to present the question to this court. *Schroeder v.*

*Schmidt*, 74 Cal. 459, 16 Pac. Rep. 243; see, also, *Polack v. Gurnee*, 68 Cal. 267, 5 Pac. Rep. 229, 610; *Malone v. County of Del Norte*, 77 Cal. 217, 19 Pac. Rep. 422.

The assignment of error is the pleading which points out the particular question raised and passed upon in the court below, and presented to this court for review. The bill of exceptions is intended to present the facts and the exception which sustains the point made and thus reserved for our determination. *Pico v. Cohn*, 78 Cal. 385, 20 Pac. Rep. 706. If this were not so, this court would be compelled, instead of looking to the assignment of errors for the questions presented, to search the whole transcript to find them; opposing counsel would have no means of knowing what points would be relied upon until the briefs were filed in this court, and questions could be urged here that had never been called to the attention of the court below on the motion for a new trial. A different rule was declared in one case, in department, in which a distinction is made between a statement and a bill of exceptions in this respect. *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. Rep. 403. It is true, as said in that case, that the statute applies, in terms, to statements only; but this court has held, in a number of cases, that a statement and a bill of exceptions are the same, and where a bill of exceptions is used on a motion for a new trial, and is thereby made to take the place of the statement, it must contain everything necessary to present the question by a statement. Undoubtedly a bill of exceptions might be used where a statement might not be proper, and in many cases no specification of error would be necessary. But where a bill of exceptions is used as the basis of a motion for a new trial, it is a statement. The court below has a right, under the Code, to have specifically pointed out all errors relied upon in making the motion, and this court can only be called upon to pass upon such questions as have thus been specified, and relied upon in the trial court. That such was the intention of the Code we have no doubt, and it is absolutely necessary that it should be so, in order that cases may be fairly presented and properly decided. The same rule must prevail in any case where the error to be reviewed depends upon the evidence given at the trial, whether it is necessary to present the error complained of by a motion for a new trial or not. The policy of the law is that a question should be presented to the court below, and an opportunity be given to that court to correct the error, if one has been committed, before appealing to this court.

It is further contended by the respondent that, as the determination of the question whether or not the nonsuit was properly granted depends entirely upon the sufficiency of the evidence to make out the plaintiff's case, the appeal must have been taken within 60 days, and, as this appeal was not taken within that time, it was too late. Section 939 of the Code of Civil Procedure provides: "But an exception to the decision or verdict, on the ground that it is not supported by the evidence,

cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." We think the ruling on the motion for a nonsuit was a "decision" within the meaning of this section, and although the ruling, if erroneous, has been held to be an error of law, the whole question depends, in this court, upon the sufficiency of the evidence to sustain the decision of the trial court. The appeal must be taken within 60 days to be available.

The appellant contends that the judgment of nonsuit cannot be upheld in this case because the record does not show the grounds upon which the motion was made, or that any grounds were assigned. This would be so, if the nonsuit had been denied, and the defendant had appealed. But it is not so where the nonsuit was granted. The decision of the trial court will be upheld where the nonsuit is granted, if the ruling can be justified on any ground, whether made a ground of the motion or not. The reason for this is that the moving party must show error on appeal, and, in order to sustain an appeal in this class of cases, he must show that he pointed out to the court below the grounds of his motion. If he did not, the objection is waived. But this rule cannot apply where the motion is granted, as the doctrine of waiver can have no application where the decision is in favor of the moving party. But, notwithstanding our conclusion that the question is not properly presented, we have examined the evidence carefully, and are satisfied that the evidence of the plaintiff was entirely insufficient to make out his case, or to put the defendant upon her proof. Judgment affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

PATERSON and MCFARLAND, JJ. We concur in the judgment on the ground last stated. The decision of the department in *Shadburne v. Daly* is correct, in our opinion, and should be adhered to.

I dissent: DE HAVEN, J.

I dissent: THORNTON, J.

(57 Cal. 394)

KIRKWOOD v. SOTO. (No. 13,894.)

(Supreme Court of California. Jan. 4, 1891.)

COMPENSATION OF OFFICER—INCREASE DURING TERM.

Under Const. Cal. art. 11, § 9, providing that "the compensation of any county, city, town, or municipal officer shall not be increased after his election, or during his term of office," it is the compensation for services to be rendered, and not traveling and other incidental expenses of the office, that is forbidden to be raised.

Commissioners' decision. In bank. Appeal from superior court, Contra Costa county. JOSEPH P. JONES, Judge.

Action by Kirkwood, county superintendent of schools of Contra Costa county, against Soto, auditor of the same county, to compel defendant to draw his warrant on the county treasurer for \$76.75, traveling expenses incurred by plaintiff in the performance of his official duties, which never

had been allowed by the county board. From a judgment in plaintiff's favor defendant appeals. Affirmed.

W. S. Tinning, for appellant. Chase, Chase & Mellis, for respondent.

BELCHER, C. C. The respondent was elected superintendent of schools of Contra Costa county at the general election held in 1886. His term was four years, commencing on the first Monday of January following. In due time, he qualified, and entered upon the discharge of his duties, and has ever since continued to hold the office. At the time of his election, Contra Costa was a county of the seventeenth class, and the county government act contained the following provision in regard to his salary: "Sec. 189. In counties of the seventeenth class, the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to-wit: \* \* \* (11) The superintendent of schools, eighteen hundred dollars per annum." St. 1885, p. 176. In March, 1889, section 1552 of the Political Code was amended so as to read as follows: "Sec. 1552. Each county superintendent shall receive his actual and necessary traveling expenses, said expenses to be allowed by the board of supervisors, and to be paid out of the general fund: provided, that this amount shall not exceed ten dollars per district per annum. He shall also be allowed postage and expressage, payable out of the county school fund, two dollars for each school-district: provided, that in incorporated cities each school containing three hundred pupils shall be considered equal to one school-district." After this amended section took effect, the respondent incurred, in the performance of his official duties as school superintendent in visiting schools in his county, actual and necessary traveling expenses, to the amount of \$76.75. For this amount, he presented a claim to the board of supervisors, properly itemized and verified for allowance. The claim was examined and allowed by the board, and a warrant was ordered drawn on the county treasurer therefor. The appellant was county auditor at the time, and, as such, refused to draw the warrant ordered, and thereupon this proceeding was commenced to compel him to do so. After a hearing, the court below granted the prayer of the petition, and ordered a peremptory writ of mandate to issue, commanding the appellant to forthwith draw his warrant in favor of the petitioner upon the county treasurer for the amount allowed and ordered paid by the board of supervisors. From that order or judgment this appeal is prosecuted. The only contention of appellant is that section 1552, supra, is inapplicable and unconstitutional, so far as the respondent is concerned, it having been passed after he was elected to office, because, in authorizing the payment of his necessary traveling expenses, it, in effect, increases the compensation or salary allowed him at the time of his election. The clause of the constitution relied upon reads as follows: "The compensation of any county, city, town, or municipal officer shall not be in-

creased after his election, or during his term of office." Article 11, § 9. The words "compensation" and "salary" were evidently used synonymously in the constitution, and in the county government act. Thus, in article 5, § 19, of the constitution, it is provided: "The governor, lieutenant governor, secretary of state, controller, treasurer, attorney general, and surveyor general shall, at stated times during their continuance in office, receive for their services a compensation for their services which shall not be increased or diminished during the term for which they shall have been elected," etc. In article 9, § 2, it is provided: "A superintendent of public instruction shall, at each gubernatorial election after the adoption of this constitution, be elected by the qualified electors of the state. He shall receive a salary equal to that of the secretary of state," etc. And, in article 6, § 17, this language is used: "The justices of the supreme court and judges of the superior court shall severally, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished after their election, nor during the term for which they shall have been elected. The salaries of the justices of the supreme court shall be paid by the state. One-half the salary of each superior court judge shall be paid by the state, the other half thereof shall be paid by the county for which he is elected. During the term of the first judges elected under this constitution, the annual salaries of the justices of the supreme court shall be six thousand dollars each." In the county government act the same language is used at the commencement of each section which fixes the compensation of county officers. It is: "The county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries." Since the adoption of the present constitution many acts have been passed by the legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices. Among them, the following may be noted: The justices of the supreme court and the judges of the superior court, who were first elected under the constitution, entered upon the discharge of their duties, as such, on the first Monday of January, 1880. In April following, an act was passed to amend part 1 of the Code of Civil Procedure, and substituting a new part 1 to take the place thereof. See Amend. Codes 1880, p. 21. By section 47 of this act, it was provided that the supreme court shall hold regular sessions at the capital of the state, at the city and county of San Francisco, and at the city of Los Angeles; and that "the justices and officers of the supreme court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its sessions." By section 71, it is provided that a judge of any superior court may hold the superior court in any county, at the request of the judge of that county, "and, upon the request of the governor, it shall be his duty to do so." And, by sec-

tion 160, it is provided that "a judge so holding a court, at the request of the governor, shall be allowed his actual expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof." The constitutionality of these provisions has never been questioned, so far as we are advised, in any court, or elsewhere, and yet, if the theory of the appellant be true, they would seem to have been subject to the same objections raised here, during the terms of the justices and judges who were in office at the time the act was passed.

The question now presented for decision does not appear to have been ever passed upon by the supreme court of this state, but a similar question was before the supreme court of Illinois, in *Briscoe v. Clark Co.*, 95 Ill. 809. The constitution of that state provided that the county board should fix the compensation of all county officers, with the amount of their necessary expenses, "provided, that the compensation of no officer shall be increased or diminished during his term of office." The supreme court held that it was the salary of the county officer—the compensation for the personal discharge of official duty—which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the necessity, which the business of the office should develop, and being so, the allowance for expenses could be increased. In our opinion, it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden, by section 9 of article 11 of the constitution, to raise. We therefore advise that the judgment appealed from be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(87 Cal. 329)

BAKER v. BRICKELL et al. (Nos. 12,992, 13,574.)<sup>1</sup>

(Supreme Court of California. Jan. 8, 1891.)

HUSBAND AND WIFE — OCCUPATION OF GOVERNMENT LAND — BONA FIDE POSSESSOR — TRUST — ESTOPPEL.

1. In 1860 a married man went into possession of part of the government land known as the "outside lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of Act Cong. March 8, 1866, (14 U. S. St. at Large, p. 4.) relinquishing and granting the right and title of the United States in said lands to the city of San Francisco, in trust to be "disposed of and conveyed by said city, to parties in the bona fide actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. While the husband and wife were in possession, they executed a declaration of homestead on the land under the California homestead act of 1862, by which the homestead estate, on the death of either, vested absolutely in the survivor. Thereafter the city deeded the land to the widow, she having com-

<sup>1</sup> For dissenting opinion, see post, 1067.



plied with the various ordinances and legislative acts relative thereto. *Held*, that as she had *bona fide* actual possession at the passage of the act, no trust arose under the conveyance to her in favor of said children.

2. The fact that she, as administratrix of her husband, returned said land as assets of his estate is immaterial, and does not estop her to claim it as her own.

BEATTY, C. J., dissenting.

Department 2. Appeal from superior court, city and county of San Francisco: JOHN HUNT, Judge.

E. J. & J. H. Moore, for appellant. Kellogg, Fox & King, for respondent.

THORNTON, J. In this case there are two appeals prosecuted by defendant Brickell, —the first (12,992) from the judgment on the judgment roll; and the second (13,574) from an order denying Brickell's motion for a new trial. They will be considered together. The action is brought to establish a trust against defendant Brickell. The lands in controversy are portions of what are known as the "outside lands" of the city and county of San Francisco, and not within that portion affected by the Van Ness ordinance. John H. Baker went into possession of the lands in suit, called the "Baker Tract" or "Golden Gate Ranch," on July 9, 1860. He purchased this and other lands within his possession from one James C. Garner. He was then a married man, and at the time above stated went into possession with his wife, Maria Baker, (who is the defendant, Maria Baker Batchelder,) and their children. John H. Baker died in March, 1863, leaving his wife surviving with six children, of whom the plaintiff was one, then an infant of tender years. The surviving wife, with her children, remained in possession of the land in controversy, and was in possession when the act of congress of March 8, 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," was passed, and before and some time after the passage of this act. See this act on page 4 of 14 U. S. St. at Large. At the time of the passage of this act, the legal title to these lands was in the United States. The land granted by the act was within the corporate limits of the city of San Francisco, and the right and title of the United States was by it relinquished and granted to the city of San Francisco and its successors, subject to certain reservations and exceptions designated therein, "upon the following trusts, namely: That all the said land not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof by themselves or tenants on the passage of this act, in such quantities, and upon such terms and conditions, as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public use." A proviso follows the above which has no bearing on the case, and need not be further adverted to.

It may be remarked here that no part of the land in suit was ever reserved or set apart by ordinance, or otherwise, for public uses. Some observations are here ap-

propriate as to the nature of the title of the city, successor to the former pueblo of San Francisco. The character of this title has been the subject of discussion in similar cases, both in the supreme court of the United States and in this court, and it may be regarded as settled law that the title of the pueblo, as well as that of the city, was not an indefeasible estate; ownership of such lands could not be strictly affirmed of either the pueblo or the city. The title amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for buildings, or cultivation, or both, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. The right of this possession and use was in all particulars subject to the control of the government of the country. They were to be held by the pueblo or city in trust for the benefit of the inhabitants, and its right of disposition was subject to be modified, and even taken away by the government. On this point see *Townsend v. Greeley*, 5 Wall. 326; *Grisar v. McDowell*, 6 Wall. 364; *Palmer v. Low*, 98 U. S. 16; *Trenouth v. San Francisco*, 100 U. S. 253; *Leroy v. Cunningham*, 44 Cal. 599; *Dupond v. Barstow*, 45 Cal. 450; *Low v. Lewis*, 46 Cal. 549; *McManus v. O'Sullivan*, 48 Cal. 7, 17, 18; *Randall v. Austin*, 46 Cal. 54; *McCreery v. Sawyer*, 52 Cal. 257; *People v. Holladay*, 68 Cal. 442, 9 Pac. Rep. 655. The legal title to these lands passed to the United States from Mexico on its acquisition of California, and passed to the city by the act of March 8, 1866, upon the trusts above set forth, for the benefit of such of its inhabitants as were in the *bona fide* actual possession of the same at the date of the passage of the act just above referred to, viz., on the 8th day of March, 1866.

Now, who was in the *bona fide* actual possession of the land on the 8th of March, 1866? For whose benefit and behalf was the grant by congress made? Obviously, Maria Baker. She was then and before that date an inhabitant of the city of San Francisco, residing on the lands with her children. That the grant was made to the head of the family there can be no question, and Maria Baker was then the head of her family. We consider this determined in *Labish v. Hardy*, 77 Cal. 327, 19 Pac. Rep. 531, where a similar question was determined in similar language in a grant made by act of congress to the corporate authorities of the town of Santa Cruz. The only difference between that case and this is that in the case cited the surviving husband was held to be the grantee, and in this case the surviving wife is the grantee. The possession in both cases was that of the head of the family, the husband in one case, and the wife or widow in the other. Here the husband and father was not in being when the act of congress was passed in 1866. He had then been dead nearly three years. It goes without saying that then, being dead, he could not take title under the grant, and, therefore, on his decease the land did not become a part of his estate. It may be added here that the tenant spoken of in the act of congress may be held to signify the conventional ten-

ant. *Brooks v. Hyde*, 37 Cal. 374. Here there was no contract either express or implied from which the tenancy could be inferred, nor is there any reason to hold that Mrs. Baker became the tenant, in any sense, of her husband on his decease.

To carry the act of the 8th of March, 1866, into execution, the board of supervisors passed an ordinance, known as "Order 800," which was ratified and affirmed by an act of the legislature passed March 27, 1868. Order 800 was passed by the board of supervisors on the 14th of January, 1868. See St. 1867-68, p. 379, etc. Subsequently, in 1870, another act of the legislature was passed to expedite the settlement of the land-titles in the city and county of San Francisco, etc., affirming order 800 of the board of supervisors of the city. See St. 1869-70, p. 353, etc. This enactment was made to enable the parties entitled to procure conveyances of the title to these lands from the city and county of San Francisco. Of the act of congress, and of the ordinances of the city and county of San Francisco, and of the acts of the legislature, it may be remarked that nowhere in them is the title of any other person recognized or allowed, save those who were in actual *bona fide* possession on the 8th of March, 1866, by themselves or their tenants, except where a possessor had been ousted from his possession, which possession he might recover by suit. As there was no evidence of ouster here by Maria Baker of any one, no question arises here as to ouster and recovery of possession by a suit at law.

By the order 800, ratified as above, it was provided that a map or plan of these outside lands should be made and adopted by the board of supervisors above mentioned; that upon the completion of the map it should be deposited for public inspection in the office of the clerk of the board of supervisors, there to remain for a period of thirty days, notice whereof should be given by publication in three of the daily papers of the city during the time that the map should so remain in the clerk's office. The occupant of any tract of land was required, by order 800, ratified as above, to present a diagram of his land, and have it delineated on the map made by the supervisors. This delineation of a tract, however, could not be made on the map unless all the taxes on it should have been paid for five fiscal years preceding the year beginning July 1, 1866. The claimant was also, before the title could be procured, required to surrender all claim to any streets and highways. By the act of 1870 (St. 1869-70, supra,) passed March 14th of that year, the claimant was empowered to file a petition for a grant from the city of the tract of land of which he was in possession, as above mentioned. By the provisions of this act the petitioner was to set forth in such petition, verified as required by the act, a claim that he or his tenants, or the persons through whom he claims or derives possession, had been, from and including the 8th day of March, 1866, and still was, in possession of a portion of such outside land, and that he, or the person through whom he claims or derives possession, has

paid to the tax collector of the city and county of San Francisco the amount assessed by the Outside Land Commission upon the land described in the petition, to pay for the land reserved for public uses, provided for in section 10 of order 800, and has also paid the five years' taxes mentioned in section 4 of order 800, and all taxes levied on said lands for state and municipal purposes, then remaining unpaid. The board of supervisors was, these before-mentioned acts having been done, required to proceed to act on his petition. The claimant was required to make proof of the facts stated in his petition before a committee of the board of supervisors, styled the "Outside Land Committee." After the proofs were closed, the Outside Land Committee was required to consider the same, and to make such report and recommendation thereon as shall seem to them just and proper in the premises. The committee was required to file with the clerk of the board the testimony taken by it, and its report, which report was to be submitted to the board of supervisors for their approval, and if, in their judgment, the claim of the petitioner is well founded, the board was, by an order entered in their minutes, to adjudge and award a grant of his lands to the petitioner, less the amount reserved for public use. The board was thereupon required to give public notice of their award by notice published at least once a week for three successive weeks in a daily newspaper published in the city and county of San Francisco, which notice should specify the name of the applicant, the date and filing of his petition, and the tract of land awarded, by a good and sufficient description thereof, proof of publication of which notice was to be made in the manner then or thereafter required by law for the proof of publication in civil process. Section 2, p. 354, Act 1870. The third section of the act provides for the execution of a deed of conveyance signed by the mayor of the said city and county, and acknowledged and delivered by him to the applicant of the tract of land awarded to him, to which shall be attached the corporate seal of the city and county above named, provided the petitioner, before receiving the deed aforesaid, is required to quitclaim and personally deliver the possession of all lands claimed by him reserved for public purposes, and for the use and benefit of the city and county, provided there is no suit pending between the petitioner and some third person. A reference will be further made to this last-mentioned proviso hereafter in this opinion. By the third section it is provided that the conveyance executed under the provisions of this act shall operate as an acknowledgment on the part of the city and county aforesaid that the title to the land described in it has passed under and by virtue of order 800 and ordinance 822, and of the several acts of congress and of the legislature ratifying said order and ordinance, under the authority of which the same have been passed. The said conveyance shall likewise operate to grant, convey, remise, and release to the party, his heirs and assigns, named therein, the

lands in such conveyance described, and all the estate and interest present and future of the city and county of San Francisco in and to such lands. On the 10th day of January, 1873, Maria Baker, after due and regular proceedings had under order 800, and the acts of the legislature of 1868 and 1870, was granted a conveyance in the usual form of all the lands described in the complaint as being part of the Baker ranch, which conveyance was executed to her by the authorities of the city and county, as required by the act of 1870, above referred to, and in the mode therein set forth, conveying to her the title of the city and county of San Francisco, as declared in the fifth section of the act of 1870, the provisions of which have been fully stated above. When the conveyance was made to her afterwards, it does not appear that any suit in regard to the land was pending against her. Not appearing, this court must regard it as not existing. Maria Baker intermarried with one David F. Batchelder, and subsequently she and her husband, Batchelder, executed to the defendant Brickell divers mortgages on the land conveyed to her by the deed of the city and county aforementioned, and on other lands, to secure the payment of divers sums of money, amounting in the aggregate to the sum of \$42,500. These mortgages were subsequently regularly foreclosed, and the land sold under a decree of foreclosure, regularly given, made, and entered, and by such decree and the sale thereunder, and the deed of the sheriff of the city and county of San Francisco executed to defendant Brickell, the title of said Maria Batchelder became vested in Brickell. It further appears from the findings herein that on the 23d of September, 1862, Maria Baker and her then husband, John H. Baker, executed a declaration of homestead in due form of law, embracing the land involved in this litigation. This homestead estate, under the provisions of the act of 1862, under which the declaration was made and recorded, on the death of either spouse, vested absolutely in the survivor. Such is the effect of the fourth section of the act of 1862. See *Herrold v. Reen*, 58 Cal. 445-447, where the point is considered and decided. See, also, cases cited in the opinion in that case. It was not necessary that this homestead estate should be set apart by the probate court to the surviving spouse. It vested in the survivor by descent. *Herrold v. Reen*, supra. So on the death of John H. Baker, in March, 1863, the homestead estate vested in his surviving wife, Maria Baker. Under such circumstances the contention cannot be upheld that the possession of Maria Baker was not, on the 8th of March, 1866, *bona fide*. She was not only in actual possession, but she was there having title to the whole land as against any heir of John H. Baker, by the legal devolution to her of the whole land as a homestead. In such a state and condition the *bona fides* of her possession could not be impeached. Its *bona fides* were beyond a doubt.

This conclusion disposes of this case, for in no event would any trust arise here in favor of any of the children, issue of the

marriage of Maria Baker and her husband John H. Baker. The plaintiff could have no claim to any portion of the land. There is nothing on which to build a trust. A trust arises from contract or from circumstances which affect the conscience of a party, and charge him with the rights of another. Here there was no contract between Maria and John H. Baker, constituting a trust, and no circumstances affecting the conscience of Maria Baker, charging her with any duty to her children in regard to the lands in suit. John H. Baker had no title to this land. His settlement and possession on it was merely permissive. He acquired no right to it by such possession. The title was then in the United States, to give it to whom it thought best; and when it did make a donation, in March, 1866, he could not be the recipient of a grant. He had then departed this life, and could take nothing by the act of congress passed on the day above mentioned. The possession on that day was that of his wife, the then head of the family, Maria Baker. She owed no duty to her children save support, maintenance, and education,—none in regard to this land. Independent of the homestead which had arisen under the act of 1862, which, as we have seen, passed to her on the death of her husband, we think she was on the 8th day of March, 1866, in the actual *bona fide* possession of the land, but when the homestead right is taken into account, there can in our judgment be no question or doubt as to the *bona fides* of her actual possession. She was, therefore, the grantee under the act of congress of the land in question. The grant to Maria Baker was a pure donation, and how any trust in favor of any other person could arise out of it, we cannot surmise. Nor are we without authority to sustain this conclusion. In *Labish v. Hardy*, 77 Cal. 327, 19 Pac. Rep. 531, a like question came before this court for discussion, and its determination was in accordance with what is stated herein. In that case the decision was in relation to the provisions of an act of congress of July 23, 1866, relinquishing and granting the lands within the limits of the town of Santa Cruz to the corporate authorities thereof, in trust, and with authority to convey them to the parties in the actual *bona fide* occupancy thereof at the date of the passage of the act. On May 13, 1871, the corporate authorities of the town conveyed the premises to William H. Hardy, father of appellant, and husband and grantor of respondent. The appellant claimed that the rights and equities acquired by her parents through occupancy and possession of the premises constituted community property, one-half of which belonged to her mother, and at her death, by the law then existing, descended to and vested in her children. The mother of appellant died in 1856, ten years prior to the passage of the act of congress in July, 1866. The court, per SHARPSTEIN, J., said: "The beneficiaries under the act of congress were clearly those in the *bona fide* occupancy of the land in the town of Santa Cruz at the date of the passage of said act, which was ten years after the death

of appellant's mother. An occupancy which terminated ten years before the passage of the act would not be a *bona fide* occupancy at the time of its passage. We are unaware of any law under which a bare occupancy of any public land of the United States vests in the occupant any right or equities in or to the land so occupied. We think no property was acquired in the premises in controversy by either of the parents of appellant prior to the passage of the act of July 23, 1866." This judgment was concurred in by five of the justices of this court, and there was no dissent. It is clearly correct and meets our approval.

The other circumstances, viz., the facts that Maria Baker qualified and was appointed as administratrix of John H. Baker, and put the land in suit on the inventory returned by her to the probate court as assets of her intestate's estate in the administration of the estate, are entirely immaterial. We are aware of no law by which a person appointed administrator loses his land by so acting. There is no estoppel on Maria Baker to claim her own property under such circumstances. She no doubt acted in this matter through ignorance of her rights, or, if advised at all, from having been improperly counseled. It is useless to dwell on the points adverted to in relation to the administration, which are totally immaterial, and cannot in any proper view of them affect the decision of this case. The judgment and order are reversed and the cause remanded for a new trial, in accordance with the views expressed in this opinion. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.  
(87 Cal. 422)

CHESTER v. FIELD *et al.* (No. 13,816.)  
(Supreme Court of California. Jan. 4, 1891.)

EJECTMENT—QUIETING TITLE—JUDGMENT ON PLEADINGS.

1. Upon a complaint containing the usual allegations in ejectment, and all that are necessary to quiet title, and a prayer that defendants be required to set forth their claims; that said claims be adjudged to be invalid, and plaintiff's title declared to be good; that plaintiff be restored to possession, and defendants be barred forever from asserting any claim to the land, and "for such other and further relief as shall be meet in the premises," judgment would not be given without evidence, even if there was no answer.

2. A specific denial of plaintiff's right of possession, which would be bad on special demurrer for uncertainty, is sufficient to raise an issue as to some portion of the property, and to defeat a motion for judgment on the pleadings, even if such motion were ever good in ejectment.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

A. Everett Ball, for appellant. Edward Field, *in pro. per.*, and Henry C. Dibble, for respondents.

PATERSON, J. The complaint contains the usual allegations in ejectment, and all that are necessary to quiet title. At the trial, and before any evidence was introduced, the plaintiff moved for judgment on the pleadings, claiming that the an-

swer raised no material issue. There was no demurrer to the answer. The motion was properly denied. If the action be considered as an action of ejectment, there is a specific denial of plaintiff's alleged right of possession. The denial, it is true, covers all the parcels described in the complaint, and would not stand the test on demurrer for uncertainty, but it is sufficient to raise an issue as to some portion of the property, and to defeat a motion for judgment on the pleadings, assuming that such a motion would be good under any circumstances in an action of ejectment.

The prayer of the complaint is that the defendants be required to set forth their claims; that said claims be adjudged to be invalid, and plaintiff's title declared to be good; that plaintiff be restored to possession, and defendants be debarred forever from asserting any claim to the land, and "for such other and further relief as shall be meet in the premises, and costs of suit." Upon the allegations of the complaint and this prayer the court would not have given judgment without evidence, if there had been no answer at all filed. The judgment is affirmed. All concur.

(87 Cal. 413)

CLAVEY *et al.* v. LORD. (No. 13,578.)

(Supreme Court of California. Jan. 4, 1891.)

ACCOUNTING—FINDINGS OF FACT—ADMISSION OF EVIDENCE AFTER VERDICT—OBJECTIONS TO EVIDENCE—HARMLESS ERROR.

1. In an action for an accounting by defendant of cattle delivered to him by plaintiff's intestate, the issue as to the number of cattle delivered to defendant is immaterial where it appears that defendant has made a complete settlement with deceased and with plaintiffs.

2. Each party moved for judgment on a special verdict, but the court did nothing until three months thereafter, when it permitted defendant to introduce further evidence, without showing cause therefor by affidavit. Plaintiffs also introduced such evidence as they wished. Held, that there was no abuse of discretion.

3. Where one of plaintiffs' counsel objected to evidence of statements made by plaintiffs' witness inconsistent with his testimony, on the ground that there was no foundation laid to impeach his testimony, and plaintiffs' leading counsel then said, "if it was not after he testified, he cannot be impeached in that way," the objection does not go to the proving of what witness said after he testified.

4. The findings as to settlements being controlling, any error in the admission of evidence tending to show the number of cattle delivered to defendant was harmless.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

James H. Budd and F. D. & G. W. Nicol, for appellants. F. W. Street, E. A. Rodgers, and J. C. Campbell, for respondents.

VANCLIEF, C. The first count of the complaint in this action alleges that the decedent in his life-time verbally contracted with the defendant to deliver to the latter a large number of stock cattle, which the defendant was to herd, pasture, feed, and care for, in consideration of which the defendant was to have one-half of the increase of said cattle, but was to return, or account to the decedent for, all the cattle

originally delivered and one-half of the increase at the expiration of the contract. The contract did not fix or state the time during which the defendant was to keep the cattle, but it is alleged that he kept them until William Clavey died, June 25, 1885. Nor is the date of the contract alleged, but it appears that it was made in 1875. It is further alleged, on information and belief, that the deceased delivered to the defendant, under the contract, "about one hundred and forty head of stock cattle," which defendant kept according to the contract, and "that the increase of said cattle, while in possession of the defendant under said contract, amounted to many hundreds." It is further alleged, on information and belief, that during the life-time of William Clavey there was no accounting between him and defendant in regard to the cattle; and that no accounting or settlement has been made between plaintiffs and defendant in regard to the cattle since the death of William Clavey. In the second count it is alleged, on information and belief, that during the life-time of the deceased he and defendant entered into a verbal contract, "by the terms of which they were to purchase large tracts of land in Tuolumne county, the same to be held by them in common." That under said contract "Clavey furnished to defendant large sums of money with which to purchase and pay for his (Clavey's) interest in the aforesaid land;" and that defendant, "with said money, and money of his own, and under said agreement, did purchase large tracts of land, the deeds and conveyances of which were taken in the name of defendant, and in trust, however, for the joint benefit of himself and said Clavey, each of whom owned an undivided half thereof." That the defendant still holds the title to said lands, and "refuses to account to plaintiffs therefor, or for the rents and profits of the land, or for the money invested therein by Clavey, and refuses to make any statement of his trust under said contract, all of which has been demanded by plaintiffs. The prayer of the complaint is—*First*, that defendant account for the cattle under the contract first alleged; and, *second*, that he account for all money received by him for the purchase of land under the contract, alleged in the second count, and for all lands purchased therewith, and for the rents and profits thereof. The answer of the defendant admits a contract in regard to the cattle, but with the additional terms that the defendant was authorized to deal with, sell, and dispose of the cattle and the increase as his own, during the time he should keep them, and account to Clavey for the proceeds of such sales; and that defendant was not to be liable for loss of cattle by death or otherwise; and, also, that defendant was to hold said cattle as security for all debts due the defendant from Clavey. And denies that Clavey delivered to defendant more than 77 head of cattle under the contract. Denies that there had been no accounting and settlement with Clavey and the defendant; but alleges that at divers times he had accounted to and settled with Clavey, during his life-time, all mat-

ters pertaining to the cattle contract, and that in March, 1887, he had accounted and settled with the plaintiffs for all the cattle and increase thereof that remained in his possession after the death of Clavey. The answer also denies all the material allegations of the second count. Twenty-five special issues framed by counsel for the respective parties were submitted by the court to a jury, and on April 7, 1888, the jury returned a verdict in favor of the plaintiffs upon all the issues except one, as to which the jury failed to agree. Thereupon each party asked for judgment on the special verdict; but no further action appears to have been taken by court or counsel until July 14, 1888, when defendant's counsel asked permission to introduce further evidence, which was allowed by the court against the objection of plaintiffs' counsel. After hearing the additional evidence the court set aside the special verdict, and upon all the evidence made written findings in favor of the defendant, and rendered judgment accordingly. The plaintiffs appeal from the judgment, and from an order denying their motion for a new trial. The court found the cattle contract to have been as stated in defendant's answer, and that defendant received only 77 head of cattle under the contract; and further found, in regard to the cattle transaction, as follows: "(6) That during the life-time of Clavey, defendant and said Clavey had frequent settlements and accountings in regard to the cattle so received, and the increase thereof, and that at each of said settlements defendant fully settled with said Clavey for all of the cattle sold and the increase of said cattle; (7) that on or about the 10th day of March, 1887, defendant delivered to plaintiffs herein, the administratrix and administrator of the estate of said William Clavey, deceased all of the cattle that remained in defendant's possession, whether the same were original stock cattle, or the increase of said stock cattle, and the plaintiffs herein received the same; (8) that at the time of the commencement of this action, defendant did not have in his possession any of the original stock cattle received from William Clavey, nor any of the increase of the original stock cattle so received, nor any of the proceeds of the sale of said cattle or the increase thereof, but had fully accounted to said Clavey during his life-time for the increase of said cattle, and the proceeds from the sale of the same, and had turned over to said plaintiffs all of the cattle that they were entitled to receive under the terms of said contract." Upon all the issues in the second count, the court found in favor of defendant.

1. Many of the findings are attacked on the ground that they are not justified by the evidence. But I think all the findings, except that as to the number of cattle delivered to defendant under the contract, are sustained by a preponderance of evidence; and the finding as to the number of cattle delivered is supported by the positive testimony of the defendant, and of the witness Richards, opposed to the positive testimony of John Loney and the rather indefinite testimony of McFarland.

for the plaintiffs. There was an attempt by each party to discredit the witnesses of the other as to the number of cattle; but there is nothing in the record from which it can be seen or determined here that the court did not justly estimate the credibility of the witnesses. Besides, if the sixth, seventh, and eight findings as to settlements with the deceased and plaintiffs are justified by the evidence, as I think they are, they are controlling, and render the issue as to the number of cattle immaterial.

2. It is insisted by appellants that the court erred in hearing additional evidence three months after the verdict of the jury was rendered, and in disregarding the verdict of the jury. When the verdict was rendered, each party moved for judgment upon it, and it does not appear why the court did not further act in the case until three months thereafter; yet it does not appear that the delay was objected to by the appellants. If the court disagreed with the verdict of the jury, there should be no question that it had the power to disregard and set it aside of its own motion, since, until adopted by the court, it was only advisory. *Johnson v. Powers*, 65 Cal. 179, 3 Pac. Rep. 625; *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. Rep. 540, and other cases. The only remaining question under this head is whether the court erred in permitting the defendant to introduce further evidence without showing cause therefor by affidavit. It was undoubtedly within the discretionary power of the court to permit further evidence, under the circumstances disclosed by the record. *Foot v. Richmond*, 42 Cal. 441; *Barry v. Bennett*, 45 Cal. 80; *Keys v. Warner*, Id. 60; *Association v. Willard*, 48 Cal. 615; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. Rep. 745; *Bank v. Wolff*, 79 Cal. 70, 21 Pac. Rep. 551, 748. And no abuse of that power appears. Both parties were permitted to introduce additional evidence without any apparent restriction; and both parties did introduce additional evidence. There is no complaint that the plaintiffs were surprised, or were not allowed ample opportunity to procure and introduce evidence in rebuttal or in chief; nor does it appear that plaintiffs failed to procure any additional evidence desired, which would have been available under other circumstances. Conceding that the court might have denied the motion to admit further evidence without any apparent abuse of discretion, as in the case of *Kobler v. Wells*, 26 Cal. 613, cited by respondent, it does not necessarily follow that it was an abuse of discretion to grant the motion; for, in cases where the decision is governed entirely by the discretion of the court, it may often happen that a decision in favor of either party would not appear to be an abuse of discretion. To say that the law allows no latitude for the exercise of discretionary power is to deny that the power is discretionary. The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and

motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice.

3. On the trial before the jury, McFarland testified for the plaintiff as to the number of cattle delivered to the defendant. On the trial before the court, three months later, the defendant offered to prove by his witness, Preston, that, after McFarland had testified, he made a statement, in regard to the number of cattle, inconsistent with his testimony before the jury. Thereupon the following objection by counsel, and ruling by the court, were made: "Mr. Nicol. I object upon the ground that no proper foundation has been laid to impeach his testimony. Mr. Budd. If it was not after he had testified, he cannot be impeached in that way. Mr. Campbell. It was after. The Court. Answer the question. Mr Budd. Plaintiff excepts." The witness then testified to a statement by McFarland made after he had testified before the jury, inconsistent with his testimony before the jury. Counsel for appellants contend that the admission of Preston's testimony was error. I think, however, that the objection, as modified by Mr. Budd, who appears to have been the leading counsel for plaintiffs, was no objection to proving what McFarland said after he testified before the jury; and that the objection must have been so understood by the court and counsel for defendant.

4. The deposition of J. W. Tullock, assessor of Stanislaus county, was offered in evidence by defendant to show how many cattle were assessed to Clavey in 1874. The plaintiffs objected to questions numbered 7, 8, 9, 10, and 11. Their objection was sustained as to 9 and 10, but was overruled as to 7, 8, and 11. Those questions were as follows: "No. 7. State whether or not the assessment list of that year contains certain cattle belonging to the said Clavey? No. 8. State just what the assessment book shows with reference to these cattle, with regard to number, value, and quality? No. 11. State whether or not the 124 head of cattle above referred to include all the cattle which were assessed to William Clavey in 1874." The answers to these questions appear to have been read by the witness from page 22 of the assessment roll of 1874, showing that 124 head of cattle and no more had been assessed to Clavey that year, and that "124 head of stock cattle had been removed to Tuolumne county." The grounds of the objections were that No. 7 was incompetent, irrelevant, and not the best evidence; the same as to No. 8, and also that it does not appear who made the assessment, or that Clavey signed or had anything to do with it; and that No. 11 did not ask for the best evidence. It is claimed by appellants' counsel that the court erred in overruling their objections to the questions numbered 7, 8, and 11. If there was error in any of these rulings, it was harmless. The evidence objected to tended to prove only that Clavey owned no more than 124 head of cattle at the time of the assessment in 1874; and, therefore, could not have been applied to any other issue than

that as to the number of cattle delivered to defendant. It had no bearing whatever upon the issues as to settlements, and could not have influenced or contributed to the findings upon these issues. These findings are controlling, and dispose of the case in favor of the respondent without regard to the number of cattle delivered.

5. Several other exceptions to rulings of the court were taken, but they appear to be either grounded upon misapprehension of the facts or unimportant in view of the settlements found. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(3 Cal. Unrep. 372)

PEOPLE *ex rel.* BOARD OF STATE HARBOR COMMISSIONERS V. ROBERTS. (No. 12,989.)

(Supreme Court of California. Jan. 4, 1891.)

#### WHARFAGE TAXES—CONSTITUTIONAL LAW.

1. Wharfage charges imposed by the board of harbor commissioners on the owner of a barge and lighter, which were kept within a slip constructed, repaired, and dredged by the board, are valid, and not in violation of Const. U. S. art. 1, § 10, which prohibits a state from levying duty on tonnage without the consent of congress.

2. Where a lighter actually received the support of a wharf in discharging into and loading from a vessel tied to the wharf, the fact that the vessel lay between the wharf and the lighter, and that the owner of the vessel had paid regular wharfage rates, does not affect the right of the board of harbor commissioners to collect wharfage rates from the owner of the lighter.

3. While Act Cal. March 17, 1880, which amends Act March 15, 1878, so as to exempt vessels engaged solely in domestic commerce from the wharfage tax, to which vessels engaged in interstate commerce still continue subject, may be invalid, in so far as it discriminates against vessels engaged in interstate commerce, yet the board of harbor commissioners, which is the agent of the state, with only such powers as are conferred on it by the legislature, cannot disregard the amendment, and collect wharfage taxes from vessels engaged solely in domestic commerce.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

*Rosenbaum & Scheellne*, for appellant. *T. C. Coogan*, for respondent.

PATERSON, J. This action was brought on behalf of the people on relation of the harbor commissioners to recover a certain sum, claimed to be due to plaintiff for wharfage. The defendant's barge and lighter part of the time were attached to the wharves by hawsers and lines fastened to mooring piles, which had been placed there for that purpose by the respondents, and part of the time they were not attached to the wharves, but were fastened by lines to the sides of other vessels, which were moored up against and fastened to the wharves. Appellant contends—*First*, that his vessels did not use the wharves, and, therefore, the charge is one upon tonnage and in conflict with section 10, art. 1, of the constitution of the United States; *second*, that appellant is exempt from the charge made, because his vessels are en-

gaged in transferring merchandise between different points within the state.

There is no merit we think in the first contention. The court found that the appellant did use the wharves, and that finding is not challenged, but it also found that appellant's vessels were not in all cases attached directly to the wharves. The barge and lighter were, however, within the slips which were constructed, kept in repair, and dredged by the respondents; and appellant could not have made use of them unless they had been so repaired and dredged. Under these circumstances, wharfage charges are valid, and the constitutional provision relied upon by appellant is not violated. *People v. Gas-light Co.*, 54 Cal. 248; *People v. Williams*, 64 Cal. 502;<sup>1</sup> *State Tonnage Tax Cases*, 12 Wall. 219; *Cannon v. City of New Orleans*, 20 Wall. 577; *Benedict v. Vanderbilt*, 1 Rob. (N. Y.) 194. Furthermore, the barge and lighter were, when within the slips, actually receiving the support of the wharves in discharging into and loading from vessels which were tied thereto. They were practically tied to the wharves, although there was a vessel between them and the wharf itself, and the fact that the owners of the vessels lying next to the wharf had paid regular wharfage rates does not affect the right of the harbor commissioners to collect from the defendant. *Vicksburg v. Tobin*, 100 U. S. 430.

We are of the opinion that appellant's second contention is sustained by the act of the legislature, approved March 17, 1880, amending section 6 of an act entitled "An act concerning the water front of the city and county of San Francisco," approved March 15, 1878. This amendatory act provides that "no wharfage shall be collected on any merchandise or other article loaded on any vessel or railroad car, in the city and county of San Francisco, for the purpose of being transported to any port or place in the state of California, nor on any merchandise or other article loaded on any vessel or railroad car, at any port or place in the state of California, and arriving in the city and county of San Francisco." It is claimed by respondents that this act is unconstitutional, and they rely upon the decision of the supreme court of the United States, in the case of *Guy v. Baltimore*, 106 U. S. 434, in support of this proposition. We do not think that case is in point. It was held in that case that a state could not employ its property for public use so as to hinder, obstruct, or burden, interstate commerce in the interest of commerce wholly internal to that state; could not build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states. In that case an ordinance of the city of Baltimore required vessels laden with the products of other states to pay, for the use of the public wharves of that city, fees which were not exacted from vessels landing thereat with the products of Maryland. It does not follow that because vessels plying between San Francisco and ports outside of this state are exempt from wharfage, under the de-

<sup>1</sup>2 Pac. Rep. 393.



cision in *Guy v. Baltimore*, the defendant's vessels should not be exempt therefrom. Application of the rule contended for by respondent, would be a discrimination against domestic vessels. The power to collect wharfrage is derived from the legislature, and the board of harbor commissioners is the agent of the state, with such powers, and no others, as are conferred upon it by the legislature. The court found that "both said lighter and said barge were engaged in transporting freight between different points in the state of California." Judgment reversed, with directions to the court below to enter judgment on the findings in favor of the defendant.

We concur: WORKS, J.; MCFARLAND, J.; SHARPSTEIN, J.

(87 Cal. 399)

SUKEFORTH v. LORD. (No. 13,363.)

(Supreme Court of California. Jan. 5, 1891.)

PLEADING—AVERMENT OF FRAUD—INSUFFICIENCY—WAIVER—FRAUDULENT CONVEYANCES.

1. Failure to demur to a general allegation of fraud, or to object to evidence offered at the trial, is a waiver of the insufficiency of the pleading. Distinguishing *Albertoli v. Branham*, 80 Cal. 633, 22 Pac. Rep. 404, and overruling *Sukeforth v. Lord*, 23 Pac. Rep. 296.

2. The fact that the verdict is against the party alleging the fraud does not deprive him of the benefit, on appeal, of the waiver by his adversary of the insufficiency of the plea.

3. The fact that no such objection appears in the statement, on motion for new trial, which contains all the evidence, is a sufficient showing that no such objection was made.

4. In an action for wrongful attachment, the answer denied generally plaintiff's ownership, and then alleged that, by a conspiracy between a debtor of defendant and plaintiff, such debtor conveyed the property in question to plaintiff, with intent to defraud his creditors. Held, that the allegation of fraud so qualifies the denial of ownership that a demurrer on the ground that fraud is not sufficiently alleged goes to the whole answer.

5. Where the record shows that counsel stated to the court, just as the jury were retiring, that he wished an exception to all the instructions given for the other party, and refused for himself, and that the court told him to have them entered, the exception is sufficient as to the written charges, though neither the minutes of the court nor the reporter's notes show that any exception to instructions was reserved or entered. Overruling *Sukeforth v. Lord*, 23 Pac. Rep. 296.

6. Where a creditor attaches property transferred by his debtor to another, on the ground that the transfer is fraudulent, and is sued by the transferee for its value, which is admitted to be a certain sum, it is error to instruct that the jury may find for plaintiff for a sum less than the admitted value.

7. It is error to refuse to instruct that a transfer by an insolvent may be vitiated by constructive as well as actual fraud.

8. It is likewise error to refuse to instruct that the acceptance by a creditor of an insolvent debtor of an amount of property largely in excess of his demand is a circumstance from which fraud may be inferred.

9. An agreement between the creditor accepting the property and the debtor that the surplus proceeds shall be refunded to the debtor is a circumstance tending to show that the transfer was made with intent to hinder and defraud creditors, and it is error to refuse an instruction to that effect.

In bank. On rehearing. For former report, see 23 Pac. Rep. 296.

George A. Rankin, (T. C. Coogan, of counsel,) for appellant. Cross & Simonds, for respondent.

BEATTY, C. J. This is an action to recover damages on account of the seizure by defendant, under a writ of attachment, of certain goods claimed by the plaintiff. The case was under the following circumstances: On the 15th of August, 1888, L. M. Sukeforth, who, for a number of years theretofore, had carried on a certain carpet business at Nevada City, being largely indebted and insolvent, sold, transferred, and delivered to the plaintiff, who is his brother, for a nominal consideration of \$1,500, his entire stock in trade, all his outstanding bills and accounts, and all other property exempt from execution which he then possessed. Among his creditors, at the time of this transfer, were Sloan & Co., wholesale carpet dealers, who caused a suit to be instituted upon their claim, and, in said suit, caused an attachment to issue, which was levied by the defendant, as sheriff of Nevada county, on the stock of carpets, etc., then in the possession of the plaintiff, and claimed by him as vendee of his brother. Thereupon, this action was commenced against the sheriff, who defends upon the ground that the sale from L. M. Sukeforth to the plaintiff was fraudulent and void as to creditors. The case was tried by a jury, who found for the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial. At the trial in the superior court all questions of fact were eliminated from the case by the mutual admissions of counsel, except the single one of fraud in the sale, and all the assignments of error, which we are asked to consider, relate exclusively to that matter.

A preliminary objection is made by the respondent to any consideration of the errors assigned, upon the ground that the answer of the defendant was insufficient to raise the issue of fraud. The allegations of the answer upon this point are as follows: "That the defendant is informed and believes, and, upon such information and belief, so avers the fact to be, that, on or about the said 15th day of August, 1888, while said L. M. Sukeforth was so as aforesaid engaged in business, and while he was so aforesaid indebted, he, said L. M. Sukeforth, and the plaintiff, who is his brother, conspired together for the purpose and with the intent to hinder, delay, and defraud the creditors of said L. M. Sukeforth out of their just debts and demands against him, said L. M. Sukeforth; and with such purpose and intent, the said L. M. Sukeforth made a pretended, false, and fraudulent sale of the property mentioned in plaintiff's complaint, and of all other property, save such as is by law exempt from execution, owned by said L. M. Sukeforth, to the plaintiff, and, with such purpose and intent, the said plaintiff received said pretended, false, and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise."

If there had been a demurrer to the answer, it would probably be held, on the authority of *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. Rep. 950, and other cases cited by respondent, that these allegations were insufficient as a plea of fraud. Or, if evidence tending to prove the supposed fraud had been objected to at the trial, upon the ground of immateriality, the objection would probably have been sustained, unless the answer had been amended. But there was no demurrer to the answer, and at the trial evidence was offered and admitted without any objection whatever, which tended in the strongest manner to establish every fact necessary to invalidate the sale on the ground of fraud. The question therefore is whether a party, who has treated an answer containing a general allegation of fraud as sufficient to raise the issue by going into a trial of all the questions involved without any objection, can make the point here for the first time, that there is no such issue in the case. We think there can be no manner of doubt that, if the verdict and judgment in this case had been in favor of the defendant, and the plaintiff had been appealing, he would not have been heard to allege the defect in the answer, which he relies on here to prevent a consideration of the errors assigned by the defendant. In *King v. Davis*, 34 Cal. 106, the plaintiffs were appealing, and in this court objected to the answer on precisely the ground taken by the respondent here. But the court said: "The point made by the appellant, that the answer does not make an issue of fraud, cannot be considered by us further than to say that it comes too late. The answer contains a general allegation of fraud, and the appellant went to trial upon the issue thus joined, without making any exception to the answer on the score of insufficiency. Nor was any objection made by the appellant to the testimony introduced by the respondent in support of the issue of fraud; on the contrary, that issue was assumed to have been properly made, and was tried upon its merits. Under these circumstances, an objection to the answer that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, cannot be entertained by us." This proposition, that the failure to allege the particular facts constituting fraud, or estoppel, or other special defenses pleaded in general terms, may be waived by failure to demur, or to object to the evidence offered at the trial, has been affirmed over and over again in a long series of cases running through our reports from the first volume down to the case of *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. Rep. 386. We refer to the following, among many others: *Lee v. Figg*, 37 Cal. 335; *Hutchings v. Castle*, 48 Cal. 155; *Bull v. Ford*, 66 Cal. 176, 4 Pac. Rep. 1175. Against this long list of cases is cited the recent decision of department 1 of this court in *Albertoll v. Branham*, 80 Cal. 633, 22 Pac. Rep. 404, which is supposed to establish a different doctrine. If that case could not be distinguished from this, it would be sufficient to say that it is not law. A decision of one department of this court cannot be held to have over-

ruled a long line of cases decided by the whole court, especially when they are not even named, or otherwise referred to, in the department decision, and were evidently not considered. But the truth is that case differed from this, and from the cases above cited, in the important particular that the evidence of fraud was objected to at the trial, though the report does not show it. By reason of this fact, probably counsel for defendant did not make the point that there had been any waiver of defects in his plea of fraud, and did not cite any of the cases holding the doctrine above quoted from *King v. Davis*. His whole contention was that his plea was sufficient, and that was the only question which the department decided. Therefore, the rule of *King v. Davis* is still unquestionably the law of this state, as it unquestionably ought to be. But the respondent contends that it does not apply to this case, because—*First*. The answer was in such form that he could not have demurred to it on any ground allowed by the statute, and, therefore, he waived nothing by failure to demur. *Second*. The record does not show that he failed to object to evidence of fraud. *Third*. The defect in the plea was not cured by verdict, as in *King v. Davis*, and other cases in which the verdict was in favor of, and not against, the plea, as it is in this case.

With respect to the first point, respondent says the plea of fraud was not separately stated, but was coupled with a denial of plaintiff's ownership, which made the answer good against the general demurrer to the whole answer, and a demurrer to the plea of fraud impracticable. We think, however, that the plea of fraud is separately stated in the answer, and might have been separately demurred to. But, if it was not separately stated, it must be regarded as qualifying the denial, in general terms, of plaintiff's ownership, and showing that such denial meant nothing more than that the plaintiff was not owner of the goods, because the transfer from L. M. Sukeforth was void as to creditors, by reason of fraud. In which case, assuming that the fraud was insufficiently pleaded, the whole answer was demurrable, on the ground that it did not state facts sufficient to constitute a defense, or that it was ambiguous, uncertain, and unintelligible. Code Civil Proc. § 444.

As to the second point. It is true, as contended by respondent, that there is no express statement in the record to the effect that he failed to object to the evidence of fraud, but we do not deem such an express statement necessary, if the fact can be clearly inferred from the statement, as we think it can. The defendant, in moving for a new trial, specified in his statement the particular grounds upon which he relied, and every specification of fact or law showed that he relied upon having proved every fact necessary to establish a fraudulent sale. He also set out the evidence to sustain his specifications, all appearing to have been received, without any objection, upon the ground that fraud had not been pleaded. If any such objection had been made, it was the right of the respondent to amend the proposed

statement so as to show it, and undoubtedly he would have done so. The fact, therefore, that no objection appears to have been made is proof that there was none. To hold otherwise would destroy all the advantage of the doctrine of waiver; for, in all cases where the party had not been warned of the defects of his plea by demurrer or objection to evidence, he would be wholly unaware of the necessity of making it appear by his statement or bill of exceptions that he had not been warned, and the court would merely have saved him from one snare in order to involve him in another.

As to the third ground for denying the defendant the benefit of the doctrine of waiver, we think that the fact that he is appealing is rather in his favor than otherwise. In *King v. Davis*, as in all the cases in which the plaintiff was appealing, the only consequence of a reversal of the judgment on account of the insufficiency of the plea would have been a retrial of the cause upon amended pleadings; but to affirm the judgment on that ground, when the defendant is appealing, would leave him without remedy, or hope of redress. Therefore, when he is appealing in a meritorious case, in which he might prevail on a new trial under correct rulings, it would be even more unjust to allow plaintiff to object to his plea in this court for the first time than it would have been to allow the objection in the cases cited. For these reasons we conclude that the defendant is entitled to have his appeal considered on its merits.

His first proposition is that the evidence showed, without substantial conflict, that the transfer of the property in controversy by L. M. Sukeforth to plaintiff was fraudulent and void as to creditors, and that the superior court erred in not granting a new trial on that ground. It is certain that many facts were established, without any conflict in the evidence, from which the jury would have been justified in inferring a fraudulent intent upon the part of plaintiff and his brother in making and accepting the transfer; but we are not willing to say that such inference was absolutely necessary. It is, however, certain that the case was such as entitled the defendant to have the issue of fraud submitted to the jury upon instructions fully and fairly stating the law applicable thereto. This we think was not done, the court having given instructions that should have been refused or qualified, and refused instructions that should have been given. But here, again, we are met with the technical objection that the errors of the court in giving and refusing instructions cannot be reviewed, because they were not excepted to in time, or at all. The objection is based upon the following statement in the record: "After the officer had been sworn to take charge of the jury, and as the jurors were retiring, but before they were out of the court-room, counsel for the defendant stepped up to the side of the bench, and said to the court: 'I would like an exception entered to all the instructions given by the court, at the request of the plaintiff, to all the instructions asked by the defendant, and refused by the court,

and to all instructions given by the court on its own motion.' The court said: 'Have any exceptions entered you desire.' Counsel said: 'Shall I have the clerk enter them?' The court replied: 'If you choose to do so.' Neither the minutes of the court, kept by the clerk, nor the reporter's notes of the trial, show that any exception to instructions was reserved or entered." This shows very clearly that a sufficient exception was taken to the written requests to charge given and refused, (*McCreery v. Everding*, 44 Cal. 249; *Shea v. Railroad Co.*, Id. 429,) though it was probably insufficient as an exception to the oral charge of the court, (*Rider v. Edgar*, 54 Cal. 130, and cases there cited.) We will, therefore, consider only the exceptions to the written charges.

It was error to give plaintiff's instruction No. 15, which was as follows: "If you find a verdict for the plaintiff in this case, your verdict will be for the value of the property converted by the defendant at the time of the conversion, not exceeding the sum of \$4,000, together with interest thereon from August 25, 1888, to this date, at the rate of seven per cent. per annum." The property taken by defendant was alleged in the complaint, and admitted by the answer, to be worth \$4,000, and a verdict for the plaintiff could not properly have been rendered for less than \$4,000, and interest. Under this instruction, the jury were allowed to find, and they did find, a verdict for less than \$4,000. This does not look like an injury to the defendant, but he complains that he was injured by the instruction in this way. If the jury had been compelled to find for the plaintiff, for \$4,000, or not at all, they would have found for defendant, but, being allowed to find a smaller verdict for plaintiff, they eased their consciences by a sort of compromise between what they wished and what the law demanded. We scarcely think that this would have been a ground for reversal, but as the case is to be remanded for a new trial on other grounds, and as the defendant deems himself injured by this instruction, we feel constrained to pronounce it erroneous.

It cannot perhaps be said that the first, eleventh, and thirteenth instructions are positively erroneous. They are all to the effect that a transfer of property by a debtor to one creditor in preference to others is not necessarily fraudulent. It would have been better, however, in view of the facts of this case, to have added the qualification that such transfer must be made in good faith.

The instructions asked by defendant, and numbered 4, 6, 11, and 16, were all correct and pertinent, and the refusal to give them was error, and error clearly prejudicial to the defendant. By the first, (No. 4,) the defendant sought to impress upon the jury the view that a man is guilty of fraud in doing what the law deems fraudulent, although he may not be conscious that he is committing any wrong. By the second, (No. 6,) the court was asked to instruct the jury that the acceptance by a creditor from an insolvent debtor of an amount of property largely in excess of his demand is a circumstance tending to

prove a fraudulent intent. By the third, (No. 11,) the court was asked to charge as follows: "If a debtor, who is insolvent, transfer to one of his creditors all his property, except such as is exempt from execution, with an understanding or agreement between himself and his creditor that the latter will dispose of the property so transferred, and, after paying himself, refund whatever remains to the debtor, such an understanding or agreement would be a circumstance tending to show that the transfer was made with intent to delay and defraud creditors. And, where the value of the property so transferred is grossly in excess of the creditor's claim, that is a circumstance tending to show that such an understanding exists." The fourth (No. 16) contains a correct statement as to the necessity in most cases of relying upon circumstantial or presumptive evidence to prove fraud, and of the amount of proof required to establish it satisfactorily. From the character of the evidence in this case, it was important that the jury should be correctly informed on all these points, and, for the error in refusing these instructions, the judgment and order appealed from must be reversed. We see no error in the other rulings complained of. Judgment and order reversed, and cause remanded.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

(87 Cal. 390)

VANCE v. SUPERIOR COURT OF SACRAMENTO COUNTY *et al.* (No. 13,936.)

(*Supreme Court of California*. Jan. 4, 1891.)

BILL OF EXCEPTIONS—SETTLEMENT—POWER OF SUPREME COURT.

Code Civil Proc. Cal. § 652, providing, "if the judge in any case refuses to allow an exception in accordance with the fact, the party desiring the bill settled may apply by petition to the supreme court to prove the same," does not apply to a case where the trial court in settling the bill of exceptions makes amendments in the statement of the proceedings and evidence.

In bank.

Amos H. Carpenter, for petitioner.  
Wilson & Wilson and A. L. Rhodes, for respondent.

MCFARLAND, J. This proceeding is in the form of an original petition to this court in which it is stated (substantially) that the petitioner, Vance, was a defendant in a certain action in the court of respondent; that, judgment having been rendered against him in said action, he presented to the respondent, judge of said court, a draft of a bill of exceptions, which, it is averred, contained a true statement of the proceedings and evidence in said action; that the said judge changed the said draft by striking out certain things from its statement of said proceedings and evidence, and inserting certain other things therein, and settled said bill as so amended by him; and that the amendments made by said judge were incorrect and untrue. The prayer of the petition is that this court "will allow and settle said bill of exceptions \* \* \* as set forth in the printed pages of this pe-

tition." The printed pages of the petition contain the entire draft of the bill of exceptions, which purports to state all the proceedings and evidence in the action referred to; and the written part shows the amendments made by the judge before the settlement. The amendments do not appear to us to be material, and yet they may have some importance which does not appear here.

If this proceeding can be maintained at all, it must be by virtue of section 652, Code Civil Proc. The language of that section is as follows: "If the judge in any case refuse to allow an exception in accordance with the fact, the party desiring the bill settled, may apply by petition to the supreme court to prove the same." Now, it seems quite apparent upon the face of this language that the petition must be based upon the refusal of the judge to allow an exception which is "an objection upon a matter of law to a decision made \* \* \* by a court, tribunal, judge, or other judicial officer," (Code Civil Proc. § 646;) but, in the petition now before us, there is no averment or showing or pretense that the respondent refused to allow any exception whatever, or that the proceedings or evidence about which the dispute occurs had any reference whatever to any exception which he refused to allow. The petitioner, therefore, clearly fails to bring himself within the language of the section. It is argued, however, by petitioner, as it has been argued by counsel in other recent cases, that there should be no "narrow" construction given to section 652, but that this court should construe it to extend to every imaginable case where, in a statement on motion for a new trial, or (which is practically the same thing) in a long bill of exceptions covering the whole trial, there is a dispute between the attorney and the presiding judge as to what evidence had been introduced, or what in other respects had occurred at the trial. This is an attempt, without warrant in the canons of construction, to assume that the legislature meant more than it said. No interpretation can justly be called "narrow" which follows statutory language which is itself *ex industria* narrow. When section 652 was enacted, the general statutory law, in accordance with the inherent distinction between trial and appellate courts, was that the judge of the trial court alone should make that record which otherwise would not be record, by settling statements and bills of exceptions; and that the appellate court should act upon records as they came to it. If the legislature had intended to entirely overturn that ancient rule, and to send the appellate down into the trial court to construct for the latter an entire history of a trial there, it certainly would not have confined itself to the "narrow" language which it employs. But it evidently approached the subject with the greatest caution. It said nothing about statements on motion for new trial, or about what evidence, or what history of proceedings generally, should go into statements or general bills of exceptions; nor did it

undertake to give this court general power to reconstruct such statements or bills, or determine what evidence should go into or be stricken out of them. It refers solely to a case where the judge is charged with having refused to allow an exception; that is, where a party claims that he made an "objection upon a matter of law to a decision made" by the court, and took an exception to the decision, and the court refuses to certify in a bill or statement that such an exception was taken, or that such an occurrence took place. In such a case the party may prove, if he is able, in this court, that he did take such exception, and may prove, no doubt, in that connection, sufficient surrounding facts to show what the point of exception is. If he succeeded in making his proof, his exception will be here put into a bill, certified by this court through its chief justice, and filed with the clerk below, where it will take its place among the other things which constitute the record. But when the Code speaks of an exception which the judge has refused to allow, it necessarily refers to an exception which the judge had the power to allow, and section 652 has no application except where a judge has refused to allow such an exception. If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character, and under his judicial oath, cannot be overcome by the contradictory statement of somebody else, why it must be put into that large class of evils (real or imaginary) which this court has no jurisdiction to remedy. These views are in accordance with *Landers v. Landers*, 82 Cal. 480, 23 Pac. Rep. 126. They are also expressly held in the recent case of *Hyde v. Boyle*, 24 Pac. Rep. 1059, (decided November 7, 1890,) although in the latter case it does not appear that the opinion was concurred in by a majority of the court. And, for the reasons above stated, the application in the case at bar must be dismissed.

It may be noticed that counsel for respondent raises here, for the first time, the point that section 652 is unconstitutional, for the reason that by it the legislature undertook to confer upon this court powers, and to impose upon it duties, not embraced in any of the categories of jurisdiction enumerated in that part of the constitution by which the court is created. But, as the case is already disposed of, we do not care to consider the constitutional question at this time. The prayer of the petition is denied, and the proceeding dismissed.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.

(15 Colo. 316)

# HORN v. REITLER.

(Supreme Court of Colorado. Dec. 19, 1890.)

## PLEADING—AMENDMENT—REFUSAL OF NONSUIT.

1. After a judgment has been reversed by the supreme court upon appeal, and the cause remanded for a new trial, the trial court may permit the pleadings to be amended whenever the ends of justice will be subserved thereby.

2. An application to amend under such circumstances is addressed to the sound discretion of the trial court, and its decision thereon will not ordinarily be disturbed.

3. Error in overruling a motion for a nonsuit, when such motion is based upon the failure of evidence to establish plaintiff's cause of action, will not avail the defendant upon appeal, provided the omitted evidence be supplied at a subsequent stage of the trial.

(Syllabus by the Court.)

Appeal from district court, Jefferson county.

Suit by appellee, Reitler, as administrator of the estate of Robert Standerling, deceased, to recover certain cattle claimed by appellee, Horn, under the following written instrument: "Bailey, Colo., April 11, 1884. I hereby assign, transfer, and sell to P. C. Horn twenty-five (25) head of cattle branded 'S' to secure him for his bond, given for me in my suit against J. Carrothers in justice's court, before C. M. TAYLOR. If said costs are paid by me this bill of sale shall be void. ROBERT STANDERLING. W. W. HOOPER." In the district court plaintiff had judgment. The remaining facts sufficiently appear in the following opinion of the court, or will be found in connection with the former opinion, therein referred to.

S. T. Horn and H. C. Cassidy, for appellant. Robt. E. Foot, for appellee.

HAYT, J., (after stating the facts as above.) Upon the previous appeal in this case, the facts, as they then appeared upon the record, were fully set out in the statement preceding the opinion, and will not be here repeated. See *Horn v. Reitler*, 12 Colo. 310, 21 Pac. Rep. 186. Upon the evidence introduced at the first trial, the district court directed a verdict for the plaintiff. On review in this court, this action of the trial court was held to be erroneous, and the judgment for this reason reversed. It was then said that, under the pleadings and admissions at the former trial, the material issues to be determined were: "Did Standerling make a sale of the cattle to Horn with a condition of defeasance for a valuable consideration? \* \* \* And did Horn acquire rights thereunder which had not been divested at the time of the commencement of the action?" The case having been remanded, a new trial was had in the district court at the November, A. D. 1889, term thereof, resulting again in favor of appellee, Reitler, as administrator of Standerling. To reverse this judgment, the cause is again brought to this court by appeal.

The first error assigned by appellant relates to the order of the court allowing plaintiff to file an amended replication. In this amended pleading, plaintiff admits the giving of the bill of sale with the condition of defeasance as set forth in defendant's answer, and alleges, by way of discharge and avoidance thereof, that the bond mentioned in said instrument was the usual cost-bond provided by statute, and that all costs in the suit mentioned which Standerling was by law required to pay had been paid by him; that he (Standerling) was the plaintiff in the suit in which the bond was given, and recovered judgment therein; and that no costs were

found or adjudged against him; and that Horn, with full knowledge of all these facts, fraudulently and secretly confessed judgment for certain alleged costs in other cases, not covered by the bond. Facts are also alleged connecting the purchaser of the cattle with such fraudulent acts. The amended pleading appears to have been necessary to enable the plaintiff to fully and thoroughly present upon the trial his defense to the new matter set up in the answer, and was properly allowed. See *Horn v. Rettler*, *supra*. It is not claimed that defendant was surprised at the nature of the matters pleaded therein, and, if he had shown such surprise, this would more properly have furnished a ground for a continuance than a valid objection to the allowance of the amendments. It is the policy of the Code to allow amendments to pleadings whenever the ends of justice will be subserved thereby, and it has been repeatedly held by this court that such amendments may be permitted in the discretion of the court after one trial has been concluded and a new trial ordered. Such applications are addressed to the sound discretion of the trial court, and its decision thereon will not ordinarily be disturbed.

At the last trial, plaintiff rested his case, in the first instance, upon evidence of his ownership of the cattle on April 11, A. D. 1884, and defendant's refusal to surrender the same upon demand. At this point, a motion for a nonsuit was interposed by the defendant, based upon the insufficiency of the evidence to warrant a verdict for plaintiff. This motion being overruled by the court, an exception to such ruling was duly reserved, and error assigned thereon. The reasons given by the court for overruling the motion for a nonsuit were, in substance, as follows: The plaintiff having offered proof to show that he was the owner of the cattle on the 11th day of April, 1884, and it standing admitted by the replication that a conditional sale to the defendant was made of the property upon that day, it was incumbent upon defendant to show that the sale had become absolute. If the defendant desired to have this ruling of the court reviewed upon appeal, he should have stood upon his motion, and refused to introduce further testimony. This he did not do. Both parties thereafter proceeded with the trial in the order designated by the court, and the issue as to whether or not the bill of sale at any time became absolute was fully tried, and determined against appellant. The defendant thus waived the right to have the ruling of the court upon his motion for a nonsuit, based upon the absence of testimony, (which was afterwards supplied,) reviewed. Error in overruling a motion for a nonsuit, when such motion is based upon the failure of evidence to establish plaintiff's cause of action, will not avail the defendant upon appeal, provided the omitted evidence be supplied at a subsequent stage of the trial. *Railway Co. v. Henderson*, 10 Colo. 1, 13 Pac. Rep. 910; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Association v. Willard*, 48 Cal. 614.

It is unnecessary to consider in detail

the remaining assignments of error. The case appears to have been fairly tried in accordance with the views expressed in the former opinion of this court. It was then determined that the conditional bill of sale was, in effect, a chattel mortgage, and, by the pleadings as amended, the case was made to turn upon whether or not Horn became liable upon his bond to the payment of costs in the case of *Standering v. Carrothers*. The issue was submitted to the jury under proper instructions, and decided against the appellant. The evidence seems to fully warrant the verdict. The judgment will therefore be affirmed.

#### ON REHEARING

(Jan. 10, 1891.)

**PER CURIAM.** Upon petition for rehearing, counsel for appellant urge with renewed zeal that the denial of the motion for a nonsuit by the court below was fatal error. The Code (section 166) provides that, if plaintiff fails to prove a sufficient case for the jury, a judgment of nonsuit may be rendered upon motion of defendant. If the case proved by plaintiff be clearly insufficient, the court would certainly, upon defendant's motion, be justified in rendering a judgment of nonsuit. This is the doctrine announced in *Behrens v. Railroad Co.*, 5 Colo. 400, upon which counsel place so much reliance. But it does not necessarily follow that, if the court refuse defendant's motion for a nonsuit, when plaintiff fails to prove a sufficient case for the jury, the error will be such as to cause a reversal of any judgment which may thereafter be rendered in favor of plaintiff; for, if defendant elects to proceed with the trial, he does so at the risk that the defect in the proof of plaintiff's case may be supplied either by evidence given in behalf of defendant or by evidence permitted to be given by plaintiff in his original case. See Code, § 187; *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. Rep. 705; *also Railway Co. v. Henderson*, 10 Colo. 1, 13 Pac. Rep. 910, (cited in the original opinion.) Undoubtedly, if the defect in the proof be not afterwards supplied at the trial, the error in refusing the nonsuit is not cured; and, if repeated by a final judgment in favor of plaintiff, the judgment may be reversed, either for the original or repeated error. The other matters urged in favor of a rehearing do not require discussion. The petition for rehearing is denied.

(15 Colo. 173)

#### OHIO CREEK ANTHRACITE COAL CO. v. HINDS.

(*Supreme Court of Colorado*. Dec. 5, 1890.)

#### PRINCIPAL AND AGENT—PLEADING AND PROOF—APPEAL—PRACTICE.

1. The fact that the manager of a corporation, in settling accounts between the corporation and his mother, who was engaged in boarding its officers and employees, included debts due from himself as charges against her, does not justify the corporation, after he has ceased to be its manager, to charge her with his debts without her consent, even though it is done under his direction.

2. Where the itemized statement of the account sued on gives as a single item a balance

agreed on at a certain date, and the evidence sustains the item, the admission of evidence of prior balances struck between the parties is not inconsistent with the statement.

3. Where an answer is filed and the action contested, plaintiff may, where the evidence justifies it, recover judgment for a larger amount than that prayed for in the complaint.

4. Where a judgment for plaintiff is erroneous only because of the disallowance of a single item in the counter-claim, the cause may be remanded, with directions to enter judgment for the amount due after deducting said item, without a new trial.

Appeal from Gunnison county court.

*Thomas Bros. & Wegener*, for appellant.  
*Louis Boisot*, for appellee.

HELM, C. J. In 1885, the appellant company was organized as a successor to the Mount Carbon Anthracite Coal Company, which at the same time ceased to exist. The husband of appellee was a director, also a member of the executive committee, while her son was the superintendent and general manager of both companies. In the spring of 1885, appellee took charge of the company's boarding-house, under an arrangement by which she was to receive from it \$26 per month for each employe boarded. During the succeeding two years, she obtained, from time to time, groceries and other merchandise, as well as cash, from the company. The keeping of her accounts, and the making of her settlements, appear to have been left almost entirely to the supervision of her son. He frequently had personal obligations of his own charged to his mother's account, and, while he remained, no objection was made because of the items thus entered against her. On the 1st of June, 1887, the son terminated all connection with the company, and soon afterwards left the state. He, however, directed that all claims thereafter made by his creditors against him be charged to his mother's account. Subsequent to the date last mentioned, bills aggregating a large amount, for which the son was responsible, were thus debited. In September of the same year, the present action was brought by appellee to recover a balance due her. The company pleaded a set-off or counter-claim, exceeding in amount the sum demanded in the complaint. All of its alleged counter-claim accruing subsequent to the 1st of June, 1887, was disallowed at the trial, and appellee recovered judgment for \$1,902.

The practice of the son in occasionally charging personal items of his own to appellee's account while he was the company's superintendent and general manager, in and of itself, did not warrant a continuance thereof after his connection with the company had ceased. Nor did this practice, coupled with the fact that, while such superintendent and general manager, he attended to the settlement of her accounts, establish such an agency as enabled him to bind her by an express contract to operate after his departure. The evidence indicates that he arranged with the book-keeper to close his personal account on June 1st, when he left, and to charge against appellee his personal debts thereafter accruing and presented to the

company, either by himself or his creditors; but there is nothing to show that appellee assented to this arrangement, or even knew of its existence, and she expressly denies her son's authority to make it. While he was managing the company's business, and settling its accounts with her, it may have been a matter of mutual convenience to adjust certain personal items in connection therewith in the manner adopted. The son was, to some extent, acting as the agent of both parties. For a portion of the time, he kept the company's books, and always, to a greater or less extent, regulated its charges, and attended to their monthly liquidation. It requires no argument to show that the habit of sometimes settling, in connection with appellee's account, items purely personal to the son, grew out of and was mainly dependent upon the son's official connection with the company, and the consequent business relationship arising between the parties; but, when the business status thus created was wholly changed by the son's absolute withdrawal from all relationship with the company, the mother should have been consulted before an attempt was made to hold her for his future debts.

Prior to the commencement of the trial, appellant made demand, under section 63, Civil Code, for an itemized statement of the account sued on. Appellee's response to this demand contained, among other items, the following: "To board of defendant's officers and employes, as per balance struck and agreed upon on or about July 1, 1887, \$1,506.01." At the trial, appellee was permitted to state that the books of the company were balanced at the end of each month, and incidentally to give the different balances thus found for the months beginning with October and ending with July. These prior balances need not have been mentioned, but the reference thereto does not sustain counsel's objection. Appellee testified that, on the 1st of July, the balance found showed an indebtedness to her of \$1,506.01. In this regard she was corroborated by McDougal, her attorney. The testimony thus given directly sustains the statement rendered. No attempt was made to relate the different items constituting this particular balance. Therefore no response on our part is necessary to counsel's argument predicated upon the hypothesis that, under the general statement mentioned, appellee was permitted to enumerate different specific items, of which appellant had received no sufficient notice.

Nor was there error in rendering judgment for a larger amount than that prayed for in the complaint. An answer being filed, and appellee's claim being contested at the trial, she could recover such a sum as the evidence showed she was entitled to, regardless of the amount designated in this part of her pleading.

But among the items in the counter-claim disallowed by the court was one for \$207.89, paid by the company to an employe of appellee. Appellee expressly admits that she requested the book-keeper to pay this claim. We cannot account for the court's failure to allow this credit,



save upon the ground of inadvertence or mistake. For error in this particular, the judgment will be reversed, but it is deemed unnecessary to readjudicate the entire controversy. The cause will be remanded, with directions that the court below enter a new judgment for the amount due after deducting the sum mentioned. Remaining objections are not considered of sufficient importance to require notice in this opinion.

(15 Colo. 302)

**SOUTH BOULDER & R. C. DITCH CO. v. MARFELL et al.**

(*Supreme Court of Colorado*. Dec. 5, 1890.)

**IRRIGATION—OPTION CONTRACT—FORFEITURE.**

1. A contract by which a ditch company agrees to furnish a consumer with a certain amount of water "year after year, so long as [he] shall pay the annual rental therefor," is a mere option which may be terminated by the consumer at the end of any year.

2. Causing the county commissioners to fix a rate for water from the company's ditch, and declining to pay more than such rate, is a termination of such contract, though the contract itself is not returned or canceled.

3. A provision in such contract that, upon failure to pay the annual rental, the consumer "forfeits and relinquishes all rights and claims whatsoever in and to the use of said water from said ditch," applies only to rights given by the contract, and does not waive the consumer's statutory right to obtain water from the company's ditch under an order of the county commissioners.

4. A proviso in such order that it shall not affect existing contracts does not exclude from the privileges of the order consumers who have signed such option contracts, and then terminated them by applying for the order.

5. Under the statutory provision allowing an application for such an order to be made by "any party or parties interested in procuring water," it is not necessary that all consumers using or seeking water from a particular ditch should join in the application.

Appeal from district court, Boulder county.

This cause was tried on an agreed statement of facts. Appellees, including Mitchell, were consumers of water from appellant's ditch. Mitchell made with appellant the following instrument of writing: "State of Colorado, County of Boulder—ss.: This agreement, made and entered into this fifth day of June, 1886, by and between the South Boulder and Rock Creek Ditch Company, of the one part, and Joseph Mitchell, of the other part, witnesseth: That the said company, for and in consideration of the sum of one dollar, to it paid by the said Joseph Mitchell, the receipt of which is hereby acknowledged, and for the additional annual rental of one hundred and fifty dollars, to be paid by the said Joseph Mitchell, agrees that, after reserving for its own special use one thousand inches of water out of the amount decreed it, to furnish to the said Joseph Mitchell, out of the overplus to which it is entitled by virtue of said decree, one hundred inches of water, according to the company's system of measurement, (provided always there is sufficient water in the South Boulder creek to furnish the same according to the decree rendered and priorities of ditches taking water therefrom,) upon the following conditions:

The company is to keep the ditch in good repair, and of sufficient dimensions to carry the amount of water decreed it, and to furnish to said Joseph Mitchell the said one hundred inches of water year after year, for and during the irrigation season of each and every year, so long as the said Joseph Mitchell shall pay the said annual rental therefor. And it is expressly agreed to, by and between the parties hereto, that the said Joseph Mitchell purchases and takes said interest in and to said water according and subject to the customs of consumers of water from said ditch; and that, in the event of his failure to get his full quota of water, or any part thereof, as aforesaid, by reason of a scarcity of water in said creek, and reservation of water by said company, and the respective interests of prior claimants, he will make no claim to or for a *pro rata* distribution of what water may be running in said ditch at such time, but will concede to all claimants and consumers of water from said ditch prior to him in point of time the full amount of their respective claims, (priorities to be numbered according to dates of agreements, and such agreement to be executed in duplicate.) And upon the failure of the said Joseph Mitchell to pay said annual rental as aforesaid, he will forfeit and relinquish all rights and claims whatsoever both against the said company and in or to the use of said water from said ditch. In witness whereof the said parties have hereunto affixed their names the day and date above written. THE SOUTH BOULDER AND ROCK CREEK DITCH COMPANY. By A. C. GOODHUE, its President. JOSEPH MITCHELL. Witness: MARY E. MILLER, Sec'y." The agreements made by the other appellees with appellant are precisely similar in general terms to the foregoing, and therefore it was deemed unnecessary to set them out in the record. Appellees received water for the year 1886, paying therefor the amount specified in the writing; but in January, 1887, they, with other landowners under appellant's ditch, petitioned the county commissioners, in accordance with the statute in that behalf enacted, to establish an annual rate of charges for the delivery of water from appellant's ditch. In pursuance of this petition, the commissioners fixed such rate at \$1 per cubic inch. Appellees tendered this amount for the year 1887, but appellant refused to accept less than \$1.50 per inch, as provided in the alleged agreement. Appellees paid the sum thus demanded, taking receipts, however, showing that 50 cents per inch thereof was paid under protest, and providing for refunding the same, if, in an agreed case to be brought, appellant's right thereto should be judicially denied. The present action being prosecuted in accordance with the above stipulation, judgment was duly rendered by the court below for the amount thus claimed by appellees.

Thomas R. Owen, for appellant. Richard H. Whiteley and Richard H. Whiteley, Jr., for appellees.

HELM, C. J., (after stating the facts as above.) The determination of this controversy depends upon our construction

of the instrument executed by the carrier (appellant) with its consumers. For present purposes, it is only necessary to consider the following principle features of the writing in question: *First*, the affirmative promise by appellant to deliver to its consumer a certain quantity of water annually, upon the annual payment of the specified consideration therefor; and, *second*, the nature and extent of the penalty affixed to the consumer's failure or omission to make this payment and receive the water. It will be observed that, in consideration of the sum of \$1, the receipt whereof is acknowledged, and the yearly payment of an "annual rental" of \$150, appellant promises to deliver to its consumer named in the instrument before us, for use during each irrigating season, 100 inches of water. This arrangement is to terminate at no particular time. It continues at the consumer's pleasure. There is no promise on his part to take the water for any specified period, or at all. If he declines to pay the price, and exercise the right conferred, no liability attaches for even nominal damages, and no cause of action against him, as for breach of contract, accrues. The undertaking of the company is somewhat similar to the "options," so common in this state, for the purchase of land, the consideration for which is usually a cash forfeit paid in advance. The option in the present case, however, is unlike the options mentioned, in that it provides for a continuous series of transactions. As above suggested, it runs for as many years as the consumer pays the sum named, and uses the water; it terminates whenever he fails or refuses to make the specified payment. The instrument provides substantially for a series of annual contracts. In legal effect, it extends on behalf of appellant an annual proposition, which when accepted by its consumer, becomes a contract for the current season. It is apparent from the foregoing that, in our judgment, appellees might terminate the arrangement at will. And when, in January, 1887, they caused the county commissioners to fix a rate for the delivery of water from appellant's ditch, and declined to pay the price named in the writing, they unquestionably evinced their intention to waive the option and relinquish the privileges connected therewith. It would, perhaps, have been more courteous had they first delivered up to appellant the copy of the instrument in their possession, and given formal notice of their intention to depend in future upon the statutory adjudication; but appellant received due notice of the proceedings before the commissioners, and the action of appellees in the premises was a legal abandonment of all privileges theretofore enjoyed under the agreement.

We turn to the remaining feature, above mentioned, of the writing under consideration. The provision is that, upon a failure to pay the annual delivery charge specified, the consumer "forfeits and relinquishes all rights and claims whatsoever, both against the said company and in and to the use of said water from said ditch." We deem it unnecessary to consider in the present opinion the question

of public policy argued in this connection by counsel for appellees. Whether appellees could, by contract forever relinquish rights relating to water conferred upon them by the constitution and statutes we need not determine. The instrument itself, in our judgment, does not indicate any such intent. It contains no declaration that, upon a failure to accept the annual proposition, and make the annual contract, the consumer abandons all right to obtain, in any manner, water from the carrier's canal. In the absence of an express declaration or clear implication to the effect that such omission or failure should produce a forfeiture of constitutional and statutory rights existing, collateral to those provided for in the agreement, such collateral rights would, in any event, unquestionably remain undisturbed. The simple and obvious meaning of the provision is that the "rights and claims" intended to be forfeited are those mentioned by the instrument itself, viz., the consideration advanced, and the privileges therein expressly enumerated. The "said water," the use of which is relinquished, is the 100 inches specifically covered by the option. Under all the circumstances, the phraseology employed fairly admits of no other construction.

When the written instrument was executed, the statute authorizing, in pursuance of constitutional mandate, the fixing of a maximum rate by the county commissioners, embodied a proviso declaring that such action should not affect existing contracts between the carrier and consumer, or the reciprocal rights and duties of the contracting parties. The order of the county commissioners appearing in the statement of facts before us contains a similar proviso. It is ably argued by counsel for appellant that these provisos apply to appellees, and that consequently appellees belong to a class expressly excepted from the statute, and from whom the privilege of invoking action by the county commissioners, or receiving the benefit of such action, is therefore expressly withheld. To the correctness of this construction we cannot subscribe. Our view is that the legislative proviso in question, and that of the commissioners as well, relate to existing, definite, and valid contracts, binding upon both parties. They do not contemplate mere options, such as the one before us, nor compel the consumer, who is a party thereto, to make the yearly contracts provided for, or give up all claim to water from that particular canal. To say that these options were included in the excepting clause adopted by the commissioners would be to charge them with stultifying their own action; the proviso would nullify the order, so far as appellees are concerned, and the commissioners would be convicted of the absurdity imputed to them by counsel. Such a view is not called for by the letter of either the statute or order, and a reasonable interpretation fairly excludes it from the spirit of both.

We shall not discuss separately and at length the remaining specific objections presented on this appeal. In response thereto, the following brief suggestions

are deemed sufficient. The inadequacy of the annual water-rate fixed by the county commissioners is a subject not properly before us at the present time. This action is simply to recover back the 50 cents per inch above such rate, paid by appellees under protest. The inadequacy of price does not appear to have been adjudicated in the court below; and, even could such matters be reviewed, a point upon which we here express no opinion, there is no *data* before us to furnish ground for the requisite examination. The law does not require that all consumers using or seeking water from the same carrier shall join in the petition to have the commissioners establish a maximum rate. Such application may be made by "any party or parties interested in procuring water," etc. The failure, therefore, of senior consumers from appellant's ditch to unite with appellees in the petition is a matter of no legal significance. Nor does the action of the commissioners in pursuance of the statute prevent consumers from making special contracts with the carrier regarding the rate, or from continuing under agreements already existing. If it be a fact that, by repudiation of the option, appellees forfeited the right to claim as former users from appellant's ditch, their attitude in invoking the decision of the county commissioners does not necessarily affect the questions now to be determined, for the statute permits parties having land under the carrier's canal, who have never previously been consumers therefrom, to petition for the establishment of a maximum water-rate; and take advantage thereof, if the carrier's diversion be not exhausted. In view of the foregoing discussion, it is unnecessary to further answer the objection that the action of the board of county commissioners in fixing a rate for appellees impairs the obligation of a contract. Unless we have failed to accomplish our purpose, we have shown that the writing relied on constituted an option merely, and there was, properly speaking, no contract binding upon appellees to be violated. The record does not apprise us that senior consumers from appellant's ditch suffered either actual or legal injury by the proceedings now presented for review. And it would be an unwarranted, as well as an uncalled-for, step on our part to discuss or determine questions based upon the assumption that such injuries necessarily resulted. The judgment of the court below is affirmed.

(15 Colo. 310)

COMET CONSOLIDATED MIN. CO. v. FROST.

(*Supreme Court of Colorado.* Dec. 5, 1890.)

SUMMONS—FORM—EFFECT—SERVICE ON CORPORATION.

1. A summons issued and signed by plaintiff's attorney, under Act Colo. April 7, 1885, is not "process" within the purview of the constitutional provision requiring all process to run in the name of the people, although its service is the statutory method of beginning a suit.

2. A summons which requires the defendant to answer the complaint that "will be filed in the clerk's office on the second Monday after service" thereof, fixes that day as the time when defendant must answer, and not as the time when the complaint will be filed.

3. Under the provision of the Colorado Code that service upon corporations "shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer, or general agent thereof, but if no such officer can be found in the county, service may be had on any stockholder," service upon the vice-president of a corporation is sufficient, even though the return does not show that the president could not be found in the county.

Commissioners' decision. Error to district court, Arapahoe county.

*Hugh Butler*, for plaintiff in error.

RICHMOND, C. Defendant in error, plaintiff below, instituted this action to recover the sum of \$6,687.77, with interest at the rate of 10 per cent. per annum from the 17th day of December, 1885, evidenced by a promissory note. The proceedings in this case were based upon the act of 1885 entitled "An act to amend an act providing a system of procedure in civil actions in the courts of justice of the state of Colorado, approved March 17, 1877." In pursuance of this act a summons was issued, signed by the attorney of plaintiff, addressed to the defendant and served upon J. Granville Sharp, vice-president of the defendant company, in Denver, Arapahoe county, Colo. On the 28th day of December, 1885, a complaint was filed which is in the following words and figures: "State of Colorado, county of Arapahoe—ss.: In the district court. Henry C. Frost, Plaintiff, vs. The Comet Consolidated Mining Company, Defendant. The plaintiff complains of the defendant and alleges that on the 17th day of December, A. D. 1885, at Denver, in the county of Arapahoe and state of Colorado, the said defendant by its promissory note of that date, by it duly executed, for value received, promised to pay, to the order of said plaintiff, one day after the date thereof, the sum of six thousand six hundred and eighty-seven 77-100 dollars, with interest at ten percent. per annum until paid, and delivered said note to the plaintiff, who is now the holder and owner thereof; that although said note is long since past due, and although often requested, the said defendant has not paid the same, nor any part thereof. Wherefore the plaintiff demands judgment against said defendant for the sum of six thousand six hundred and eighty-seven 77-100 dollars, with interest thereon at ten per cent. per annum from the 17th day of December, 1885, until paid, and costs of this suit. GEO. C. NORRIS, Attorney for Plff." Thereafter, on the 25th day of January, A. D. 1886, in vacation, judgment of default, and final judgment, was entered by the clerk of said district court for the full amount claimed, together with interest and costs. To reverse this judgment plaintiff in error prosecutes this writ. Appellant contends: *First*. That the summons heretofore recited is not in conformity with the constitution of the state of Colorado, in this, that it does not run in the name of the "people of the state of Colorado;" that it is a "process" coming within the provisions of the constitution. *Second*. That the summons was served on the 24th day of December, 1885; that complaint was not

filed until the 28th day of December; that under and by the terms of the summons, defendant was not expected to answer until the 4th day of January, 1886, and in support of this contention it is insisted that the summons stated that the complaint would be filed in the clerk's office on the second Monday after service of summons, if served in Arapahoe county. *Third.* That the summons was served on the vice-president of the company, and that the return on the summons does not show that the president was not then in the county of Arapahoe, and state of Colorado. The foregoing are the principal points discussed by plaintiff in error.

As to the first point raised, that the summons is such a process as must be issued in the name of the people of the state of Colorado, we are strongly inclined to follow the conclusion of the supreme court of Florida in *Gilmer v. Bird*, 15 Fla. 411. In this case the identical question here presented is discussed at some length,—that is, “that the summons, as authorized by the Code, is a ‘process’ within the meaning of the constitutional provisions which require the style of all process to be the ‘State of Florida;’ that the summons had no such style; that this was essential to the validity of the judgment, there having been no appearance.” And the court said: “But is a notice given by an attorney of the institution of a suit in a form similar to a summons, but not issuing out of a court, a ‘process’ within the meaning of the constitution? Baron COMYS, in giving the definition of the term ‘process,’ says it imports the writs which issue out of any court to bring the party to answer, or for doing execution. There is no definition of ‘process,’ given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily ‘process.’ A party is entitled to notice and to a hearing under the constitution before he can be affected, but it is nowhere declared or required that that notice shall be only a writ issuing out of a court.” In *Porter v. Vandercook*, 11 Wis. 70, it was held that “the summons provided for by the Code is not a ‘writ’ or ‘process’ within the meaning of the constitution, art. 7, § 17, and need not be in the name of Wisconsin,” nor tested in the name of the presiding judge, nor sealed with the seal of the court.” In *Hanna v. Russell*, 12 Minn. 80, (Gil. 43,) the court said: “But we think a ‘summons’ is not ‘process,’ within the meaning of section 14, art. 6, of our state constitution. It is merely a notice given by plaintiff's attorney to the defendant that proceedings have been instituted, and judgment will be taken against him if he fail to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it ‘process,’ for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons, or in any other manner by which the defendant may be notified that proceedings have been instituted against

him.” In *Bailey v. Williams*, 6 Or. 71, it was held that “a summons used to bring a defendant into the circuit court is not ‘process,’ and need not run in the name of the state.” In *Nichols v. Plank-Road Co.*, 4 G. Greene, 44, it was held that “the notice provided by the Code is not a ‘process,’ and need not be in the style of the ‘State of Iowa.’” This seems to be the generally accepted conclusion of all courts having a similar Code practice and a similar provision in the constitution, and is, in our judgment, a satisfactory determination of this question.

The contention of appellant that the summons stated that the complaint would be filed in the clerk's office on the second Monday after service of summons in the county of Arapahoe, is without foundation. The summons does not so state. The language of the summons requires him to answer the complaint which will be filed in the office of the clerk of the district court of the second judicial district of the state of Colorado on the second Monday after service thereof, fixing, in the language of the Code, the time when it was the duty of the appellant to answer the complaint, not fixing the time when the complaint would be filed in the district court. Immediately upon the service of the summons it was within the power of the appellant, defendant below, to appear and demand a copy of the complaint. This he could have done at the time of the service or any time thereafter before the second Monday. The summons was served on the 24th; the complaint was filed on the 28th of December; all of which in our judgment was in strict conformity with the provisions of the Code. The second objection, therefore, in our opinion, is wholly untenable. Judgment was not taken until after the second Monday after the service of the summons, the second Monday occurring on the 4th of January, and judgment was rendered on the 5th of that month.

The third objection, that the summons was served on the vice-president and not upon the president, and that the return of the officer or person serving the summons does not show that the president was not within the county, is equally untenable. The provision of the Code providing for service upon corporations is as follows: “If the suit be brought against a corporation, service shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer, or general agent thereof; but if no such officer of the corporation can be found in the county, service may be had on any stockholder of such corporation.” The language of this provision admits of service upon any of the officers enumerated therein, president or other head of the corporation, the secretary, cashier, treasurer, or general agent. Certainly the vice-president comes within the provisions of this section. If service had been made upon a stockholder we are clearly of the opinion that ere a judgment of default could have been entered the return should show that none of the officers above enumerated were within the county where

service was to be had. Service upon the vice-president, in our judgment, was amply sufficient, and no certificate is necessary by the party making the service to the effect that the president did not reside in the county. The Illinois case cited by plaintiff in error is not in point, because the statute referred to in that case is not similar to the provisions of our Code above recited. It was within the power of plaintiff in error to have met all of these questions in the court below by motion to vacate the judgment if the company had a meritorious defense to the action. This it did not see proper to do, and for this reason we are not inclined to favorably consider such objections here. The other errors assigned not having been urged need not be considered. The judgment of the court below should be affirmed.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

(15 Colo. 320)

BOARD COUNTY COM'RS CHEYENNE COUNTY  
v. BOARD COUNTY COM'RS BENT COUNTY.  
(No. 2,618.) BOARD COUNTY COM'RS LINCOLN COUNTY v. SAME. (No. 2,619.) BOARD COUNTY COM'RS KIOWA COUNTY v. SAME. (No. 2,640.)

(Supreme Court of Colorado. Dec. 12, 1890.)

COUNTIES—APPORTIONMENT OF DEBT—INTEREST.

1. Where a new county is created out of a county having a debt, under an act providing that the commissioners of the new and of the old counties "shall have full power and authority to adjust and settle all matters of revenue proper to be done on account of the formation of said county, and also to apportion the indebtedness of said counties," the new county is liable for its share of the existing debt, without making any deduction on account of cash in the treasury of the old county, or of unpaid taxes due to it.

2. Such new county is liable *in present* to the old county for its share of the debt, though part of the debt is not due.

3. Claims against the old county which are the subject of pending litigation, and the validity of which is denied by said county, cannot be included in the debt to be apportioned.

4. Under Act Colo. March 22, 1889, fixing the rate of interest, in the absence of special agreement, at 8 per cent., a judgment fixing the rate of interest in such case at 10 per cent. is erroneous.

Appeal from district court, Bent county.

These three cases were consolidated for the purposes of the argument in this court, and will be disposed of together. The cases, which are numbered respectively 2,618, 2,619, 2,640 here, were tried below upon an agreed statement of facts, and involve the same questions of law. The controversies arose over the adjustment of certain matters of revenue between the counties of Cheyenne, Lincoln, and Kiowa, appellants, and the county of Bent, appellee, consequent upon the creation by the seventh general assembly of the former, in part, out of the territory up to that time included in the latter. The counties of Prowers and Otero, also formed out of the county of Bent at the same legislative session, do not appear to

be in any way interested in the present controversy. The agreed statement of facts in cause No. 2,619, in so far as the same is material to the present controversy, is, in substance, as follows: *First.* It appears from the assessment roll of said Bent county for the year 1888 that the taxable property of said county for said year amounts to the sum of \$7,800,149. *Second.* The value of taxable property in said county of Bent included within the boundaries of the present county of Kiowa for said year is \$1,244,381. *Third.* The value of taxable property in said county of Bent included within the present county of Lincoln for said year is \$402,692. *Fourth.* The value of taxable property in said county of Bent included within the present boundaries of the county of Cheyenne for said year is \$1,390,838. *Fifth.* The books and accounts of the county of Bent show the total gross indebtedness or liabilities of Bent county on the 13th day of April, 1889, to be the sum of \$181,403.96, and that said total amount includes certain items the validity of which as a charge against said defendants is controverted by the above-named defendants. At this point, these controverted claims are set forth, and numbered respectively from 1 to 7, the claims above numbered 3, 4, and 5 being now in suit in the district court of Bent county, Colo., in three certain actions therein pending, entitled "The Atchison, Topeka & Santa Fe Railroad Company v. The Board of County Commissioners of Bent County;" "The Prairie Cattle Company v. The Board of County Commissioners of Bent County;" and "J. C. Coad v. The Board of County Commissioners of Bent County,"—all of which said actions are being defended by said Bent county; and the files in said causes may be referred to and are made a part of this stipulation for the purpose of enabling the court to determine whether said claims legally constituted part of the indebtedness or liabilities of said Bent county on said April 13, 1889. *Sixth.* That on the 13th day of April, 1889, the cash in the hands of the county treasurer of Bent county to the credit of the several funds amounted to the sum of \$22,705.67. *Seventh.* That on the 13th day of April, 1889, there was due to said Bent county delinquent and unpaid taxes for the year 1887, amounting to the gross sum of \$7,270.66, and for the year 1888 taxes amounting to the gross sum of \$35,297.96. *Eighth.* And it is further stipulated and agreed that the 13th day of April, 1889, shall be taken as the date of the settlement or apportionment between the county of Bent and all of the three above defendant counties. *Ninth.* The defendants above named conceded the correctness of the amount of the gross indebtedness or liabilities of Bent county as above specified on the 13th day of April, 1889, with the exception of the items hereinbefore numbered respectively 1, 2, 3, 4, 5, 6, and 7, and the plaintiff, Bent county, asserts that all said items, controverted as aforesaid by defendant counties, are proper to be estimated in arriving at the total amount of the gross indebtedness of Bent county on said date. *Tenth.* The defendant counties above

named claim that, in making the apportionment of their proportion of the indebtedness of Bent county, on the date above specified, there should be deducted from the gross amount of the indebtedness of said Bent county (1) the sum of \$22,705.67, cash in the hands of the treasurer of said county, and (2) the amount of delinquent taxes due said Bent county on said date, amounting, in the aggregate, to the sum of \$42,568.62, which said claim, upon the part of the defendant counties, is controverted by the plaintiff county claiming that said defendant counties are not entitled to any part of the cash in the hands of the treasurer of Bent county on said date, nor to any part of the delinquent taxes due to Bent county on said date.

Upon the statement of facts, and the exhibits mentioned therein, the court made certain findings. Of these the following were specifically excepted to: "*Fourth.* The court further finds that all the cash in the hands of the treasurer of Bent county to the credit of the several county funds on the 13th day of April, 1889, amounting to the sum of \$22,705.67, belongs to and is the property of said Bent county, and not subject to apportionment between it and said county of Cheyenne. *Fifth.* That all delinquent taxes unpaid and owing to the said county of Bent on the 13th day of April, 1889, amounting to the sum of \$42,568.62, belong to and are the property of said Bent county, and not subject to apportionment between it and said county of Cheyenne." The court further found that the plaintiff, Bent county, was not entitled to include as part of the liabilities or indebtedness of said county, and to collect from the defendant county, its proportion of the claim specified in subdivisions 1, 2, 3, 4, 6, and 7 of paragraph 5 of said agreed statement of facts, and disallowed the same, to which said finding and disallowance the plaintiff county, by its attorney, excepted. And thereupon the court entered judgment in favor of the plaintiff and against the defendant, in accordance with said findings, for the sum of \$21,567.31, with interest thereon at 10 per cent. per annum from April 13, 1889, and costs of suit. Similar judgments, but varying in amounts, were entered in each of the other cases.

A. B. McKinley, W. T. Rogers and M. B. Gerry, for appellants. Caldwell Yeaman, for appellees.

HAYT, J., (after stating the facts as above.) The district court found that the cash in the hands of the treasurer of Bent county at the date of the creation of the new counties, and the delinquent taxes at that time due Bent county, belonged to, and were the exclusive property of, said county, and judgment was entered accordingly. Appellants question the correctness of these findings and judgment. They say the new counties are entitled to have deducted from the gross indebtedness of Bent county an equitable share of the cash fund, and a ratable proportion of the delinquent taxes, and that the balance then remaining represents the indebtedness which is to be apportioned under the statute. And the failure of the court below

to so decide is the basis of the assignment of error in this court. In the case of *Washington Co. v. Weld Co.*, 12 Colo. 152, 20 Pac. Rep. 273, it is said: "In the absence of a restrictive constitutional or statutory provision on the subject, when a new county is created by segregating a portion of the territory belonging to an existing county, the old county retains all assets previously owned by it, including rights of action, funds, and other personal property; also all real estate held in proprietary right, save such, if any, as may be within the territory taken away. It likewise remains bound by its existing contracts, and is subject to the burden of discharging all existing obligations and liabilities. The new county receives none of the assets, and assumes none of the burdens." The reasons for these conclusions, as well as the authorities relied upon in support thereof, are given in the opinion. In that case the counties of Washington and Logan had been carved out of the territory formerly included in the county of Weld, and it appeared that at the time of the creation of the new counties there was a surplus fund of \$60,000 in the treasury of Weld county. The new counties claimed the right to share in this surplus, which claim was denied. The court, being of the opinion that there was nothing in the constitution nor in the act creating the new counties changing the common-law rule, decided that the new counties were not entitled to any part of the surplus funds of the old county. The correctness of these conclusions is not disputed by appellants, but a distinction between the case then before the court and the present cases is attempted to be made. Such distinction finds no substantial foundation in any dissimilarity between the statute then under consideration and those now controlling. The statutes are practically the same. And it is not claimed that the constitution has since been changed. The distinction relied upon grows out of the fact that in the former case there was a surplus and no liabilities, and in the present there is both a surplus and liabilities. The argument is that the indebtedness of the old county to be apportioned between it and the new counties is not the sum of \$120,955.01, as found by the court below, but this sum less the cash in hand and the amount of the delinquent taxes. We cannot accept this view. The term "indebtedness" has a fixed and well-understood meaning. "Indebtedness" is defined by Anderson in his *Law Dictionary* as "the condition of owing money; also the amount owed." "Indebtedness. The state of being in debt, without regard to the ability or inability of the party to pay the same." *Bouv. Law Dict.* It is unnecessary to multiply authorities to show that "indebtedness" is not synonymous with the term "net wealth," as claimed by counsel. By a familiar canon of constructions, we are required to presume that the word "indebtedness" is used in the statute in its popular sense. Moreover, in the present instance, we have convincing proof that the legislature which created appellant counties had in view

the distinction between "indebtedness" and "surplus," from the fact that it was repeatedly called upon to legislate in reference thereto in the creation of the numerous counties brought into existence at the same session. Among the new counties formed by that legislature were Yuma, Morgan, Phillips, and Sedgewick. In each of the various acts creating these counties the legislature made specific provision for these very matters, the omission of which from the acts controlling the present controversy is made the more noticeable. The nature of these provisions will be more fully shown later, in connection with the claim for a division of, or a credit for, the delinquent taxes. In the absence of legislative provision therefor, we can see no reason for making a distinction between cash in the treasury where there is an indebtedness and such cash where there is no indebtedness. In either case, the statute being silent, under the decision in *Washington Co. v. Weld Co.*, supra, the fund remains the property of the old county. In reference to the equities of the claims of the old and new counties to this fund, judicial opinions are not in harmony. Should it be conceded, however, that the greater equities are in favor of the new counties, the result cannot be changed for this reason. The courts cannot undertake to add provisions not found in the statute for the purpose of preventing an apparent hardship. *Cooke v. School-Dist. No. 12*, 12 Colo. 453, 21 Pac. Rep. 496, 719; *Hampshire v. Franklin*, 16 Mass. 85; *Laramie Co. v. Albany Co.*, 92 U. S. 307.

The reasons for disallowing the new counties a share in the surplus fund in the treasury of Bent county apply with reference to the uncollected taxes. Undoubtedly it was competent for the legislature to have given the new counties the taxes previously assessed upon the property within the territory set off to them, but, in the absence of legislation changing the rule, it has been repeatedly held that the old county alone retained the right to the taxes assessed previous to the division. This applies as well to taxes upon property set off to the new county as to those levied upon property remaining within the boundaries of the old county, and, when collected, they will belong to the latter. It is claimed, however, that in the present instance the statute is not silent. Authority to apportion the delinquent taxes is sought in the following provision of section 10 of the act creating Cheyenne county: "The board of county commissioners of the said counties of Bent, Elbert, and Cheyenne shall have full power and authority to adjust and settle all matters of revenue proper to be done on account of the formation of said county of Cheyenne, and also to apportion the indebtedness of said counties of Bent and Elbert, as specified in section nine (9) of this act." And similar provisions are to be found in the acts by which the counties of Lincoln and Kiowa were created. Should we assume that the legislature intended by these provisions to provide for a division of the delinquent taxes, the act is fatally defective,

because no basis for such distribution is provided. A careful consideration of the act in connection with other acts passed at the same time by which other counties were created, leaves no doubt, however, that the authority conferred upon the county commissioners "to adjust and settle all matters of revenue proper to be done" has no reference to the delinquent taxes due Bent county. In the acts by which the counties of Yuma, Morgan, Phillips, and Sedgewick were respectively created, the same delegation of power to the commissioners to settle all matters of revenue, etc., is to be found. And yet in each of these instances the section conferring such power is immediately preceded by a section providing for the distribution of the cash on hand in the treasury of the old county, and the delinquent taxes thereafter to be collected. In the act creating the county of Phillips out of the county of Logan the section is as follows: "Sec. 12. All moneys now in the treasury of said county of Logan, and all moneys which may hereafter come into the treasury of said county from the taxes of the year 1888 and previous years, together with all moneys arising from the redemption of lands sold for taxes of the years 1887 and 1888, and bid in by the said county of Logan, and from all other sources of revenue, shall be apportioned between the counties of Phillips and Logan, in proportion to the valuation which the taxable property of that portion of Logan county which is now included within the boundaries of Phillips county bears to the taxable property of Logan county, as shown by the assessment rolls for the years 1887 and 1888." If the argument of appellants to the effect that the cash on hand and the delinquent taxes are to be apportioned under the provision for the adjustment of revenue is to prevail, it will, in effect, render section 12 in the Phillips county act, and similar sections in other acts, entirely superfluous and idle. To this conclusion we cannot yield our assent. In our opinion, the legislature was acting advisedly in these matters, in the belief that section 12 was necessary in cases where a division of the funds and delinquent taxes became proper. We cannot, therefore, disturb the findings and judgment of the district court by which it was determined that the delinquent taxes, as well as the cash in the treasury of Bent county, remained the property of that county after as well as before the division.

The court below entered judgment against appellant counties for their respective proportions of the indebtedness of Bent county, although a portion of this indebtedness had not at the time matured, and this is assigned for error. There was no error in this. The debt was fixed by the legislature so far as the new counties are concerned, and a judgment *in present* might properly be entered under the statute.

In determining the amount of the indebtedness of Bent county for the purposes of the apportionment, the district court disallowed a number of claims filed against Bent county. The rejection of such claims is made the ground of appel-



lee's cross-errors. The majority of these claims did not constitute an indebtedness against Bent county at the time of the taking effect of the act creating the new counties, and were therefore properly rejected; the acts creating the new counties providing only for the apportionment of "the present indebtedness." And, as to the claims for excess of taxes paid to Bent county by the Pueblo & Arkansas Valley Railroad Company and others, there is no sufficient data before this court upon which the claims can be allowed. It appears that these matters, as well as the claim of J. C. Coud, were at that time in litigation in independent suits, and we are referred to the pleadings in those actions for further information. An examination of these pleadings shows the causes to be at issue for trial, certain facts being alleged upon the one side, and denied upon the other. In this state of the record, the claims were properly disallowed by the district court.

The only substantial error appearing upon this record is in reference to the rate of interest as fixed by the court below. Under the act of March 22, 1889, which went into effect 90 days thereafter, the rate of interest, unless otherwise agreed, is fixed at 8 per cent. per annum. For error in this regard, the judgment will be reversed, with directions to the district court to modify the same by fixing the rate of interest in accordance with the statute.

(1 Okl. 1)

ALLISON v. BERGER *et al.*

(Supreme Court of Oklahoma. June 24, 1890.)

COUNTY COURTS—JURISDICTION IN OKLAHOMA.

Section 9 of the organic act of Oklahoma territory declares that the judicial power shall be vested in "a supreme court, district courts, probate courts, and justices of the peace." Section 11, among other things, extends Const. Neb. art. 6, §§ 15, 16, and Comp. Laws Neb. c. 20, relating to "probate courts," to Oklahoma until after the adjournment of the first session of its legislature, and provides that the "county courts" and justices of the peace shall have the jurisdiction authorized by that chapter, except that justices' jurisdiction shall not extend to cases involving over \$100, and "county courts," shall have jurisdiction in all cases involving more than \$100. Const. Neb. art. 6, § 15, provides for the election of county judges, and section 16 gives them general probate jurisdiction, "and such other jurisdiction as may be given by general law;" but provides that in civil actions their jurisdiction shall not extend to cases involving more than \$1,000. Comp. Laws Neb. c. 20, § 2, on probate courts, gives the county judges concurrent jurisdiction with the district courts in all civil cases not involving more than \$1,000 exclusive of costs. *Held*, that congress intended to establish "county courts" in Oklahoma with the same probate and civil jurisdiction as the county courts in Nebraska, and therefore a county court has jurisdiction of a civil suit for a money demand of \$310.

County No. 1. Application for writ of prohibition.

*Horace Speed*, for applicant. *H. S. Cunningham, John Fastor, T. H. Soward, and T. A. Sears*, for defendants.

GREEN, C. J. This is a petition for a rule on Charles A. Berger, as county

judge of the first county of the territory of Oklahoma, to show cause why a writ of prohibition should not issue against him as judge of the county court of said county, prohibiting him taking jurisdiction in a certain suit pending in said county court wherein the defendant W. W. Barberick is the plaintiff and the petitioner William M. Allison is the defendant. The defendants waive the service of the rule to show cause, enter their appearance, and interpose a demurrer to the petition. The petition alleges "that on the 13th day of June, 1890, one W. W. Barberick appeared before Charles A. Berger, then claiming to act as a county judge in said territory, and filed a complaint against this petitioner, charging that this petitioner is personally indebted to said Barberick in the sum of, to-wit, \$310, which sum was justly due, and for which sum demand had been made, and payment thereof refused, and praying judgment against this petitioner in the sum of, to-wit, \$310; that thereupon said Charles A. Berger issued under his hand as county judge within the territory of Oklahoma a paper purporting to be a writ issued by him as such county judge, in the name of the territory of Oklahoma, and directed to the sheriff, or any constable of said county, commanding that this petitioner be notified that he had been sued by said Barberick in the county court for the first county, and that unless this petitioner answer by the 7th day of July, 1890, the petition of said Barberick, now filed in the office of said court, would be taken as true, and judgment rendered accordingly, and directing the summons be returned on or before June 26, 1890; that upon the back of such paper, purporting to be a writ, is the statement, in writing, that if this petitioner fail to appear and answer judgment will be taken for \$310 with interest thereon, which said statement is signed by said Charles A. Berger, subscribing himself as county judge. Petitioner would further show that such complaint, writ, and proceedings thereon do not arise out of any matter pertaining or properly belonging to a probate court, but are wholly matters which, if cognizable in any court, are merely founded upon a money demand for indebtedness, and are only cognizable in the district court of this territory. Petitioner therefore asserts that said Berger has no authority to issue such writ or paper as a county judge, and is not, speaking with propriety, a county judge, but is the judge of the probate court within and for the first county of said territory, having the powers and jurisdiction of a probate court, and not the powers and jurisdiction of a county court. This petitioner therefore prays that this court issue a rule requiring said Charles A. Berger to show cause, if any he can, why the writ of prohibition should not issue from this court, directing that he shall proceed no further in the cause or matter hereinbefore stated, and, until such showing is had, this petitioner prays a rule requiring said Berger to proceed no further in such cause or matter; and that upon the hearing, the court make the rule of prohibition absolute and perpetual." The peti-

tion is duly verified by the affidavit of the petitioner, and the questions arising upon the demurrer have been ably and fully argued, both for and against the awarding of the writ of prohibition: and the jurisdiction of this court to award a writ of prohibition, in a proper case, has not been questioned.

The contention on behalf of the petitioner is that, under the organic act and laws of the territory of Oklahoma, there is no such court as a county court, and no such officer as a county judge having jurisdiction in actions at common law, or having any jurisdiction other than that which properly pertains to and is exercised by a probate judge and a probate court; and the whole controversy turns upon the construction to be given to the act of congress organizing the territorial government of the territory of Oklahoma. The provisions of the fundamental law which is the constitution of the territory of Oklahoma, so far as they relate to the county judge and the county court whose jurisdiction is challenged, may readily be brought together, and are found in sections 9 and 11 of the organic act, and in those parts of the constitution and laws of the state of Nebraska which are extended to and put in force in the territory of Oklahoma. Section 9 provides "that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist of a chief justice, and two associate justices, any two of whom shall constitute a quorum. They shall hold their offices for four years, and until their successors are appointed and qualified, and they shall hold a term annually at the seat of government of said territory. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law: provided, that justices of the peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy, when the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars; and the said supreme court and district courts, respectively, shall possess chancery as well as common-law jurisdiction, and authority for redress of all wrongs committed against the constitution or laws of the United States, or of the territory, affecting persons or property." Section 11 provides "that the following chapters and provisions of the Compiled Laws of the state of Nebraska, in force November first, eighteen hundred and eighty-nine, in so far as they are locally applicable, and not in conflict with the laws of the United States or with this act, are hereby extended and put in force in the territory of Oklahoma, until after the adjournment of the first session of the legislative assembly of said territory: \* \* \* Sections fifteen and sixteen of article six of the constitution of said state, and of chapter twenty of said laws, entitled 'Courts—Probate.'" "The supreme and district courts of said territory shall

have the same powers to enforce the laws of the state of Nebraska, hereby extended to and put in force in said territory, as courts of like jurisdiction have in said state, but county courts and justices of the peace shall have and exercise the jurisdiction which is authorized by said laws of Nebraska: provided, that the jurisdiction of justices of the peace in said territory shall not exceed the sum of one hundred dollars, and county courts shall have jurisdiction in all cases when the sum or matter in demand shall exceed the sum of one hundred dollars." Sections 15 and 16 of article 6 of the constitution of the state of Nebraska provide: "Sec. 15. There shall be elected in and for each organized county one judge, who shall be judge of the county court of such county, and whose term of office shall be two years. Sec. 16. County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars." Section 2 of chapter 20 of the Compiled Laws of the state of Nebraska, entitled "Courts—Probate," provides: "County judges, in their respective counties, shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall, in civil cases, have concurrent jurisdiction with the district courts in all civil cases, in any sum not exceeding one thousand dollars, exclusive of costs, and in actions of replevin, where the appraised value of the property does not exceed that sum; and the provisions of the Code of Civil Procedure, relative to justices of the peace, shall, where no specified provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said county court."

It will be readily perceived that in the organic act, and in the parts of the constitution and laws of the state of Nebraska which are extended to, and put in force in, the territory of Oklahoma, the designations, "probate courts," and "county courts," and "county judge," and "probate judge," are used; and in this apparent confusion, and indiscriminate use of names, we are required to ascertain, if possible, the intention of the law-making power, and such intention must control in the construction of these seemingly conflicting provisions. Such is the well-settled and well-defined rule of law for the construction of legislative enactments, and written constitutions, in all cases of doubt or uncertainty in the language used; and we are required also to examine all the provisions of the organic act, and the provisions of the constitution and laws

of the state of Nebraska, which are extended to, and put in force in, the territory of Oklahoma, and which are *in pari materia*, and, from a view of the whole, to arrive at the true intention of each part, and of the whole of such parts. Cooley, Const. Lim. 68-70; Sedg. St. & Const. Law, 194. That congress did not intend to create two courts, one called a "probate court," and the other a "county court," in each organized county of the territory of Oklahoma, having exactly the same jurisdiction in probate matters, and the one presided over by a judge called a "probate judge," and the others, by a judge called a "county judge," can admit of no doubt; for to do so would be an act of stupidity and imbecility on the part of congress, and we cannot adopt a construction of the organic act that will lead us to such a conclusion. But it is clear from a consideration of the organic act, and the provisions of the constitution and laws of the state of Nebraska, which are extended to, and put in force in, the territory of Oklahoma, that congress did intend to create a court in each organized county of the territory, having and exercising the same jurisdiction in probate, civil, and criminal matters that the court, known as the "county court," in the state of Nebraska, has and exercises under the constitution and laws of that state; and that the judge of such court should be known as and styled a "county judge."

At the time of the framing and passage of the organic act, congress must have known, and did know, that there was no court in the state of Nebraska constitutionally styled a "probate court;" for, by the first section of article 6 of the constitution of that state, from which article sections 15 and 16 are taken, it is provided that the judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and in such other courts, inferior to the district courts, as may be created by law for cities and incorporated towns. And, as congress intended to extend a part of the laws of that state to, and put them in force in, the territory of Oklahoma, sections 15 and 16 were selected, which provide for a county judge and a county court, so that there might be perfect harmony between the court and the law of the court, until after the adjournment of the first legislative assembly. This view of the case is sustained by the provision in the last paragraph of section 11 of the organic act, that the "supreme and district courts of said territory shall have the same power to enforce the laws of the state of Nebraska, hereby extended to, and put in force in, said territory, as courts of like jurisdiction have in said state." And any other view than that congress intended to create the office of county judge and a county court, in each of the organized counties in the territory of Oklahoma, renders absolutely nugatory the provisions of sections 15 and 16 of article 6 of the constitution of the state of Nebraska, and they have been extended to and put in force, as a part of the territorial law, for no purpose whatever. As section 9 of the organic act, in distributing

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the judicial power of the territory of Oklahoma, provides that it shall be vested in a "supreme court, district courts, probate courts, and justices of the peace," it is contended, with much earnestness and ability, that there can be no such court as a county court, for the reason that the courts named absorb the whole judicial power, and that there is no residue of judicial power to be vested in a county court, and that all other courts are excluded by those named, by an application of the maxim, *expressio unius, est exclusio alterius*; and, in support of this proposition, the case of *Ferris v. Higley*, 20 Wall. 375, is cited. That was a case arising in the territory of Utah, and involved the single question whether or not the probate court had jurisdiction in that particular case. The organic act of that territory provided that "the judicial power of the territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace." A statute of the territorial legislature enacted that "the several probate courts, in their respective counties, have power to exercise original jurisdiction, both civil and criminal, and as well in chancery as at common law, when not prohibited by legislative enactment; and they shall be governed in all respects by the same general rules and regulations, as regards practice, as the district courts." It was held that this act of the territorial legislature was in conflict with the organic act, and, therefore, void. But no act of the legislative assembly of the territory of Oklahoma is involved in this controversy, as all the provisions of the organic act emanated from congress; and the power of congress to enact the different provisions of the organic act of the territory of Oklahoma has not been and cannot be called in question.

But it is claimed that there is an irreconcilable conflict between the provisions of section 9 and section 11, in this: that section 9 provides for a probate court, while section 11 provides for a county court; and that, in this instance, the provisions of section 9 must control, as having been first agreed to by congress. If such conflict be conceded,—and as to whether there is such a conflict or not we express no opinion,—then the provisions of section 11 must control the provisions of section 9, so far as they are in conflict, as having been last agreed to by congress; and this is a rule of construction clearly stated in the authorities. Mr. Sedgwick says: "So again it is said if the latter part of a statute be repugnant to the former part thereof, it shall stand, and, so far as it is repugnant, be a repeal of the former part, because it was last agreed to by the makers of the statute. And this principle has been declared by the supreme court of New York. So, in Pennsylvania, it has been said that, in cases of irreconcilable repugnancy, the rule is to let the last part determine the intention of the law-giver." St. & Const. Law, 353; *Harrington v. Trustees*, 10 Wend. 547; *Packer v. Railroad Co.*, 19 Pa. St. 211.

As to the jurisdiction of the county court, it is objected that, as to all sums and

matters in demand which exceed \$100, by the provisions of the last paragraph of section 11 of the organic act, its jurisdiction is absolutely unlimited; and this fact is emphasized to show that congress did not intend to create such a court. This objection arises from a misapprehension of the provisions of the law in relation to the jurisdiction of the county court. If there were no other provision than that contained in the last paragraph of section 11, its jurisdiction as to all sums and matters in demand in excess of \$100, would seem to be unlimited, but when the provisions of section 16 of article 6 of the constitution of the state of Nebraska, and section 2 of chapter 20 of the Compiled Laws of that state, which are extended to and put in force in the territory of Oklahoma, are considered, the jurisdiction of the county court will be found to be limited to the sum of \$1,000, exclusive of costs.

One other point has been urged as bearing upon the intention of congress to create a county court, and that is that no provision is made for a review of the judgments of the county court by appeal to the district court. An examination, however, of a few sections of the Compiled Laws of the state of Nebraska, which are in force in the territory of Oklahoma, will disclose the fact that ample provision has been made for an appeal from the county court to the district court. Section 2 of chapter 20 provides that "county judges, in their respective counties, shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall in civil cases have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs; and, in actions of replevin, when the appraised value of the property does not exceed that sum, and the provisions of the Code of Civil Procedure relative to justices of the peace, shall, where no specified provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said county court." And when we turn to the provisions of the Civil Code referred to, we find the following: "In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." Section 1006. And the following sections provide the time within which an undertaking must be filed, and the amount and conditions of such undertaking, and for the certifying and filing of a transcript of the proceedings in the district court. We have no hesitancy in reaching the conclusion that an appeal will lie from all judgments of the county court in civil actions to the district court of the territory of Oklahoma, as that court, by the last paragraph of section 11 of the organic act, is given the same power and jurisdiction to enforce the laws of the state of Nebraska, which are extended to and put in force in this territory, that courts of like jurisdiction have in that state. As the county court, therefore, has jurisdiction of the subject-matter of the suit mentioned in the petition, the demurrer is sustained,

and the rule to show cause is discharged, and the writ of prohibition is denied.

SEAY and CLARK, JJ., concur.

(1 Okla. 12)

*Ex parte HALLEY.*

(Supreme Court of Oklahoma. June 24, 1890.)

JURISDICTION OF UNITED STATES COMMISSIONERS—  
TERRITORIES—CRIMINAL LAW.

Section 10 of the organic act of Oklahoma provides that persons charged with any crime in the territory may be arrested by the United States marshal, or any of his deputies, but in all cases the accused shall be taken for preliminary examination before a United States commissioner, or a justice of the peace for the county. *Held*, that a United States commissioner had authority to commit petitioner upon a charge of assault to the custody of a United States marshal, notwithstanding section 11 of the organic act puts in force in Oklahoma the Nebraska laws providing for the arrest and commitment of persons charged with crimes and offenses.

*Habeas corpus.*

C. B. Freeman and C. W. Kerns, for petitioner, Horace Speed, for the Territory.

SEAY, J. This is a case in which the petitioner, A. H. Halley, presented a petition to the Honorable E. B. GREEN, a judge of the first judicial district of the territory of Oklahoma, in which he alleges that he is unlawfully held and restrained of his liberty, at the city of Guthrie, in said territory of Oklahoma, by W. S. Lurty, the United States marshal of said territory, by virtue and authority of a commitment issued by W. M. Allison, a United States commissioner, in and for the first judicial district of said territory; that said petitioner was apprehended on a warrant issued on a complaint made before said commissioner by one E. M. Bamford, charging the petitioner with having unlawfully and feloniously assaulted him (said Bamford) with the intent to inflict upon him great bodily injury, contrary to the statute, and against the peace and dignity of the United States; that the petitioner was, on the 13th day of June, 1890, examined before said commissioner and held to answer said charge of assault with intent to do great bodily injury before the district court, at Guthrie, on the first Monday in September, 1890. Petitioner then alleges the illegality of his imprisonment to consist in this, to-wit: That the crime charged is an offense against the laws of Nebraska extended over this territory by the act of congress giving it a territorial government, and is not an offense known to or against the laws of the United States; that said W. M. Allison, commissioner, as aforesaid, had no "power or authority or jurisdiction" over said offense, and that said Lurty, United States marshal, had no authority, under said warrant, to restrain said petitioner of his liberty. Whereupon said judge caused a writ to be issued to said Lurty, United States marshal, commanding him to bring the body of said petitioner before said judge at Guthrie, on the 17th day of June, together with the cause of his detention and restraint. In obedience to said writ, said marshal brought said prisoner before said judge, making re-

turn that he held said petitioner in default of bail by virtue and authority of a commitment from United States Commissioner Allison as heretofore stated. The supreme court, of which said judge is chief justice, then being in session, the case was by him adjourned into the supreme court for hearing. See section 368, c. 34, p. 1068, Comp. St. Neb. There is no question of fact, nor plea of not guilty, nor excuse, nor extenuation set up in the petition for the crime charged. It is contended for the petitioner that the United States commissioner had no authority to hear or commit, and the United States marshal had no authority to hold or restrain the petitioner for a crime committed under the laws of Nebraska, which were put in force here by the organic act of the territory, but that the authority is conferred exclusively on what counsel calls the "local territorial courts and officers."

The question presented is one of power of jurisdiction, and is the only question to be decided in this case. It involves the legal relations of territories to the parent government. A territory is merely an inchoate state. Its people are not sovereign. Its organic act takes the place of a constitution. "The government of the territories belongs primarily to congress," and "during the term of their pupillage as territories they are mere dependencies of the United States. \* \* \* All political power exercised therein is derived from the general government." Territories are spoken of by Judge BRADLEY as "dependencies," and "the extent of their power depends upon the organic act in each case." *Snow v. U. S.*, 18 Wall. 317. This was a case in which the legislature of Utah, under authority of the territorial organic act, had created the office of attorney general for Utah territory, and a question arose between that officer and the United States attorney for said territory as to who should appear and prosecute crimes committed against the territorial laws. Judge BRADLEY, who delivered the opinion, said this was an anomalous case; that, "strictly speaking, there is no sovereignty in a territory of the United States except the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses." But after stating that the practice had been different, and that "there is no necessary conflict between the organic act and the territorial laws of Utah, he concludes that as the practice has been supported by long usage, and as the entire matter is subject to the control and regulation of congress," it is his duty, under the circumstances, to declare the territorial act valid. This had the effect to oust the United States attorney general from prosecuting crimes committed under territorial laws. In *Hussey v. Smith*, 99 U. S. 20, the court held that while the marshal, created by the territorial laws, had the right to serve process, and make sales of land, under judgments of the court, held

under the territorial laws, yet, when such process was served and sales made by the United States marshal, his acts were upheld on the ground that he was a *de facto* officer, and his acts, as such, were as valid and binding as if he had been an officer *de jure*. The court says: "An officer *de facto* is not a mere usurper, nor yet within the sanction of the law, but one who, *colore officio*, claims and assumes to exercise official authority; is reputed to have it, and the community acquiesces accordingly." So under the authority here quoted even if the acts of the marshal and commissioner complained of were only acts of officers *de facto*, the promotion of good government, in the punishment of crime, would induce us to sustain those acts. But we hold that they acted as *de jure* officers.

It seems from the scope of the argument in this case that some fear is entertained that the court may drift too far towards centralization, and claim more power for federal officers and United States courts than is consistent with the full recognition of the rights of the people to control their own local affairs, in their own way. On this point, it is enough to say that we give hearty assent to the doctrine laid down by Chief Justice CHASE, in *Clinton v. Englebrecht*, 13 Wall. 434, in which he uses the following comprehensive language: "The theory upon which the various governments for portions of the territories of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government, consistent with the supremacy and supervision of the national authority, and with certain fundamental principles established by congress." If, after what has been said, any one should doubt the authority of the commissioner to examine and bind the prisoner, or the marshal to imprison and restrain him of his liberty, let him examine section 10 of the organic act,—the constitution of the territory. That section provides that "persons charged with any offense or crime in the territory of Oklahoma, \* \* \* may be arrested by the United States marshal, or any of his deputies, wherever found in said territory; but in all cases the accused shall be taken for preliminary examination before a United States commissioner, or a justice of the peace of the county." Observe the language: "Any offense or crime in the territory of Oklahoma." We cannot conceive how the jurisdiction of the commissioner or marshal can be longer questioned.

But it is said that section 11 of the organic act puts the chapter of the Nebraska statutes concerning crimes in force here. So it does, "so far as they are locally applicable, and not in conflict with the laws of the United States and this act." While it may be conceded that under the Nebraska statute the petitioner might have been arrested by a sheriff, and taken before a justice of the peace for preliminary examination, and if held to answer an indictment might, in default of bail, have been remanded to the custody of the sheriff, to be by him safely kept, till the grand jury examined and disposed of the case, this would in no wise affect the power ex-

exercised by the commissioner and marshal in this case, under the authority conferred on them by the tenth section of the organic act. For the foregoing reasons, the petitioner is remanded to the custody of Warren S. Lurty, United States marshal for the territory of Oklahoma, to be by him dealt with according to law. The other justices concur.

(1 Okl. 42)

**COLLETT V. ALLISON.**

(*Supreme Court of Oklahoma.* June 27, 1890.)

**MANDAMUS—AFFIDAVIT—REMEDY AT LAW.**

1. A writ of *mandamus* cannot be issued when the motion is not based upon an affidavit as required by Code Civil Proc. Neb. § 649, which was extended to Oklahoma by section 11 of the organic act.

2. A writ of *mandamus* will not issue upon an application which does not show that the applicant has no adequate remedy at law.

**Mandamus.**

*Huston & Hamilton*, for plaintiff. *Horne Speed* and *H. S. Cunningham*, for defendant.

CLARK, J. The plaintiff complained that on the 22d day of May, 1890, she was arrested by the United States deputy-marshal on a warrant issued by William M. Allison, a United States circuit court commissioner, district of Kansas, and exercising jurisdiction in the territory of Oklahoma, charging her with converting the sum of \$310 in money, which she had in her possession as bailee, the same being the property of one W. W. Barberick; that said United States officers took from her the said sum of \$310, which was delivered to the defendant, Allison; that on the 27th day of May, 1890, the said defendant William M. Allison, sitting as an examining magistrate, found that there was no probable cause to believe that this plaintiff was guilty, and thereupon dismissed said criminal action and discharged this plaintiff; and that said defendant, William M. Allison, although requested to deliver said money to the plaintiff, Nettie Collett, refused and still refuses so to do. The plaintiff prayed for an alternative writ of *mandamus* requiring said defendant to pay the same over to the plaintiff in this action, or show cause why he does not do so. This is one of those extraordinary remedies resorted to in cases where the usual modes of procedure cannot furnish the desired relief, and should be commenced in the name of the sovereign power on complaint of the aggrieved party. The statute requires that the motion for a writ must be based upon an affidavit. Comp. St. Neb. p. 945, § 649. The petition in this case cannot on this hearing be treated as an affidavit. The verification does not arise to even that degree of proof.

The statute further prescribes that this writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. Page 945, § 646. This is the general rule recognized by all courts. Not only does the petitioner fail to negative the idea that the plaintiff has any other mode of redress, but it is apparent that she has an adequate

legal remedy by an action at law against the defendant, William M. Allison, when an issue can be joined and tried by a jury. *State v. Mayor, etc.*, 4 Neb. 260; *State v. School-Dist.*, 8 Neb. 98. The petition is therefore denied.

(1 Ariz. 56)

**TERRITORY V. DORMAN.<sup>1</sup>**

(*Supreme Court of Arizona.* Jan., 1872.)

**CRIMINAL LAW—INSTRUCTIONS—FORMER JEOPARDY.**

1. Comp. Laws Ariz., (Crim. Code § 363,) requiring, in criminal cases, that the charge "shall be in writing signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally," is not complied with by charging orally, and filing after verdict what purports to be a copy of the charge given.

2. Accused is not put twice in jeopardy by a new trial granted on a reversal of a judgment on his application.

Appeal from district court, Pima county. *Coles Bashford*, for appellant. *J. E. McCaffry*, for the Territory.

PER CURIAM. At the October term of the district court, sitting in and for the county of Pima, the defendant and appellant was indicted and tried and convicted of the crime of murder, committed by killing one Felipe Garcia, on the 6th day of June, A. D. 1870, and was thereafter sentenced to be hanged. Subsequently an appeal was taken to this court from the judgment, and the warrant for the execution of the accused stayed. No exceptions to the proceedings before, at, or after the trial are noted in the transcript. No motion was made for a new trial, and no statement upon the appeal accompanies the judgment roll. Accompanying the judgment roll is what purports to be the written charge of the court, but it is conceded that the charge to the jury was given orally, and not read to the jury, and that the written charge attached to the judgment roll was not placed with the papers until some time had elapsed after the trial. It is not signed by the judge, nor does it appear to be filed with the papers in the case, as required by section 363<sup>2</sup> (Comp. Laws) of proceedings in criminal cases. The minutes of the court before us do not show that the defendant waived a written charge, and it is conceded that such waiver was not made by the defendant at the trial. The defendant's counsel asks us to set aside the judgment for this and other causes noticed in his brief.

It is unnecessary, as we think, that the court should examine and pass upon the points insisted on as error. We have before held that the failure of the judge to give his charge to the jury in writing, unless such written charge be waived by defendant, as provided by the statute, is error, and entitles the accused to have the judgment set aside; and we have seen no

<sup>1</sup>This case, filed January, 1872, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports, from volume 1, p. 1.

<sup>2</sup>"The charges of the court shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally."

good reason to depart from the decision we have so made.

The question has been raised before us, and elaborately argued by counsel, whether, upon the reversal of the judgment in this case, the defendant is entitled to be discharged, or whether a new trial should be awarded, and it has been argued that he is shielded from being again tried for the offense of which he was convicted by the provision contained in article 5 of amendments to the constitution of the United States. It is unnecessary to review the authorities upon this point, or even the cases cited by counsel. The majority of the court are of the opinion that when a conviction has been had in a criminal case, and judgment has been rendered, and the judgment is reversed on application of the accused, on the ground of error at the trial, he is not shielded by the constitutional provision cited from being tried anew for the same offense; in fact, that no trial such as the law contemplates has been had, and that he has not been in jeopardy in the sense in which the term is used in the constitutional provision cited. We are of the opinion that judgment in the case should be reversed for the cause hereinbefore expressed, and a new trial had in the district court of the county from which the appeal was taken, and it is so ordered.

(1 Ariz. 505)

#### TERRITORY v. KENNEDY.<sup>1</sup>

(*Supreme Court of Arizona.* Jan., 1872.)

##### INSTRUCTIONS—ORAL CHARGE.

It is error to deliver the charge to the jury orally, without the consent of the accused, though it had been reduced to writing before delivery, and is filed with the papers in the case some days after the trial, under Comp. Laws Ariz., (Crim. Code, 368,) providing that the charge shall be in writing, signed by the judge, and filed with the papers in the case, unless the accused consent in open court to the charge being given orally.

Appeal from district court, Pima county.  
J. E. McCaffry, Atty. Gen., for the Territory.

TWEED, J. The defendant was tried and convicted of the crime of robbery in the district court for Pima county at the October term for the year 1871. The appeal is from an order of that court overruling a motion for a new trial, to which order the defendant, by his counsel, excepted. The error complained of, or so much thereof as we deem it necessary to consider, appears in the statement signed by the judge who tried the cause, and is to the effect "that the charge of the court to the jury was delivered orally," the defendant not having waived in open court his right to a written charge. It appears from the record that a written charge, purporting to be the charge given by the court, was filed some days subsequent to the trial. Upon the argument of the cause before us, it was, we think, claimed that the charge was in fact reduced to and was "in writing" when delivered, but it was

conceded, that the charge was not read to the jury. The case stands in this regard precisely as did the case of *Territory v. Duffield*, 1 Ariz. 58, ante, 476, which has been decided at this term. Since the opinion in that case was prepared, his honor, the chief justice, has submitted to us a dissenting opinion therein. We have examined this dissenting opinion carefully, and with great deference to the learning and judicial experience of the chief justice, but it fails to convince us that the conclusions arrived at by him are correct. That portion of section 368 of proceedings in criminal cases governing this matter reads as follows: "The charges of the court to the jury shall be in writing, signed by the judge, and filed with the papers in the case, unless the defendant consent in open court for the charges to be given verbally." Comp. Laws, p. 137. The provision is a most important one to a party charged with crime. It enables him, upon a motion for a new trial or upon appeal, to reproduce the exact language of the charge, and to assign error, if the charge is legally objectionable, with a degree of precision and accuracy impossible to be attained when the charge is given verbally. Nothing is left to the recollection of the court or the counsel in the cause. If a rigid adherence to this provision of our statute should defeat the ends of justice in any particular case, it is to be regretted; but, however this may be, the rights which it secures to a defendant in a criminal action may not be denied him. The filing with the papers in the case of a written charge conforming as nearly as possible, according to the recollection of the judge, to the charge verbally given, is in no sense a compliance with the law. Exactness, certainty, entire and complete accuracy, as to the whole charge, is what the law aims at, and this in the interest of the accused; and it seems to us that this certainty cannot be so well attained in any other manner as by reading the charge to the jury, and we have no doubt that this is what the law requires to be done. The judgment is reversed, and the cause remanded for a new trial.

REAVIS, J., concurred.

(1 Ariz. 31)

#### UNITED STATES v. CERTAIN PROPERTY, etc.<sup>2</sup>

(*Supreme Court of Arizona.* Jan., 1871.)

##### TRADING WITH INDIANS—LICENSE.

1. Trading with Indians without a license on lands west of the Mississippi river, to which the Indian title has been extinguished, is not prohibited by the act of congress of June 30, 1834, (4 U. S. St. at Large, 729,) regulating trade with the Indians "in the Indian country;" section 1 of that act providing that "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been

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extinguished, shall, for the purpose of this act, be taken to be Indian country.

2. The intercourse act of March 30, 1802, (2 U. S. St. at Large, p. 145, § 19,) provided that the act should not be construed to prevent trade or intercourse with Indians living on lands surrounded by settlements of citizens of the United States. The act of 1834, § 29, provided that the repeal of the act of 1802 should not affect it so far as it related to Indian tribes east of the Mississippi river. The organic act of New Mexico provided that the laws of the United States not locally inapplicable should have the same force and effect in the territory as elsewhere in the United States, and this provision was, by Organic Act Ariz. § 2, made applicable to that territory. *Held*, that section 19 of the act of 1802 was extended to the territory of Arizona by its organic act.

3. The claimant's goods were seized for a violation of the act of 1834. He had a store on land open to settlement near the line of a reservation, and traded at his store without a license with Indians from the reservation and others. *Held*, that there was no error in refusing a certificate of probable cause under 1 U. S. St. at Large, p. 696, § 89, providing that, if it should appear that there was reasonable cause for the seizure, the court should cause a proper certificate or entry thereof to be made.

REAVIS, J., dissenting.

Appeal from first district court.

C. W. C. Rowell, for appellant. J. E. McCaffry, for respondent.

TITUS, C. J. This proceeding was instituted July 29, 1871, by petition and information, in the district court of the first judicial district of Arizona, for the condemnation of certain merchandise therein described, alleged to have been forfeited, and seized as such June 20, 1871, near the reservation of the Pima and Maricopa Indians, by Capt. Frederick E. Grossman, special Indian agent, on a charge of illegal traffic with the said Indians. On the 21st of October last, William Richard & Co. were, on their petition and claim as sole owners, permitted to defend the said property from the decree of condemnation thus prayed for; and they having filed their bond for \$7,000, the value of the property, with sufficient sureties, the case proceeded. The property in contest, including a barrel of whisky, was alleged in the information to have been seized on the Indian reservation above mentioned. This allegation, however, was afterwards found to be erroneous, and was abandoned, as appears by the stipulations filed and of record in the present case, which stipulations admit the conclusions of fact on which the judgment of the court below was prayed; it being therein stated by the attorney for the United States, as well as by the attorney for the claimants, "that the place of business of William Richard & Co., wherein the goods against which this action was brought were seized, was and is off the limits of the described Indian reservation, very close to the southern boundary of said reserve,—in fact, within a few feet of the line; and that the lands outside the said Pima and Maricopa reservation are open to survey and pre-emption, including the place of seizure." The deposition of the said Capt. Grossman, referred to in the stipulations filed, was agreed in open court, on the hearing below, to be dispensed with as containing

nothing but what was and is of judicial notoriety, "except that the articles alleged in the information and the said deposition mentioned as on storage shall be, for the purposes of this trial, considered as *in transitu* only." It may be added as of public notoriety here that the lands thus described in the records as "outside of the Pima and Maricopa reservation," and "including the place of seizure," have been partially surveyed, and are now occupied, cultivated, and improved, under the authority of the United States, by American and Mexican residents, either citizens, or seeking and awaiting citizenship under our laws; that the lands recently proposed to be annexed to the said reservation alone contain, as appears from authoritative reports made by congress, 25 of these American and Mexican residents, and that the whole valley of the Gila river, including the place of seizure, round it, and outside of the reservation, is better settled with permanent residents, excluding Indians, than any other rural portion of Arizona. The store of the claimants, where the merchandise in controversy was seized, is near the principal highway from Tucson to Fort Yuma; and it is also matter of public notoriety here that claimants carry on an active trade, not only with the residents on Gila river, but also with travelers by the said road.

On the part of the United States, it was alleged upon the hearing of this case in the court below—*First*, that all the territory of the United States west of the Mississippi river, with little, if any, exception, is Indian country; *second*, that no one can lawfully trade therein with an Indian or Indians without a license from some Indian superintendent or agent; and, *third*, that the claimants, William Richard & Co., having traded with the Pima and Maricopa Indians without such license, the merchandise seized as above stated and described is forfeitable, and ought to be condemned. The district court, after argument upon record of the case, refused the decree of condemnation prayed for. An appeal was taken from its judgment to this court on behalf of the United States, and the errors alleged in the judgment of the court below on the argument of the appeal, though not formally presented in this court, were the denial of the three propositions above cited, and the omission of that court to certify that there was probable cause for the seizure of the property in controversy.

It has been conceded by all, in every stage of this case, that congress has power to dispose of and make all useful rules and regulations respecting the territory or other property, and regulate commerce with the Indian tribes of the United States. Congress has, to a considerable extent, exercised both these powers. It is not necessary to inquire whether congress has exhausted the whole of these two classes of powers in its legislation thereupon; it is quite sufficient for the present case to determine whether or not it has passed any law which authorizes us to condemn the property in controversy. No other class of ordinary federal legislation is so full of pains, penalties, and for

feitures as that which regulates trade and intercourse with the Indians; *aposteriori*, therefore, this court cannot be too cautious in declaring where and to whom it applies. Throughout this whole case the United States has relied on the congressional act of June 30, 1834, (4 U. S. St. at Large, 729,) especially its first section, as entitling it to a decree for the forfeiture of the property in controversy. That section is as follows: "That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also other parts of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act [shall] be taken and deemed to be the Indian country." This provision must be regarded as a description, by the highest legislative authority, of what an Indian country is. Its special purpose is declared, as in and by no other, to be "for the purposes of this act" itself, so it says,—however, whenever, and wherever it applies and extends. This declaration shows the place of operation of every pain, of every penalty, of every forfeiture, of every license, and of every prohibition which the law authorizes concerning trade and intercourse with Indians. And in this statute, as well as in those since enacted, the limitation "Indian country," as here declared, is the place, and no other, to which all their consequences, whether lenient or severe, are applied. A brief analysis of this provision will show us what it comprehends. Its purpose was, obviously, to declare what an Indian country should be thereafter. The limitation employed is, "to which the Indian title has not been extinguished." This was and is the badge of law to show an Indian country to all mankind. The territory, then and since, that could abide this test was the Indian country, and no other. Section 2 of the same act proceeds to apply this test. It is as follows: "No person shall be permitted to trade without license with any of the Indians." Where? In the Indian country. Section 3 allows an Indian superintendent or agent to refuse license to a person of bad character, because it would not be proper for him to reside—where? In the Indian country. Section 4 forfeits the goods of the man who, without license, resides as a trader, or introduces goods, or trades—where? In the Indian country. Such is the limitation throughout this whole act. All its penal consequences are referred to the Indian country. The same limitation is preserved in later acts. The act of June 14, 1858, (11 St. at Large, 363,) authorizes the marshal to employ a *posse comitatus*, not exceeding three persons, in any of the states, respectively, to assist in executing process by arresting and bringing in prisoners from the Indian country. The act of March 15, 1864, § 1, (13 St. at Large, 29,) makes it penal for any person to sell, exchange, give, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or to introduce the same into any Indian country.

Thus by an analysis of our laws regulating trade and intercourse with the Indians the conclusion is reached that an Indian country, as declared by the first section of the act of 1834, is one "to which the Indian title has not been extinguished;" that there it is that a license is required to enable the citizen to trade with the Indians, and that in the Indian country, as thus described, apply the pains, penalties, prohibitions, and forfeitures declared by our acts, regulating trade and intercourse with the Indians.

The venerable maxim of legal construction, *expressio unius, est exclusio alterius*, which thus ordains that where in a statute one or a few of a class of particulars are enumerated, it must be taken that all the rest of this class not enumerated are intended to be excluded from its operation, impels to the conclusion that in no other than the Indian country, as described by the act of 1834, is a license required to enable the citizen to trade with the Indians, and that in no other do the pains, penalties, prohibitions, and forfeitures denounced by the laws regulating trade and intercourse with the Indians apply at all.

On this conclusion alone the condemnation prayed for in this case might be denied. The magnitude of the question involved, however, it is submitted, requires a more exhaustive examination of the law; and, by a different mode of investigation, and of a different class of legal provisions, the judicial mind is carried to the same conclusions. The act of 1834, already examined, was the consummation of more than 50 years of tentative Indian legislation; the act of 1802 of 13 years of similar legislation, under the constitution. The act of March 30, 1802, (2 St. at Large, 145,) provides: "Sec. 19. Nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States." The same provision is found in the act of July 22, 1790, (1 St. at Large, 137,) in the act of March 1, 1793, § 13, (1 St. at Large, 331,) and in the act of May 19, 1796, § 19, (1 St. at Large, 474,) which was the last act on the subject preceding that of 1802, from which the citation under immediate consideration is taken. In reference to this provision, the act of 1834 thus provides in its repealing clause: "Sec. 29. That such repeal shall not affect the intercourse act of 1802, so far as the same relates to or concerns Indian tribes east of the Mississippi river." Why, it may be asked, was this reservation in the act of 1834 made in favor of the states and citizens east of the Mississippi river? It was because they comprised great numbers of citizens settled around Indians upon lands of their own or those of the United States, which the federal government did not mean should be embarrassed by the monopolies of license in their trade with the Indians or others. The act of 1834, regulating trade and intercourse with the Indians, is to some extent the result of the then recent cases of *American Fur Co. v. U. S.*, 2 Pet. 358; *Cherokee Nation v. State of Georgia*, 5 Pet. 1; and *Worcester v. State of Georgia*, 6 Pet.

517,—the last of which was decided in the supreme court of the United States only two years before the passage of the act of 1834. At the date of the act of 1834, there were but two organized territories east of the Mississippi river,—Michigan and Florida. In these, however, and as well in the vast domain west of that river, large and ever-increasing communities of citizens had settled and were settling around Indian settlements, on land of their own or those of the United States; and it was to prevent these, and other similar ones sure to arise, from being cramped and embarrassed in their trade and intercourse, that the Indian country was, by the act of 1834, circumscribed to territory "in which the Indian title had not been extinguished."

The protection and improvement of the Indians has been a cherished policy of the United States. Not less so has been the settlement of the public domain by citizens, its organization and development as territories, and their final admission into the Union as states, co-equal with those already there. The laws regulating trade and intercourse with the Indians are the offspring of both branches of this policy, and any construction of these laws which excludes either branch of this policy from its consideration must be vicious. The act of 1834, (section 29,) we have seen, limited, to the states east of the Mississippi river, the act of 1802, (section 19,) which allowed free "trade and intercourse with Indians living on lands surrounded by settlements of the citizens of the United States." The act of 1802, though thus limited, has never been repealed. After the passage of the act of 1834, the first territory established was Wisconsin, organized April 20, 1836, and the last was Wyoming, organized July 26, 1868. In the organic act of each of the 15 territories established since the act of 1834 will be found a provision substantially, if not literally, as follows: "That the constitution and the laws of the United States which are not locally inapplicable shall have the same force and effect in said territory as elsewhere in the United States." This is the provision on the subject in the organic act of New Mexico, which, with its legislation at the date of our organic act, was, by the second section of our organic act, made applicable to the territory of Arizona. The only test provided, relative to the laws of the United States, is their applicability to the territory of Arizona. The laws of the United States which are applicable to Arizona have the same force and effect here as elsewhere. Is the nineteenth section of the act of 1802, allowing free trade to citizens of the United States settled around Indians, and limited to the east of the Mississippi by the twenty-ninth section of the act of 1834, applicable to Arizona? If so, then it must govern the present case. Still further. The act of February 27, 1851, § 7, (9 St. at Large, 587,) is as follows: "All the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the territories of New Mexico and Utah." By the act of August 4, 1854, § 1, (10 St. at

Large, 575,) the territory now comprised in Arizona was annexed to New Mexico. The law regulating trade and intercourse with the Indians was therefore the law of Arizona, so far as applicable, for more than eight years prior to its organic act of 1863, (12 St. at Large, 664,) and would have so remained after its organization as a territory, without a special provision on the subject. The question then occurs, is section 19 of the Indian intercourse act of 1802 in force in this territory? Mere inspection, it is submitted, shows it is so applicable, by all the exigencies that made it universal in 1802, and applied it east of the Mississippi river after 1834. In this territory there are settlements of citizens on land their own, or so to become, unaffected by any Indian title, and around Indian settlements. The store of William Richard & Co., where the controverted property was seized, is in one of these citizen settlements. It cannot be for the benefit of either the Indians or citizens, under such circumstances, to compel the one class to buy of some monopolist, relieved of all competition by his license, or to compel the other to purchase licenses before they can sell to an Indian or Indians, who choose to purchase where they can do so the cheapest or the best.

The conclusion therefore is that William Richard & Co. required no license to enable them to trade with the Indians outside of any Indian reservation, or land unaffected by Indian title; and that the property controverted in this case, seized, as it was, on neither, is not forfeitable by reason of their not having such license. To prevent misconception, it may not be improper to state some limitations on some of the terms used above, and some of the conclusions reached. An Indian title is one of mere occupancy, possession, or use subject to the right of pre-emption in the United States. An Indian country is a portion of territory subject to an Indian title, inhabited by Indians. A mere solitude, or a country without Indians, could hardly be considered an Indian country, even if their title, which is merely possessory, could survive the absolute absence of its beneficiaries. An Indian reservation may be defined to be a certain limited portion of our national domain, assigned by the federal government to a tribe or tribes of Indians, or some part or parts of the same, to be held by them according to the terms of the assignment. An Indian reservation and an Indian country are so far legal equivalents that the laws of the United States regulating trade and intercourse with the Indians apply alike to both. Licenses to trade in either are grantable by an Indian superintendent, agent, or subagent. The act of March 15, 1864, § 1, (13 St. at Large, 29,) makes it an offense equally penal, to sell, exchange, give, barter, or dispose of any spirituous liquors or wines to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or to introduce the same into the Indian country. This conclusion is supported by the following cases: *American Fur Co. v. U. S.*, 2 Pet. 358; *U. S. v. Holliday*, and *U. S. v. Haas*, 3 Wall. 407.

To enable a person to buy or sell the live-stock of an Indian beyond the Indian country or an Indian reservation, a license is necessary. No license can anywhere legalize selling liquor to Indians. *U. S. v. Holliday*, and *U. S. v. Haas*, 3 Wall. 407. License cannot authorize the purchase, by one not an Indian, of the arms or clothing, or implements of labor, or domestic utensils, of an Indian or Indians.

It is not pretended or alleged that the claimants in the present case, or any of them, have sold, or offered to sell, liquor to the Indians, or that they have infringed any of the other provisions of our Indian intercourse laws, or that they have indulged in any unconscionable practices with the Indians, or with others. On the contrary, it is a matter of public notoriety here that they have done much to advance agriculture among the Indians, and in the neighboring settlements, by the importation and distribution of seeds, as well as by other similar services.

The certificate of probable cause in this case was withheld by the judge of the court below because nothing appeared in the case to show any probable cause for the seizure of the property in controversy. By the act of congress concerning frauds on the revenue of March 2, 1799, (1 St. at Large, 696,) it is provided (section 89) that in prosecutions for seizures under that act, "if it shall appear to the court before whom such prosecution shall be tried that there was reasonable cause for such seizure, the said court shall cause a proper certificate or entry to be made thereof," etc. If no probable cause appears in any case, such as this, for the seizure of the property in controversy, the judge is not justifiable in making such certificate or entry. No such cause appearing in the present case, the certificate was properly omitted. Nothing appearing in this case to show that the property in controversy was at any time within an Indian reservation or in an Indian country, or that there was any probable cause for the seizure of the said property, or that the claimants have, in any particular, infringed the laws of the United States regulating trade and intercourse with the Indians, or any of the said laws, the decree of the district court of the first judicial district of Arizona, made in this case, is hereby affirmed, and the certificate of probable cause is refused.

TWEED, J., concurred.

REAVIS, J., (*dissenting*.) I regret that I am unable to concur with the majority of the court in the opinion just read, and I proceed to give my reasons for such dissent. The grave importance of the subject-matter of the cause at bar in my judgment demands the most careful examination possible, to the end that a just conclusion may be arrived at in the premises touching the legal rights of the parties interested and to be affected by the determination of the questions at issue. In the month of June, 1871, the agent appointed by the government for the confederate tribes of Pima and Maricopa Indians seized the goods in question, which

are claimed by William Bichard & Co., for an alleged violation of the intercourse laws of the United States regulating trade and commerce with the Indian tribes. The information filed in the court below recites, among other things, that the illicit trade with the Indians was and had been carried on by the claimants on the reservation set apart for the tribes mentioned; but the stipulations of counsel upon which the case comes into this court disclose the fact that claimants' place of business was off, but very near to,—say a few feet from,—the southern boundary of the reservation. There is nothing in the record, however, to show that the claimants knew before the date of the seizure that their store-house stood on the outside of the reservation boundary, nor does it appear that they became aware of its exact locality until a survey of the original lines of the reservation was had, at their own instance, after the seizure had been made. But this is not a material question for the purposes of this inquiry, and I pass it by for the present.

The points decided by the majority of the court, as I have been able to gather them from the opinion of the chief justice, who delivered the judgment of the court, are, substantially: (1) That the seizure of the goods of claimants was unlawful and unauthorized, for the reason that the place where they were stored and kept was outside of the Indian reservation; (2) that the act of 1834, in its operation, is limited to that portion of the public domain of the United States where the Indian title has not been extinguished; (3) that an Indian reservation and an Indian country "are so far legal equivalents that the laws of the United States regulating trade and intercourse with the Indians apply alike to both;" in other words, for the purposes of the intercourse laws mentioned, it is Indian country on the inside of the reservation lines, and not such on the outside, and that, whereas it would be a violation of the act of 1834 to trade with the Pima and Maricopa Indians on the inside of the lines of their reservation without a license, it would not be if the trade with the same Indians was had on the outside; (4) that the intercourse act of 1802 is in full force in this territory, and especially the nineteenth section thereof, allowing free trade and intercourse between Indians on a reservation and citizens settled on lands around them; (5) that William Bichard & Co. require no license to trade with citizens on the outside of any Indian reservation, on land unaffected by Indian title, and that the property seized is not forfeitable on account of their omission to obtain one to trade with the Indians; (6) that the certificate of probable cause was properly withheld, because nothing appeared in the case to show any probable cause for the seizure of the property.

The foregoing propositions furnished the premises from which the conclusions of the court appear to be drawn, but I shall not consider them exactly in the order I have mentioned them.

It is nowhere denied that congress has the power, under the constitution, to

regulate trade and intercourse with the Indian tribes inhabiting any portion of the public domain of the United States; nor is it denied that this power has been exercised to the extent necessary to meet the exigencies of the relative situation and condition of the government and the Indians every year since the adoption of the constitution. The faith of the government has always been pledged for the protection of those tribes with whom it has entered into treaty stipulations, or one to whom its intercourse laws have been extended, regulating trade and commerce therewith. In the case of *Cherokee Nation v. State of Georgia*, Chief Justice MARSHALL, who delivered the opinion of the court, held that an Indian tribe or nation within the United States is not a foreign state, "within the meaning of the second section of the third article of the constitution." In the same opinion the learned jurist held that the Indians were in a state of pupillage. "Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection, appeal to it for relief to their wants, and address the president as their great father." It therefore follows that the relation of these tribes to the general government is marked by "peculiar distinctions," in the regulation of trade and intercourse, "which exist nowhere else." The first section of the intercourse act of 1834 defines what was known as the Indian country at that day, west of the Mississippi river. That designation, with the exception of the states of Missouri, Louisiana, and the territory of Arkansas, comprehended the whole of the possession of the United States west of the Mississippi. The territory over which that law was to have its operation had been acquired by the United States from the republic of France by treaty of cession at Paris, April 30, 1803, the sixth article of which treaty provides: "That the United States promises to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon." The act of 1834, and all subsequent treaties made with the Indian tribes inhabiting such territory, were enacted and made in pursuance of the treaty of cession of 1803, which practically recognized and secured to the Indians some sort of title to the soil, which the United States has from time to time extinguished by purchase under treaties for that purpose. The twenty-ninth section of the act of 1834 repealed the act of 1802 so far as its operation was concerned with reference to the Indians living west of the Mississippi river, but continued it in force over those east of it.

I cannot agree with the majority of my brethren of the bench that any subsequent legislation on the part of congress has resuscitated that act, so as to make it operative everywhere within the jurisdictional limits of the United States. The act of congress of 1851, extending all the intercourse acts, not locally inapplicable, over the Indians inhabiting the territories of

New Mexico and Utah, does not, by necessary implication or otherwise, revive the act of 1802 for the purposes of such extension. There is nothing in the act of 1851, or any other act on the same subject, in my judgment, to indicate such an intention on the part of the national legislature. I conclude, therefore, that the act of 1834, and the acts amendatory thereof, are the only laws in force in this territory on the subject of trade and intercourse with the Indian tribes residing herein.

That portion of the territory in which is located the Pima and Maricopa reservation was acquired from the republic of Mexico by treaty in 1854, known as the "Gadsden Treaty," in which no provision is made respecting any Indian tribes who might be living here at the time. So the *status* of all such Indians must depend upon existing laws, in so far as the question of trade and intercourse with them is concerned. These laws have already been referred to, and the question recurs, how far are they locally applicable to the Arizona tribes, and what operation did the congress intend they should have in the matter of regulating trade and commerce with them? There is no pretense set up that these Indians occupy an analogous position, with reference to the soil of the country here, to those who resided in the Indian country designated in the act of 1834; and the question of Indian title can have no weight in the determination of the question at issue in this case. The act of 1834 is sufficiently described in its title, viz.: "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace, on the frontier;" and in the first section it expressly declares, after giving a description of certain territory, that such territory, so described, with the exceptions therein mentioned, "for the purposes of this act, be taken and deemed the Indian country." What were the purposes of that act? The question is fully answered in the title just given. The territory mentioned therein was Indian country for no other purpose than for the regulation of trade with the Indians, and its operation everywhere must be uniform to that extent.

I agree with the learned chief justice who wrote the opinion of the court in this case that we cannot very well have an Indian country without the bodily presence of Indians; and where we have such Indians, whether they have submitted themselves to the control of the government, or occupy a hostile attitude thereto, the matter of trade and intercourse with them in either capacity must be regulated by the existing laws provided for the purpose. All the decisions on the subject pronounced in the supreme court of the United States agree that the various intercourse acts passed from time to time by congress have been intended to protect the Indians against fraud and deception, and to regulate trade and commerce with the various tribes, upon the broadest principles of equity and justice. To that end, those localities inhabited by Indian tribes have been carved into convenient districts or superintendencies, and a suitable person selected by the president

of the United States for each of such districts, who, by and with the advice and consent of the senate, is appointed to superintend the affairs of the Indians in the particular districts; and for each individual tribe an agent is selected in the same manner, and these officers must report to, and are directly under the control of, one of the political departments of the government, known as the "Department of the Interior," which is charged with the execution of all the laws having reference to Indian affairs. These officers are required to give ample bonds for the faithful performance of their duties, as prescribed by law, among which is the selection of proper persons to act as traders with the Indians, who are licensed for that purpose, and give bonds conditioned for the faithful performance of the duties imposed by law, and to obey all such rules and regulations in the premises as shall from time to time be prescribed by the head of the department referred to. There has been a superintendent of Indian affairs provided for Arizona, and there are agents for the confederate tribes of Pima and Maricopa Indians, with whom the illicit trade complained of in this cause was carried on; and these officers were in the active discharge of the duties of these several offices at the time the seizure of the goods in question was made. There were also at the same time licensed traders, duly appointed and qualified to trade with these Indians. These traders are called "monopolists" by the learned judge who delivered the opinion of the court in this case, and he assumes that the act of 1834 was passed in consequence of the decisions in the cases of *American Fur Co. v. U. S.*, *Cherokee Nation v. State of Georgia*, and *Worcester v. State of Georgia*, in none of which have I been able to find doctrines in support of the assumption. The language of the act itself makes it very clear that, while congress believes the provisions of the act of 1802 were ample for the purposes of trade and intercourse with the Indians east of the Mississippi, they were not deemed sufficient for the purpose in the case of the Indians on the west side of that river. All the states of the Union at that time, except two, lay between the Mississippi river and the Atlantic ocean, and the act of 1834 was intended to operate upon those Indians inhabiting the territory mentioned in the first section thereof.

The majority of the court hold that, inasmuch as the trade complained of, and the seizure of the goods in consequence thereof, all took place outside of the reservation, *per se* the trade was not unlawful, but the seizure of the goods was. Is it true that the government and the laws afford no protection to the Indians outside of the lines of the reservation? Does the authority to regulate trade, traffic, or commerce extend no further than the boundaries of such reservation? In the case of *U. S. v. Holliday*, 3 Wall. 407, the supreme court said that, if commerce or traffic or intercourse is carried on with an Indian tribe, or with a number of such tribes, it is subject to be regulated by congress, although within the limits of a state. The locality of the traffic can have

nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on. The same doctrine was held in the case of *U. S. v. Haas*, 3 Wall. 407.

I have no doubt of the power of the agents of the government to prevent any person from trading with Indians under their charge unless specially authorized by law to do so, and this, whether on or off the Indian reservation. Whether the goods of the offender would be liable to seizure will depend upon the circumstances of the particular case, but that such agents have the power to make such seizure for a violation of the intercourse act I have equally no doubt. In this case the certificate of "probable cause" should have been issued. Its issuance is not a matter of discretion of the court, to be exercised at pleasure; and to withhold it in this case is error. It is for the protection of an officer of the government, when acting officially, in pursuance of what he conceives to be the law, or under orders from his superior officer. In either case he is entitled to the certificate. For these reasons, I cannot concur in the opinion and judgment of the court.

(1 Ariz. 319)

UNITED STATES v. BARNARD *et al.*<sup>1</sup>

(*Supreme Court of Arizona*. Jan., 1876.)

BOND OF POSTMASTER—ACTION—ANSWER BY SURETIES.

1. In a suit on the bond of a postmaster, the time for answering having expired, it is not error to refuse to allow the sureties to file an answer setting up that he is entitled to a credit not given him in his account with the government, unless it appears that the sureties will be able to prove that a claim for the credit has been presented to the officers of the treasury for their examination, and by them rejected, or that defendants will have at the trial vouchers not before in their power to procure, and will then be able to show that they were prevented from exhibiting to the treasury a claim for the credit by absence from the United States, or by unavoidable accident; Rev. St. U. S. § 951, providing that, in suits by the United States against individuals, no claim for a credit shall be admitted, except such as appear to have been presented to the officers of the treasury for their examination, unless it is proved that defendant is, at the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or by unavoidable accident.

2. A defendant having demurred and answered at the same time, as allowed by Practice Act Ariz. § 42, and a trial having resulted in a judgment against him, it will be presumed that the demurrer was properly disposed of, the record being silent on that point.

3. Part of the defendants only being shown to have joined issue in the case, it will be presumed that the default of the others was duly entered.

Appeal from district court, Yavapai county.

<sup>1</sup>This case, filed January, 1876, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

*J. A. Rush, J. P. Hargrave, and J. W. Leonard*, for appellants. *E. B. Pomroy*, for respondent.

**DUNNE, C. J.** The complaint alleges, in substance: (1) That defendant Barnard was postmaster at Prescott, in said Yavapai county, at the time hereinafter stated. (2) That, February 23, 1870, defendants executed a bond to the United States, in the penal sum of \$18,000, conditioned to be void, if defendant Barnard faithfully discharged all his duties as postmaster aforesaid, according to law and the regulations of the post-office department, specifying in detail many of such regulations, among them the following: "And, moreover, should faithfully account with the United States in the manner directed by the said postmaster general for all moneys, postage-stamps, stamped envelopes, bills, bonds, blanks, etc., received by him as such postmaster for the use of said office." (3) That said Barnard, between April 1, 1870, and July 31, 1871, received, as postmaster, public moneys, amounting to \$1,979.69, and fraudulently converted the same to his own use. (4) That, on an accounting with the United States, July 31, 1871, defendant Barnard was found to be indebted to the United States, in the sum of \$1,977.69, and, on February 24, 1872, was directed to pay the same to one A. J. Sullivan, postmaster of Santa Fe, N. M., but refused to do so, and no part thereof has been paid. Prays judgment. Filed October 24, 1872. Service of summons made on all the defendants. Return of summons filed March 25, 1873. Defendant Wormser demurred, in substance: (1) That the court had no jurisdiction of the person of the defendant, nor the subject of this action, because (a) the complaint is not signed by plaintiff, nor his attorney; (b) summons has not issued upon any complaint filed in this court, or any other court known to the laws of the United States, or of this territory; (c) summons has not issued from a court having authority, nor has it been signed by an authorized clerk, nor returned by an authorized officer. (2) That the complaint does not state facts sufficient to constitute a cause of action. Filed, March 13, 1873. Defendant Barnard, the postmaster, answered admitting office, bond, and indebtedness as charged; denies conversion of funds; alleges they were embezzled by his clerk; denies refusal to pay said Sullivan said sum, or any sum; alleges action barred, because not commenced within two years from liability. Filed July 24, 1873. Defendant Wormser, who had demurred, as aforesaid, then answered admitting office of Barnard; denying execution of the bond; on information and belief, denying indebtedness; as to alleged defalcation, alleging that he has no knowledge thereof sufficient to form a belief; also pleading two years' limitation. Filed February 24, 1873. On the 11th day of October, 1875, long after time for answering had expired, defendants Stevens, Wormser, Moeller, Bean, and Henderson asked leave to file an answer, in substance, as follows: (1) Admitting that Barnard was postmaster, as charged, February 24, 1870; but denying that he was postmaster

any longer than to, and until on or about, April 1, 1871. (2) Admitting the bond. (3) Alleging that, on or about April 1, 1871, J. N. Dawly, United States special post-office agent, took possession of Barnard's office, with \$1,800 worth of stamped envelopes, etc., charged to Barnard; taking and using the same for the United States, plaintiff herein. (4) Denying breach of bond by Barnard; alleging that, if he had been credited with said \$1,800, as he should have been, his account would have been balanced, etc. Defendants offered to show, by affidavits, that the facts set up in said proposed answer had come to their knowledge since the time for answering had expired, and that it was offered in good faith. The United States district attorney waived affidavits, and consented that the motion be heard as though such affidavits were filed. Motion denied. Defendants excepted. Then, October 14, 1875, the cause coming up regularly for trial, judgment that, defendants failing to make oath that they were equitably entitled to credits submitted to accounting officers of the treasury, and rejected, plaintiff have judgment, with costs. Defendants appealed from the judgment.

There is nothing to show that the demurrer of defendant Wormser was ever disposed of. It is true he answered; but, under section 42 of our practice act, a party may demur and answer at the same time. It may have been error to have rendered the judgment against him, but there is no assignment of error here on that ground. We could not consider there was error in this respect without presuming, though the record be silent on the point, that the court did not, in fact, dispose of the demurrer. We cannot presume this. Also, there is nothing in the record to show that issue was joined in the case by any of the defendants, other than by Barnard and Wormser, further than the recital in the judgment, "and the said defendants being present by counsel;" but there is no assignment of error that the default of the other defendants had not been entered, or that the entry of the judgment, as against them, was irregular in any other respect than the one assigned as error. The notice in the summons is sufficiently full to warrant a judgment by default, to the extent of the judgment actually rendered; and, in the absence of anything to the contrary in the record, it will be presumed that the proceedings below were regular in all that is necessary to support the judgment.

The assignment of error in this case is as follows, as stated in the transcript: "Such appeal is taken on the following assignment of error, to-wit, that the court erred in refusing to grant leave to the defendants to file the answer referred to in the bill of exceptions." The application of defendants below, the refusal of which is assigned for error, was an application to file an answer after the time for answering had expired. The first rule governing the court in this matter is found in the sixty-eighth section of our practice act, as follows: "The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow,



upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this chapter."

The question then is, was there good cause shown why this leave should have been granted? The question as to what would have been good cause in this case is determined by some very special provisions in the Revised Statutes of the United States. Section 957 of those statutes reads as follows: "When suit is brought by the United States against any revenue officer, or any other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return-term, upon motion, unless the defendant, in open court, (the United States attorney being present,) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officer of the treasury, and rejected, specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper specified in the affidavit. And no continuance shall be granted except as herein provided." "Sec. 958. In suits arising under the postal laws, the court shall proceed to trial, and render judgment at the return-term; but, whenever service of process is not made at least twenty days before the return-day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient, and if he makes affidavit that he has a claim against the post-office department, which has been submitted to, and disallowed by, the sixth auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant continuance until next term." "Sec. 952. No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employe of the post-office department, unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident."

If the above sections should be thought to relate more particularly to the officer himself, note the following: "Sec. 951. In

suits brought by the United States against individuals, no claim for a credit shall be admitted on trial, except such as appear to have been presented to the accounting officers of the treasury for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or by unavoidable accident." These sections, of course, have no relation to what a defendant may state in his answer, if he chooses to answer. He may state what he likes in his answer, subject to the usual motions to strike out, as in other cases. They relate to granting continuance, and to what claim may be admitted on the trial of the cause. But when a defendant is in default, and asks leave to make an answer after time, one of the main things always demanded by courts is that he satisfy the court in some way that there is reasonable ground to presume that he has a valid defense to the action. Unless he raise some such presumption, there is no reason for opening the case, and delaying it. If he undertakes to show what it is he claims he can prove on the trial, and the law is clear that such a defense would avail him nothing in the trial, and there is no other cause shown for opening the case, a refusal of the judge below to permit the answer after time will not be reversed as error. It would be plain, in such a case, that the party had not shown good cause for opening the case.

Now, could the defendants have shown on the trial the facts which they say they desired to show, we are satisfied, from the rule in *Giles' Case*, in the United States supreme court, (9 Cranch, 212, as found in 3 Curt. Dec. 339,) that defendant could not have used this defense on the trial. In that case, the action was against *Giles* and his bondsmen. The defendants claimed a credit which had not been submitted to the officers of the treasury and rejected. Such a claim is not considered a good defense in the case of the principal. The question was, could the sureties avail themselves of it? Did they stand in any different position in the matter from the principal? At this point, the court says: "If, then, in a suit against *Giles* himself, a claim for the credits, under the existing circumstances, could not be sustained, neither can it in an action on his bond, without permitting the defendants to do indirectly what the marshal could not have done directly, and in this way avail themselves of what the law seems to regard as a default, or at least a negligence, on the part of their principal." 3 Curt. Dec. 339. And so the defendants in that case were held liable, although it was actually proven on the trial, and so found by special verdict of the jury, that the marshal had really paid the money to the United States district attorney, and it was customary to so pay it. But because he had not presented his vouchers from the district attorney to the accounting officers,

and had his accounts for such payment allowed or rejected, the mere fact of paying could not avail his bondsmen on the trial. And so, in this case, even if the case had been opened, the answer permitted, and the parties had actually proven on the trial all they claim they could prove, it would have availed them nothing; the credit could not be allowed, and the court would still have been obliged to enter judgment against them. The defendants, to have been able to advance a claim for credits on the facts alleged, must have shown on the trial that the claim had been presented, and rejected, before the commencement of the suit, or that they had vouchers at the time of the trial not before in their power to procure, and that they had been prevented from presenting them by absence from the United States, or unavoidable accident. True, the time of trial had not yet arrived, and it may be that they could, on the trial, have made the showing. If they thought they could have done so, they should have made a showing that they expected to be able, when the cause would be called for trial, to show vouchers, and bring themselves within the statute. They did not do this. They did not make any showing to the court which made it reasonable to presume that on the trial they would have a valid defense. They did not, therefore, show any good reason why the court should exercise its discretion, and allow an answer to be filed after time. There was therefore no error in the action of the court denying the motion. Wherefore, the judgment is affirmed.

(1 Ariz. 336)

**TORQUE V. CARRILLO.<sup>1</sup>**

(*Supreme Court of Arizona. Jan., 1876.*)

**TRIAL—RECEIVING VERDICT—ABSENCE OF COUNSEL.**

1. There is no error in giving additional instructions to the jury at their request, nor in receiving the verdict, in the absence of counsel and without having been called, the party himself being present, and the presence of the latter will be presumed unless his absence is shown.

2. The affidavit of a juror cannot be received to show that he did not agree to the verdict duly returned.

Appeal from district court, Pima county.

*Farley & Pomroy*, for appellant. *Briggs & Goodrich* and *McCaffry & Clark*, for respondent.

**PER CURIAM.** The appeal is from the judgment and from the order of the court denying a motion for a new trial. The action was for damages for personal injuries charged by the plaintiff to have been inflicted by the defendant upon the plaintiff. The complaint charges that the plaintiff was of the age of 70 years, in feeble health, and having previously lost the sight of one of his eyes before the injuries complained

of were inflicted by the defendant; that the defendant made a violent assault upon his person, by means of which his remaining eye was destroyed. Plaintiff asked for damages in the sum of \$12,000. The answer alleges that the plaintiff made the first assault, and denies that the defendant did in any manner wound or hurt the plaintiff. The jury rendered a verdict in favor of plaintiff for the sum of \$2,000.

Among other matters it is assigned as error by counsel for the appellant "that after the case had been given to the jury, and they had retired, they returned into court and asked for and received instructions from the court in the absence of the defendant's counsel; also, that the verdict of the jury was received in the absence of the defendant's counsel; and that on neither of these occasions was the counsel for the defendant called." It does not, however, appear from the statement that the defendant himself was absent on either of the occasions referred to. It was not error for the court to give instructions to the jury upon their returning into court, as stated in the transcript, in the absence of the counsel for the appellant, if the defendant was himself present, and his presence will be presumed unless his absence is shown, (Comp. Laws, p. 412, § 170.) Though the proper and better practice is, in such cases, that the counsel be called. Nor was it error to receive the verdict of the jury in the absence of counsel for the defense. There is no provision upon the subject in the civil practice act, and no authority is cited by counsel sustaining the position that so to receive the verdict is erroneous.

An affidavit of one of the jurors was incorporated in the statement on which the motion for a new trial was based, to the effect that he, the juror, did not agree to the verdict. The minutes of the court show that the verdict was in writing, signed by the foreman of the jury; that it was recorded in the presence of the jury, was then read to the jury by the clerk, and the jury asked if that was their verdict, and they said it was. It is not admissible in such a case to receive an affidavit of a juror to impeach the verdict. There was no error in the instructions given by the court; on the contrary, we think the law of the case was clearly stated in the charge of the court. Insufficiency of the evidence to justify the verdict was one of the grounds upon which the motion for a new trial was urged, and, as it appears to us, much the strongest, if not the only plausible ground upon which the motion for a new trial was based. The evidence, as set out in the statement, is certainly very meager upon the question as to the responsibility of the defendant for the injuries received by the plaintiff in the altercation, but we are not prepared to say that the jury might not, from the evidence, believe the defendant responsible for the injuries received by the plaintiff. The judgment must be affirmed, and it is so ordered.

<sup>1</sup> This case, filed January, 1876, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

(1 Ariz. 49)

TERRITORY *ex rel.* ROWELL v. FORREST.<sup>1</sup>  
(Supreme Court of Arizona. Jan. Term, 1872.)

CERTIORARI—JURISDICTION—PRACTICE IN ESCHATE.

1. Any justice of the supreme court may issue the writ of *certiorari* to the district court, under Comp. Laws Ariz. p. 375, providing that the supreme court and each justice thereof shall have power to issue all writs necessary or proper to the complete exercise of the powers conferred on the court.

2. On an information alleging the escheat of the estate of an intestate, and that it is being badly managed by the administrator, the district court has no power to order the latter to deliver the assets in his hands to a receiver appointed by the court, the district court having appellate jurisdiction only of matters cognizable in the probate court, and Comp. Laws Ariz. pp 561-563, providing that the receiver shall be the custodian of the real estate, and the rents and profits thereof, and that the administrator shall settle the estate, and, after paying the debts, shall pay to the treasurer of the territory the residue of the estate.

*Certiorari.*

C. W. C. Rowell, for relator. J. P. Hargrave, for respondent.

TWEED, J. This is a *certiorari* granted by the supreme court, and directed to the district court, second judicial district, in and for the county of Yuma. The record or transcript in the case shows that the relator, William H. Forrest, was appointed administrator of the estate of Robert Cavennaugh, deceased, by the probate court for the county of Yuma, on the 26th day of December, 1859; that the relator qualified and entered upon his duties as such administrator, and continued to act as such administrator up to the time his petition herein was filed; that his letters had not been revoked, and no proceedings had been instituted in said probate court for their revocation; that the property of said estate consisted of certain real estate situated in Arizona City, Yuma county, and of money and other personal property of the value in all of some \$12,000; that in November, 1871, and during the session of the district court, in and for said county of Yuma, an information was filed in said court by the acting district attorney of said county of Yuma, alleging the escheat of said estate to the territory of Arizona, and praying, among other things, for a decree vesting said estate in said territory. It is also alleged in the information, in very loose and general terms, that the estate was being badly managed by the administrator, and the court was asked to appoint a receiver therein. Upon this information such proceedings were had that on the 13th day of November an order was entered in said court appointing Thomas Hughes receiver, to take charge of said estate, and a further order therein made directing said administrator, "the relator herein," upon application of said Thomas Hughes, receiver, at once to turn over to said receiver all property and moneys in his hands or under his control belonging to said estate. The foregoing contains all that is material in the tran-

script for consideration in passing upon the question to be decided. The relator, in his petition and in his brief filed, insists that the said court acted without authority of law, and exceeded its jurisdiction in making the order, in so far as such order required the relator to turn over and deliver the personal property and effects in his hands as the administrator of said estate to the receiver.

The case was submitted to us without argument, but upon briefs filed in the case of Territory v. Meahr,<sup>2</sup> also before us by *certiorari* at this time. In the argument in that case, and by the brief filed by respondent, it was insisted that the writ was improperly issued, the order for the issuance of the writ having been made in that case as in this by his honor, the chief justice. We, however, are satisfied that in this regard the writ was properly issued. Section 5 of the statute conferring jurisdiction (Comp. Laws, p. 375) reads as follows: "This court [supreme court] and each of the justices thereof shall have power to issue all writs necessary or proper to the complete exercise of the powers conferred by law, and by this and other statutes." It seems clear to us that under this section the authority given to each of the justices in the issuance of this writ is precisely the same as that given to "this court." The fact that the supreme court judges are also the district judges may be a good reason for changing the law, so that a concurrence of two should be required to grant the writ; but we think the language of the section quoted unequivocal, and in conferring upon "this court," and each of the justices thereof, the power to issue writs, it must be deemed that the legislature intended to bestow upon each of the justices all the powers conferred upon this court in this regard.

This brings us to the consideration of the question whether or not the district court exceeded its power and jurisdiction in the matter complained of by the relator. We regret that we are compelled to pass upon and dispose of the question at issue hurriedly. No term of this court can be held until next January, and it is important to litigants that the causes before us, which have been submitted, shall be passed upon and decided at this term. Under such circumstances, we cannot set out as fully as we desire to do the reasons for and the grounds upon which our decisions are made. Conceding the proceeding had in the district court to decree the escheat of the estate of Cavennaugh to have been regular, and the appointment of a receiver in such proceedings to have been necessary and proper, was there any authority in said court to compel the administrator to turn over the personalty of said estate to the receiver? We think there was not, and that the court, in making such order, acted without authority of law, and in excess of its legitimate jurisdiction. The statute relating to escheats, Comp. Laws, pp. 561-563, nowhere contemplates, even when a receiver is appointed, that he shall be the custodian of the estate beyond the

<sup>1</sup>This case, filed January, 1872, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports, from volume 1, p. 1.

<sup>2</sup>Not reported.

realty and the rents and profits thereof, but expressly provides that the administrator shall proceed to settle the estate as in other cases; and after all just debts against the estate are paid, together with the expenses of administration, shall pay over the residue of moneys belonging to the estate, if any there be, not to the receiver, but to the territorial treasurer, who shall place the same in general fund of the territory. It is proper to add that the district court of the territory have only appellate jurisdiction of matters properly cognizable in the probate courts, and that the exercise of other than appellate jurisdiction in such matters is unauthorized by law. Our decision is, and it is so ordered, that the district court of the second judicial district in and for the county of Yuma so modify its order herein as to make the receiver so appointed the custodian only of the real property, with the rents and profits thereof, and that said order, so far as it requires the administrator, the relator herein, to turn over the moneys or other personal property of said estate to said receiver, be vacated.

(1 Ariz. 399)

TERRITORY V. HARPER.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1881.)

## HOMICIDE—EVIDENCE OF CHARACTER—VERDICT—INSTRUCTIONS.

1. On a trial for murder, the character of the deceased is not in issue, unless the evidence raises a doubt whether the accused might not have acted in self-defense.

2. The validity of a verdict in writing is not affected by a failure to record it before reading it to the jury and inquiring if it is their verdict.

3. Under a rule of court requiring instructions asked to be presented before argument, it is not error to refuse instructions not presented until after the close of the argument.

Appeal from district court, Pima county.

James W. Otis and Ben Goodrich, for appellant. Farley & Pourroy, for respondent.

FRENCH, C. J. The transcript in this case fails to comply with the requirements of the rules of this court, and especially with rules 5 and 6. Six errors are assigned. The first two assignments are the exclusion of evidence as to the character of the deceased. Unless it be shown that under the circumstances the defendant might have acted in self-defense, or unless the circumstances raise at least a doubt whether he might have so acted or not, the character of the deceased is not in issue. *People v. Murray*, 10 Cal. 309. The third and fourth assignments are untenable. The jury in this case presented their verdict regularly in all respects, and were required by the court to declare the same, which they did. It was a written verdict signed by the foreman. They were then directed by the court to deliver the same to the clerk for record. The clerk received the verdict, and filed it, but without entering it in the minute-book of the court read it to the jury, and

<sup>1</sup> This case, filed January, 1881, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

asked them if it was their verdict, to which they replied in the affirmative, being the second declaration by the jury affirming their written verdict. The verdict was then perfect and complete. *People v. Gilbert*, 57 Cal. 96. The statutory direction as to recording had its origin in the practice of verbal verdicts. For the same reason as stated in *People v. Gilbert* there was no error in refusing the motion for arrest of judgment, or in refusing the motion to change or amend the minutes of the court, or in refusing to admit the testimony of the clerk or affidavits of counsel on these points. The rules of the court requiring instructions asked to be presented before the argument, the refusal to give such instructions when not so presented, or not presented till after the close of the argument, cannot be assigned as error. *Walde v. Doll*, 29 Cal. 555. In this court, this case was submitted without argument, and the record discloses no error whatever. The judgment must be affirmed, and it has been so ordered.

STILWELL and PORTER, JJ., concur.

(1 Ariz. 52)

TERRITORY V. MIX.<sup>2</sup>

(Supreme Court of Arizona. Jan., 1872.)

## APPOINTMENT OF ADMINISTRATORS—JURISDICTION OF DISTRICT COURT.

Letters of administration were granted to M. by the probate court. K. applied for the appointment, as administrator of the same estate, and, his application having been refused, he appealed to the district court. That court dismissed the appeal, but appointed both M. and K. as administrators of the estate, and it subsequently dismissed M. for disobeying its orders. Held, that the proceedings of the district court, after dismissing the appeal, were void, the appointment and direction of administrators belonging primarily to the probate court, and the district court having appellate jurisdiction only.

REAVIS, J., dissenting.

Clarence Gray, for appellant. William P. Miller, for the Territory.

TITUS, C. J. This is an appeal from the final judgment of the district court of the second judicial district of Arizona, upon a special proceeding therein pending. The transcript of the record filed in this court discloses the following state of facts in this case: "On the 8th of October, 1871, A. A. Mix, the appellant, was, by the probate court of the county of Yuma, appointed special administrator of the estate of M. D. Dobbins, then late of the said county, deceased. Subsequently, R. B. Kelly applied to the said probate court for appointment as administrator of the same estate. This application was rejected, and the said R. B. Kelly appealed to the district court aforesaid from the judgment of rejection by the probate court, the said A. A. Mix being made appellee. That appeal, as the records allege, was dismissed, and an order entered by the said district court, appointing both the said R. B. Kelly, and the said defendant, Mix, administrators,

<sup>2</sup> This case, filed January, 1872, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

to act conjointly in the administration and settlement of the said estate. Such is the statement of the record as shown by the transcript. Subsequently, on the 25th of December, 1871, the said A. A. Mix was, by the order of the said district court, dismissed from the administration of the said estate for disobeying, as the record alleges, a lawful order of the said court, addressed to him, as such administrator, as appears from the record itself." Upon this state of facts the appeal is made to this court, and the order of the district court, dismissing the appellant, A. A. Mix, from the administration of the estate aforesaid, is the error alleged in the procedure of the court below.

This case, like all special proceedings, is an unusual one, and the facts disclosed by the transcript are not so full as to exclude all conjecture; enough, however, appears to show this court that the whole procedure below, from the rejection of Kelly's application for administration by the probate court to the dismissal, as it purports, of Mix by the district court, is one entire integral procedure, and must be so regarded by this court in its disposition of the case. There is nothing in the record to show that Mix was not doing his whole duty as administrator, at any time, from the beginning to the end of this proceeding. The presumption of law regarding administrators, as well as other officials, is that they do their duty until the contrary is shown. The action of the district court strongly aids this presumption; for, instead of dismissing Mix on Kelly's appeal, it dismissed the appeal itself, and appointed Mix. Had the district court stopped there, no possible exception could have been made to its action. The record, however, shows that it went much further than this, for it appointed both Mix and Kelly co-administrators, and at last dismissed Mix from the administration for disobeying one of its orders. The character of the order disobeyed is not, however, stated in the transcript, and the presumption of law would hardly be in its favor, against an administrator whose appointment and direction must come from another court, having a primary jurisdiction exclusively its own, which the district court can neither share or touch, nor question. The opinion of this court is that everything done by the district court in this case, after the dismissal of Kelly's appeal, was without authority of law, and therefore null and void; that, from all that appears from the record before us, A. A. Mix is still the sole administrator of the estate of M. D. Dobbins, deceased, and primarily amenable and accountable to the probate court of Yuma county, and no other. The order of this court, therefore, is that the district court of the second judicial district of Arizona vacate and rescind of record its several orders appointing R. B. Kelly, and dismissing A. A. Mix, as the administrators of the estate of M. D. Dobbins, deceased; that A. A. Mix, or whoever is or may be appointed administrator of the said estate by the probate court of Yuma county, be allowed to administer such estate as the law directs; and that the

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clerk of this court certify this order to the said district court.

TWEED, J., concurs.

REAVIS, J., (*dissenting*.) This cause is here on a pretended appeal from the district court for Yuma county. I cannot concur in the judgment of the court. There are two reasons why this case should be dismissed: *First*. It is not a case in which the law allows an appeal; *second*, if it were such a case, there is no appeal taken in the manner provided by law. Section 350 of the Civil Code of the territory provides that, "to render an appeal effectual for any purpose in any case, a written undertaking should be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all damage and costs which may be awarded against him on an appeal, not exceeding three hundred dollars, or that sum should be deposited with the clerk, by whom the judgment or order was entered, to abide the event of the appeal. Such undertaking should be filed, or such deposit made, with the clerk, within twenty days after the notice of appeal is filed, or such further time as the court upon application may allow." No such undertaking has been given or deposit made, in this cause, as the law expressly requires, nor is there anything in the record to show that the time for filing such undertaking, or making such deposit has been extended by the court. For these reasons it is very clear that this case is not properly before this court, and should be dismissed.

(1 Ariz. 421)

TERRITORY v. POTTER.<sup>1</sup>

(*Supreme Court of Arizona*. Jan., 1888.)

RAPE.

On the trial of a father for the rape of his daughter about 12 years old, it appeared that she made no resistance nor any outcry, and that no force was used and no threats except telling her to lie still or he would slap her. *Held*, that a conviction for rape could not be sustained, under Comp. Laws Ariz. p. 76, § 47, fixing the age of consent at ten years.

Appeal from district court, Pima county. *M. A. Smith*, for appellant. *Littleton Price*, for the Territory.

PINNEY, J. The defendant was tried and convicted for the crime of rape, and sentenced to the territorial prison for life; from which judgment he takes an appeal. The evidence entirely fails to sustain or make a case of rape. If true, it does make a clear case of incest. By the evidence of the daughter of the defendant, it appears that she had been sleeping with, and having connection with, her father, for about one year previous to the finding of the indictment. She testified that she was about 12 years old at the time of the alleged rape. The girl testified that she was at the house of a neighbor; that she had been staying there while her father

<sup>1</sup>This case, filed January, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

was out in the mountains at work. In the evening after his return, he called at this neighbor's house, and she went with him to his cabin. He went to bed first, and she got into bed with him. No force and no threats were used up to this time. Some time after they had been in bed, defendant told her to lie still or he would slap her. No outcry or resistance of any kind was made on the part of the girl, and no force was used by the defendant, and no threats, except to tell the girl to lie still or he would slap her, are anywhere shown in the record. If the facts detailed in the evidence of this case be true, we can scarcely imagine a more horrible case on the part of one calling himself "father." But courts are not organized for the purpose of making laws. We can only construe them as we find them. The law presumes a female of tender years incapable of consenting to sexual intercourse; and a man who has connection with such a female, although she may have consented thereto, is guilty of rape. 1 Whart. Crim. Law, § 558. What is a female of tender years and incapable of giving consent is fixed by the statutes of the different states and territories. In this territory, if she be under the age of 10 years, she is incapable of giving consent; if over that age, and of sound mind, she must resist, or be prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution. In this record, there is no proof of any imbecility of mind, and the girl being over the age of 10 years, the law imposes the duty on the prosecution to show that the girl offered such resistance as was in her power to make, or that she was prevented from resisting by threats of great bodily harm. Nothing of the kind is shown. It appears that the girl has consented to all this intercourse; and consent, even if reluctant, if free, always negatives rape. For the reasons above given, the judgment and order will be reversed, and the cause remanded for a new trial. And it is so ordered.

(1 Ariz. 87)

**PORTER v. BICHARD et al.<sup>1</sup>**

(Supreme Court of Arizona. Jan., 1873.)

**ACTION AT LAW—ACCOUNTING—JUDGMENT BY DEFAULT.**

1. The plaintiff and a firm composed of the two defendants having engaged in the business of common carriers, under a contract providing that each party should perform certain services, and that the capital should be contributed and the losses borne and the profits divided equally, the plaintiff may recover his share of the net profits in an action at law in which the parties may be examined as witnesses for each other, their books inspected, and their accounts unraveled.

2. Comp. Laws Ariz. p. 409, § 152, providing that judgment by default may be entered by the clerk if no answer is filed within 20 days after service of the summons, the clerk has no power to enter judgment by default after an answer has been filed in due time by one of the defendants, on behalf of both, in which he denies all knowledge of material allegations of the complaint,

<sup>1</sup>This case, filed January, 1873, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

averts that his "co-defendant, a resident of San Francisco, alone can and will fully answer," and asks for further time to enable him to do so.

3. The verification of the informal answer does not in any manner impair its efficacy, though the complaint was not verified, Comp. Laws Ariz. p. 394, § 51, providing that when the complaint is verified the answer shall be verified also.

4. A motion to set aside a default, and notice thereof, are not defective because in the title of the cause as given in the motion the defendants are described as "W. B. et al." and in the notice as "W. B. and N. B.," while in the complaint they are described as "W. B. and N. B., doing business under the firm name of W. B. & Co."

**Appeal from third district court.**

*H. H. Cartter*, for the appellant. *J. P. Hargrave*, for the respondents.

**PER CURIAM.** In this case, eight days after service of summons, William Bichard, the one of the two defendants residing without the jurisdiction of this court, filed his sworn and informal answer to the unsworn complaint of the plaintiff, James P. Porter, in which he admits some of the allegations of the said complaint, denies all knowledge of its other more material allegations, avers that the other co-defendant, Nicholas Bichard, a resident of San Francisco, alone can and will make full answer to such complaint, and asks the further time of 60 days to enable him to do so. With this answer on file in the case the clerk of the district court in which the suit was brought, 20 days after service of summons on the said William Bichard, that is, on the 11th day of November, 1871, at the instance of the plaintiff's counsel, declared the defendants in default, and entered judgment against them, and in favor of the plaintiff, for the sum of \$1,346, with costs of suit. Subsequently, on the 22d day of June, 1872, the district court, on motion of the defendants' counsel and argument on behalf of both parties, ordered that this judgment should be opened and the defendants allowed to answer. From that order the plaintiff appealed, and now asks this court to rescind it, and restore the judgment of the clerk, alleging the said order to have been null and void.

In addition to this averment of error on behalf of the plaintiff the counsel for the defendant, in his notice of motion to open the judgment in the court below, suggested an exception to the jurisdiction of the district court, alleging that the cause of action in the present case was so far an equitable one as to render the common-law remedy there sought inadequate to do justice between the parties. That suggestion was repeated in this court. A brief analysis of the case, however, will show that the district court, under our statutes, is entirely competent to dispose of it in justice to all the parties. The persons concerned in interest are but three,—the plaintiff and the two defendants sued as partners. Some of the relations of the opposite parties, in the case, it is true, are similar to those of partners, but the aggregate relations of the parties are neither numerous nor complex, nor does the case present for solution any equitable element. The plaintiff's claim is for the net profits of freight due him, as al-

leged, on a contract between him and the defendants, as common carriers, in which the services were to be performed by the respective parties, as provided in the said contract, and the capital contributed, the losses borne, and the profits divided equally between the parties. An account and discovery, in some of their simpler forms, may be required by the plaintiff of the defendants, in the solution of their controversy. The remedial powers of the district court are quite competent to do justice between the parties in this case, hardly less fully, and much more speedily and cheaply, than any mere court of equity. Issues clear and simple can always be extracted from any detail of fact by complaint and answer under our statutes, and when the issues are thus developed, the parties can be made witnesses for each other, and can be interrogated under oath as exhaustively as the same can be done on a bill in equity for discovery. Their books can be inspected and their accounts unraveled in a case such as this so fully as to satisfy all the exigencies of justice. Nothing in the case, therefore, requires this or the district court to abdicate its common-law jurisdiction, which had already attached, for the dilatory and expensive remedies of a court of equity.

The question recurs upon the validity of the order to open the judgment in the court below. The authority of the clerk to declare the defendants' default is simply clerical, involving no judgment or discretion. The statute (Comp. Laws, p. 409, § 152) provides that judgment may be thus entered if no answer has been filed with the clerk of the court. Any answer, when filed in the case, suspends the power of the clerk to declare the defendant's default and judgment, however informal, and its value as a pleading must be determined by the judge, and no one else. The answer of the defendant had, it seems, been filed by the clerk, who entered the judgment in this case, and had been on his file at least 20 days when the judgment was entered. The informal answer of William Bichard, as it appears upon the record, though not competent to form a triable issue, was certainly sufficient to entitle the defendants to further time to answer. It would have been so found on application to the court or judge for further time to answer, it would have secured the defendants leave to answer over on a judgment overruling the plaintiff's demurrer to it, and it would have entitled the defendants to a postponement of the trial in order to secure the testimony of Nicholas Bichard as a witness, on the trial of the cause at some future time. The conclusion, therefore, is that the clerk was wrong in entering the judgment of default against the defendants, with the informal answer of William Bichard on file in this case, and that the judge of the district court of the third judicial district was right in rescinding such judgment after it had been entered.

It only remains to notice two more exceptions of the plaintiff's counsel, which were adverted to in his brief, and on the oral argument of this case. One of these is that the answer of William Bichard

was on oath, while the complaint to which it purports to be responsive was not so, and that it was the answer of both parties, though only made by one. The other of these minor exceptions is that the defendants in the notice of motion to open the judgment, and in the proceedings which grew out of it, were not described and entitled as in the complaint, and that hence the notice was insufficient and inoperative, and the order of the judgment null and void. In the notice of motion the defendants are described as "William Bichard and Nicholas Bichard," and in the motion itself they are described as "William Bichard et al.," instead of "William Bichard and Nicholas Bichard, partners, doing business under the firm name and style of William Bichard & Co.," as they are entitled in the complaint, and with the exception noted in the other parts of the proceedings. The title as here indicated was the mere badge of the notice, as explained and applied by the notice itself, to show who sent it, and, like all such notices, does not require the certainty of a pleading. It is always sufficient where it informs the party entitled to its receipt of the thing to be done and leads him to the place of doing it at the proper time. The title was explained by the body of the notice, and together they left the plaintiff in no doubt of what was meant. Were William Bichard et al., and lawsuits between them and James P. Porter, so numerous that the latter could possibly have misunderstood this notice? Practically this question would have to be answered in the negative if there were nothing more. But on turning to the record we find this admission on behalf of the plaintiff: "I acknowledge service of the within motion. Prescott, Dec. 14, 1871. [Signed] H. H. CARTER, Attorney for Plaintiff." Besides this, the minutes of the cases show that the counsel for the plaintiff attended at the hearing of the motion, and resisted the order. This would have cured all defects of notice, if any there were. The verification of the informal answer of William Bichard by affidavit does not in any manner impair its effect. Our Compiled Laws provide, (page 394, § 51:) "When the complaint is verified by affidavit, the answer shall be verified also." It does not prohibit such verification, nor make it detract from the statement in any other case, for the truth is the verification. adds to the sanctity of the statement, and is not matter of exception in the present case. The informal answer of William Bichard in this case thus commences: "William Bichard, for and in behalf of himself and Nicholas Bichard,"—and thus concludes: "So the defendants in this case respectively pray this honorable district court," etc. The remainder, and the whole effect, of this informal paper is to tell the plaintiff, the clerk, and the court that the absent defendant, Nicholas Bichard, could and would make full answer to the complaint in the case if time were allowed him to do so. He makes the statement and he prays for the time, as would have been obvious, without the commencement or conclusion, on behalf of both the defendants; for both, as parties to the suit, were



interested in it. It is impossible to see how this can impair the effect of this informal answer, or constitute any cause for rescinding the order for opening the judgment in controversy. This court, therefore, is thus constrained to disregard all these minor exceptions. Some cases were cited in argument, but they had so little application to the present case that their discussion here would add little or nothing to its interest or instruction. They certainly ought not to vary the foregoing conclusions. The judgment and order of this court, therefore, is that the order of the district court of the third judicial district, opening the judgment of default entered by the clerk of that court in this case, be confirmed, and the case be remanded there for further proceedings thereon.

(1 Ariz. 340)

MURPHY *et al.* v. WHITLOW.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1876.)

LIABILITY FOR FIRM DEBT—OBJECTIONS TO INSTRUCTIONS.

1. There being evidence tending to prove a partnership between defendant and B., it is not error to charge that the former is bound, if, when called on to pay a note signed by B. in the firm name, defendant did not deny his authority, but promised to pay the note.

2. The defendant cannot object to comments of the court on evidence introduced by him, on the sole ground that the evidence itself is irrelevant.

3. If the manner and emphasis with which a charge to the jury is delivered can be assigned as error at all, it must first be made the ground of a motion for a new trial supported by affidavits.

Appeal from district court, Maricopa county.

G. H. Oury and J. T. Alsap, for appellant. John A. Rush, for respondents.

PER CURIAM. This was an action on a promissory note signed by Whitlow & Beatty. Whitlow was sued as surviving partner of the late firm of Whitlow & Beatty. The complaint alleges the partnership, and other essentials, in form not objected to by the defendant. The defendant answers, denying the partnership, execution of the note, and indebtedness. The case was heard with a jury. Plaintiff introduced evidence to show that the defendant and Beatty, whose name was signed to the note with that of defendant, had held themselves out to the public as partners; that Beatty had executed and delivered the note as a partnership note; that payment of the same was demanded of defendant; that he promised to pay, not denying the authority of Beatty to make the note. The note was put in evidence, with an indorsement of the payment of \$200 thereon. Defendant introduced evidence denying the partnership, alleging that, when he promised to pay the note, he was acting as administrator of the estate of Beatty, deceased, and that he promised as administrator, not as personally liable, alleging that he did tell one of the plaintiffs, at the time of the de-

mand, or conversation about the debt, that Beatty had no authority to pledge defendant for payment. The foregoing evidence was the testimony of defendant himself. Defendant introduced other evidence, viz., that of one Wilson, his book-keeper, to the effect that, though the payment of \$200 on the note had been made by his book-keeper, it was without authority; that the mules, alleged by plaintiff to have been given to defendant in consideration of the note by delivering them to Beatty, had been bought by Beatty with \$600, given him for that purpose by defendant's book-keeper, as instructed by defendant; and that, when Beatty brought them to defendant's place of business, he claimed the mules as his own property, took them off on a journey for about a week, when he returned, turned them into defendant's corral, and, in a few days, Beatty was killed. The book-keeper says he credited Beatty on his books with the mules, having charged him with the \$600; that defendant took and used the mules, sold some of them, had some of them yet; that he made this credit on the books to Beatty for the mules, without any instructions from either Beatty or defendant; that Beatty had made no disposition of the mules after he had returned from the journey mentioned; and that defendant was absent from home at the time he (the book-keeper) credited Beatty on the books with the mules. The jury having been charged, found for plaintiffs. Defendant moved for a new trial, assigning error of law in the charge of the judge. Motion denied. Appeal from the order refusing new trial.

The judge charged as follows, among other charges: "If the jury believe from the evidence that the defendant, with knowledge of the existence of the said note, made no objection to plaintiffs against the authority of Beatty to make it, when called upon to pay it, but promised plaintiffs to pay it, he thereby ratified the act of Beatty, and became liable." This is assigned as error. We see no error in this charge. It was not undertaking to answer for the default of another. The charge says. If the jury believe defendant had knowledge of the note, the note is the note of Whitlow & Beatty. To have knowledge of that note is to know that it is signed in that manner; that it is the signature of a partnership. It is a firm name. There was evidence before the jury that there was such a firm, and that defendant was a member of it. It was not error to say to the jury, with the evidence before them, that, if they believed defendant had been notified that a note was out, signed, "Whitlow & Beatty," had been called on to pay it, had not denied the authority of Beatty to make the note, but, on the contrary, promised to pay it, he was then liable on the note.

The court further charged: "It is not my province to say what is proven, or what is not proven. Of that you are the sole judges. But I have the right to call the attention of the jury to important points in the testimony; the manner in which the defendant obtained the mules purchased by Beatty. According to the

<sup>1</sup>This case, filed January, 1876, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

testimony of Wilson, it would seem that the mules were brought by Beatty to defendant's place, and claimed by Beatty as his mules, and were by him taken to McDowell, and brought back to defendant's place by Beatty on the Wednesday before his death. The witness Wilson, according to his own testimony, without one word having been said to him either by Beatty or the defendant, credited Beatty, on his account with defendant, with the mules on the day of, or day preceding, the death of Beatty; and it appears from the testimony of Wilson that defendant took possession of the mules, and has retained possession of them ever since. If the defendant was the partner of Beatty, he had a right to the possession of the mules as surviving partner, and, if he was not partner, then the mules belonged to the estate of Beatty, according to the testimony of Wilson, and should have been administered upon as the property of the estate, and used to pay the debts of Beatty." This is the second assignment of error. It is urged that it was error to comment on this testimony, because it is claimed the testimony is not relevant to the issue in the case. But all this testimony was introduced by the defendant, and admitted, without objection. Defendant cannot now object that the testimony was irrelevant. The testimony was in. It had gone to the jury, and, if it were really irrelevant, all the more reason why the judge should comment upon it, so far as to prevent the jury from being misled by it. The purport of the evidence seemed to be that, because the defendant had the mules in his possession, they were his individual property. The judge explained to them that if the defendant was a partner of Beatty, then the mere fact of his having possession of the mules would prove nothing, because, as surviving partner, he would have been entitled to the possession; that, if he was not a partner, then, according to the testimony of Wilson, the mules belonged to Beatty, and defendant, being administrator of Beatty's estate, would have been entitled to the possession of the mules, as such administrator. Certainly, it is a correct proposition of law that a surviving partner is entitled to the possession of the personal estate of the partnership, pending administration, as also that, as administrator in the case shown, if the property belonged to Beatty, defendant was entitled to the possession of it.

It is urged that he could not have been administrator and partner at the same time; but that is a collateral matter. His appointment as administrator might have been resisted in the probate court, if it were shown that he was a partner; but such a question cannot be considered here, in this case, on the present record.

It is further urged—and this seems to be relied upon as a serious ground of objection to this error—that, as stated in the words of the transcript, "this recapitulation by the court of Wilson's testimony was made with a manner and emphasis indicative that the court regarded the testimony as extremely suspicious." Whether the manner in which a judge delivers a

charge, or the peculiar emphasis with which he pronounces it, can be assigned as error, is not before us. It is sufficient to say that it is not properly assigned here. The appeal here is that it was error to deny a new trial. If it was claimed that a new trial ought to have been granted for that the defendant was unfairly prejudiced before the jury by the court, it should have been charged as irregularity in the proceedings of the court, coming under the first of the seven grounds for new trials, and the application should have been supported by affidavit. This is the mode prescribed by the statute, and it cannot be properly presented or raised in any other way. A judge may have been entirely unconscious of the fact that his manner of addressing the jury was thought to unfairly prejudice them in any way in the case. If the charge is deliberately brought before him on motion for a new trial, and affidavits filed with it, showing what persons consider that his manner was unfair, and to what extent they think it was calculated to prejudice either party, he, as also the appellate court, is in a position to judge whether a new trial ought to have been granted or not. But when parties have not thought the matter of sufficient importance to present it properly, or, for any cause, have not in fact done so, the question cannot, of course, be considered on appeal. The order denying a new trial and the final judgment are hereby affirmed.

(1 Ariz. 509)

OURY v. DUFFIELD.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1872.)

EJECTMENT—PLEADING.

Under Comp. Laws Ariz. p. 267, § 114, giving to the administrator the right to the possession of all the real estate of his intestate, his title is sufficiently alleged in a complaint in ejectment by an averment that "as administrator he is seised in fee, and entitled to the possession of the premises," though no possession, nor right of possession, in his intestate is averred.

Appeal from district court, Pima county.

TWEED, J. This was an action of ejectment to recover land in Pima county. Judgment by default was rendered by the court against defendant, from which he appeals. Some objections are made to the sufficiency of the summons by counsel for the appellant, which we think not well taken. It is strict and literal compliance with the requirements of the statute. It is objected to the complaint that it alleges no possession, or right of possession, in the intestate. The complaint, however, does allege that the plaintiff, "as administrator, was seised in fee, and entitled to the possession of the premises," etc. The statute gives to the administrator a right to the possession of all the real estate of his intestate. Comp. Laws, pp. 267, 268, § 114. And we see no reason why he cannot maintain a possessory action to recover

<sup>1</sup>This case, filed January, 1872, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports, from volume 1, p. 1.

it. The complaint asserts his right to the possession as administrator, and the default confesses it. The judgment must be affirmed.

TITUS, C. J., and REAVIS, J., concurred.

(1 Ariz. 362)

SANDFORD V. MOELLER.<sup>1</sup>

(*Supreme Court of Arizona*. Jan., 1877.)

APPEAL—REVIEW—OBJECTIONS WAIVED.

1. Where no objection was made to the issues, or to the submission on special issues, it cannot be assigned as error that they did not cover all the issues in the case.

2. The right to a statement on appeal being, by Comp. Laws Ariz. § 341, deemed waived, if not served within 20 days from judgment, no errors alleged therein can be considered if it was not served within that time.

Appeal from district court, Yavapai county.

*Materson, Howard, Southworth & Goodwin*, for appellant. *Hargrave and Rush & Wells*, for respondent.

FRENCH, C. J. The jury in this case find, on the special issues submitted to them: "(1) That the plaintiff was not in prior possession by himself, or through his grantors, of the premises, or any part thereof, described in the complaint on and before the months of February and March, 1868; (2) that the whole of the land in controversy was included in the military reservation known as 'Ft. Whipple' on the twenty-seventh day of April, 1870."

Although the special issues submitted to the jury do not appear to have covered all the issues in the case, plaintiff made no objection to these issues as framed, or to the submission of the case to the jury on them, so far as the transcript discloses. It is alleged as one of the assignments of error that the special issues submitted to the jury did not cover all the issues in the case. But this assignment was made for the first time in making up the record long after the trial of the case, and, even here, it is not alleged that plaintiff ever objected to the submission of the case to the jury on special issues. The finding of the jury on these issues is decisive of the case, especially is the first one so decisive. We cannot reach this verdict to disturb it on the record before us. The transcript contains a voluminous statement, in which many errors are alleged but not shown, and a large mass of redundant and irrelevant matter. The statutory provisions, in regard to statement on appeal, are found in sections 340, 341, and the sections immediately following page 346 of the Compiled Laws. None of these statutory provisions have been complied with. It does not appear very clearly when the judgment was entered. But the decision was made on the 25th day of May, and the judgment was filed on the same day; the statement was served on the 23d of June following. This was not within the 20 days, and the 341st section prescribes the penalty: "He shall

be deemed to have waived his right thereto." We can therefore only consider the judgment roll, which, showing no error on its face, the judgment must be affirmed, and it has been so ordered.

(1 Ariz. 381)

TERRITORY V. SELDEN.<sup>2</sup>

(*Supreme Court of Arizona*. Jan. Term, 1879.)

APPEAL—REVIEW.

No error having been assigned, and an examination of the record disclosing none, the judgment is affirmed.

Appeal from district court, Pima county. *S. Ainsa*, for appellant. *L. C. Hughes*, for the Territory.

FRENCH, C. J. There is no bill of exceptions, and no statement whatever in this transcript; nor is there any assignment or claim of error in the case in this court. An examination of the record discloses no error. The judgment of the court below is therefore affirmed.

(1 Ariz. 383)

HOUGHTALING V. ELLIS *et al.*<sup>3</sup>

(*Supreme Court of Arizona*. Jan. Term, 1880.)

PLEADING—ANSWER.

In a suit for money due under a written contract, defendant may plead an equitable defense founded on a mistake in the writing, and may have it reformed; Comp. Laws Ariz. p. 409, § 2437, providing that "there shall be in this territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," and Prac. Act Ariz. § 46, providing that the answer may contain denial, and "a statement of any new matter constituting a defense or counter-claim." SILENT, J., dissenting.

Appeal from district court, Yavapai county.

Action at law by D. K. Houghtaling against N. E. Ellis and others for the recovery of money due under a written contract. The defendants pleaded that a mistake had been made in reducing the contract to writing, and asked that it be reformed. Plaintiff demurred to the answer, and the demurrer was sustained. From a judgment in favor of plaintiff, defendants appealed. Comp. Laws Ariz. p. 409, § 2437, provides that "there shall be in this territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs." Prac. Act Ariz. § 46, is as follows: "The answer of the defendant shall contain, (1) in respect to each allegation of the complaint controverted by the defendant, a specific denial thereof, or a denial thereof according to his information and belief, or any knowledge sufficient to form a belief; (2) a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language."

<sup>1</sup>This case, filed January term, 1879, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

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<sup>3</sup>This case, filed January term, 1880, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

*Clark Churchill*, for appellants. *Bush & Wells*, for respondent.

FRENCH, C. J. In the argument of this case, it was assumed that the question was raised in this record whether in this territory an equitable defense can be interposed to a complaint setting forth an action at law, and especially whether the defendant pleading such equitable defense can properly ask that the contract on which the legal action is founded be reformed in such action. There is no doubt that a reformation of the contract on which the action is brought may be properly asked for in the answer in such action, if the action be an original proceeding in equity. This may be done even in an action for the specific performance of such contract. The matter entitling a party to amendment of his contract may be set up by way of defense to a proceeding for a specific performance of it. *Woodworth v. Cook*, 2 Blatchf. 151. As to the federal constitutional courts, the rule and practice is well established that the two systems of law and equity cannot be blended in the same action or proceeding. The equity jurisdiction of the purely federal courts is derived solely from the constitution and acts of congress. The equitable jurisdiction of these courts is the same in every state, and the rule of decision is precisely the same in all. Their rule of practice is not regulated, or even modified, by the state practice. *Dodge v. Woolsey*, 18 How. 347; *U. S. v. Howland*, 4 Wheat. 108, 4 Curt. Dec. 360. A great many cases to the same effect are found in the United States supreme court decisions, and none *contra*. The supreme court goes further still. In the case of *Jones v. Mc-Masters*, 20 How. 22, the court say: "It must be remembered that this is a suit at law to recover the possession of the land in dispute, and that, although it may be the course of practice in the courts of the state of Texas in a suit of this description to blend in the proceeding the principles of law and equity, in the federal courts sitting in the state, the two systems must be kept distinct and separate. This principle is fundamental in these courts, and cannot be departed from. The court, therefore, in a suit at law, should exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity. In a case calling for the interposition of this court, and turning upon equitable considerations, relief should be sought by bill in equity." The doctrine is here clearly announced that, if a party seek equitable remedy or relief, he must do it by original bill, and not in answer to an action at law. In the United States federal courts state statutes and practice have no application. This doctrine and practice, so uniformly announced and maintained in all the United States federal courts, has, no doubt, tinged the decisions of the territorial courts in some instances. But the courts of the territories are not United States constitutional courts, but United States territorial courts, acting under the statutes of their respective territories; and the question in the case at bar

is whether an equitable defense to an action at law can be authorized by territorial statutes, and, if so, whether it has been so authorized by territorial enactments in Arizona. I am of the opinion that both these questions may be answered in the affirmative. Two cases in the supreme court of Montana are cited by the respondent. But these cases do not reach the case at bar. In the summing up of the doctrine of these two cases, in the latter case, in divisions numbered 1, 2, 3, 4, and 5 on page 540, the concluding number, 5, reads as follows: "That suits in equity, where equity relief is prayed, or where an equitable defense is set up to a claim at law, must be tried as in a court of chancery, and the decree emanate from the judge sitting as a chancellor." This is precisely what is prayed for by the defendants in this case. I am of the opinion that the answer in this case is a full bill in equity in substance, and not justly subject to the objection of not containing facts sufficient to constitute a defense. If doubt be entertained as to the equitable matter solely, it sets up the legal matter, not by denial, it is true, but by averment and facts stated, such as that the consideration failed, which constitute a good defense at law. I am, therefore, of the opinion that the judgment should be reversed, and the case remanded for further proceedings, and that the demurrer to the answer be overruled, and it is so ordered.

PORTER, J., concurs.

SILENT, J., dissents.

After the rendition of the foregoing opinion, a rehearing was granted, upon which the court reaffirmed its former opinion.

(1 Ariz. 25)

# DAVIS v. SIMMONS.<sup>1</sup>

(*Supreme Court of Arizona*. Jan. Term, 1866.)

PUBLIC LANDS—ENTRY ON UNSURVEYED LANDS—DAMAGES FOR DETENTION.

1. Under Comp. Laws Ariz. p. 636, § 1, making any settlement, cultivation, or improvement in pursuance of an intention permanently to occupy and improve public lands as a home sufficient to give a possessory right, one who measured off, and took possession of, 160 acres of unsurveyed land, and cultivated a part, erecting a house of poles covered with brush, and posting notice of his claim, is entitled to possession of the entire tract as against one entering a month later, and it is immaterial that his claim was for a tract a mile long and only one-fourth of a mile wide, as such tract has the width of the 40-acre unit used in federal surveys.

2. Six hundred dollars' damages for detention of 80 acres one season is not excessive, when defendant cut and sold therefrom hay amounting to nearly that sum.

3. An offer to buy peace in order to avoid a lawsuit is no recognition of an adverse claim.

Appeal from district court, Yavapai county.

*J. P. Hargrave*, for appellant. *James Anderson*, for respondent.

<sup>1</sup>This case, filed January term, 1866, is now published by request, with others, in order that the *Pacific Reporter* may cover all cases in the *Arizona Reports* from volume 1, p. 1.

**PER CURIAM.** This case arose in the court below on the complaint of Davis against Simmons, to recover possession of the eastern half of a tract of land in Yavapai county, the whole of which is described in the said complaint as follows: "Situate on Willow creek, commencing at a stake near a hill at the south-west corner; thence north one-fourth of a mile to a stake; thence east one mile to a stake; thence south one-fourth of a mile to a stake; thence west one mile to the place of beginning; the said ranch being about one mile west from the house of Giles & Co., and embracing not exceeding, but about, one hundred and sixty acres." The plaintiff also claims \$2,000 damages for the detention of the described premises and costs. The date of the summons is June 5, 1865. The date of the answer, which is a mere general denial of the allegations of the complaint, is not given in the transcript before this court. On the trial of the cause, the parties waived a jury, and the conclusions of law on the facts found, as stated by the court, were as follows: "That judgment must be entered for plaintiff for the possession of about eighty acres of land, or so much of defendant's claim as may encroach on plaintiff's as originally stepped and staked by him, one-quarter of a mile wide and one mile long, according to the description contained in plaintiff's complaint, with damages in the sum of six hundred dollars, for the wrongful taking and detention of said lands, to-wit, about eighty acres at the eastern end of plaintiff's claims as described as aforesaid; and that execution issue according to law for the said sum of money; and that the sheriff, by a writ of restitution, put the plaintiff in possession of said lands, as aforesaid; and for all costs and disbursements in the said suit." The date of the trial and decision of the court are not given; but the transcript states that judgment was entered thereupon, with costs taxed at \$89.90, May 9, 1866, which was probably meant for 1865, as appears from subsequent dates. There appear to have been no exceptions made at the trial, and no further proceedings in the case, till January 22, 1866, when the defendant gave notice of his appeal "from the whole judgment entered against him," and "which is [generally] assigned as error, as being contrary to law, and not supported by the facts found."

It is not necessary to cite all the facts here. A condensed statement of them will, however, show that they fully sustain the judgment rendered in the case. From these it appears that the plaintiff, Davis, took possession of the land in controversy about the 11th of November, 1864, measured it, put up a summer-house of poles planted in the ground, covered with brush, and placed a written notice of his claim thereupon. The plaintiff sowed a small piece of wheat November 12, 1864, and cultivated about six acres on the upper part of his claim as described. It appears that the plaintiff saw no improvement on this land as described, and did not know of the defendant's claim till about the 1st of the succeeding April. On

the 2d of the succeeding January he filed with the county recorder a copy of the notice fixed to his building on the 11th of November, 1864. It appears, from the facts as found by the court, and which seem not to be denied or controverted, that on the 10th or 12th of December, 1864, the defendant took possession of the land in controversy, and so much more as formed with it a square, measured it by stepping, and planted stakes for corner marks, and soon after hauled some logs for a cabin, and broke about one acre of land on the tract in controversy. The defendant's building was not finished for a considerable time afterwards, in consequence of the snow. It further appears that the defendant, on the 4th of May, 1865, prevented the plaintiff from going or cutting grass on the land in controversy; that he cultivated a portion of it, and gathered from it about 28,000 pounds of hay, which he sold at \$45 per ton. The defendant himself testifies on the trial that he saw the plaintiff's house when he first went and set his stakes on the land in controversy; and it appears that the defendant's father, for whom the land was originally taken up, had seen the plaintiff's notice. As early as January, 1865, it seems the Messrs. Steinbrook talked with defendant on the land in controversy, as to the location or building of the plaintiff thereon. The land in controversy was part of the public domain of the United States, and, at the time referred to, unsurveyed.

The essential legal requisites of a possessory right in lands here, are the intention of the occupant permanently to occupy and improve the same for his home, and the manifestation of that intention, as early as practicable, by such improvements and badges of ownership as shall make it known to others. By our act, Comp. Laws, p. 536, § 1, any settlement, cultivation, or improvement in pursuance of this intention is sufficient to secure this right. This intention of permanent occupancy as a home, and sufficient improvement to proclaim it to the world, are all that our act concerning possessory rights in public lands, or the homestead laws of the United States, require. The plaintiff's intention to occupy the land in question as a home seems to have been continued at great peril, until he was ousted by the defendant early in 1865. His simple improvements and badges of ownership were competent notice of ownership to all the world. They were quite equal to those of defendant, with the legal advantage of a whole month's priority. The conclusion, therefore, is that the plaintiff ought to have restitution of the land which he claims in the present case.

The damage of \$600 is not excessive; for it appears that the defendant, in a single season, cut and sold hay of about that value from the premises in controversy.

The narrow elongation of the plaintiff's land, as described in his complaint, cannot invalidate his claim, or enable the defendant to appropriate any portion of it. Its width is equal to that of the 40-acre unit of the federal surveys; its length is not greater than the square mile from which that unit is obtained by subdivis-

ion; while, like the linear bases of the federal surveys, it extends due east and west, or as nearly so as the crude measurements of both parties, without instruments, could make it. For aught this court can determine, the plaintiff's claim may correspond to four continuous connected 40-acre tracts, yet to be indicated by those surveys, or even a slight variation, may be susceptible of easy territorial and legal adjustment.

The plaintiff's offer to buy his peace and avoid a lawsuit, for \$75, was not the surrender of any legal advantage, or the admission of an adverse claim, rejected, as it seems to have been, by the defendant, to whom it was made. Part of the syllabi of some cases were cited without comment as adverse to the present case, which was submitted without oral argument. On examination, however, they do not seem to have such analogy of fact to the present case as to make them legal precedents for its determination. Surely the Arizona settler, who suffers so much peril and privation in the location of his homestead, ought not to be ousted by precedents of doubtful application, born elsewhere of the mere safety and comforts of more favored regions. The determination of fact, and the conclusions of law, in the present case, are stated by the court below in its written decision with considerable prolixity and informality, but with sufficient certainty to show that the judgment entered thereon ought to be maintained. The order of this court, therefore, is that the judgment of the district court of the third judicial district in the present case be affirmed, and that it be remanded there for execution.

(1 Ariz. 364)

DAVIS *et al.* v. BREON.<sup>1</sup>

(*Supreme Court of Arizona*, Jan., 1875.)

ASSUMPSIT—IMPLIED PROMISE TO PAY.

No promise to pay is implied from a mere use of personal property with the permission of the owner.

Appeal from district court, Mohave county.

*Davis & Henning*, for appellants. *Murphy & Blakely*, for respondent.

DUNNE, C. J. This is an action to recover for the use of personal property, based upon the assumption that the law implies a promise to pay, from the fact of use with the permission of the owner. It is in fact for the rent of a house; but the complaint alleges that the house is personal property. It was demurred, among other things, that the complaint did not state facts sufficient to constitute a cause of action. Demurrer sustained, and judgment for the defendant. The appeal is from the order sustaining the demurrer.

The appeal being from the judgment on the demurrer, the allegation in the complaint that the property used was personal property must, for the purposes of this

hearing, be taken as true, whether in law or in fact it was really so or not. The complaint does not allege any hiring of the property, any request for its use, any contract concerning it, any promise to pay any sum for its use, nor that defendant is indebted in any sum to plaintiff, but simply alleges that defendant used the property with permission of plaintiff; that such use was reasonably worth the sum claimed; and that defendant has not paid the same, or any part thereof. This is not sufficient in the matter of personal property. We express no opinion as to whether it would be good for real property, but, if it were true of personal property, there is no end to the number of annoying actions which might be instituted and maintained. A person says to another, "My horse is in such a stable. Any time you would like to ride, go and take him;" or "I have such and such books in my library. Any time you want them, make use of them." Or, by permission of plaintiff, a person might make use of any other article of personal property. But to say that such use, by such permission, raises an implied contract to pay what such use is worth is not sustained by law. An allegation that defendant hired an article of personal property has been held to imply that the matter was a business transaction, and implied a promise to pay what the use was reasonably worth. *Emery v. Fell*, 2 Term R. 28. But there was no allegation here of hiring, request, contract, indebtedness, or promise to pay. Except on a contract or state of facts which imports a legal liability, a promise by defendant must be averred. *Gould*, Pl. 73; *Candler v. Rossiter*, 10 Wend. 487. The demurrer in this case was good, and was properly sustained, but, as the court sustained the demurrer on different grounds, the judgment is set aside, as may be done by Comp. Laws, p. 447, § 347. An order sustaining the demurrer is affirmed, with the qualification added that plaintiff may have the usual time to amend, to date from the notice given him by the clerk of the district court of the filing in his office of a certified copy of this opinion. All costs to abide the final result.

TWEED, J., concurs.

PORTER, J., concurred, except as to the qualification added.

(1 Ariz. 240)

COLE v. BEAN *et ux.*<sup>2</sup>

(*Supreme Court of Arizona*, Jan., 1877.)

CANCELLATION OF DEED.

On a bill to set aside a deed, judgment for plaintiff cannot be sustained, where, by the findings and decree, the instrument is found to be a mortgage made to secure a debt to third persons.

Appeal from district court, Yavapai county.

*Materson & Howard* and *Farley & Pomroy*, for appellants. *John A. Rush*, for respondent.

<sup>1</sup>This case, filed January, 1875, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

<sup>2</sup>This case, filed January, 1877, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

FRENCH, C. J. Neither the judgment nor decree in this case can be sustained under the pleadings. The plaintiff, by his complaint, asks that a certain deed from plaintiff to Mary M. Bean, wife of Curtis C. Bean, be canceled and held for naught, on the grounds that he was incapacitated at the time of its execution, and that the execution of the same was procured by fraud and conspiracy; and asks also an injunction against defendants, Bean and his wife, pending the action. The answer does not properly deny some of the allegations of the complaint. But no objection to any of those imperfect denials appears to have been taken by the plaintiff, and evidence was introduced by plaintiff in support of the allegations of the complaint, in the same manner, and to the same extent, as would have been done if all the denials in the answer had been perfect. At the close of plaintiff's testimony, defendant moved for a nonsuit, which the court denied. There was no error in this denial. The motion for nonsuit was frivolous. The testimony first introduced by plaintiff, in support of his complaint, was strictly and entirely correspondent to its allegations, and tended strongly to support the same, making a formidable *prima facie* showing in the case. But afterwards, the evidence takes another and different line, not included in the issues, or responsive to the allegations of the complaint. There must be substantial correspondence between the allegations and the evidence. But throwing all the evidence, with the objections to the same, out of the record in this case, the incompatibility of the pleadings with the findings and decree still confronts us. It was not necessary for a reversal that the evidence and the voluminous transcript in this case should have been brought up. If the pleadings, findings, and decree only had been brought here, a reversal must have resulted. Even on the judgment roll alone the error fully appears. The complaint does not support the decree. In the findings and decree, the instrument sought to be set aside by plaintiff's complaint is found to be a mortgage executed to a married woman, the wife of Bean, to secure indebtedness to other persons or parties.

Leaving out of view all questions of the conformity of the pleadings to the case made by the evidence, the pleadings, findings, and decree in this case are not only inconsistent with the issues made by the pleadings, but are also inconsistent with each other; and, viewing the findings and decree separately, and without any relation of the one to the other, each of them is inconsistent with itself. On page 116 of the transcript, the complaint in the case, and also the deed from plaintiff to Mrs. Bean, are both made a part of the findings, as follows: "Which said complaint, and said exhibit, [the deed above mentioned,] are made a part of the findings herein, and a part hereof." This is entirely inconsistent with the findings of the judge in the case. It is a part of the duty of attorneys to see that the findings are within the issues, and that the judgment or decree be supported by both the pleadings

and the findings. This seems to have been either overlooked or entirely lost sight of for the time being by the learned counsel of respondent in the latter part of the proceeding in the court below. The learned judge of that court seems to have been intent on doing no injustice to any party, but substantial justice to all. The decree was not drawn in accordance with the findings, although expressly ordered by him at the close of his findings to be so made. The cause has been ably argued on both sides at the bar of this court, especially so on the part of respondent; but, on the grounds stated above, the findings must be set aside, and the judgment and decree reversed, and cause remanded for a new trial, and it has been so ordered. The associate justices concurred.

(1 Ariz. 377)

COLE v. BEAN *et ux*.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1878.)

EQUITY—RIGHT TO JURY TRIAL—CAPACITY TO CONTRACT—EVIDENCE.

1. In equity, a party cannot demand the submission of issues to a jury.
2. On the question as to one's capacity to contract by reason of intoxication, his condition on days previous to the transaction may be shown.
3. Persons not experts may testify as to the effect of liquor on one with whom they are familiar.
4. Declarations of an agent, made after the transaction in question, are admissible if his agency continues.

Appeal from district court, Yavapai county.

Thomas Fitch, for appellant. Rush & Wells, for respondents.

FRENCH, C. J. The hearing of the appeal in this cause in the supreme court, without the usual copies being furnished, was had by agreement of the parties, and consent of the court, to save the hearing of the appeal from going over the yearly term. No copy of the transcript has been furnished since the hearing. I am therefore without a transcript of record in this case. On the decision of the case in the district court, I filed an opinion of some length, which, by statutory provision, and also by stipulation, has been embodied in the transcript, and goes with the record in this case. That is the opinion of a single district judge *at nisi prius*, but, after the able, elaborate, and exhaustive arguments of appellants in the supreme court, I have found nothing in that opinion which, in my capacity as one of the justices of the higher court, I wish to change. The present opinion, under these circumstances, must be somewhat summary.

At the commencement of the hearing of this case in the district court, counsel for defendant presented certain special questions, and asked that these questions be submitted to a jury. If the case were one at law, instead of equity, it would not be permissible for one party to the action to frame certain specific issues or questions.

<sup>1</sup> This case, filed January, 1878, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.



and ask a jury to determine these against the objection of the other party to the action, and without the sanction of the court. Such a mode of proceeding would be in derogation of the rights of the opposite party, and a trenching on the powers and functions of this court. But the present is an equity proceeding purely. Our statutory enactments in this regard conform to those of California, whose courts have uniformly denied the right to trial by jury in equity cases. In the United States courts, the same rule has been established. Chief Justice MARSHALL, in *Harding v. Handy*, 6 Curt. Dec. 534, says: "An issue, indeed, might have been directed; but we do not think it a case in which this course ought to have been pursued. The degree of weakness, or of imposition, which ought to induce a court of chancery to set aside a conveyance, is proper for the consideration of the court itself; and there seems to be no reason for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict, however it might be found. A verdict affirming the capacity of W. C. to execute these deeds on the ninth day of May, 1805, could not, we think, have been satisfactory to the court, and it was, consequently, not necessary to refer the question of competency to a jury." It is generally impracticable for the chancellor to know or determine, before at least a partial hearing, whether a jury would be proper or not.

The objection taken to the testimony of Hattie Wells, as to Cole's condition, that is, the degree and intensity of his intoxication on the latter part of October, and first of November, and extended to the testimony of many other witnesses on this point, cannot, I think, be sustained on reason or authority. An examination of cases like the present will show that, where the question was the mental condition at a certain day, the testimony, both under and without objection, has extended back not a few days only, but for months and years.

It is also objected that testimony of persons not experts was received as to the effect of liquor on Cole. I think this testimony is proper. If the witness, from long-continued and intimate association, knows the facts from his personal intercourse, his testimony is proper. An expert can say what the general effects would be; can testify as to the effect of liquor, drugs, poison, or food upon persons generally. The expert can say, for example, that the common article of food, cheese, is a common article of diet, wholesome and agreeable to people in general, but to some persons the most detested and abhorrent, and fatal to health, and even life. The witness, who speaks from his own personal knowledge, knows to which of these classes the person concerning whom the scrutiny is made belongs. In other words, he knows the effect of that article of food upon the particular individual inquired about much better than the mere expert. So, of drugs and poisons, the witness who speaks from personal knowledge can tell the effects on the particular person more surely than the expert, who lacks these

personal observations; the evidence is more direct and positive, and thus more decisive.

Elaborate objections were taken by defendants to the declarations of Mr. Bean, made after the transaction of the deed, and because these declarations, as to the transaction, were made after Bean, acting as the agent of his wife, had procured the deed in question. I am entirely clear that the objection that these declarations ought not to be received as evidence, because not made at or about the very time of the execution of the deed, *dum opus ferret*, cannot be sustained. Mr. Bean was the agent of his wife before these transactions, and continued to be her agent all the time, from the time of the execution of the deed up to the time of the commencement of the suit. When these declarations were made, he was in the very midst of other transactions of, and concerning, and connected with, the subject-matter of the main transaction, viz., the deed between his wife and the plaintiff. If any one thing is more clear than another, it is this: that all this business was entirely conducted and transacted by Mr. Bean, as he testifies, constantly, as the agent of his wife. The objection, therefore, that these declarations form no part of the *res gestæ* has no application at all on this point.

The only question necessary to consider here is, had Mr. Bean, before he made these declarations, ceased to be the agent of Mrs. Bean? Had his authority as her agent in this business ceased? The admissibility of the declarations must be determined solely by the answer to these questions. The law applicable to this point is well expressed in the case of *Stewartson v. Watts*, 8 Watts, 392; also found in *Dunlap's Paley, Ag.* (Ed. 1856,) p. 256, note. I quote from the syllabus of the case in *Watts*: "When some evidence of the existence of an agency has been given, it is competent to give in evidence the acts and declarations of such agent respecting the subject-matter of his authority; and whether his agency had then ceased, or was continued, must be submitted as a fact to the jury, with the direction that, if his authority had ceased, his acts and declarations are to be disregarded." It is not claimed that Mr. Bean's acts or authority as agent of Mrs. Bean had ceased at or before the time of these declarations. In fact, it affirmatively appears from the record that he continued to act as such agent. Judgment affirmed.

TWEED, J., concurs. PORTER, J., expressed no opinion.

(1 Ariz. 413)

BREMEN v. FOREMAN et al.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1883.)

MECHANICS' LIENS—ENFORCEMENT.

Under Comp. Laws Ariz. p. 248, § 4, making only the interest of the person causing the building to be erected, or materials to be fur-

<sup>1</sup> This case, filed January, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

nished, subject to the lien therefor, it is error to decree a sale of the whole property under a lien for materials furnished to one in possession under a contract of purchase, without ordering payment of the unpaid purchase price.

Appeal from district court, Gila county.  
A. C. Baker and Lemon McCabe, for appellants. William Graves, for respondent.

PINNEY, J. This is an action for the enforcing of a mechanic's lien for material furnished. Section 4 of the lien law (Comp. Laws, p. 248) provides: "The land upon which any building or superstructure shall be erected, together with a convenient space around the same, or so much as may be required for the convenient use and occupation of the premises, shall also be subject to the lien created by this act, if at the time the work and labor was done, or the material furnished, the said land belonged to the person who caused the said building, superstructure, or other work to be erected; but if said person owned less than a fee-simple estate in such lands, then only his interest therein shall be subject to such liens, and the liens created by this act shall be preferred to every other lien or incumbrance which shall have been attached upon said property subsequent to the time at which the work was commenced or the materials furnished; but nothing herein contained shall be construed as impairing any valid incumbrance upon the said lands duly made and recorded before such work was commenced or materials furnished." Bremen entered into an agreement on the 29th day of November, 1879, with Foreman and others, to supply boards, timber, shingles, etc., to be used in the construction and repairing of a certain mill building, and between that date and the 1st day of March, 1880, Bremen had furnished a large amount of material for the erection of a mill on some mining property which Foreman had purchased on the 11th day of October, 1879, from S. Silverburg, Hammerslag, and Collingwood. They being the owners of the mill property, the interest of Foreman in the premises rested upon an agreement for the sale and conveyance of said property. One provision in the agreement was that Foreman should expend the sum of \$7,000 in making improvements upon the property to successfully operate and run a quartz-mill. Foreman was immediately put in possession of the premises under the contract. On the 24th day of December, 1880, Silverburg, Hammerslag, and Collingwood, by a quitclaim deed, conveyed to L. J. Webster the property and premises in question. The court below, after finding the facts, decreed a sale of the whole premises, including the interest of Webster as well as the interest of Foreman, and from the decree appellants appeal to this court, and assign, among other causes of error, the rendering of the decree against Webster's interest in the property. This was clearly error, for the statute expressly provides that only the interest of the party who caused the building to be erected, or the materials to be furnished, shall be subject to such liens.

The contract, in this case, for the fur-

nishing of materials was not made with Webster or his grantors, but with Foreman and those acting with him. What, then, was the interest of Foreman in the property in question? For it is upon that interest that the material-man must rely for his remedy. Webster, standing in the shoes of his grantors, has the same rights and protection that they would have had, and his fee cannot be taken from him lawfully until the purchase money and interest thereon be fully paid him. Foreman's interest in the premises may be subject to sale in this proceeding. The lien of Bremen is on the interest Foreman had in the premises. The decree should declare the rights of the several parties as herein indicated, subject to the rights of Webster as they existed under the contract between Silverburg, Collingwood, and Hammerslag to Foreman at the time the material was furnished by Bremen, and, in default of payment to Bremen, that the premises should be sold, and from the proceeds the amount due under the contract of sale from Silverburg, Collingwood, and Hammerslag to Foreman should be first paid to Webster, and then the material-man, Bremen, should be paid the amount of the lien; and the remainder, if any, after paying these demands and the costs, should be paid to Webster.

The decree must be reversed, and the cause remanded for further proceedings; and it is so ordered.

(1 Ariz. 161)

CAMPBELL *et al.* v. SHIVERS.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1874.)

TIME OF HOLDING COURTS—EVIDENCE—WATER-RIGHTS.

1. Act. Cong. Aug. 16, 1856, § 5, (Rev. St. U. S. § 1920,) providing that the judges of the supreme court in each of the territories shall fix the times and places of holding the several courts in their respective districts, is not repealed by Act June 14, 1858, (11 St. at Large, 366,) which leaves the authority to fix county courts to the territories, and the judges may fix times for the district courts different from those appointed by the legislature.

2. An exception to a charge, in ejectment, that plaintiff cannot recover if defendant has been in possession a certain time, is waived by a contention that defendant is a tenant in common, as no recovery could be had in such case.

3. A tenancy in common to a water-ditch, arising under a deed, is not severed by claiming under a promise or parol license from a third person, where the deed and promise appear to be parts of the transaction.

4. Plaintiffs are estopped to deny defendant's water-rights in a ditch by declarations of their grantor while in possession, that the grantor of defendant had the right to a certain part of the water, relying on which declaration defendant bought and entered into possession prior to plaintiffs' purchase.

5. An exception to a charge requiring a preponderance of evidence to entitle to a verdict is frivolous.

Appeal from third district court.

Coles Bashford, for appellants. J. E. McCaffry and John A. Rush, for respondent.

<sup>1</sup>This case, filed January, 1874, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

TITUS, C. J. Judgment for the defendant, Daniel W. Shivers, in the district court of the third judicial district, at the suit of the plaintiffs, John G. Campbell and James M. Baker, for the alleged unlawful use of water in irrigation, is the cause of this appeal. The appellants here were the plaintiffs below, the defendant there is the respondent here; and the record, by the transcript, discloses the following conclusions of fact: In the month of March, 1867, the defendant moved to Chino valley, in the county of Yavapai, near Ft. Whipple, about 25 miles north of Prescott, took possession of the ranch which he now occupies, and has ever since occupied the same. Along with this, (his ranch,) he has ever since used, and still continues to use, for purposes of irrigation, one-fourth of the water which flows through a certain ditch or drain, not only to or through the defendant's ranch, but also to or through the ranches of Robert Postle, George Banghart, and the ranch of the plaintiffs. The use of the one-fourth of the water flowing through the ditch or drain above described, from February 1, 1870, to January 1, 1872, is the wrong of which the plaintiffs complain; and they claim, with their costs, damages in the sum of \$2,000, which they aver they have suffered by this alleged unlawful use of the water described. The defendant denies that his use of the water described was unlawful at all, denies that he has damaged the plaintiffs, and asks to be dismissed with his costs. This is the issue tried in the court below, and the correctness of the verdict and judgment thereupon in favor of the defendant is the question to be reviewed here in this court.

It is to be regretted that the settlement in Chino valley, of which the property in question constitutes part, was not more fully and correctly described than it is in the record of the present case. The ranch of the plaintiffs, in two of the deeds submitted in evidence on the trial of the case, is described as situated west of Postle's ranch; while the same ranch, in two other deeds submitted in evidence on the trial of the case, is described as situated north of Postle's ranch. The order of the several ranches on the ditch or drain, which conducts the water for their common irrigation, is not given; while their boundaries are entirely omitted, not only in the pleadings and evidence, but even in such deeds of them as have been submitted in evidence on the trial of this cause. The water-right in controversy is wholly omitted from the original deed of the plaintiffs' title, as the same appears in evidence, while their counsel is found denying the defendant's claim to contest this very right with them, because of the same omission from his own deed. The court is thus left to conjecture, and counsel are involved in absurdity on matters of the utmost importance in the discussion of questions such as the present case presents. It seems that Postle's ranch is above all others on the ditch or drain which is the common medium of supply, and about three-quarters of a mile from the mass of the water upon which all depend. The relative positions of the plain-

tiffs' and defendant's ranches do not appear except from conjecture. Of all those who depend on a single drain or ditch for water, it is impossible for any one to exhaust or reduce the supply of others, excepting such as are below him on the same ditch or drain. The plaintiffs claim that the defendant has done this for them. From this, it would seem to be a presumption of fact, therefore, that the ranch of the defendant is higher up the ditch or drain, and nearer the common source of the water supply, than the ranch of the plaintiffs. Of ranches located or selected for purposes of irrigation, other things being equal, those nearest the water supply are first chosen. From this, it would also seem to be a presumption of fact that the ranch of the defendant must have been located, if not anterior to, at least contemporaneous with, that of the plaintiffs. The legal deductions from these presumptions of fact will be stated hereafter. Further reference to the facts of this case will be made in connection with the points to which they pertain. No assignment of error has been made in this case excepting such as appear in the briefs of counsel.

The points presented by the counsel of the appellants against the judgment in this case are as follows: "(1) The court erred in charging the jury that, if defendant had been in possession of the said property for five years, plaintiffs must fail in this action. The owners of the property in question were tenants in common of the water-right, the possession of one being the possession of all. (2) The court erred in rejecting the evidence offered by plaintiffs of a meeting held by Banghart, Brown, and Postle, in which the two former refused to let defendant have any of the water claimed by them; that Postle said he would let him have part of his; and that there was no other understanding between them. (3) The court erred in refusing to give the third instruction asked for by plaintiff's counsel: 'That defendant, having asserted a right under the deed of Degrallo, is bound by it, and that the statute of limitations does not begin to run until he claims under the right now set up by him.' (4) The court erred in charging the jury that plaintiffs were estopped by the declarations of Brown. (5) The court erred in its charge to the jury that there must be a preponderance of evidence in favor of plaintiffs to enable them to recover. (6) The court should have sustained the objection of the plaintiffs: 'That the court was not legally in session.'"

As the last of the above-cited exceptions is first in practical order, and, if allowed, must impel this court to reverse the judgment in the present case, it is proposed to consider it first. The legislature of this territory has, from its origin, assumed that it is authorized to fix the terms of the supreme and district courts. Till the present case, no conflict has arisen on this subject between this court and the legislature, because the practice of the court has been to adopt and ratify the action of the legislature in regard to the terms of the district courts. At its session of 1871, the legislature enacted on this

subject, as follows: "The district courts, in the several counties of the territory, shall be held as follows, to-wit: 'In the county of Pima, on the first Mondays of March and October of each year; in the county of Yuma, on the third Monday in March, and the first Monday in November, of each year; in the county of Yavapai, on the third Mondays in June and November of each year.'" This distribution of the terms of the district courts was undoubtedly a defective execution of the order of congress, because it contained no limitation to the sessions of the court. It was just such legislation as enabled a Mormon district judge to sit one hundred and twenty days, not for the transaction of business, but to charge the federal government an enormous bill of expenses, — an abuse, or rather one of the abuses, which induced the act of congress of 1856, which will be cited hereafter. The ratifying order of the supreme court supplied this defect by imposing the necessary limitation. It was found, however, that the interval, only two weeks, between the Yuma and Yavapai terms was absolutely too brief to enable the United States district attorney to transact the United States business at one of these courts, and reach the other in time for it there. Accordingly, the legislature was invited to join the judges of the supreme court in amending this order, not because these judges doubted their power to make the order alone, but to avoid every appearance of disrespect towards the legislature, and all possibility of exception, such as has been taken in the present case. The legislature refused to act, and the judges of the supreme court, not doubting their authority, made and promulgated the following order: "Order of the supreme court of Arizona. Until the further order of this court, the terms of the district courts of the several districts of the territory of Arizona shall, respectively, commence at the times hereafter mentioned, and shall continue so long as may be necessary to transact the business before the respective courts, and no longer: In the first district, on the first Monday in March, and the first Monday in October; in the second district, on the first Monday in April, and the first Monday in December; and in the third district, on the first Monday in June, and first Monday in November. By order of the court, February 11, 1873. [Signed] JOHN TITUS, C. J. C. A. TWEED, ASSO. JUSTICE. DE FOREST PORTER, ASSO. JUSTICE." In the order thus made, this court imposed upon the terms the only limit practicable in the case; that is, the whole of the two periods between the commencements of the respective terms. The court limited the sessions of the respective district courts to the time necessary to transact the business before the respective courts. The changes thus made in the terms of the respective courts were imperatively necessary for the transaction of the judicial business of this territory. The session and term of the district court of the third judicial district, and in and to which the exception of the present case was taken, was the semi-annual term for both federal

and territorial business, and for the whole district, with juries, grand and petit, called from all parts of such district.

The authority of this court to make the order in question is derived from Act Cong. Aug. 16, 1856, (11 St. at Large, p. 49,) which is as follows: "Sec. 5. That the judges of the supreme court in each of the territories, or a majority of them, shall, when assembled in their respective seats of government, fix and appoint the several times and places of holding the several courts in their respective districts, and limit the duration of the terms thereof: provided, that the said courts shall not be held at more than three places in any one territory: and provided, further, that the judge or judges holding such courts shall adjourn the same, without day, at any time before the expiration of such terms, whenever, in his or their opinion, the further continuance thereof is not necessary." A brief reference to the character and history of the act of which the section cited is part will show that it is fundamental to all the territories, remains unrepealed, and will probably so continue till the last territory shall take its place in the galaxy of states. This act consists of 15 sections, and its title shows its comprehensive character,—"An act to amend the acts regulating the fees, costs, and other judicial expenses of the government, in the states, territories, and District of Columbia, and for other purposes." No part of this act appears to have been repealed, certainly not the provision applicable to the present case, as appears by the large volume of our new Federal Code. § 1920, recently published. The history of this act is one of much interest. Before and at the time of its passage, considerable dissatisfaction had existed, in most if not all the territories, with the operations of the federal government. "Territorial sovereignty" was announced as a favorite dogma of a certain school of active politicians. In Kansas and Utah, organized resistance, more or less flagrant, was made to the federal officers, especially the judges of the district courts. The president of the United States, during the session of congress by which this act was passed, in his "Proclamation respecting disturbances in Kansas," (11 St. at Large, p. 791,) uses this language, in respect to the territory of Kansas: "It appearing that combinations have been formed therein to resist the execution of the territorial laws, and thus, in effect, subvert by violence all present constitutional and legal authority," etc. Part of this system was to intimidate or embarrass the federal judges, and thus prevent their administration. In Utah, the state of society was, if possible, worse than in Kansas. Two years later, it there culminated in armed rebellion, so that the president of the United States, in his proclamation respecting the rebellion and Mormon troubles in the territory of Utah, (Id. p. 796,) employs, among other topics, this language: "Judges have been violently interrupted in the performance of their functions, and the records of the courts have been seized, and either destroyed or concealed." There, as in Kansas, the legislature embarrassed the federal judges

not of Mormon faith by denying them all legal aid, such as refusing to fix the times and places of their sessions. It was this last practice which induced the act of 1856, above cited, enabling the federal judges to fix their own terms. Enormous expenses were accumulated against the federal government by all in Utah whom the Mormons could control. This led to the severe system of accounting provided for in the act under consideration.

Careful consideration of section 5 of the act of 1856, above cited, shows that it intended to enable the United States judges in the territories to appoint the terms of their own district courts, independently of legislative control. No respectable authority, it is submitted, has been, or can be, cited which conflicts with this conclusion. The opinion of Judge Conkling certainly does not. His treatise was written 8 years before the organic act of New Mexico was passed, and 20 years before Arizona was organized. Commenting on this topic in his treatise, (page 201,) he says: "But, by a general act of August 16, 1856, c. 124, (11 St. at Large, p. 49,) the judges of the supreme court of the several territories are required"—this is his own language—to do what? "When assembled at their respective seats of government, to fix and appoint the several times and places of holding the several courts in their respective districts," etc. The learned commentator has misquoted the law under consideration, but he has not so far mistaken as to deny its true operation; for he not only concedes to the judges of the territorial supreme courts the authority to fix the terms of their respective district courts, but declares they are required to do so. The act of June 14, 1858, (11 St. at Large, p. 366,) furnishes no rule for the construction of the act of 1856, already cited. It is perfectly apparent that, were the authority given the federal judges to fix the times and places, or either, of holding the county courts, without anything more, such grant of authority would be futile. The judges would have no means of paying the expenses of these courts, and the United States refuse to pay them. Congress did not intend to confer on the federal judges of the territories the authority to appoint county courts, while withholding from them the means of its execution. It has wisely left the authority of fixing the county courts to the territories, or the counties themselves, by which the expenses are to be paid. This was obviously the intention of congress in making this difference between these statutes, and not "forgetfulness" of the act of 1856. The case of *Klopfer v. Keller*, 1 Colo. 410, is no authority in this case. It was tried at a special county court, in which the act of 1856 could not legitimately come in question. It presents, therefore, the case of a mere *obiter dictum*, decided under a Colorado statute, passed in accordance with the organic law of that territory framed in 1861. Chief Justice HALLETT, who announced this *dictum*, based it on the fact that the enabling power of congress in the organic law of Colorado, and the territorial statute passed under it, were both subsequent to the congressional

act of 1856. Our organic law, on the contrary, is six years prior to the act of 1856. The cases cited in the case above entitled are not more applicable to the courts of this territory than the principal one. *Dunphy v. Kleinsmith*, 11 Wall. 610, is more applicable to the case in controversy than the opinion cited in argument from Conkling, or that of *Klopfer v. Keller*, from 1 Colo. 410. In that case, the power of a Montana court to try an equity case by jury was absolutely denied, and the legitimacy of a jury of nine was seriously questioned by the supreme court of the United States, with all the power a territorial legislature can confer. This case shows that the powers conferred by congress on the United States courts in the territories are not to be impaired by territorial legislation. The supreme judges of this territory, therefore, had the power to appoint the regular terms of the district courts for each of the several entire districts; and this exception to the contrary is overruled.

The error first assigned on the brief of appellants' counsel, and the one next to be considered, is as follows: "(1) The court erred in charging the jury that, if defendant had been in possession of the said property five years, plaintiffs must fail in this action." To this the appellants' counsel adds: "The owners of the property in question were tenants in common of the ditch and water-right, the possession of one being the possession of all." The latter statement is certainly true, and it is an abandonment of this exception. This unity of possession, which makes the defendant a tenant in common with the plaintiffs, protects him from all disturbance by them, or either of them. He can call upon them to account for any invasion of his rights, and his unity of possession can only be dissolved by proceedings in partition, or by amicable agreement. If this is not so, then, from all that appears in the present case, the five years and some months which elapsed between the defendant's entry upon the enjoyment of the water-right in March, 1867, and the institution of this suit in August, 1872, must bar the plaintiffs' recovery. Comp. Laws, p. 331, § 3. From all that appears in the present case, therefore, the defendant is entitled to the protection which is due to a tenant in common, or to the statute of limitations, and, in either event, this exception must be, and is, overruled.

The next exception is as follows: "(2) The court erred in rejecting the evidence offered by plaintiffs of a meeting held by Banghart, Brown, and Postle in which the two former refused to let defendant have any of the water claimed by them; that Postle said he would let him have some of his; and that there was no other understanding between the parties." No legal right of the plaintiffs was infringed by the rejection of this evidence. The defendant was not present at this meeting, either personally or by representation. The declarations of the persons present, whether confined to the parties themselves or communicated to the defendant, could not affect his legal rights, unless it should appear that he, in some way, accepted or as-

sented to them. It does not appear that his acceptance or assent was shown, or proposed to be shown. This exception is therefore overruled.

The third exception is as follows: "(3) The court erred in refusing to give the third instruction asked for by plaintiffs' counsel: 'That defendant, having asserted a right under the deed of Degrallo, is bound by it, and that the statute of limitations does not begin to run until he claims under the right now set up by him.'" It does not clearly appear, either from the record or the argument upon it, what is meant by this exception. To be at all available for the plaintiffs, it must be found to refer to some portion of the evidence in the case. The only portion of the evidence in the case, to which this exception appears to be responsive, is defendant's allegation that, "early in 1867, Brown offered him a ranch in Chino valley, as an inducement for him to bring his family, and settle there." This seems to be that which this exception describes as "the right now set up by him." The exception assumes that this is, in some way, fatally conflicting with the "defendant's having asserted a right under the deeds of Degrallo," and that this severed the tenancy in common, which is asserted by the plaintiffs' first exception, and formed an era in the case which put the statute of limitations in active operation. Such, however, is not the legal effect of this testimony. There is really no conflict in the defendant's claiming at one time under Degrallo's deed, and, at another, under Brown's promise. They are parts of one complex transaction, in which the deed appears as the fulfillment of the promise previously made. The defendant might, at one time, assert that Brown's promise was the consideration which actuated him; at another, the \$500 mentioned in Degrallo's deed; at another, the deed itself; and at other times, any two of these, or all three of them together; and yet, by these, he would forfeit no legal right, and incur no legal hazard. The defendant, in his conversations on this subject with Brown himself, or with Brown's grantees, would naturally refer to Brown's promise, with strangers, to Degrallo's deed; and, in stating the cost of his ranch and water-right to anybody, he might allege the \$500 mentioned in the deed, by which he and his must expect to hold them, and be guilty of no breach of legal or moral truth, and incur no forfeiture or hazard. No error appears in the charge thus excepted to, and the exception must be overruled.

The fourth exception is as follows: "(4) The court erred in its charge to the jury that plaintiffs were estopped by the declarations of Brown." The exception does not fully state the charge of the judge upon the trial of this case, nor the evidence to which it refers. The charge was this: "Again, if Brown did represent to defendant, while he, Brown, was in possession of the property now claimed by the plaintiffs, that one-fourth of the water flowing in the ditch was the property of Degrallo, and used the inducements alleged to induce the defendant to go there,

and settle, and defendant, relying on his representation, did so go to that valley, and enter upon the possession of the ranch and water-right, under and by virtue of any alleged purchase or agreement by Brown, or Brown and Postle, from or with Degrallo, these plaintiffs are estopped, as Brown himself would be, if he were the plaintiff in this action, from denying such right of defendant to one-fourth interest in the water-right forever after,—and this, if Degrallo never had any right or interest in the property whatever, or if there was no such man in being." The whole of this exception must be taken together with the evidence to which it refers, in estimating its legal effect in this case. On recurring to the testimony, we find that the defendant took possession of his ranch, and one-fourth of the water now in controversy, in March, 1867, and has ever since used and enjoyed both, and that the deed of Degrallo to defendant was recorded April 11, 1867. Brown's deed to Schneider is dated November, 1867; Schneider's deed to Campbell, one of the plaintiffs, and Buffum, is dated August, 1868; and Campbell's deed to Baker, the other plaintiff, is dated March, 1872. The only principle upon which Brown's grantees, the present plaintiffs, can deny the binding effect upon them of Brown's declarations concerning the water to the defendant would be that they had no notice of them. In respect to this, the presumption of law is that Campbell and Baker exercised ordinary diligence in ascertaining the conditions and relations of their ranch at the time they took possession of it in November, 1867, and in March, 1872. The law requires of them ordinary diligence, in all such matters as this water controversy, in which others are concerned. *Vigilantibus non dormientibus subservit lex*. The law will hardly take from the defendant his ditch water, and give it to the plaintiffs, in pity or approval of their self-imposed ignorance at the time they purchased their present ranch. The evidence shows that, if they then made the ordinary efforts to learn the extent of their water-rights, they found the defendant in possession and in enjoyment of the one-fourth of the water now in controversy, his deed of record for the ranch he occupied and farmed, and the public repute of the locality conceding the defendant's right to the water of which the plaintiffs now seek to deprive him. The evidence shows that John G. Campbell, one of the plaintiffs in this case, made his tenant, D. K. Poland, understand that the defendant owned the one-fourth of the water at the time of their engagement in 1868. It is somewhat significant that in Brown's deed to Schneider, of November 5, 1868, for the ranch which the plaintiffs now claim, there is no mention of any ditch or water-right whatever, and that the quantity is not stated in any of the subsequent deeds for the same property. If this court had any doubt of the conclusion above stated, the defendant's right could be maintained on the ground of parol license. It has none, however, and this exception must be, and is, overruled.

The fifth and last exception is as follows: "(5) The court erred in its charge to the jury that there must be a preponderance of evidence in favor of plaintiffs to entitle them to recover." The proposition thus excepted to would seem so axiomatic as to defy either question or discussion. If, in any case, the evidence should be equal on one side and on the other, how could the jury find a verdict at all? The jury would be compelled to agree to disagree in such a case, and thus the trial would fail. In cases such as this, if they actually do occur, it is the highest duty of the jury to disagree. To enable a jury, therefore, to find a verdict at all, in any case in which there is conflict of testimony, there must be a preponderance of evidence in favor of one side, and the jury must find it as a condition precedent to the rendition of their verdict. That the judge thus stated a truism to the jury on the trial of this case is no matter of successful exception, and this exception is accordingly overruled.

The exceptions of the appellants thus all fail, and there is nothing else in the record to show why the judgment in this case should not be affirmed. This conclusion, it is submitted, if there were any doubt of its legality, could be sustained on the evidence which the case presents of a parol license to the defendant of the water-right in controversy. And the same conclusion is reached by another most simple process of investigation. It was found as a presumption of fact in the statement of this case that the defendant was located higher up on the ditch, and nearer the source of water supply, than the plaintiffs; and also, as another presumption of fact, that his location was therefore older than theirs. By a very simple deduction, the legal conclusion therefore is, *prior in tempore potior in jure*, in the absence of all sufficient evidence to the contrary, that the defendant's right is better than the plaintiffs'. The judgment of the court below in the present case is therefore hereby affirmed.

TWEED, J., concurs.

(87 Cal. 424)

JOYCE v. WING YET LUNG. (No. 13,687.)

(Supreme Court of California. Jan. 5, 1891.)

EQUITABLE ASSIGNMENT—VERBAL ACCEPTANCE.

An order drawn by a creditor on his debtor for the whole amount of the indebtedness operates as an equitable assignment of the debt to the payee, and a verbal acceptance of the order by the debtor is valid.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

L. F. Fisher and C. C. Stephen, for appellant. R. Dunnigan, for respondent.

DE HAVEN, J. The findings show that Wing Yet Lung was on March 27, 1888, indebted to the firm of Joyce & Duncan in the sum of \$643.30, and that firm being also indebted to the respondent in the same amount, they upon that day gave an order requesting the appellant to pay respondent the sum of \$643.30. Said order was accepted by appellant and he paid

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thereon the sum of \$300. Judgment was rendered against appellant for the balance of \$343.30, and his motion for a new trial denied. Appellant's acceptance of the order drawn against him by the firm of Joyce & Duncan was only verbal, and upon the trial he objected to the admission of the evidence showing such verbal acceptance, and also to the introduction of the order itself, upon the ground that such acceptance, not being in writing, was not binding, and that the order itself was incompetent without a written acceptance, and these objections being overruled are assigned as error. The court did not err in overruling appellant's objection to this evidence. *Wheatley v. Strobe*, 12 Cal. 92. The evidence is sufficient to support the findings, and we find no error in the record. Judgment and order affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(87 Cal. 428)

CAMPBELL v. THOMAS. (No. 13,891.)

(Supreme Court of California. Jan. 5, 1891.)

REAL-ESTATE AGENTS—COMMISSION.

Defendant, having only possessory title to a reservoir dam site, appointed plaintiff his agent to sell it, informing him that he would get the legal title, and agreeing that plaintiff should have a certain amount if he effected a sale to be approved by defendant, or if defendant made a sale without consulting plaintiff. Thereafter defendant obtained the legal title, and sold the property. Held, that plaintiff was entitled to the amount provided by his contract.

Department 2. Appeal from superior court, Los Angeles county; JOHN R. AITKEN, Judge.

*Waters & Gird*, for appellant. *E. E. Rowell and Paris & Fox*, for respondent.

McFARLAND, J. This is an action to recover two-fifths of the amount for which certain property was sold by defendant. The court gave judgment for plaintiff for \$1,850.90, and defendant appeals. The defendant and other persons entered into a written contract with plaintiff by which plaintiff was appointed their agent to negotiate a sale of a certain reservoir dam site, situated on the San Jacinto river in San Diego county, and which they agreed that if plaintiff effected a sale to be approved by them, they would give him two-fifths of the purchase price, and that if they, themselves, made a sale without consulting plaintiff, he was to have the same percentage as though he had effected the sale. While this contract was still in force, and plaintiff was still their agent, they effected a sale without consulting him, and, on that sale, defendant received property of the value of \$4,627, for two-fifths of which the judgment was rendered. At the trial, a great many exceptions were taken which are not referred to in appellant's brief, and which do not seem to present any material error. The real point insisted on by appellant is that the property sold was not the property mentioned in the contract. The facts on which this point rests are these: At the time of the contract defendant did not have the legal title to the reservoir dam site, but only a possessory title. He had



posted notices claiming the site, and also certain water-rights, and claimed to be in possession. This site was on section 7, and was consequently railroad land. He told plaintiff that he had made arrangements with the railroad land agent, and that as soon as the land was graded and in the market, he would get title from the railroad company. Afterwards such title was procured, and although in the sale the property was described as so much land, it was the same land that constituted the reservoir dam site described in the contract, and was bought by the purchasers, Judson, Potts, and Mayberry, for the express purpose of a reservoir dam site, for which purpose it was mainly valuable. The facts, therefore, that a better title was procured after the making of the contract, and that the property was described in the sale as land, do not defeat the contract. It is clear that the property mentioned in the contract, and the property sold, was the same. Judgment and order denying a new trial affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(87 Cal. 345.)

RYAN v. FITZGERALD. (No. 12,962.)

(Supreme Court of California. Jan. 8, 1891.)

CLAIM AND DELIVERY—VERDICT—JUDGMENT—UNCERTAINTY—DAMAGES.

1. In an action of claim and delivery, a verdict for plaintiff for the possession of the property, or its value, is good, under Code Civil Proc. Cal. § 627, prescribing what the verdict shall contain, but not requiring that there shall be any findings as to delivery.

2. In an action of claim and delivery against a constable for property taken on execution, where damages are claimed for both the taking and the detention, a verdict for damages in a certain sum is good, though it does not specify whether the damages are for the taking, or the detention, or for both.

3. An objection to the form of the verdict, in that it omits to state whether the damages given are for the taking, or the detention, or for both, cannot be urged for the first time on appeal.

4. Where the verdict and judgment for plaintiff for part of the property are silent as to the balance, and defendant in his answer asks for the return of the property, which from the record appears to be in plaintiff's possession, the judgment will be so modified as to require plaintiff to return to defendant that part as to which the verdict and judgment are silent.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county.

G. W. Langan, for appellant. D. M. Connor, for respondent.

FOOTE, C. This action of claim and delivery was for the recovery of the possession of certain horses and colts and two mowers, or their value, and damages for their taking and detention. The defendant admits the taking of the property, as a constable, under a writ of execution on a judgment against Jeremiah Ryan, the assignee of the plaintiff. The cause was tried by a jury, who returned this verdict: "We, the jury in the above-entitled cause, find for the plaintiff the possession of the following property: The horses and colts described in the complaint, or their value, the sum of \$1,225, with damages in the sum of \$48.55." Upon that ver-

dict a judgment was rendered for the plaintiff that he have and receive possession of the property mentioned in the verdict, specifying it, "or for the sum of \$1,225, the value thereof, in case a delivery thereof cannot be had, and in case a delivery of any portion thereof cannot be had, then for the value of such portion of said property, together with \$48.55 damages, and for costs taxed at \$39.50." From this judgment, an appeal is taken on the judgment roll, and the appellant claims a reversal thereof, because: "The verdict is uncertain in this: It does not provide for a delivery of the property to the plaintiff, if delivery can be had, and does not, nor does the judgment, state for what the damages are given. The complaint claims damages for taking as well as for detention. Damages for detention only are permitted, and, so far as appears, the damages may have been awarded for the taking only." It was unnecessary that the verdict should have provided for any delivery of the property, if such could be had. When the jury found the right of possession to be in the plaintiff, then the conclusion of law followed, as provided in section 667 of the Code of Civil Procedure, that he was entitled to delivery, if it could be had, and, if not, to the value of the property as found by the jury in the alternative. This the judgment must contain, but not the verdict; for, as to the judgment, the form of it must be as provided in the section of the Code of Civil Procedure supra, but section 627 of the same Code, which prescribes what the verdict of the jury shall contain, requires no finding as to delivery at all.

As to the second matter of objection, that in reference to the uncertainty of the verdict for damages, whether it is given for taking or detention, it may be said: That in an action of the kind in hand, damages may be claimed and recovered for both taking and detention. *Arzaga v. Villalba*, 24 Pac. Rep. 656. And the verdict being for a sum certain for damages, not specifying which kind, will be presumed to cover both grounds alleged for damage. Again, the objection going to the form of the verdict should have been taken in the court below, and it is too late to urge it here. *Campbell v. Jones*, 41 Cal. 515.

It is urged further that, because the jury found for the plaintiff for the possession of a part of the property only, and as to the balance their verdict was silent, that a judgment based thereon is void, as not responsive to the issue raised by the pleadings,—that is, the right of possession of the whole of the property sued for. Conceding that, if such a verdict had been rendered for the defendant, it would have been insufficient to support the judgment, under the rule laid down in *Muller v. Jewell*, 66 Cal. 216,<sup>1</sup> yet the defendant here does not allege in his answer that the plaintiff has the possession of any of the property, but that an officer of the law has it under a writ in this case. The plaintiff has only obtained judgment for a part of the property, and has no right

<sup>1</sup>5 Pac. Rep. 84.

to possession of the balance. There is nothing to show but that the defendant is entitled thereto, and that it cannot be withheld from him. The verdict and judgment here being silent as to the balance of the property, it must be held that the plaintiff was denied any further relief than he has obtained, and he is precluded from any further litigation with the defendant as to this balance. *Gray v. Dougherty*, 25 Cal. 277. But in this case the defendant has asked for a return of the property, and it does not appear that he has given bond and sureties, who have justified, and in that case it would have been the sheriff's duty, under section 515, Code Civil Proc., to have delivered the property to the plaintiff, and it must be presumed that he has done so. Therefore, since the plaintiff has not been determined by the verdict and judgment to be entitled to this balance of the property, the judgment here should be so modified as to require his return of it to the defendant, and in other respects the judgment should be affirmed, and we so advise.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. Ordered the judgment be modified in accordance with the views above expressed, and, as so modified, the judgment is affirmed.

(87 Cal. 367)

COFFEY v. GRAND COUNCIL. (No. 14,010.)

(*Supreme Court of California*. Jan. 4, 1891.)

**MANDAMUS—SETTLEMENT OF BILL OF EXCEPTIONS.**

A *mandamus* will not be granted to compel a judge to settle a bill of exceptions, where it appears that counsel for petitioner served a statement to which amendments were proposed, which he rejected, and that then he set a day and hour at which the statement and amendments would be presented to the judge for settlement, but, by reason of other engagements, failed to appear at the appointed hour, though he did appear later in the day, but did not then ask for a settlement of the statement, nor ask the opposing counsel to consent to a statement until two days after.

In bank.

W. F. Stafford, for petitioner. H. H. Reid, for respondent.

PATERSON, J. This is an application for a writ of mandate to compel Hon. J. P. Hoge, a judge of the superior court, to settle a bill of exceptions in the case of Coffey vs. The Grand Council of the Young Men's Institute, and should be entitled "Grand Council vs. Hoge, Judge." On the petitioner's own showing, we think it is not entitled to the writ prayed for. After judgment in the court below in favor of the plaintiff, the defendant in due time served its notice of intention to move for a new trial, and proposed statement. Proposed amendments were served January 30, 1890, and on February 3d, defendant served notice that they were not accepted, and that the proposed statement and amendments would be presented to the judge on February 10, 1890, at 10 A. M. Counsel for the plaintiff appeared before the judge at the hour named, but no one appeared on behalf of the defendant, nor was the proper statement presented until

2 o'clock of the day named, when its counsel went to the chambers of the judge, and asked permission to withdraw the proposed statement and amendments for the purpose of seeing if the attorneys for the respective parties could not agree upon a settlement. Two days later, he called at the office of the plaintiff's attorney for a voluntary settlement, but the latter refused to consider the proposal, claiming that defendant had lost the right to a settlement by reason of its laches. Thereupon defendant's counsel incorporated all of the proposed amendments in the statement, and presented an engrossed copy of the same to the judge for his certificate on March 11, 1890, but the latter refused and still refuses to sign the same, claiming that he had lost jurisdiction to act upon it. The petitioner alleges that its counsel was engaged in causes pending in other departments of the superior court, and for that reason overlooked the hour for which the settlement of the statement had been fixed. If there is any power to relieve a party from the effect of such an inadvertence, it is in the court below, not here. The matter was presented to the judge, and the petition shows that the petitioner was given repeated hearings on its application, all parties being present. Assisted before, if there was any power anywhere to relieve the petitioner from its default, and if good cause could be shown in that behalf, the court below was the proper tribunal to determine the matter, and we must assume that it did not abuse its discretion on the showing made by the parties. Furthermore, it appears that counsel for the petitioner did not ask the judge to settle the statement when he appeared before the latter, at 2 o'clock, and that he did not leave the papers with the judge, but withdrew them. Instead of going immediately to the attorney for the adverse party, to see if a voluntary settlement could be had, he held the papers for two days, and after being informed that no settlement could be made, the reasons for which were given, he held them for about a month before any attempt was made to secure the certificate of the judge. No excuse is offered for these delays. Counsel for petitioner asked at the hearing to be allowed to amend the petition, so as to set out the conversation between himself and the judge, which occurred at 2 o'clock, February 10th, as fully as it is set out in his affidavit in opposition to the motion made in department 1 of this court, to dismiss the appeal. If the petition can be amended in any case after an alternate writ has been issued, and the respondent has appeared and answered the same, it would be useless to allow it in this case. We have looked into the affidavit referred to, and there is nothing there alleged which would have any material bearing on the question before us. No copy of the petition or of the writ was served on the plaintiff, and respondent has moved to dismiss on that ground. Rule 28 requires the petitioner to serve copies on the party in interest. This would of itself be sufficient ground for dismissing the petition, no offer having been made to comply with the rule. The demurrer is sustained without

leave to amend, and the alternate writ is discharged.

We concur: WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

(87 Cal. 370)

COFFEY v. GRAND COUNCIL. (No. 14,010.)

(Supreme Court of California. Jan. 4, 1891.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

Where no transcript is filed on appeal, and it appears that the judge below has refused to settle a statement, because presented too late, and that a writ of *mandamus* to compel him to do so has been denied, the appeal will be dismissed on motion.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

W. F. Stafford, for appellant. Henry H. Reid and O. T. Shuck, for respondent.

PATERSON, J. This is a motion to dismiss the appeal for failure to file the transcript. The certificate of the clerk makes a *prima facie* case in favor of the moving party, but appellant claims that there is a statement on motion for a new trial, which remains unsettled by the judge of the court below, and which he intends to use on appeal. The judge of the court below, after repeated hearings on appellant's application to settle the statement, has refused to certify to it on the ground that it has lost its right to a statement by its failure to present the same to him for settlement. An application was made to this court in bank for a writ requiring the judge to settle the statement, and the petition has been denied. The facts shown there (*Coffey v. Grand Council*, ante, 547, this day filed) are the same as the facts here. If we assumed that the judge had the power in his discretion to settle the statement after February 10th, it still appears that after repeated applications he has refused to settle the statement, and we must assume that he will continue to do so, and that there can, therefore, be no statement on appeal. The appeal is dismissed.

We concur: WORKS, J.; DE HAVEN, J.

(87 Cal. 441)

LYNCH v. WELBY *et al.* (No. 13,743.)

(Supreme Court of California. Jan. 5, 1891.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In an action for breach of a contract to purchase all of plaintiff's merchantable beef steers, the question whether the steers were of the kind and quality defendants agreed to take is for the jury, and its verdict, on conflicting evidence, will not be disturbed.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Huggin & Van Ness, (J. M. Wilcoxson, of counsel,) for respondent.

SHARPSTEIN, J. This action is for the recovery of \$3,623 damages, alleged to be sustained by reason of an alleged breach of a contract of the parties by the defendants. The contract was, in effect, that defendants would purchase of the

plaintiff all the steers belonging to him on the 11th day of May, 1888, that were three years old and upwards, and that were then or that would be merchantable beef by the 1st day of July, 1888, the number of which was estimated by the parties to be about 300 head. And the parties further agreed that, if there should arise any question between them as to what steers would make merchantable beef, the question should be decided by arbitration, each party to select one arbitrator, and, if the two could not agree, they should select a third to settle the question. Pursuant to this agreement, plaintiff gathered his said band of cattle, and the defendants selected therefrom 90 head of the largest and most choice steers of said band, and paid the plaintiff therefor at the rate of \$40 per head, and requested plaintiff to have another and complete gathering of the cattle on the 1st day of July, 1888, at which time defendants would take the remainder of the steers as per agreement, and plaintiff had gathered and ready for delivery the residue of his band, consisting of 176 head of steers, which he insisted then, and still insists, were good merchantable steers. Defendants refused to accept all of said steers, but offered to select from said band only so many as in their opinion were then merchantable beef,—48 or possibly 50 head in all. Thereupon plaintiff insisted upon choosing arbitrators, as stipulated in said agreement, to decide how many of said steers were merchantable beef. Plaintiff chose one William Epperson, and the defendants one A. J. Harris, with the understanding if they could not agree they should select a third person to act with them. It does not appear that the arbitrators so selected ever decided that any of said steers were merchantable beef, or that they ever differed or failed to agree upon how many were or were not merchantable beef, or that they ever selected a third person to act with them. The only reason appearing in the record for not proceeding with the arbitration is that the defendant Judge announced that he could not abide by the decision of the arbitrators. He said, according to the testimony of one of the witnesses, that Lynch was not willing to do anything towards settling the matter, and, as far as he (Judge) was concerned, he would not have another thing to do with the cattle, and turned and rode out of the field. That was evidently treated by all of the parties as a revocation by defendants of their agreement to arbitrate. About two weeks after the failure to arbitrate, plaintiff sold 176 head of cattle to Lux & Miller for \$29.68 per head, and this action is prosecuted to recover the difference between the price which defendants agreed to pay for cattle of the kind and quality specified in their agreement with plaintiff, and the price paid for the 176 head sold to Lux & Miller. Whether the cattle which defendants refused to accept were of the kind and quality that they agreed to take is a question upon which there is a plain conflict of evidence, and we cannot disturb the verdict of the jury upon that question. We think the instructions of the court placed the mat-

ters in issue fairly before the jury. Judgment and order affirmed.

We concur: THORNTON, J.; McFARLAND, J.

(87 Cal. 434)

CARPENTER v. HATHAWAY. (No. 18,765.)

(*Supreme Court of California.* Jan. 5, 1891.)

PARTNERSHIP—LOCATION AND PURCHASE OF PUBLIC LAND—DIVISION OF PROFITS.

1. A verbal agreement that plaintiff should locate and purchase government land for defendant, and that on its resale, to be made for cash as opportunity offered, the proceeds of each sale, after deducting the government price, should be divided equally between them, is consistent with and not superseded by a written acknowledgment given by defendant to plaintiff after nearly all the land had been located and purchased, reciting the fact of its acquisition, and that plaintiff was to share equally in the net profits; and hence the division of the profits is not postponed by the written acknowledgment until all the land has been resold, but the division is to take place on the resale of any portion thereof, as provided by the verbal agreement.

2. The fact that defendant borrowed the money with which to purchase the land from the government does not entitle him to deduct the interest, before dividing the proceeds on a resale, as the agreement does not so stipulate.

3. A decree that plaintiff is entitled to an undivided one-half interest in the land remaining unsold, subject to a lien in favor of defendant for the amount of the purchase price, is not erroneous for its failure to provide for the payment of taxes to be subsequently levied on the land, as the interest awarded to plaintiff is taxable to himself alone, and not to defendant.

4. Defendant cannot complain of the erroneous action of the court in allowing him interest on the purchase price of a portion of the land acquired after the execution of the written acknowledgment.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

*William Shipsey*, for appellant. *W. B. Dillard*, for respondent.

GIBSON, C. Plaintiff brought this action to dissolve a partnership, for an accounting, and to establish his interest in certain lands acquired as partners, and obtained a judgment in his favor. Defendant appeals from the judgment, also from an order denying him a new trial. The main facts, as shown by the findings, may be briefly stated as follows: About November 15, 1885, the plaintiff, who was then county surveyor of San Luis Obispo county, had special knowledge of the location and quality of certain large tracts of vacant government land on the Carisa plains in that county, then offered at private sale for \$1.25 per acre, but he was without means to purchase any of the land. On or about that date, he and the defendant, who was possessed of both means and credit, entered into a verbal agreement, whereby the plaintiff, upon his part, agreed to assist in pointing out, locating and entering in the name of the defendant, such portions of the lands as the latter might deem it advisable to purchase for their joint benefit, and the defendant, upon his part, agreed, in consideration thereof, to furnish a team and wagon for the inspection of the lands, to purchase

the lands of the government, and furnish the necessary money therefor, and, when so purchased, to take charge of and sell the same for cash at a reasonable profit as opportunities might occur, and, after each sale, to deduct from the proceeds of each sale the price paid to the government for the land sold, and pay over promptly to the plaintiff one-half of the remainder. Between the date of the agreement and the 5th day of June, 1886, the plaintiff and the defendant had, pursuant to the agreement, acquired 3,169 acres of land, the title to which stood in the name of the defendant. Upon the latter date, defendant gave plaintiff a written acknowledgment to the effect that the defendant had acquired title from the United States government to 3,169 acres of land, and that it was understood and agreed that the plaintiff was to share equally with the defendant in the net profits of the land. Thereafter, about August 15, 1886, and pursuant to the same agreement, the defendant acquired title to 640 acres of land. On April 11, 1887, while all the lands were still held under the agreement, the defendant sold and conveyed to one A. R. Taylor, a near relative of the defendant, 1,937 acres of land for the sum of two dollars per acre. Of this price, he received but one dollar per acre, and voluntarily, but without the plaintiff's consent, and contrary to their agreement, gave credit to the grantee for the remainder of the purchase price, which still remains unpaid, the defendant not having taken steps to collect it. Had this latter amount been collected, the net proceeds of the sale, after deducting the sum of \$1.25 per acre paid to the government, would have been the sum of \$1,445, one-half of which the plaintiff would have been entitled to. Defendant, however, paid him but \$125 on account, which the plaintiff admitted in his complaint. On June 1, 1889, and at various times subsequently, the plaintiff demanded of the defendant an account of the lands sold, and the money received therefor, and also the payment to him of his share of the net proceeds of the sale; but the defendant failed and refused to render him any account, or to pay him any portion of the net profits of the sale, except the sum of \$125, admitted as before stated. Prior to the first demand for an account of the lands sold having been made, that is, on November 1, 1888, the defendant received an offer of \$3 per acre for all the lands acquired under the agreement, and was urged by the plaintiff to accept it; but, having sold a portion to Taylor, he could not do so, and has ever since been unable to sell the remainder of the lands. The land sold to Taylor was the only portion of the lands that the defendant sold, and the only amount of money, in which the plaintiff had any interest, that the defendant misappropriated, was the amount he gave his relative, Taylor, credit for indefinitely. On these facts, the court awarded the plaintiff \$597.50, with legal interest thereon from the date of the sale of the portion of the land to Taylor, and an undivided one-half interest in the lands remaining unsold, subject, however, to a lien in favor of the defendant for the sum of \$1.25 per acre to

cover the purchase price he paid therefor to the government.

The defendant contends that the writing superseded the oral agreement, and that, according to the former, the profits were not to be divided until all the lands were sold. The verbal agreement, alleged in the complaint as the foundation of the action, was entered into in November, 1885, and all the land in question, except the 640-acre tract, was acquired pursuant to it, nearly seven months before the writing was made, which defendant claims superseded the verbal agreement. The writing itself does not contain anything inconsistent with the verbal agreement. It merely states the substance of it. The only witnesses examined in the cause were the parties to it, and nowhere in their testimony does it appear that the writing was given or received as a contract which was intended to supersede all their previous negotiations and stipulations concerning the same subject-matter. The defendant testified that "there was no written agreement from January till June, and the reason I made that little writing was I was afraid that Carpenter was afraid of my verbal agreement, and I told him at the time my word was as good as my bond." The plaintiff testified: "My contract with defendant became complete when the writing of June 5, 1886, was executed. That writing contains the substance of the agreement." The foregoing is all the testimony that was given concerning the writing, and we think the court was justified in finding therefrom, in view of the contents of the writing itself, that it was given and received as a mere acknowledgment or memorandum of the verbal agreement. The statement of the plaintiff that the contract became complete, etc., must, when read in connection with the defendant's statement of the distrust with which he thought plaintiff regarded him, mean that he (the plaintiff) felt safe in having a tangible and complete acknowledgment of the existence of their verbal agreement and of his interest in the land, the title to which stood wholly in the name of the defendant. The agreement itself was not completely performed at the time the written acknowledgment of it was given to the plaintiff. It was still executory, and remained so until the judgment herein was entered. Now, as the verbal agreement was that the lands were to be sold for cash at a reasonable profit, as opportunities to make sales should occur, and the profits were to be divided promptly after each sale, it is clear that the plaintiff was not compelled to wait until all the lands were sold for his share of the profits.

Defendant further contends that, as he borrowed money with which to purchase the lands, and paid interest thereon, the profits should have been ascertained, in the court below, by deducting from the price for which he sold a portion of the lands to Taylor, not only the \$1.25 per acre paid to the government therefor, but the interest he had paid thereon, and the taxes and other expenses necessarily incurred in acquiring, keeping, and disposing of the property. As to the interest, it

is sufficient to say that it was not stipulated for in the agreement, and, as to taxes and other necessary expenses, even if they were properly chargeable, there was no evidence of them offered, nor claim made therefor at the trial.

It is further urged that no provision was made for the payment of future taxes upon the unsold portion of the lands in which plaintiff was awarded an interest. It was not necessary to make any further provision therefor, because, as that portion of the lands was divided equally between them, and the plaintiff's interest made subject to a lien for \$1.25 per acre in favor of the defendant to secure the purchase price, the plaintiff's interest is taxable to himself alone, and not to the defendant.

As to the 640 acres purchased under the agreement after the written acknowledgment of June 5, 1886, was given, the court, in awarding the plaintiff his half interest therein, in addition to the lien imposed thereon in favor of the defendant for the price per acre paid by him to the government, extended such lien to cover interest at the legal rate from the date of the purchase of the tract. The finding upon which this allowance of interest is based is claimed to be unsupported by the evidence. We are inclined to think so, too; but, as it is in favor of the defendant, he is not injured by it.

It is also claimed by the defendant that the 640-acre tract was erroneously brought within the agreement. The evidence that it was acquired under the agreement is quite strong. Both parties testified that it was so acquired; but the defendant, in order to defeat the plaintiff's claim respecting it, testified as follows: "The written declaration I gave Carpenter embraces all the land described in the complaint, except the 640 acres in sections 5 and 6, township 31 south, 19 east, that I acquired in August afterwards. If he kept his agreement, that was to be included in it." To which we may add: The court found that he fully performed the agreement upon his part, and this finding is supported by the evidence. We advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(87 Cal. 430)

MILLER V. HIGHLAND DITCH CO. *et al.*  
(No. 14,017.)

(*Supreme Court of California*. Jan. 5, 1891.)

SEVERAL TORT-FEASORS—JOINT LIABILITY.

The several owners of different irrigating ditches, who act independently of each other in the operation of their ditches, are not liable in a joint action for damages sustained by a land-owner from an overflow occasioned by the combined waters of all the ditches.

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

*Waters & Gird, Curtis & Otis, and George L. Otis, for appellant. Willis,*

*Cole & Craig and Harris & Gregg, for respondents.*

McFARLAND, J. Plaintiff was the owner of a tract of land situated about one mile southerly from the San Bernardino range of mountains. Part of the tract was in a high state of cultivation. Coming out of said mountains, and trending towards plaintiff's land, but not reaching it, is a canon called "Baldridge Canon." The natural waters of said canon would not flow upon plaintiff's land, but, as found by the court, "would spread out on the lower lands without cutting any particular channel, the tendency of the flow being to spread out over the said lower lands north of plaintiff's premises, and become absorbed in the soil." But the defendants, by means of three different ditches, turned foreign water into said canon, and the commingling water from said ditches passed through said canon, and by cutting new channels, etc., flowed out and over plaintiff's land, covering part of it with sand and *débris*, and thus doing him damage. All of the ditches, however, were not owned jointly by all of the defendants. Each ditch was owned and operated by part only of the defendants who had no interest in the other ditches; and there was no concert of action—that is, no common design—between the owners of one ditch and the owners of the other ditches. The action was brought to enjoin all the defendants from continuing the wrong, and also to recover damages jointly against all the defendants for the injury already done. The court gave judgment decreeing an injunction, and also adjudging damages against all the defendants, jointly, for \$972.33. Defendants appeal from the judgment and from an order denying a new trial; and the only point they make is that the joint judgment for damages is erroneous, because there was no concurrent or joint act or negligence on the part of defendants which caused the damage.

It is clear that the rule, as established by the general authorities, is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert, or unity of design, between them. It is held that, in such a case, the tort of each defendant was, several when committed; and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants; and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors. *Chipman v. Palmer*, 77 N. Y. 51; *Navigation Co. v. Richards*, 57 Pa. St. 142; *Sellick v. Hall*, 47 Conn. 260; *Gould, Waters*, § 222; *Pom. Rem.* §§ 307, 308. The case of *Blaisdell v. Stephens*, 14 Nev. 17, is very similar to the case at bar, and involved the very point under discussion. In that case,

several defendants were sued "for wrongfully flowing waste water from their lands to the injury of plaintiff's ditch, and for an injunction to restrain such wrongful flowing of waste water." It appeared, however, that the defendants "own, occupy, and irrigate separate and distinct tracts or parcels of land each in his own right;" and they moved for a nonsuit upon the ground that it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants." The trial court overruled the motion, and, on appeal the supreme court of Nevada held that the nonsuit should have been granted, and said in its opinion: "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other." On rehearing, however, it was held that the injunction against defendants was proper; but the judgment, so far as it awarded damages, was reversed. The principle has not been changed in this state, either by statute or judicial decision. The latest authority on the point here is *People v. Mining Co.*, 66 Cal. 138, 4 Pac. Rep. 1152. That was a case where it was sought, by the equitable remedy of injunction, to restrain the commission of acts similar to those complained of in the case at bar; and the appellant sought to invoke, as against the injunction, the principle above stated as applicable to actions at law for damages. This court held, however, that the rule did not apply to the equitable remedy; but it expressly stated that it would apply to an action for damages. Counsel for appellant, in support of their position, had cited a number of cases; and, in alluding to them, this court said as follows: "Each of those cases was decided upon the principle that where several persons, acting independently of each other, engage in the commission of wrongful acts, the torts are distinct and not joint; and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right." It may be contended that the earlier case of *Hillman v. Newington*, 57 Cal. 56, established a different doctrine; but it must be remembered that the main purpose of that action was to procure and maintain an injunction. The judgment awarded only nominal damages,—\$1. Before that time, there had been some doubt whether several wrong-doers, acting independently, could be joined in an equitable proceeding to procure an injunction against all; and, indeed, it had been once held in this state (*Keyes v. Water Co.*, 53 Cal. 724) that it could not be done. The language of the court in *Hillman v. Newington* must, therefore, be considered as referring especially to the right of equitable remedy. There was practically no question of damages before the court, and no question was raised as to the distinction between the equitable

and the legal remedy. The case is referred to in the opinion of the court in the later case of *People v. Mining Co.*, above mentioned, where *Hillman v. Newington* is evidently considered as settling only the equitable remedy. And, of course, the distinction is very plain between holding one defendant liable for the past wrongs of all the others, and simply enjoining all from committing wrong in the future. We think, therefore, that under the law as clearly settled, the joint judgment against the defendants for damages is erroneous.

We have considered this case somewhat at length, because it is contended that the rule as above stated will in some instances work a hardship to owners of property injured by the joint consequences of acts of several persons not acting in concert. No doubt there may be cases where it would be difficult to make sufficient proof against one of such persons, if sued separately. But it cannot be made clear that the opposite rule would work less wrong. At all events, we must declare the law as we find it. If the law were changed so that in a case like the one at bar a several judgment could be given against each defendant for the proportionate part of the joint damage which his individual acts had caused, it may be that such change would be in furtherance of justice. But the suggestion of such change could be properly made only to the law-making power. The judgment appealed from, so far as it awards damages against defendants, is reversed, and in all other respects the judgment is affirmed. Let appellant recover the costs of this appeal. Order overruling motion for new trial affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(87 Cal. 423)

*Ex parte* AH SING. (No. 20,705.)

(*Supreme Court of California*. Jan. 4, 1891.)

INFORMATION—SUFFICIENCY—ALLEGATIONS AS TO TIME.

In *habeas corpus* for discharge from a commitment under a prosecution for visiting a gambling-house, the failure of the complaint to set forth the time does not affect the jurisdiction of the court to try the case.

In bank.

*Joseph F. Coffey*, for petitioner. *Joseph D. Page*, Dist. Atty., for respondent.

THORNTON, J. Application to be discharged on *habeas corpus*. The petitioner, as appears by the return, is in custody of the sheriff of the city and county of San Francisco, by virtue of a commitment upon a conviction by the police court of the city and county aforesaid of a misdemeanor, viz., visiting a gambling place. It is urged that the court below was without jurisdiction, because the time was not set forth in the complaint upon which the conviction was had. This point might have been considered and passed on by the court which rendered the judgment, and might also have been considered and passed on by the superior court, to which the case was carried by appeal of the defendant, and the judgment there affirmed.

We cannot see that the court below was without jurisdiction for the defect claimed which is brought to our attention. The writ is discharged, and the petitioner remanded to the custody of the sheriff of the city and county above mentioned. So ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; PATERSON J.

(3 Cal. Unrep. 365)

MONTGOMERY v. SAYRE. (No. 13,911.)<sup>1</sup>

(*Supreme Court of California*. Jan. 4, 1891.)

WAIVER OF JURY TRIAL—SPECIAL FINDINGS.

1. Where the record shows that two special questions were submitted to the jury which they answered, but gave no general verdict, and that these questions did not cover all the issues in the case; that the trial proceeded, and both parties introduced evidence; and that the case was submitted to the "court for decision and judgment," which was rendered against defendant,—the right to trial by jury was waived by defendant under Code Civil Proc. Cal. § 631, providing that jury trial may be waived by oral consent in open court entered in the minutes or by failure to appear at the trial.

2. Answers to special questions not disposing of all the issues in a case do not constitute a special verdict within Code Civil Proc. Cal. § 624, defining a special verdict to be that by which the jury find the facts; and such special findings, unaccompanied by a general verdict, are of no effect, since by section 625 the special findings only control when they are inconsistent with the general verdict.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Code Civil Proc. Cal. § 631, provides that the right to trial by jury is waived (1) by failing to appear at the trial; (2) by written consent in person or by attorney, filed with the clerk; (3) by oral consent in open court entered in the minutes.

*Geo. A. Nourse*, for appellant. *W. F. Goad* and *Arthur Rogers*, for respondent.

THORNTON, J. This action was on a promissory note executed by defendant's testator to the plaintiff. It was given to secure the payment of the note of the Pioneer Gold Mining Company to the plaintiff for \$110,000. This last note was indorsed by William S. Chapman. It was further secured by the pledge of all the shares of the capital stock of the Pioneer Gold Mining Company, except 30 shares thereof, and also by a mortgage on the Pioneer mine, then owned by the company above named, executed by said company. The above facts appear and are not disputed. It further appears that there was a prior mortgage executed by the company on the Pioneer mine, on which a suit for foreclosure was brought, and in this suit the plaintiff, who was one of the defendants therein, filed a cross-complaint, asking that his mortgage be foreclosed. This was done, and an order of sale issued directing the proceeds of the sale of the mine under the decree to be applied first to the payment of the prior mortgage, and the remainder upon the plaintiff's mortgage. At the sale under this decree, the plaintiff became the purchaser of the mortgaged premises for \$50,000, of which \$10,415 was paid to the owners of the prior

<sup>1</sup> Reversed in banc. See 27 Pac. 648, 91 Cal. 206.



mortgage, and the remainder, less costs of sale, was applied on the second debt of plaintiff, adjudged then to amount to \$69,426.60. The sheriff's return of sale showed a deficiency due on the second debt to plaintiff, amounting to \$61,534.13. The complaint shows payments on the mortgage debt to plaintiff, including the payment made of a portion of the funds of the sale above mentioned, amounting to \$98,380.82. Judgment for this deficiency was docketed against the mortgagor company and W. S. Chapman. On this judgment payments were made before the commencement of this action, leaving still due, as averred in this complaint, the sum of \$34,551.20. Plaintiff asks judgment on the note sued for, principal and interest thereon, amounting to \$17,120.80. The claim of plaintiff on the note sued on was regularly presented to the defendant's executor, who rejected it. This action was brought on the note to recover the amount above mentioned, to be paid by defendant in due course of administration. It is set up in the answer that the \$110,000 note had been fully paid, and denies that any sum remains due and unpaid on it. Other allegations of the complaint were denied. These need not be fully stated. As an affirmative defense, the defendant set up by his answer the following: "That a transcript of the docket of the deficiency judgment docketed against the Pioneer Mining Company and W. S. Chapman (the maker and indorser of the mortgage note) was filed with the recorder of Fresno county in November, 1887, and thus the judgment became a lien upon all the real property of said W. S. Chapman in said Fresno county; (2) that at and before the filing of said transcript, Chapman owned certain real property described, situated in said county, which was held in the name of W. F. Goad, trustee for plaintiff, Montgomery, for further security for debts due Montgomery from Chapman; (3) that the said lien of said judgment was never enforced against said property of said Chapman, but that said Montgomery, Chapman & Goad, after the death of said A. L. Sayre, sold and conveyed by deed to Thomas E. Hughes all said real property for \$35,000, paid by Hughes to Montgomery, which was received by Montgomery as payment in full of every debt and obligation due from Chapman to him, except the judgment aforesaid, which then amounted to less than \$36,000, and that Montgomery thereupon released said land from the lien of said judgment; (4) that said real estate was then worth \$140,000, and if sold at its real value would have realized enough to pay all debts due Montgomery from Chapman, including said deficiency judgment; (5) that said Montgomery released said land from the lien of said judgment, and released said Chapman from the obligation of said judgment without the consent of defendant." The case was tried by a jury on the 28th of April, 1889, who rendered the following verdict:

"Question 1. What was the value, May 15, 1888, of the following lands, viz.: The south half of section 24, section 25, the south-east quarter of section 26 and section 35, all in township 11 south, of range

17 east, from the Mount Diablo base and meridian; also section 1, and the west half of section 15, in township 12 south, of range 17 east, from said base and meridian? Answer. \$136,800. C. C. HARRIS, Foreman."

"Question 2. Did the plaintiff, A. Montgomery, on or about May 15, 1888, release W. S. Chapman from all liability under the judgment in the complaint herein mentioned? Answer. Yes. C. C. HARRIS, Foreman."

This verdict, it appears, was in answer to special questions embracing special issues submitted to the jury by the questions above given. There was no other verdict, and no general verdict; nor does it appear that any general verdict was demanded by either party. It appears from the record that the trial proceeded after the return of the verdict, both parties introduced evidence, and on the 24th and 25th of April, 1889, it is stated "said trial was completed and submitted to the court for decision and judgment, with the privilege to the parties to file briefs herein, which was done." The court subsequently rendered its decision, finding on all the issues in the case, disregarding the verdict, treating it as non-existent, and, in fact, finding contrary to the answers of the jury on the questions submitted to them, and rendered judgment for plaintiff for a sum of money. The defendant appealed.

The above facts are taken from the record, and on them must the solution of the points in this case be made. Was there any verdict rendered on which judgment could be entered? This is an action at law, and the defenses set up on behalf of defendant were all legal defenses. Payment is certainly a legal defense, and so is the discharge of a surety by releasing his principal, or by surrendering a lien on property sufficient, if sold, to pay the debt for which the surety had obligated himself. We have no doubt of the correctness of these rules. Such is the common law, and it is so prescribed in the Civil Code, §§ 2819, 2840. The verdict cannot then be regarded as advisory to the court. The case is not one in equity. It has no such features. All the questions arising on the defenses set up relate to legal defenses. If the facts above mentioned exist, the surety is discharged by operation of law, without the necessity of appealing to a court of equity to obtain such discharge. The fact that the statute requires that the judgment must be entered, payable in due course of administration, does not make this an equity case. This doctrine applies particularly to actions for the recovery of money, which are almost always actions at law. Certainly such must be the form of the judgment in a recovery on a promissory note. By the statute, (Code Civil Proc. § 625,) in an action for the recovery of money, a jury may, in their discretion, render either a general or a special verdict. In such a case as the one before us, the court cannot direct the jury to find a special verdict, but it may, in such a case, and in fact in all cases, instruct the jury. If they render a general verdict, to find up on particular questions of fact, to be stated in writing, and may direct a writ-

ten finding thereon. This finding on the written question must be returned and filed with the clerk, and entered on the minutes of the court. When the special finding of facts on the questions submitted is inconsistent with the general verdict, the special finding controls the general verdict, and the court is bound to give judgment accordingly; that is, in accordance with the special finding. It must be held, nothing appearing to the contrary, that the court instructed the jury in accordance with law; that is, if they found a general verdict, to find on the questions submitted to them. We cannot assume or presume that the court violated the law in failing to direct the jury to find a general verdict in connection with their answers to the questions, unless the record shows it. The record must put the court in the wrong. If it does not, it must be held that the court acted in accord with the rules of law. We must presume then that the jury did not obey the instructions of the judge, in failing to find a general verdict, as they were told to find. Either party had the right to have the court direct the jury, when they returned their verdict on the questions submitted, to return a general verdict. This was not done, and it must be held that this right was waived by each party to the action.

What, then, is the effect of the verdict which was rendered? Neither party asked for judgment on the verdict as rendered. If this had been asked by either party, the other party might have objected. The objection, if made, should have been sustained, and the result would have been a mistrial. The court could not, of its own motion, have ordered judgment on the verdict. It was not such a verdict as judgment could have been rendered on, unless by consent of both parties. If judgment had been entered on it by consent, the maxim would apply *consensus tollit errorem*, and the judgment would be valid. This was not a special verdict. A special verdict is defined by the Code as that by which the jury find the facts only, leaving the judgment to the court. Code Civil Proc. § 624. The facts found by the jury are all the facts in issue. On these facts so found the court renders judgment. See *Breeze v. Doyle*, 19 Cal. 101. When the jury find a special verdict they are not bound to find a general verdict. In this case they might have returned either a special or a general verdict. Either was within their power; and in this they were beyond the control of the court. Code Civil Proc. § 625. The special finding in this case did not dispose of all the issues. It did not dispose of the defense of payment and other issues. In any point of view it was not a special verdict. It was a special finding, regularly to be accompanied by a general verdict. Not being so accompanied, it was of no legal effect, and no judgment, except by consent of the litigants, could have been entered on it. It was a nullity to which no validity could have been imputed, unless the parties had agreed that it should be regarded, so far as it disposed of the issues in the case, as a controlling finding or verdict. On this point see *Elsemann v. Swan*, 6 Bosw. 668. But the record shows

no such agreement. For all that appears the jury was discharged without finding anything which in law can be held as a verdict, and the record informs us that the parties submitted further evidence; that the trial was completed on the 25th of April, 1869, (one day after the so-called verdict was returned into court;) and that the cause was, on the 25th of April, "submitted to the court for decision and judgment." The verdict seems to have been treated by counsel and court as of no effect. It appears in the transcript that the cause came on regularly for trial; was tried on the 24th and 25th of April, 1889, when the trial was completed. We cannot construe this otherwise than as a statement, which we must hold to be absolutely true, that the trial was not completed until the 25th day of April, 1889, the day after the special findings were filed. Certainly the verdict on an incomplete trial is a nullity, and should be so treated, unless it is shown that the parties gave it effect by a stipulation that it should be regarded as of some validity, and how far it should be so regarded. The defendant had a right to have his cause tried by a jury. This was accorded to him. The jury was called and sworn in the case, and then was discharged without objection, without rendering a verdict. Both parties afterwards went on to try the case, introduced further evidence, and submitted the case for decision and judgment. We cannot hold otherwise than that there was a waiver of a trial by jury, just as effectual as if his consent had been given in open court, and entered on the minutes. The minutes show a consent by action in open court, by proceeding with the trial, introducing further evidence after the jury was discharged, and submitting the case for decision and judgment. Such action was inconsistent with any demand or desire for a jury trial, and should be held a waiver, within the provisions of Section 631, Code Civil Proc.

It is argued that the verdict was not waived. But in our view there was no verdict, and the counsel seems to have so regarded it, or he would have asked for judgment on the verdict. We can put no other construction on the statements in the record of the course that the trial took than that the finding was regarded as no verdict, and that the trial should proceed as if no verdict had been found. No question of waiver arises on the finding, for there was no verdict. It gave the defendant no right, for it conferred none. It cannot be said that the defendant did not waive his right to have judgment entered on the verdict, as the special finding gave no such right to either party. If it had conferred a right to judgment, and the parties had afterwards to complete an incomplete trial, the question might arise, although it would be manifestly unjust to hold either party bound by a verdict on an unfinished and incomplete trial. This disposes of all the questions arising in the case. There was no motion for a new trial. There is no statement or bill of exceptions in the case, nor any motion made in the court below to set aside the judgment on any ground. We find no error in

the record, and the judgment must be and is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(15 Colo. 330)

HUGHES v. FORD et al.

(Supreme Court of Colorado. Dec. 5, 1890.)

LANDLORD AND TENANT—IMPROVEMENTS—APPEAL  
—WEIGHT OF EVIDENCE.

1. In an action by a lessee of property, after the expiration of the lease, to recover from the owner the value of improvements made on the premises, plaintiff testified as to an alleged agreement on the part of defendant to pay for the improvements. The evidence consisted of conversations between the parties, but it did not appear that any price or terms were ever agreed on. Defendant denied that he agreed to pay for the improvements. *Held*, that a judgment for defendant would not be disturbed on appeal.

2. Where a tenant, who has erected improvements on the demised premises under an agreement with the lessor that he may remove them, wrongfully allows the improvements to remain on the premises after the expiration of the lease, he cannot recover rent for such improvements.

Error to superior court of Denver.

*Wells, McNeal & Taylor*, for plaintiff in error. *Geo. W. Miller and Lipscomb & Hodges*, for defendants in error.

HAYT, J. At a time prior to the year 1883, George W. Clayton and William Clayton, then being the owners in fee of lots 24 and 26, block 48, east division of the city of Denver, leased the same to plaintiff in error, Paul T. Hughes, for a term expiring June 1, 1883. By the terms of said lease all improvements erected by plaintiff were to remain his property. Thereafter plaintiff entered into possession of the premises and erected thereon certain buildings. Upon the expiration of the term of the lease, plaintiff, by the consent of the Claytons, held over upon the original terms. On or about November 21, 1883, Clayton conveyed the premises to Ford, one of the defendants in error, Clayton, however, reserving and excepting the improvements, (belonging to plaintiff,) with an agreement that plaintiff might remove the same at any time before June 1, 1884. It further appears that on or about November 21, 1883, plaintiff and defendant Ford entered into an agreement to the effect that plaintiff should deliver to said Ford the premises on the 1st day of June, 1884, free of any incumbrance caused by plaintiff, and should pay Ford as ground rent, in the mean time, \$150 a month; and also pay all taxes levied upon the premises for the year 1883. Ford, in consideration thereof, leased to plaintiff the premises until the 1st day of June, 1884. Plaintiff also testifies that at numerous times after the conveyance from the Claytons, Ford expressed to him a desire to retain the improvements upon the land, and his readiness and willingness to purchase the same at a fair valuation, and that he further promised and agreed to pay plaintiff the reasonable value of the improvements, or renew and extend the lease of the premises. This testimony of plaintiff is contradicted by the defendant. It appears, however, that about the 31st of May, 1884,

plaintiff prepared to remove therefrom the buildings and improvements erected upon the premises. About this time further negotiations were had looking to the purchase of the improvements by Ford, and, for this reason, the removal did not take place. It is in evidence that the parties attempted to fix the value of these buildings by arbitration, but the arbitrators chosen failing to agree, and the articles of submission being defective, nothing came from such attempt. Plaintiff claims that the failure of the arbitration was due to the fraud of the defendant Ford, but the proof is not sufficient to sustain this allegation. It is also shown that on or about May 20, 1884, the defendant Ford gave notice to plaintiff that he desired to take full possession of the premises on or about the 1st day of June, 1884. Plaintiff seeks, *inter alia*, for a judgment for the value of the improvements, and for a lien therefor upon the same. In the alternative, plaintiff asks that he be permitted to remove the buildings from said premises within some reasonable time to be fixed by the court.

In the superior court the case was tried to the court without a jury. The issues were there found in favor of the defendants, and judgment entered accordingly. At the trial the evidence was directed principally to two points: (1) To prove an agreement between the parties whereby the defendant Ford became obligated to pay plaintiff the reasonable value of the improvements; (2) to establish such value. Unless the first point be established, the second is entirely immaterial. To prove an agreement to pay for the improvements, plaintiff was compelled to rely almost exclusively upon his own testimony. This, at most, is vague and unsatisfactory, and is directly contradicted by the defendant Ford. In this state of the record it was the province of the trial judge to decide upon the weight of the evidence. This he did, and his decision was against plaintiff; and we see no reason for disturbing such conclusion. An examination of the evidence shows that the conversation between the parties, in reference to a sale of the buildings by the plaintiff, and their purchase by the defendant, amounted to no more than negotiations for a sale. Neither price nor terms were ever agreed upon. The minds of the parties never met. The agreement to submit the matter to arbitration shows that neither party, at that time, regarded the matter as settled. The arbitration failing, the matter must still be regarded as undecided. Under the circumstances, the defendant Ford cannot be charged with the value of plaintiff's improvements. The plaintiff asks, however, in this alternative, to be allowed a reasonable time within which to remove the same; and the defendant in his answer expressly assents thereto. Under the circumstances, the court should have made some appropriate order in reference thereto. This it did not do, and for this error the judgment must be reversed. A receiver was appointed, who collected the rents during the pendency of the action in the court below. By the final judgment, this receiver was required to pay the defendant Ford the

amounts thus collected. This part of the judgment cannot be disturbed. The improvements were wrongfully suffered to remain upon the premises after the expiration of the lease, and plaintiff was not entitled to the rent therefrom. The judgment is reversed, with directions to the court below to modify the same by allowing the plaintiff a reasonable time within which to remove the improvements.

(15 Colo. 126)

**JOHN MOUAT LUMBER CO. v. WILMORE.**

(*Supreme Court of Colorado.* Oct. 17, 1890.)

**NEGLECT—SPARKS FROM SAW-MILL—DAMAGES.**

1. The owner of a saw-mill is liable for negligently setting fire to a house, when the evidence shows that sparks constantly escaped from the smoke-stack of the mill both before and after a spark-arrester was placed on it, and that the attention of the owner had been called to the fact by plaintiff, whose house had been several times fired by the sparks.

2. Where the evidence shows that the sparks had many times before been blown into plaintiff's house, 75 yards from the mill, and that on the day of the fire the wind was in that direction, and that the window screen on the side of the house next the mill was loose so that the sparks might have gotten into the room where the fire originated, that there was no fire in the house at the time, and no other known source from which it could have originated, the conclusion that the fire was started by sparks from the mill is warranted.

3. Evidence of the cost of wearing apparel destroyed by fire, followed by evidence of wear and tear, is competent to fix its value, such goods having, when worn, no market value.

**Appeal from Jefferson county court.**

Action by appellee, J. H. Wilmore, against appellant, the John Mouat Lumber Company, for negligently setting fire to appellant's house, by reason whereof, it is claimed, it and its contents were partially destroyed by fire upon the 22d day of May, 1886. The cause was commenced in a justice's court, consequently there are no written pleadings. The trial before the justice having resulted in a verdict for the plaintiff, the defendant company appealed to the county court. In the latter court the cause was, by consent, tried to the court without a jury. As the result of this trial, appellee recovered judgment for \$300, and costs. To reverse this judgment the case is brought here by appeal.

*Wm. B. Mills and Wm. E. White, for appellant. Coe & Freeman, for appellee.*

**HAYT, J.,** (after stating the facts as above.) The principal question presented upon this appeal is in reference to the sufficiency of the evidence to support the judgment. Counsel for appellant in his written argument says "that there was no evidence of negligence on the part of the defendant, nor was there any evidence that the fire originated from the defendant's fire, smoke-stack, or mill." The evidence received at the trial was not taken down by a stenographer, and the abstract upon which we must determine the appeal is not as full as it should have been. It is admitted that appellant was the owner and proprietor of the saw-mill from whence it is claimed the fire originated. It is also conceded that the house of appellee was situate about 75 yards east

from the mill, and that there was a window in the bedroom where the fire is shown to have originated, and that this window was on the side nearest the mill, also, that the wind at the time was blowing from the direction of the mill towards the house. Appellee, testifying in his own behalf, said, in answer to the question, "Had you been troubled by fires from this mill before this, while it was occupied by the defendant?" "Answer. I had. Q. When was it? A. It was when the wind blew; had noticed a thousand of them. It bothered me all the time, but chiefly after January. I had called the attention of John Mouat, A. T. Mouat, and Mr. Eller, and most all of them, to the smoke-stack, as my wood was on fire, and my hay and charcoal. Mr. Eller is secretary of the company, and John Mouat is the president." In answer to other interrogatories the witness said: "I saw the fire catch previously from the mill. \* \* \* I have seen fires in the front room from the smoke-stack. \* \* \* I saw some sparks after the fire, but not any before that day. They were about the same thing as I had seen before. I was familiar with the smoke-stack. I examined it after the fire. It was thirty feet high. It was a hood, funnel shaped, on top of it, set on bars of iron. The hood is on the top part of it, and the space was open between the lower part and the smoke-stack." In answer to the question, "How much time did it take to fight the fires?" the witness answered: "It took a good deal of time. I cannot say how much. A good many times I got up and went out for fear, and I watched always in the day-time. I have had to leave my work and put out large fires that would take from 10 to 20 buckets of water, and I have been kept at home. This occurred many times. I cannot tell the time, for it was on and off for three and four months. It was not only the loss of time, but I would have to leave my work. I can only guess at the time. It may have been two or three weeks that I put in that way. It must have been two or three, positively two, weeks." Mrs. C. A. Northrup testified upon this point: "Question. Have you ever seen sparks from the mill flying there? Answer. Yes; it was the Tuesday after the fire occurred. That was the only time. It came in there from the north-west. I cannot tell the kind of a spark. It blew across my lap. It was a live spark, and it came from the north-west. I saw a fire that came from the way the fire was. I have seen sparks come from the mill, because they came with the smoke of the mill." Mrs. Mary Wilmore testified in answer to the question, "Have you seen sparks of the fire from this mill before the fire of your house?" "Answer. I did, repeatedly; have seen fire from the mill before the fire in our house. There was hardly a day but we had fires to put out. Q. Had you seen sparks at night from the mill more than once before that? A. Yes, sir; a thousand times. I have been burned with them. Q. Have you seen them since this spark-arrester has been put up the same as before? A. I have; have seen coals and sparks both come some as large

as the end of my thumb. A window in the west room was raised up, and the screen was torn at the top and at the bottom. I saw some dead cinders in the west room. They looked like dead bark." The witness Daniel Northrup testified in answer to the question, "Did you ever notice sparks before or after that time?" "Answer. I have. I have seen fires around Wilmore's from the cinders. I saw as many as twenty or thirty. The most of them were in his wood-pile." The witness Charles Nadler testified to the same effect. The witness Henry Hildebrand testified, in reference to the spark-arrester upon the defendant's smoke-stack, "that it was not safe, for the reason that the rim had a hole 24 inches, while the smoke-stack was only 20 inches, so it left two inches in the hole." Here we have testimony showing that this smoke-stack was constantly emitting sparks both before and after the spark-arrester was put on, and also testimony to the effect that the spark-arrester was not sufficient, and did not answer the purposes for which it was intended. We cannot find from this record that it was denied by any witness that sparks did thus escape, and although it was testified by defendant's witnesses that the spark-arrester was a good one, and one of the best that were made, still, it was for the court below to decide upon the weight of the evidence. Its decision was against appellant; and we think there was sufficient proof of negligence to support this finding of the trial court.

It is claimed that the evidence does not show that the fire caught from the mill. In support of this claim counsel contends that the fire caught inside the house, and that it could not, therefore, have been started by sparks from the mill. In answer to this, it may be said that if it be conceded that the fire originated within the bedroom, the evidence shows that it may have been blown in through the open window, although the witness Gallin testified that there was a screen on the outside of the window, and that it was not loose, so far as he could see. The testimony of this witness was so shaken on cross-examination that the trial court may have attached very little weight to it. Other witnesses testified that the screen was loose at the top and bottom, so that cinders and sparks from the mill could, and did, pass into the room; and that fires had previously caught in this manner from the mill. Although no eye-witness saw the sparks that started the conflagration, it is in evidence that sparks and burning coals were frequently emitted from the mill, and that they were so emitted upon the day of the fire; that the wind was blowing so as to carry the sparks in the direction of the house, and that fires in and about the house had frequently been started in this manner; that there was no fire in the house at the time, and no other known source from which the fire could have originated. From the very nature of the case, resort to presumptive evidence became necessary. The most important rights of property and the gravest criminal charges are being constantly determined upon such evidence, and we see no reason

why this case should be made an exception. In our opinion, the facts and circumstances detailed by the witnesses upon the stand, justified the conclusion reached by the trial court, that the fire causing the damage was started by sparks from the mill. *Kaine v. Weigley*, 22 Pa. St. 183; *Railway Co. v. De Busk*, 12 Colo. 294, 20 Pac. Rep. 752.

But one other question was raised at the trial by such specific objections as to entitle it to be reviewed upon appeal. Against appellant's objections, appellee and his wife were both permitted to give evidence of the cost of certain wearing apparel, and family clothing. As the testimony was followed by evidence of wear and tear, it was proper for the consideration of the court. There is no market value for such goods when worn; hence, the general rule in reference to the measure of damages does not control. In such case the value may be fixed by considerations of cost, and actual worth, at the time of the loss, without reference to what they could be sold for in a particular market. *Railroad Co. v. Frame*, 6 Colo. 382. Finding no substantial error in the record, the judgment must be affirmed.

(15 Colo. 430)

BOARD COUNTY COM'RS LARIMER COUNTY  
v. LOVE.

(*Supreme Court of Colorado*. Nov. 19, 1890.)

SHERIFF'S FEES—MILEAGE.

Under Gen. St. Colo. § 1441, allowing officers 15 cents for each mile "necessarily" traveled in serving process in criminal cases, a sheriff who serves process issued in different cases at the same place and on the same journey is entitled to mileage in each case for the entire distance.

Error to district court, Larimer county.  
*Wells, McNeal & Taylor*, for plaintiff in error. *T. M. Robinson*, *Eph. Love*, pro se. *E. A. Ballard* and *Sanford Darrah*, for defendant in error.

HELM, C. J. The question presented by the record before us may be stated as follows: When a sheriff serves "processes" issued in different criminal cases, at the same place and upon a single journey, is he entitled to mileage in each case for the entire trip? The statute controlling the present controversy allows that officer 15 cents per mile for each mile "necessarily" traveled in performing the duties mentioned. Gen. St. § 1441. It is unquestionably against the policy of the law to allow public officers compensation for constructive services, but there is a divergence of opinion as to whether certain alleged services are, or are not, to be treated as constructive. For instance, suppose the sheriff travels 30 miles, and at the same place serves a process in each of two separate cases, can it be said that his mileage is actual in one of the cases and constructive in the other? If so, in which case is it actual, and in which constructive? No matter how the selection be made, it will prove neither equitable nor satisfactory. Or, suppose the parties upon whom processes are thus served reside at different distances, but in the same direction, from the county-seat, so that if served separately

mileage in one case would be charged for 20, and in the other for 30, miles. Obviously, the total mileage for the 30 miles traveled could not be charged to the suitor whose process only required a trip of 20 miles; while to charge the whole amount against the other litigant and none against him, would be sure to produce the most vigorous protest. These hypothetical cases are verified by actual experiences upon every secular day. They show both the injustice and impracticability of treating the mileage as actual in one case, and constructive in the other. But it is claimed that the difficulty in all such cases as those supposed would be easily obviated by an equitable apportionment of the mileage fee among the different prosecutions or suits. This proposition is reasonable in theory, but the wisdom of attempting its practical application must be doubted. No distinction can be discovered upon principle between mileage fees in criminal and in civil cases, and none is made, in the respect now under consideration, by statute. Judicial causes, whether civil or criminal, are separate things. They are distinct entities in litigation. Unless otherwise specially stipulated or ordered, they are brought, conducted, and determined entirely independent of each other. Fees are taxed, and a fee-bill is rendered as a part of each particular case. Costs are ordinarily not expected to vary in accordance with the multiplicity or decrease of other contemporaneous actions. It is usually deemed enough for each suitor to take care of his particular suit, and the courts generally have their hands full in administering justice, without a commingling of different cases. But suppose the rule of equitable apportionment, above suggested, be adopted; the extent of a party's liability in his particular case is no longer determined exclusively by the proceedings in connection therewith. It depends upon fortuitous circumstances not growing out of the controversy which he is prosecuting or defending. If the sheriff's apportionment of mileage fees were always acquiesced in, the matter would be at least partially shorn of its seriousness and difficulty. But his action in this regard would be constantly challenged. He would often serve processes in a number of different cases at the same time, and his apportionment would be subjected to the critical analysis of as many losing litigants. Many elements of uncertainty, and grounds for imputing fraud, would enter into consideration, and ultimately become subjects of judicial cognizance, for the courts would almost certainly be called upon to determine the disputes resulting. A peculiar field of jurisprudence would thus be entered, and a vast amount of time would be consumed by the judiciary of the state that should be given to the transaction of other business. Moreover, it might happen that no one of the cases blended in this particular could be finally disposed of and passed from the docket, without a similar determination of all the others. No rule, legislative or judicial, can be adopted to govern the matter in hand that will not be obnoxious to plausible objections; but, upon careful consideration,

we are of the opinion that mileage should be allowed in each particular case. We hold that different causes, separately prosecuted and tried, should not be commingled in the taxing and apportionment of these costs; and that the time of the courts is not to be consumed in the difficult and unsatisfactory arbitration of fees between different losing suitors, having no community of interest otherwise, in pending litigation. The foregoing view we believe to be in accordance with the spirit and purpose of the statute, which, in our judgment, does not contemplate such complex and impracticable proceedings. It is also supported, as above shown, by strong considerations of justice and expediency. The officer might be compelled to make a separate trip in each case, and, though serving a number of processes issued therein, he would receive but a single mileage fee. Under these circumstances, the suitor ought not to complain. His mileage fees, thus computed and allowed, will not be unreasonable, and he is as fully protected as he can well be in practice. If the sheriff manages to serve processes in different cases upon a single journey, he is fortunate, but his good luck at one time will be more than offset by loss of fees and other misfortunes at another. Thus, on the whole, he is not likely to receive more than the reasonable mileage contemplated by the statute. The judgment of the district court is affirmed.

(45 Kan. 213)

BABB, Deputy-Sheriff, v. ALDRICH.

(Supreme Court of Kansas. Jan. 10, 1891.)

DEPOSITIONS—INDORSEMENT—CONTINUANCE—JUDGMENT IN REPLEVIN.

1. Where an indorsement on an envelope inclosing a deposition gives the title to the case, shows in whose behalf the deposition is taken, the name and character of the officer taking the same, that the deposition was sealed up by the officer who took it, and it is addressed to the clerk of the district court of the eleventh judicial district, Columbus, Cherokee county, Kan., held, that such indorsement is sufficient. *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. Rep. 874.

2. It is not error for a notary, before whom a deposition is to be taken, to adjourn the taking of said deposition at the time and place named in the notice for taking the same, until the next day, at the same place and hour, at the request of the attorney of the party taking the deposition.

3. In an action of replevin, where the plaintiff fails to obtain possession of the property on the order of delivery, and the trial of the action results in favor of the plaintiff, but the verdict is for the value of the property simply, and not in the alternative for the return of the property, or, in case it cannot be returned, for the value thereof, the verdict and judgment are irregular. But in such a case it is not necessary to reverse the judgment, and order a new trial, as the court may direct a modification of the judgment, requiring it to be entered in the alternative; and, in such a case, when the evidence clearly shows that the property could not be returned, it is unnecessary to direct a modification of the judgment.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Cherokee county; *GEORGE CHANDLER*, Judge.

*J. D. Lewis* and *W. F. Sapp*, for plaintiff in error. *W. R. Cowley* and *H. C. Root*, for defendant in error.

STRANG, C. This was an action for replevin for 77 tons of zinc ore. The defendant claims to have purchased the ore from Aldrich and Fuller in May, 1886. The plaintiff was deputy-sheriff of Cherokee county, and had in his hands an execution in favor of O. T. Street against Aldrich and Fuller which he levied on the ore as the property of said Aldrich and Fuller. The defendant demanded the ore of the plaintiff, and, on his refusal to return it to her, commenced this action to recover possession of it. The cause was tried by the court and a jury, resulting in a verdict and judgment for the plaintiff for \$924. Motion for a new trial was overruled. The first error complained of was the action of the court in refusing to suppress the deposition of Joel Bacon.

The first objection to the deposition is that it was not properly indorsed and transmitted by the officer taking it. The indorsement on the envelope is sufficient. It gives the title of the case, shows in whose behalf the deposition is taken, the name and character of the officer taking the same, that it was sealed up by the officer who took it, and it is addressed to the clerk of the district court of the eleventh judicial district, Columbus, Cherokee county, Kan. *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. Rep. 874. The certificate which is complained of is in due form and sufficient in substance. Complaint is also made that the deposition was not begun on the day named in the notice. The notary was present at the time and place named in the notice for taking the deposition. The attorney for the defendant appeared. Nobody appeared to cross-examine. Counsel for the defendant requested the notary to adjourn the taking of the deposition until the next day, which request was granted, and the taking of the deposition adjourned until the next day, at the same place and hour. The deposition was then taken. No one appeared at this time for the plaintiff. The notary had a right to adjourn from day to day, but counsel say he did not give any reason for the adjournment, and that the statute requires that a reason should be given. It is true the notary did not say in his certificate that he adjourned to accommodate the attorney for the defendant. If he had, that would have been a compliance with the statute. He did say, however, that he adjourned at the request of the attorney for the defendant. We find no error in the ruling on the motion to suppress. The petition contains all the necessary elements of a petition in replevin. While the description of the property therein is not as complete as it might have been, it is sufficient. There was no dispute over the identity of the property. The petition being sufficient, the evidence of A. H. Aldrich, R. S. Fuller, and Joel Bacon was properly admitted.

The plaintiff complains of the ruling of the court in excluding certain evidence of the defendant, Babb. If there was any error in the action of the court in this assignment, it was immediately cured by the court permitting Mr. Babb, in answer to the very next question, to go over the whole ground, and testify fully all about

the conversation had between himself and Aldrich, which was the conversation before excluded. Counsel for the plaintiff say the verdict and judgment are too large. The evidence of Mrs. Aldrich and the witness Fuller is sufficient to sustain the verdict. The trial court approved it, and we will not disturb it. The judgment was for the value of the ore simply, and not in the alternative. Such a verdict in replevin is irregular. But this court held in *Ward v. Masterson*, 10 Kan. 79, "that it was not necessary to reverse the judgment, and order a new trial; that it was sufficient to direct a modification, and that the judgment be entered in the alternative for the delivery of the possession, or, in case that cannot be had, for the recovery of the value." In this case, the plaintiff below did not get the property on her order of delivery; and the evidence of the plaintiff shows that the property was sold by him and taken away. We do not, therefore, deem it necessary to direct a modification of the judgment. It is recommended that the judgment in this case be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 244)

#### SHEPARD v. STOCKHAM.

(*Supreme Court of Kansas. Jan. 10, 1891.*)

#### RES ADJUDICATA—PLEADING.

Where, in an action brought to have certain shares in the capital stock of a corporation assigned to the plaintiff, upon the ground that the same had antecedently been purchased of the defendant, but never properly assigned to him, the defendant answered that all the issues involved in the case had been previously settled by the special findings, verdict, and judgment in another action between the same parties, and in the same court, and a demurrer was interposed to such answer, and sustained by the court below, *held error*.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, McPherson county; FRANK DOSTER, Judge.

*John D. Milliken*, for plaintiff in error. *Simpson, Bowker & Travis* and *Lucien Earle*, for defendant in error.

GREEN, C. On the 29th day of December, 1886, G. W. Stockham commenced this action against Samuel Shepard, in the district court of McPherson county, alleging, in substance, that on the 9th day of June, 1883, the defendant sold and delivered to him 62½ shares of the capital stock of the Conway Town Company, but that no transfer had ever been made on the books of the company; that, owing to the fact that the stock stood in the name of Shepard, \$26.18 of a dividend had been paid to him; and asked that upon the bringing of said stock into court, defendant be required and compelled to assign the same to the plaintiff, in proper form; and that he have judgment against the defendant for the dividend drawn. To this petition of the plaintiff the defendant answered—*First*, by general denial; *second*, that the possession of the stock had been obtained by fraud and force. And,



afterwards, by way of a supplemental answer, set up—*First*, the fact that, in another action between the same parties and in the same court, all the matters of difference between them, as raised by the issues in this case, were tried, determined, and adjudicated; and, for a *second* defense, set up the further fact that he had a judgment for \$800 against the plaintiff, which he asked to have allowed as an offset to the plaintiff's claim, to the extent of his judgment, interest, and costs. To this supplemental answer, the plaintiff demurred as to the first and second causes of action, which demurrer was sustained as to the first, and overruled as to the second. But previous to the court's passing upon the demurrer, the plaintiff, with the consent of the court, dismissed his second cause of action, wherein he asked for a money judgment for the dividend received by Shepard. The cause was tried to the court, and Shepard was ordered to sign his name to the certificate of stock which Stockham claimed he had sold to him. The facts in this case are peculiar and novel, and may be stated briefly as follows: Shepard owned 160 acres of land in McPherson county, and in consideration of \$6,125, par value of stock in the Arkansas Valley Town Company, deeded to the company 40 acres for a town-site, as a part of Conway; on the 9th day of June, 1883, he sold the remaining 120 acres of his farm to Stockham, giving him a warranty deed for the same. It was claimed by Stockham that this sale included the stock in the town company; that he had neglected to have a written transfer made, but did obtain possession of the stock. Shepard claimed, however, that the possession of this stock was obtained without his consent, and by force and fraud. After the sale by Shepard to Stockham, he moved to Kingman county, and for some three years had no communication with the town company, or Stockham, except to receive notices of the annual meetings of the town company, and seemed to have had no knowledge that any dividends had been declared on the stock. Stockham, in the mean time, had been receiving the dividends upon this stock, which had been sent to the local agent at Conway. Some time in the month of July, 1886, Shepard returned to McPherson county on a visit, and received a letter from the post-office at Conway, from the town company, inclosing a draft to his order for \$26.18, being a dividend upon the stock in question for the year 1886. He used the proceeds of this draft, and, in a short time, received a letter from Stockham notifying him that the dividend belonged to him; and, upon Shepard's refusal to account to him for the same, filed a complaint against Shepard, before a justice of the peace of McPherson county, charging him with stealing the money. He was subsequently arrested in Kingman county, and brought back to McPherson county, where the case was continued from time to time, and finally dismissed by the county attorney. On the 20th day of December, 1886, this suit was commenced, and, in a few days thereafter, an action was instituted by Shepard

against Stockham for damages for malicious prosecution. This latter action was tried on the 19th day of October, 1887, in the district court of McPherson county, before a jury, and special findings and a verdict were rendered in favor of Shepard for \$1,500, which was, upon a motion for a new trial, reduced by the court to \$800. Ninety days were given to make a case for the supreme court, but, as a matter of fact, the case was never taken up. In this case, the jury rendered a special verdict, and among other questions asked and answered were the following: "State at what time, if at all, the plaintiff, Samuel Shepard, sold his certificate of shares in the Conway Town Company to the defendant G. W. Stockham. Answer. Never sold them. Q. 2. At what time was the certificate of shares of the plaintiff, Shepard, delivered to the defendant, Stockham? A. Never delivered." Upon the rendition of the judgment in the case for malicious prosecution, the plaintiff in error in this case obtained leave of the court to file a supplemental answer, setting up—*First*, that the issues involved in the case had all been settled, by the special findings, verdict, and judgment in the action for malicious prosecution, and were, therefore, *res adjudicata*; *second*, that if such was not the case, that Shepard had a judgment of \$800 which he was entitled to set up as an offset in case the finding as to the ownership should be against him. The court sustained the demurrer as to the first cause of action, and overruled it as to the second, but upon the trial excluded all evidence tending to prove it. The trial of this case occurred on the 27th day of April, 1888.

The first ground of error relied upon is the ruling of the court in sustaining the demurrer to the defense of *res adjudicata*, set up in the supplemental answer. The real question for our determination is whether or not the same subject-matter between these parties was drawn in question, or included in the issue, so that it could be, or was, as a matter of fact, tried and determined by the special findings, verdict, and judgment in the former action, in the same court, and where the same persons were parties. A solution of this question is a decision of this case. "Three things," says Chief Justice SHAW, "seem to be necessary to constitute an adjudication, so that a former judgment may be pleaded as a bar to another suit—*First*, whether the subject-matter of a legal controversy, which is proposed to be brought before any court for adjudication, has been drawn in question, and whether the issues of the former judicial proceeding which has been determined, is a legal judgment on the matters, so that the whole question may have been determined by that adjudication; *second*, whether the proceedings were between the same parties, in the same right or capacity, relating to the subsequent suit, or with their privies, respectively, claiming through or under them, and bound and estopped by that which would bind and estop those parties; and, *third*, whether the former adjudication was had before a court of competent jurisdiction

tion." *Bigelow v. Winsor*, 1 Gray, 302. It has become a settled rule of action, firmly established in our jurisprudence, that no man shall be twice vexed over the same controversy, and, following this principle, this court has said: "When the matters in an action have been passed upon, or, from the issues made by the pleadings, might have been passed upon, the judgment rendered in the case bars a subsequent suit for the same cause of action between the same parties. When the same cause of action has once been litigated and decided, that is an end of it, and the form of action is immaterial. If the cause is the same, the judgment is conclusive." *Bank v. Rude*, 23 Kan. 146. "There is a growing disposition to enlarge the scope of the doctrine of *res adjudicata*." *Commissioners v. McIntosh*, 30 Kan. 238, 1 Pac. Rep. 572. "The rule of *res adjudicata* applies as well to facts settled and adjudicated as to causes of action." *Whitaker v. Hawley*, 30 Kan. 327, 1 Pac. Rep. 508. We find the same doctrine enunciated by text-writers. "There are but few older principles or rules of law that have been handed down from generation to generation, from the earliest days of the Roman law to the present time, than that of estoppel." 1 Herm. Estop. § 1. "There is no doubt that a judgment or decree necessarily affirming the existence of any act is conclusive upon the parties or their privies, whenever the existence of the fact is again put in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter. \* \* \* To render a matter *res adjudicata*, it is not essential that it should be distinctly and specifically put in issue by the pleadings. It is enough to have been shown and tried and settled in the former suit." *Freem. Judgm.* § 249. "To constitute a judgment in one case a bar to another action, it is not necessary that the object of the two suits be the same, nor that the parties should stand in the same relative position to each other." *Barker v. Cleveland*, 19 Mich. 230. "The judgment of a court of competent jurisdiction is conclusive on the parties as to all points directly involved in it, and necessarily determined." *Shirland v. Bank*, 21 N. W. Rep. 200; *Hahn v. Miller*, 28 N. W. Rep. 51. "The judgment of a court of competent jurisdiction upon a particular matter, fact, or point, once litigated and determined, is conclusive between the parties or their privies." *Wales v. Lyon*, 2 Mich. 282. "Such judgment is conclusive when given in evidence, though not pleaded by way of estoppel." *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. Rep. 459. The estoppel of an issue on a particular point, or of the judgment itself as to the point which it decides, will be conclusive as to the points in any subsequent proceeding, whether founded on the same or a different cause of action. 1 Herm. Estop. § 111, and cases there cited; 3 Smith, Lead. Cas. (9th Ed.) 2095; *Cromwell v. County of Sac*, 94 U. S. 351; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. Rep. 1004; *Gardner v. Buckbee*, 3 Cow. 120; *Furneaux v. Bank*, 39 Kan. v.25p.no.9—36

146, 17 Pac. Rep. 854. When a matter is once adjudicated, it is conclusively determined as between the same parties and their privies; and this determination is binding, as an estoppel, in all other actions, whether commenced before or after the action in which the adjudication was made. *Freem. Judgm.* § 249; *Poorman v. Mitchell*, 48 Mo. 45; *Allis v. Davidson*, 23 Minn. 442; *Casebeer v. Mowry*, 55 Pa. St. 419. In the latter case, the court said: "The date is of no consequence. It is the fact of an adjudication on the subject-matter between the same parties, which gives effect to the former recovery. The operation is the same, whether the record be pleaded by the one or the other of the parties." It seems to us that, tested by the well-settled rule "that a man shall not be twice vexed for one and the same cause," and the great weight of authorities, the judgment relied on and set up in the supplemental answer of the defendant is within the rule, and a bar to this action.

*Stockham* charged *Shepard* with stealing this dividend of \$26.18, and had him arrested, and he was subsequently discharged. *Shepard* then sued *Stockham* for malicious prosecution, and in that suit it was determined, by a finding of the jury, that this very stock had never been sold by *Shepard* to *Stockham*. This was an essential and important fact in that controversy. It was determined by a judicial examination and verdict, and, in our judgment, was conclusive, and the demurrer was improperly sustained. Something has been said about the sufficiency of the plea, but we think it good, upon demurrer. If it were not sufficiently full, definite, and certain, the proper way to have raised that question would have been by motion. The demurrer should have been overruled. It is not necessary for us to notice the other errors complained of. We recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 205)

#### SAUM v. LA SHELL.

(Supreme Court of Kansas. Jan. 10, 1891.)

#### COSTS—OFFER OF JUDGMENT.

The plaintiff commenced an action before a justice of the peace for \$160. The defendant immediately tendered to the plaintiff \$35, and afterwards filed a bill of particulars, neither admitting nor denying the plaintiff's claim, nor asking judgment, for any amount, but showing a claim in his own favor, and against the plaintiff, for \$65. The case was afterwards taken to the district court on appeal, and was there tried before the court and a jury, and a verdict was rendered in favor of the plaintiff, and against the defendant, for \$26.25. The defendant then filed a motion asking that, because of the aforesaid tender, all the costs made in the case after the return of the summons in the justice's court should be taxed against the plaintiff, which motion was overruled by the court, and judgment was then rendered in favor of the plaintiff, and against the defendant, for the amount of the verdict, and for costs of suit. Held that, as it was not shown that the tender was kept good, or that any offer was ever made by the defendant to confess judgment for any amount, no error was com-

mitted by the trial court in overruling the defendant's motion, and in rendering the aforesaid judgment for costs.

(*Syllabus by the Court.*)

Error from district court, Norton county; LOUIS K. PRATT, Judge.

J. R. Hamilton and H. J. Harwl, for plaintiff in error. F. M. Jeffrey and Jones & Thompson, for defendant in error.

VALENTINE, J. This was an action brought before a justice of the peace of Norton county by G. B. La Shell against Charles M. Saum, in which the plaintiff, by his bill of particulars, claimed \$160. The defendant filed a bill of particulars, in which he neither admitted nor denied anything stated in the plaintiff's bill of particulars, but showed a claim against the plaintiff, and in his own favor, for \$65. The case, after passing through the justice's court, and by appeal into the district court, was tried before the court and a jury, and a verdict was rendered in favor of the plaintiff, and against the defendant, for \$26.25. The defendant then filed a motion asking that all the costs made in the case, after the return of the summons in the justice's court, should be taxed against the plaintiff, for the reason that, after the issuing of the summons, the defendant had tendered to the plaintiff an amount greater than the amount of the verdict, and the costs which had accrued at the time of the tender, and also that he had offered, in writing, to confess judgment for that amount, which tender and offer the plaintiff refused, which motion was overruled by the court, and judgment was then rendered in favor of the plaintiff, and against the defendant, for the amount of the verdict, and for costs of suit; and afterwards the defendant, as plaintiff in error, brought the case to this court.

The only question presented to this court for consideration is whether the court below erred or not in rendering judgment for costs against the defendant. We cannot say that any such error was committed. It does not appear that the defendant ever offered, in writing, or otherwise, to confess judgment in favor of the plaintiff, and against himself, for any amount, or that he was ever willing to do so, or that either the justice of the peace or the district court ever had any notice that any tender was ever made, until on the trial in the district court, when the tender was disclosed and brought to light by the defendant's evidence. It appears from the defendant's evidence, introduced on the trial in the district court, that, at the time of the service of the summons in the justice's court, the defendant tendered to the plaintiff the sum of \$35; but it does not appear that he kept this tender good. It does not appear that he brought the amount tendered, or any amount, into court, or that he offered to do so, or that the fact of the tender was, at any time prior to the trial in the district court, brought to the attention of either the justice of the peace or the district court, and probably it was not. In the justice's court, he filed a bill of particulars, in which it would seem

that he claimed \$65 as against the plaintiff, and did not admit that he owed the plaintiff anything. Under such circumstances, it cannot be held that the court below erred in rendering judgment against the defendant for the costs which accrued in the case. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 256)

CONDIFF V. KANSAS CITY, FT. S. & G. R. CO.

(*Supreme Court of Kansas. Jan. 10, 1891.*)

INJURIES TO EMPLOYEES — EXPOSURE TO SAVE HUMAN LIFE — INSTRUCTIONS — EVIDENCE.

1. Exposure of life by an employee to save life is neither wrongful nor negligent, if attempted within the scope of an employee's duty, unless made under circumstances constituting rashness in the judgment of prudent persons.

2. Where an exposure is made for the purpose of saving human life, and the person making the exposure is injured thereby, it is for the jury to say whether the conduct of the party injured is to be deemed rash or reckless.

3. The trial court is not required to give instructions which need limitations and qualifications to make them applicable to the case.

4. The evidence and instructions in this case examined, and held, that the trial court committed no error, prejudicial to the rights of the plaintiff, in giving or refusing instructions.

(*Syllabus by the Court.*)

Error from district court, Bourbon county; C. O. FRENCH, Judge.

On the 6th day of September, 1887, James S. Condiff, as administrator of the estate of C. W. Condiff, deceased, brought his action against the Kansas City, Ft. Scott & Gulf Railroad Company, to recover \$10,000 damages for injuries received by Charles W. Condiff, on the 3d day of November, 1885, from which injuries he died soon after. The railroad company filed an answer, denying generally the allegations of the petition, and also alleging "that if the intestate of the plaintiff was injured by defendant, the negligence of said intestate directly and proximately contributed to said injury." Trial had at the May term of the court for 1888, before the court with a jury. The jury returned a verdict for the railroad company. The plaintiff filed its motion for a new trial, which was overruled. He thereupon excepted to the rulings of the court and the judgment rendered, and brings the case here.

Ware, Biddle & Cory, for plaintiff in error. Charles W. Blair, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) Charles W. Condiff, deceased, was, on November 3, 1885, a section foreman on the line of the Kansas City, Ft. Scott & Gulf Railroad. He had charge of a crew of five hands, working section No. 32, between the villages of Arcadia and Mulberry, in Crawford county. The latter village was the head-quarters of the foreman and crew, and the point from which they all started on the day named on a hand-car, at 7 o'clock A. M., to work on the track at the mouth of the cut where they had been engaged the day before. Besides the six men on the hand-car there were dinner-buckets, water-pails, material, torpedoes, spikes, shovels, picks, and other tools. The distance that the

party had to go was about  $5\frac{1}{2}$  miles, and there was a freight train, (No. 33,) south bound, due and behind time, to be met. They knew that some place on the line, before arriving at their destination, they would probably meet this train, and on the route they stopped to listen for the train, not being able to hear it while the hand-car was in motion. The wind was from the south, blowing in the same direction they were going, which made it still more difficult to hear a train approaching them from the north. From the last stop, their course, a distance of 954 feet, was over a bridge, and a long trestle and dump or fill, on which it was not practicable to remove their hand-car and tools, without pitching them down where they could not get the hand-car back, if at all, without great labor. From the last stop they proceeded over the bridge, trestle, and fill, with great haste, to their place of work, which was at the end of the fill and mouth of the cut, where there was a public road-way across the track. They heard and saw nothing of the train before the start over the bridge. They could make the 954 feet in about a minute. At the time they arrived at the crossing or point of work, they saw the train rounding a curve into the cut. This train consisted of an engine, tender, and a large number of empty freight-cars. One of the witnesses of plaintiff testified that the hand-car was about 90 feet from the engine when he first saw it, although he testified afterwards that when they arrived at the place for work, he saw the train 250 yards, or 750 feet, distant. The engineer testified that when he first saw the hand-car, he was distant from it about 150 feet, and that he saw it as soon as it came in line of vision; that he could not see it before, because of the cut and curves on the line of the railroad. The hand-car was slackening speed at the crossing, just as the crew saw the engine. The train was behind time, and was running rapidly on a slight up-grade through the cut. After the parties on the hand-car saw the engine, they stopped it as soon as they could. After the hand-car was stopped, Condiff gave the engineer of the train a signal to slow up. He then turned round (before this he had been facing the engine) and attempted, with the sectionmen, to take the hand-car off the track. There did not seem time for this to be done, and Condiff told the men with him "to let loose the hand-car." The men let loose the car, left the track, and were uninjured. Condiff did not make any effort to get off the track. The engine struck the hand-car and injured him so that he died within a few days. When the engine struck the car, it went up on the pilot under the head-light, and the tools were scattered along the track. The plaintiff's theory is that the freight train was behind time; that it was running faster than the rules of the road permitted, in order to make up lost time; that it could have been stopped on the grade inside of 450 feet; that the front brakeman was riding on the engine, where he had no business; and that the deceased lost his life in trying to save the property of the railroad company, and the lives of its employees.

The court refused to give the following instructions, which were asked by the plaintiff: "(1) If, from the appearances, the deceased believed that, by pushing the hand-car forward, and getting it in motion, he could avert a wreck of the train, and probable loss of life consequent thereon, it was not negligence on his part to make the attempt, even though he believed that he might fail, and receive an injury himself. (2) Under the circumstances in which the deceased was placed, he was justified in using every prudent effort in his power to avert the wreck of the freight train, and the loss of life that might result therefrom, and if he so acted and lost his life, he cannot be charged with negligence. (3) It is not negligence in an employee to risk his life to prevent an accident that might be attended with loss of life to his co-employees, and great destruction of his employer's property. (4) Exposure of life by an employee to save life is neither wrongful nor negligent, if attempted within the scope of an employee's duty. (5) If from the circumstances it appears to you that the deceased believed he could save the wreck of the train, and the probable consequence of loss of life and property, and acted in that direction, and, in so acting, lost his life, his acts in that regard cannot be considered negligent." On the contrary, the court instructed as follows: "If C. W. Condiff saw the train time enough before the collision, under the circumstances as detailed in the evidence, to get out of the way and avoid accident, then the failure, if any, to sound the whistle, would not make the railroad company liable for his death. If Condiff saw the danger of possible collision before it took place, and could have saved himself by stepping off the track, but did not do so, the plaintiff cannot recover. The defendant in this case sets up that Condiff contributed to the injury by his acts and conduct. Now, if you find that the injury happened through his own fault, through his own carelessness or negligence in stepping or getting in front of the engine without using ordinary care or prudence, then he in that way contributed to the injury, and the plaintiff cannot recover in this case."

The important question, therefore, presented by the record is whether the court committed material error in refusing the instructions prayed for. Most of the instructions refused, requested the court to charge as a matter of law that the deceased, in refusing to leave the track or hand-car, was not guilty of negligence, if at the time he believed, by pushing the hand-car or getting it in motion, he could avert the wreck of the train and probable loss of life. The instructions refused, stating as a matter of law that the deceased was not guilty of contributory negligence, were improper for three reasons: *First*. They directed the jury that if the deceased placed himself in the position of danger for the protection of property, he was not negligent. *Second*. They were not limited or qualified by informing the jury that the efforts of the deceased to avert the wreck of the train and probable loss of life must have been so made as to be compatible

with a reasonable regard for his own safety; that is, in his efforts to save life, he must not have acted under such circumstances as constituted rashness in the judgment of prudent persons. And, *third*, whether he acted prudently under all the circumstances detailed in the evidence was a matter to be determined by the jury, not the court. The court might very properly have stated to the jury that they were to decide, from all of the circumstances of the case, whether the deceased used ordinary care or prudence in not leaving the track, or in getting in front of the engine. It did give an instruction somewhat similar to this. We are in full accord with the decision announced in *Eckert v. Railroad Co.*, 43 N. Y. 502, and similar cases, that "the law has so high a regard for human life it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons;" but where a person voluntarily places himself, for the protection of property merely, in a position of danger, we are not prepared to say that he is not negligent. If Conditt was struck by the engine of the train while attempting merely to protect the hand-car or tools from injury, we cannot say that he was free from fault or negligence. So much of one of the instructions which were refused as stated "that exposure of life by an employee to save life is neither wrongful nor negligent, when attempted within the scope of an employee's duty," is a correct statement of the law, if it were qualified by the instruction, "if made under such circumstances as not constituting rashness in the judgment of prudent persons." The instructions refused did not contain this limitation or qualification. When the exposure is for the purpose of saving human life, it is for the jury to say, from all the circumstances of the case, whether the conduct of the person injured is to be deemed rash and reckless. The court cannot, in such a case, charge as a matter of law that the exposure is not negligence.

A careful reading of the evidence preserved in the record fails to convince us that sufficient was introduced to render a refusal of the instructions prayed for so erroneous as to reverse the judgment. Two of the persons who were upon the hand-car with Conditt at the time it was stopped testified upon the trial as witnesses for the plaintiff. One of these, William Preston, among other things, testified as follows: "Question. Did Mr. Conditt, after last looking back at the engine, make any effort to get off the track? Answer. He did not, to the best of my knowledge. He seemed to be excited some way or other. His intention was to move the hand-car to prevent a wreck, I suppose. Q. What effort, if any, did his noticing the engine, and his position at that time, seem to have upon him? A. It did not seem to have any effect on him. He seemed to be dumb struck at that time, and did not seem to realize what he was doing." The other one, George A. Fisher, testified, among other things: "Question. How fast was the train going when you first saw it? Answer. About

25 miles per hour to the best of my judgment. Q. What did Conditt do with reference to checking the train when he first saw it, if anything? A. He didn't do anything when he first saw it, until the hand-car was stopped. Then he gave the engineer signal to slow up. Q. What did he do then? A. He turned around, (he had been facing the engine before,) and attempted to take the hand-car and tools off the track. Q. Describe fully the situation at the time he was injured, and just prior thereto. A. Well I can't describe his position just immediately before. I had to look out for myself. When the damage was done I was on one side of the train, and he was on the other. When I last saw him, he had just returned from facing the engine to the hand-car, and told us boys 'to let loose the hand-car,' and that was the last I saw of him till the damage was done. I could not swear to his taking hold of the hand-car, for I did not see him. We were trying to get the hand-car off the track. When he first got off, he signaled the engineer to slow up. Then told the boys to let loose the hand-car. Then we got away; left the track entirely. Q. Was the hand-car moving from the engine at the time it was struck? A. I could not answer that, because I was not looking. I was looking the other way. Q. Why were you trying to get the hand-car off the track? A. It was company property, and we wanted to save it, and to prevent a wreck. Q. What effect, if any, did Conditt's noticing the engine and his position at that time have upon him? A. He seemed to be terribly excited." There was no evidence showing or tending to show that the freight train, coming at the rate testified, was liable to be wrecked by striking the hand-car. It did strike the hand-car without materially injuring the train, or any one on it. The hand-car, when struck, went up on the front of the engine, and the tools upon it were scattered. The only person injured was the deceased. One witness testified that it was the intention of Conditt to move the hand-car, to prevent a wreck. Whether he meant the wreck of the hand-car or the wreck of the train, he did not state. Even this evidence was his opinion only. In the excitement under which he was acting, Conditt may have desired to save the hand-car, which was in his charge, as also the material and tools upon it. While we may take judicial notice, considering the speed of the train and the position of the hand-car when the men at Conditt's instance, gave up the attempt to lift the hand-car off the track, that a collision between the two was inevitable, we cannot say, with the meager evidence before us that by the engine striking the hand-car there was imminent danger to the lives of the employees upon the train, or to any one of them. The evidence shows, however, that all the efforts of Conditt to lift or throw the hand-car from the track had ceased, as being impracticable, before he told his men "to let loose the car." After that, he had the opportunity to leave the track. He did not leave, but remained alone by the hand-car. It is not shown by any evi-

dence that his subsequent attempt to give the hand-car a backward motion averted, or was liable to avert, injury to the employes on the freight train or any one of them. We know that moving the hand-car backward would cause less resistance to the speeding train, but whether this would be of any practical benefit to prevent the train from being thrown off the track by a collision with the hand-car at the rapid rate it was going, we cannot determine, nor could the jury determine, without some evidence. No expert railroad man or other witness testified upon this point. Considering the scantiness of evidence as to the probable or possible effect to the employes on the freight train from a collision with the hand-car, and the failure of the instructions refused to contain the limitations or qualifications pointed out, we cannot say that error prejudicial to the plaintiff was committed in giving or refusing instructions. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 51)

**HICKS v. NELSON et al.**

(*Supreme Court of Kansas. Jan. 10, 1891.*)

**REDEMPTION FROM TAX-SALE — ISSUANCE OF TAX-DEED.**

The cases of *English v. Williamson*, 34 Kan. 212, 8 Pac. Rep. 214, and *Cable v. Coates*, 36 Kan. 191, 12 Pac. Rep. 931, referred to and commented upon.

(*Syllabus by the Court.*)

On rehearing. For former report, see ante, 218.

*Malcolm Nicolson*, for plaintiff in error.  
*George G. Cornell*, for defendant in error.

PER CURIAM. It was urged in support of a rehearing of this case that the former opinion was in conflict with *Cable v. Coates*, 36 Kan. 191, 12 Pac. Rep. 931. *Cable v. Coates* followed *English v. Williamson*, 34 Kan. 212, 8 Pac. Rep. 214. The opinion, however, in the former case failed to state, as it should have done, that September 4, 1881, was Sunday. In the case of *English v. Williamson*, it was said that, "under the statutes above quoted, [Civil Code, § 722.] when the last day comes on Sunday, that day, as well as the first, shall be excluded, and we suppose our tax laws, as well as all other statutes, were enacted with reference to this rule, and therefore that the rule should govern. Besides, we would also think that such rule should govern upon general principles. If Sunday, in such a case, is not excluded, the owner of the property would not have the full three years given to him by statute within which to redeem his property from the taxes, while the statutes in express terms give him that time, and more than that time." As September 4, 1881, was Sunday, the owner of the land in the *Cable-Coates* case had all of September 5, 1881, in which to redeem; but the tax-deed was issued in that case at 2 o'clock P. M. of September 5, 1881, and therefore was prematurely issued. With this explanation, the *Cable-Coates* case is in line with the *English-Williamson* case, and the opinion handed down follows both of those cases. The motion for rehearing will be overruled.

**BYINGTON v. QUINTON et al.**

(*Supreme Court of Kansas. Jan. 10, 1891.*)

**PETITION IN ERROR—LIMITATION.**

Under the statutes of this state, no proceeding to reverse, vacate, or modify any judgment or final order can legally be commenced in the supreme court, except within one year after the making or the rendering of such judgment or final order, unless the party instituting the same has in the mean time been under some legal disability.

(*Syllabus by the Court.*)

Error from district court, Shawnee county; *JOHN GUTHRIE*, Judge.

*Le Graud Byington*, for plaintiff in error.  
*Vance & Campbell*, for defendants in error.

VALENTINE, J. There can scarcely be any doubt as to the correctness of the decision of the court below, and yet, upon the record brought to this court, this court has no jurisdiction to determine whether such decision was correct or not. The decision was made and rendered on July 30, 1887, and the proceeding to reverse the same was not instituted in this court until September 25, 1888, nearly 14 months intervening. Now, under the statutes of this state, no proceeding to reverse, vacate, or modify any judgment or final order can legally be commenced in the supreme court, except within one year after the making or the rendering of such judgment or final order, unless the party instituting the same has, in the mean time, been under some legal disability. Civil Code, § 556; *McDermott's Estate v. Loftus*, 27 Kan. 68; *Bennett v. Dunn*, Id. 194; *Winkfield v. Brinkman*, 31 Kan. 25, 2 Pac. Rep. 113; *Association v. Rohl*, 32 Kan. 665, 5 Pac. Rep. 1. *Railroad Co. v. Dougan*, 39 Kan. 181, 17 Pac. Rep. 811. The petition in error in this case will be dismissed. All the justices concurring.

(45 Kan. 192)

**PILCHER et al. v. BROWN et al.**

(*Supreme Court of Kansas. Jan. 10, 1891.*)

**QUIETING TITLE—BONA FIDE PURCHASERS—NOTICE.**

In an action by the plaintiffs to quiet title, where it appeared that they purchased the land of the agents of the owner on the 6th day of June, and the defendants bought the same land, and the landlord's interest in the lease of the owner, without previous knowledge of the sale, on the 8th, taking a bond for a deed, which was properly acknowledged and duly recorded on the 18th of the same month, and the defendants entered upon the land about the same time, with the consent of the tenant, who had a lease of the premises for one year, to dig coal, and afterwards, on hearing of the sale by the agents, the owner made a deed for the same land to the plaintiffs, which recited the fact that it was given subject to a certain mortgage, and the bond for a deed, given to the defendants, and the plaintiffs purchased the interest of the tenant in the premises, but permitted him to remain in possession, and there is no other evidence of possession, upon the part of plaintiffs, held that, as against the plaintiffs, the defendants were entitled to a decree quieting the title to the land.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Lyon county; *CHARLES B. GRAVES*, Judge.

*I. O. Pickering* and *J. Harvey Frith*, for

plaintiffs in error. *J. Jay Buck*, for defendants in error.

GREEN, C. On the 1st day of August, 1887, the plaintiffs in error commenced this action in the district court of Lyon county to quiet the title to the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  and the E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 23; also 2 74-100 acres in the N. E.  $\frac{1}{4}$  of section 27,—all in township 16 of range 12; alleging, in general terms, that they were in possession, and that the defendants set up and claimed an estate and interest adverse to plaintiffs' title. The defendants answered by denying generally the petition, and claimed that they were the equitable owners of the land, and, by way of a cross-bill, alleged possession of the premises, adverse claim of the plaintiffs, and asked for affirmative relief by way of annulment of plaintiffs' title, and that their title be quieted.

The case was tried to the court, and the following conclusions of fact made: "(1) On and before May 27th, William Lewis owned the land in controversy. (2) Glendenning and Sawyer were real-estate agents at Admire, Kansas, and were, by the said Lewis, duly authorized to sell said land. (3) On June 6, 1887, said agents sold said land to the plaintiffs by contract, in writing. Said writing consisted of the letters and telegrams in evidence, which were written and signed by the said plaintiffs, and by said agents of the said Lewis, Glendenning and Sawyer. The said plaintiffs paid on said contract the sum of \$100 at the time it was made, and were able, ready, and willing to pay the remainder of the purchase price, upon the receipt of the deed from said Lewis for said land. (4) Immediately after closing said sale, and on June 6, 1887, said agents informed said Lewis of said sale by mail. Lewis resided at Lerado, Reno county, Kansas. (5) The land in controversy is located within one and one-half miles of the village of Admire, in Lyon county, Kansas, and the defendants all reside in said village of Admire, near said land. (6) On June 8, 1887, at Lerado, Kansas, said Lewis made an agreement with one T. D. Griffith, who was agent of the defendants, to sell said land to the defendants upon the terms and conditions stated in the bond for a deed, a copy of which is attached to defendants' answer in this action, and to which reference is here made; and the said T. D. Griffith, as agent for the said defendants, then paid to said Lewis the sum of \$200 cash, and executed the defendants' negotiable notes for the \$800, and the \$1,000 mentioned in said bond. (7) At the time of the execution and delivery of said bond for a deed, and payment of said \$200, and the execution of said notes, as aforesaid, neither the said defendants nor their said agent, T. D. Griffith, had any knowledge or notice whatever of the aforesaid purchase by the plaintiffs. (8) On June 18, 1887, the defendants duly filed their said bond for deed, in Lyon county, Kansas, for record, it having been duly acknowledged when executed. (9) On June 20, 1887, Lewis, having heard of the aforesaid sale to the plaintiffs, carried out the same by execut-

ing to them a general warranty deed to said land. Said deed contained, among other recitals, the following, viz.: 'The above-described land is free and clear of all incumbrances whatever, except a mortgage of \$1,700 on same land, together with a bond for a deed held by Griffith and Brown on said land.' The plaintiffs, in consideration of said deed, paid Lewis the purchase price agreed upon by them with the said Glendenning and Sawyer, on June 6, 1887, as aforesaid. Said payment was made in cash, and amounted to the sum of \$1,800. The plaintiffs, to procure said deed, indemnified Lewis against loss on account of the said sale to the defendants. The plaintiffs duly recorded said deed June 25, 1887. (10) At the time of the foregoing transactions said land was in the actual possession of a tenant of Lewis, who was entitled to the possession thereof until March 1, 1888. Said tenant, after June 20, 1887, sold out his right to the plaintiffs, surrendered possession of said land as said plaintiffs' tenant, and was so in possession when this suit was begun. (11) After said purchase and possession by the plaintiffs as aforesaid, the defendants claiming said land entered thereon, and began prospecting for coal, and were so prospecting thereon when this suit was begun. (12) Lewis, after the delivery of the deed to the plaintiffs, and before this suit was brought, tendered to the defendants the cash paid and the notes given by them, which they refused to receive. (13) After this suit was brought, the defendants tendered full payment of the notes given to Lewis, and demanded a deed, which was refused. (14) On June 4, 1887, W. H. Brown, one of the defendants, and the aforesaid T. D. Griffith, went to the land in controversy, and there inquired of the said tenant, then living on said land, as to the residence of Lewis, and were informed by said tenant that said Lewis resided at Lerado, Kansas. They were also informed at said time that the aforesaid Glendenning & Sawyer, real-estate agents at Admire, Kansas, were trying to get the agency for the sale of said land. (15) On the 7th day of June, 1887, said Griffith left Admire and went to Lerado, Kansas, and there concluded the transaction mentioned in conclusion number 6 herein. Neither Griffith nor said defendants made any inquiry of said Glendenning and Sawyer concerning said land before said Griffith left, as aforesaid. It is about two hundred miles from Admire to Lerado. (16) The plaintiffs, prior to and at the time of all the foregoing transactions, were the managing officers of a coal company operating at the said village of Admire, and the aforesaid Glendenning and Sawyer were the local agents of said coal company at Admire, and superintendents of its business." Upon the above findings, the court held, as a conclusion of law, that the defendants below were entitled to the land, and rendered judgment quieting the title in defendants, and for costs, against the plaintiffs, who bring the case here.

The first contention is that the defendants did not prove that they were in possession of the land at the commencement



of the action, and hence could not have affirmative relief; that, according to the findings, the plaintiffs were in possession. The situation, in regard to the possession of this land, was somewhat peculiar. It appears from the evidence and special findings that William Lewis owned the land in controversy in May, 1887. On June 6th, Glendenning & Sawyer, as agents of the owner, sold the land to the plaintiffs. Two days after this, Lewis gave the defendants a bond for a deed for the same land, in which it was stipulated that the defendants were to have the landlord's share of all of the growing crops and fruit from the place, except \$50 of the proceeds of the orchard. The farm was in the actual possession of a tenant, who was entitled to remain in possession until the 1st of March following. On the 18th of June, the defendants filed their bond for a deed in the office of the register of deeds of Lyon county, it having been properly acknowledged. About the 20th of June, the defendants, with the consent of the tenant, went onto the land to prospect for coal. On June 20th, Lewis made a deed to the plaintiffs containing the recitation set out in the ninth finding. Some time after this, the tenant sold out his right to the plaintiffs, but still remained on the place, and plaintiffs in error claim that he continued to hold the actual possession of the land as their tenant. Let us see how this could affect the rights of the defendants. This sale took place the 5th day of July. The defendants held a bond for a deed, which was of record some days before this, for the land, and the right to the landlord's share of the crop, except \$50 of the proceeds of the orchard. Could this sale, by the tenant of Lewis, interfere with defendants' possession, or confer any rights upon the plaintiffs, who took a deed after the recording of this bond for a deed, with an express recitation therein that the conveyance was made subject to this instrument, and to procure the same the plaintiffs were obliged to indemnify the former owner against loss, and the tenant could not, under section 11 of the landlord and tenant act, transfer his interest, or any part thereof, to another, without the written assent of the landlord, or person holding under him? Section 3620, Gen. St. 1889. We think, under this bond for a deed, the defendants below held the equitable title to the land, and owned the landlord's interest in the lease, and the evidence and special findings show a sufficient possession to entitle the defendants to a decree, quieting the title, as against the plaintiffs. We see no reason for disturbing the judgment of the court below, and recommending an affirmance thereof.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 170)

CHICAGO, K. & W. R. CO. v. MOURIQUAND.

(Supreme Court of Kansas. Jan. 10, 1891.)

EMINENT DOMAIN—DAMAGES—EXPERT EVIDENCE—VIEW BY JURY.

1. A person who has testified on the trial that he is 50 years of age; that he has followed farming all his life; that he has had experience

in growing orchards of fruit trees; that he has put out in his life-time three or four different orchards; that he knew at the time of the construction of the railroad through the premises that there was "quite a nice little orchard there;" that he had been over the premises very frequently; that he lived only two miles from the same; that while he could not say he knew the particular trees taken, he knew what fruit trees planted in such an orchard were reasonably worth at the time of the construction of the road,—is competent to give his opinion of the value of fruit trees, two, three, and five years old, which were growing in an orchard on the premises, but taken or destroyed by a railroad company in constructing its road over its right of way.

2. The case of *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 419, followed.

(Syllabus by the Court.)

Error from district court, Chautauqua county; M. G. TROUP, Judge.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *McBrien & Pile*, for defendant in error.

HORTON, C. J. Mrs. S. J. Mouriquand appealed to the district court of Chautauqua county from the award of commissioners condemning a right of way through lands owned by her. The condemnation commissioners awarded as damages the sum of \$202.50. Three acres of land were taken for the right of way. The jury returned a verdict of \$772.10. Judgment was entered upon the verdict. The railroad company excepted to the rulings and judgment of the court, and brings the case here. Upon the trial, there was evidence tending to show that, in constructing the railroad across the premises in controversy, 137 peach trees, 9 apple trees, 2 cherry trees, and 1 plum tree were taken or destroyed. Some of the witnesses, who knew the value of peach, apple, cherry, and plum trees in the orchard, and had actual knowledge of the trees taken from the premises, testified that the peach and apple trees were worth \$5 each, and the plum and cherry trees \$2 each. \$228.15 were allowed for the trees taken. Complaint is made because D. C. Chilcote was permitted to testify as to the value of the fruit trees when he was not acquainted with the particular trees taken or destroyed by the railroad. We think his evidence was competent. He testified that he was 50 years of age; that he lived two miles from the premises; that he had resided there six years; that he had been over the premises very frequently; that he had followed all his life farming and cattle raising; that he had had experience in growing orchards of fruit trees; that he had put out in his life-time three or four different orchards; that he knew at the time of the construction of the railroad through the premises that there was "quite a nice little orchard upon it," and, while he could not say that he knew the particular trees taken, he knew what fruit trees planted in such an orchard were reasonably worth at the time of the construction of the road. He had, therefore, such knowledge and experience as enabled him to form an opinion as to the value of the trees. "It is not necessary," said JOHNSON, J., in case of *Whitbeck v. Railroad Co.*, 36 Barb. 644, "that he [the witness] should actually have seen or been

familiarly acquainted with the trees in question. It was enough that he was acquainted with the fruit business in that neighborhood, and the value of similar property there." See *Lawson*, Exp. Ev. 19.

Complaint is further made that the court erred in instructing the jury concerning the view of the premises which they had been permitted to make. One or two lines of the instructions are open to criticism, but we do not think, in view of the decision in *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 419, that the instructions were so incorrect as to reverse the judgment. In the *Martineau* case, this court ruled that a direction to the jury to use the result of their observation in connection with the sworn evidence was not erroneous. In the present case the court said, among other things, to the jury: "You have also been permitted to go in a body and view the premises, in addition to hearing this evidence, and you are at liberty to take into consideration, in making up your verdict, whatever you may have seen in and about the premises." With the admonition that they were not to rest their verdict solely on what they learned at the view, it might have been better to have gone no further in the instruction referred to, as the object of permitting the jury to view the premises is to enable them to intelligently understand and apply the testimony which has been introduced before them. But, when the court directed the jury to disregard any evidence, it must be construed with the following language: "In making up your verdict you should consider the evidence, and give it fair and impartial consideration, and you will also take into consideration your own view of the premises." The jury were permitted by the whole instruction to decide between the conflicting evidence upon their own view of the premises. Had the jury disregarded all the sworn evidence, and returned a verdict upon their own view of the premises, then it might be said that the evidence which the jurors acquired from making the view had been elevated to the character of exclusive or predominating evidence. This is not allowable. The evidence of the witnesses introduced in the court on the part of the land-owner supports fully the verdict. If the verdict was not supported by substantial testimony given by witnesses sworn upon the trial, we would set it aside; but, as the jury only took into consideration the result of their view of the premises, in connection with the sworn evidence produced before them, to determine between conflicting evidence, the instruction was not so erroneous as to require a new trial.

Complaint is also made that the special findings conflict with the general verdict. The thirteenth interrogatory, submitted to the jury, reads: "Question. What were the several elements and sources of damages which make the aggregate of all of the damages sustained by plaintiff? Give each item separately, with the amount of such damages. Answer. Trees, \$228.15; pond, \$100; opening gates, \$250; land taken for right of way, \$60; damage to

land north and south of road, \$61.85." Adding these items up, the total amount of damages, according to the special findings, amounts to \$700, but the general verdict was \$772. It appears, however, under the instruction of the court, that the jury allowed interest in their general verdict. Adding interest to the several itemized amounts in the special findings, and there is no conflict between these findings and the general verdict. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 226)

*ZIEGLER et al. v. HYDE.*

(*Supreme Court of Kansas. Jan. 10, 1891.*)

APPEAL—SETTLEMENT OF CONTROVERSY—DISMISSAL.

Where, after a case has been brought on petition in error to the supreme court, it has been settled, and all the costs in the case provided for, so that no decision which the supreme court could render upon the merits would be of any benefit, or could answer any beneficial purpose so far as any of the parties are concerned, the case will be dismissed from the supreme court, although in the settlement of the case it was agreed between the parties that the case should remain in the supreme court and be decided by the court upon its merits.

(*Syllabus by the Court.*)

Error from district court, Geary county; *M. B. NICHOLSON*, Judge.

*Thomas Dever*, for plaintiff in error.  
*McClure & Marshall*, for defendant in error.

VALENTINE, J. Counsel for the defendant in error, in his brief in this court, uses the following among other language: "Although the record fails to show it, the fact is, this case has been finally disposed of and settled, and ought to have been dismissed. I can see no reason to burden the supreme court with useless and unnecessary litigation of this kind." Counsel for the plaintiffs in error, in his reply brief, uses the following among other language: "In answer to the suggestion contained in the brief of the defendant in error 'that the case is settled,' and that the supreme court ought not to be burdened 'with useless and unnecessary litigation of this kind,' I will say that it is true that the case has been compromised, the costs in the district court have been paid, and the costs in this court have been provided for. But as a part of that compromise it was agreed and understood that the questions of law involved in the case should be settled, and to that end the case should retain its place on the docket of this court, and when its turn should come, it should be decided upon its merits. \* \* \* The compromise was effected long after the case was brought to this court, and, as a part of the terms of that compromise, it was agreed and understood that the case should go to final judgment in this court; not for the benefit of the parties to this particular case, but for the benefit of the bench and the bar of the state." It seems to be admitted by counsel for both parties that no decision which this court could render in this case would be of any benefit, or could answer any beneficial purpose, so far as any of the parties to this

action are concerned, but it is claimed that it will be of benefit to the bench and bar of the state. Now this court has no desire to be transformed into a moot court, and, agreeing with counsel for the defendant in error, we shall order the case to be dismissed. All the justices concurring.

(45 Kan. 212)

**CITY OF KANSAS CITY v. BIRMINGHAM.**

(*Supreme Court of Kansas. Jan. 10, 1891.*)

**DEFECTIVE SIDEWALKS — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS — LIABILITY OF CITY.**

1. Evidence examined, and found to support the verdict and special findings of the jury that there was no contributory negligence.

2. That it was not error in the instructions given by the trial court to speak of an opening in a sidewalk as a "defect or excavation," under the circumstances of this case.

3. Several instructions examined, and held to be correct.

4. Where the court instructs the jury fully upon contributory negligence, it is under no obligation to repeat such instruction in another form at the request of the defendant.

5. Special instructions asked and refused, examined, and held that no error was committed.

6. It was not error for the court to instruct the jury that, if the contractor of the building being erected provided and maintained reasonably safe guards, or signals, to protect persons traveling along the sidewalk, in front of the same, this would relieve the city from liability, the same as though such guards and signals had been placed and maintained there by the city.

7. Answers to special questions examined, and held not to be evasive, and supported by some evidence.

(*Syllabus by Green, C.*)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

*William S. Carroll and L. W. Keplinger, for plaintiff in error. J. O. Fife, for defendant in error.*

GREEN, C. James S. Birmingham, as administrator of the estate of Thomas Sewell, brought this action in the district court of Wyandotte county, against the city of Kansas City, to recover damages for the wrongful killing of his intestate, alleged to have been caused by the negligence of the city, in permitting an excavation in the sidewalk, on the west side of James street, and within the corporate limits of the city, to remain unprotected by barriers and lights, or other signals, to warn people of the danger of falling into the same. It appears that a building was being erected on the street in question, and an excavation had been made in the sidewalk for an area way under the same, 72 feet long, 12 feet wide, and 7 or 8 feet deep, and it is claimed that this excavation was not sufficiently protected, especially upon the south end, the only protection being a board nailed to the side of the building, immediately south of the building, some 3 feet above the sidewalk, and slanting diagonally to the outside line of the curb, a distance of 12 feet. It is claimed that there were no lights or barriers, other than this board, on the south side of the excavation; and that on the night of the 27th of July, 1886, Thomas Sewell fell into this excavation and was killed, from the carelessness and negligence of the defendant below. The action was tried by a jury,

and a verdict and judgment rendered in favor of plaintiff, for \$5,000. The city, claiming that there were errors upon the trial in the district court, brings the case here for review.

1. The first claim made by the city is that there was contributory negligence, without which the injury could not have occurred; and that the verdict and findings were against the evidence, and contrary to the law as given by the court. We have carefully considered the entire record in this case, and there is certainly some evidence to support the verdict and the special findings of the jury. One witness testified that he saw the deceased about half past 9 o'clock on the night of the 27th of July; that he was sober and in good health. He was found on the following morning in the excavation dead, and in answer to special questions, the jury said that he was not intoxicated on the night of the accident. It was disclosed in the evidence that a bottle was found upon his person, containing liquor, but there is nothing in the record to indicate that he was under the influence of liquor, when last seen on the night in question. There is evidence sufficient in the record to support the findings and verdict of the jury.

2. The plaintiff next complains that the court erred in giving the first and second paragraphs of the sixth instruction, which reads: "Before the plaintiff can recover a judgment in this action, it must appear by a preponderance of the evidence (1) that plaintiff's intestate, Thomas Sewell, was killed as the result of a defect or excavation in the sidewalk on James street in the defendant city, and that such excavation was left in an unsafe condition; and (2) that said city or its officers were negligent in permitting said sidewalk to remain in said unsafe condition at the time said Thomas Sewell is alleged to have been killed. To charge the defendant with negligence, it must appear that the proper officers of the city had notice of the unsafe condition of the sidewalk, in time to have prevented the killing of Thomas Sewell by falling into said excavation, or that by the exercise of reasonable and ordinary care and diligence, they could have known of the unsafe condition of said sidewalk, in time to have prevented such killing. By reasonable and ordinary care and diligence, is meant that degree of care and prudence which an ordinarily careful and prudent man would reasonably be expected to use, under similar circumstances." Counsel contends that the jury were misled by the court's instruction in calling the opening in the sidewalk a "defect," and that attention should have been directed more particularly to the question of the sufficiency of the guard and signal lights. Possibly, the instruction may be subject to some criticism in the language used, but it will be noticed that the court referred to this place as a "defect or excavation," and in one sense it was a "defect;" that is, there was a want of some thing necessary to make a complete sidewalk along James street, and to that extent it might be reasonably characterized as a defect. We do not think the lan-

guage used in the instruction is prejudicial error.

3. The city complains of the seventh, eighth, ninth, and tenth instructions. In the seventh instruction, the court told the jury that every person "is presumed to act with ordinary care and prudence, until the contrary appears." The eighth instruction, counsel contends to be good law in the abstract, but bad law as applicable to the case at bar. The court simply stated the law as to the liability of cities for negligently permitting dangerous defects to remain in sidewalks, no matter how such condition was caused. The ninth instruction is a correct statement of the law, with reference to the use of the sidewalk, and the qualifying clause, "not already otherwise in use," contended for by counsel, was not necessary to make the instruction good. The tenth instruction is in regard to the necessity of notice, and the court correctly stated that it was not necessary that the city should have actual notice of the unsafe and dangerous condition of the sidewalk, if the jury should find that the dangerous condition had existed a sufficient length of time before the accident, to have enabled the city, through its officers, by ordinary care and diligence, to have known of the existence of such defects, and remedied the same. Counsel make the same criticism upon the court's language of "unsafe and dangerous condition of the sidewalk" which we have already noticed, and contend that the court erred in keeping before the jury the defective condition of the walk, instead of the defective manner of guarding, or of giving notice of the condition which he claimed was legal and permissive. We do not think the jury could have been misled by any of these instructions complained of, especially when taken in connection with the entire charge of the court.

4. Counsel for the city asked certain instructions upon contributory negligence which were refused, and this, he contends, is error. The court fully instructed the jury upon contributory negligence, and was under no obligation to repeat such instruction in another form, at the request of the defendant below.

5. The next error which counsel contends for is the refusal of the court to submit certain questions to the jury. The first question refused reads as follows: "From all the surrounding circumstances,—the erection of the building, the building material on the street, and the location of Sewell's residence, with relation thereto, and the direction to travel to and from his work,—do you find that the deceased knew, or had good reason to know, of the excavation and its surroundings at the time he sustained the injuries that caused his death?" While the court might, with propriety, have submitted this question to the jury, we do not think that it was prejudicial error to refuse the same, inasmuch as a number of the questions with reference to the condition of the sidewalk, and the sufficiency of the protection and signal lights, were submitted. The tenth special question, refused, reads as follows: "If you find that such guards and lights were there at the excavation, and that

they were not sufficient to notify Sewell of the excavation, state what, in your opinion, would be reasonably necessary, in the shape of guards and lights, to have given any travelers on the sidewalk, exercising ordinary care, notice?" Clearly this question was properly refused by the court. The jury impaneled was simply to try the issues joined in the particular case, and it would not have been proper, by any question submitted to them, to call forth an opinion as to what was necessary to properly guard this excavation, and we think the question was very properly refused.

6. We see no error in the last instruction given by the court, of its own motion, which counsel for plaintiff in error contends was erroneous. The court told the jury in its instruction, that if the contractor of the building being erected, provided and maintained reasonably safe guards or signals to protect persons traveling along the sidewalk, in front of the building, from injury, this would relieve the city from liability the same as though such guards and signals had been placed and maintained there by order of the city, and we think this is a correct statement of the law.

7. The final error contended for is that the answers to the special questions were evasive, untrue, and not directly responsive to the questions themselves; but we do not think this position of counsel well taken. We have examined each special question answered by the jury in this case, and we think the answers are direct and intelligent responses to the questions propounded, and are each and all supported by some evidence. There is no error in the record, as brought to this court, and we recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 231)

ROSS V. ALLEN.

(*Supreme Court of Kansas. Jan. 10, 1891.*)

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—  
MEMORANDUM.

The following is a memorandum of an alleged contract for the sale of lots numbered 23 and 24, in block 74, in Leavenworth city proper, in the county of Leavenworth and state of Kansas, by Kate H. Allen to Charles J. Ross, viz.: "Leavenworth, March 19, 1887. Received one hundred dollars of Mrs D. Byington, a/c Chas. J. Ross, to apply on payment of eight thousand dollars (\$8,000) for property number 617 and 619 Delaware street, block 74, city proper: two thousand to be paid when abstract and title is furnished, two thousand in ninety days, and balance two years, with interest at 8%; abstract to be furnished within 30 days. J. M. ALLEN, Agent." J. M. Allen was not the agent of Ross, and the memorandum was not signed by Ross, or by any one for him, and he did not, by any other writing, recognize or adopt the contract. In an action against Ross for specific performance, it is held that the memorandum was vague, indefinite, and insufficient, within the requirements of the statute of frauds, and that the contract is not such as can be specifically enforced.

(*Syllabus by the Court.*)

Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

This was an action to specifically enforce the performance of a contract alleged to have been entered into between the parties on or about the 19th day of March,

1887, by which Charles J. Ross purchased lots 23 and 24 in block 74, in Leavenworth, Kan., for the sum of \$8,000. The written agreement set up by Kate H. Allen in her petition to sustain the cause of action is as follows: "Leavenworth, March 13, 1887. Received one hundred dollars of Mrs. D. Byington, a/c Chas. J. Ross, to apply on payment of eight thousand dollars (\$8,000) for property number 617 and 619 Delaware street, block 74, city proper; two thousand to be paid when abstract and title is furnished, two thousand in ninety days, and balance two years, with interest at 8%; abstract to be furnished within 30 days. J. M. ALLEN, Agent." The plaintiff below further alleged that she had duly performed the terms of the contract upon her part so far as she could, and still stood ready to keep and perform the same, but that the defendant had failed, neglected, and refused to perform the contract upon his part in every respect. At the trial, the following findings of fact and conclusions of law were made and stated by the court:

"FINDINGS OF FACT.

"(1) That on, before, and since the 19th day of March, 1887, Kate H. Allen, the plaintiff, was a married woman. That her husband's name was Harvey Allen. That, ever since A. D. 1862, Kate H. Allen has been the owner in fee-simple of lots 23 and 24, in block 74, in the city of Leavenworth proper, in the county of Leavenworth, in the state of Kansas. That on the 19th day of March, 1887, Kate H. Allen was the owner of said lots in fee-simple, clear, free, and unincumbered of record. That on, before, and since said 19th day of March, 1887, James M. Allen was the duly authorized agent of Kate H. Allen in and about the sale of said lots, and on said 19th day of March, 1887, said James M. Allen, by the name of J. M. Allen, and as agent of Kate H. Allen, entered into an agreement for the sale of said lots 23 and 24, in block 74, Leavenworth city proper, Leavenworth county, Kansas, with the defendant, Charles J. Ross, and thereupon the said Charles J. Ross paid on such purchase the sum of \$100 in cash, to said J. M. Allen, and thereupon said J. M. Allen, as agent for Kate H. Allen, signed and delivered to said Charles J. Ross a written memorandum in words and figures following: 'Leavenworth, March 19, 1887. Received one hundred dollars of Mrs. D. Byington, a/c Chas. J. Ross, to apply on payment of eight thousand dollars (\$8,000) for property number 617 and 619 Delaware street, block 74, city proper; two thousand to be paid when abstract and title is furnished, two thousand in ninety days, and balance two years, with interest at 8%; abstract to be furnished within 30 days. J. M. ALLEN, Agent.' That said Charles J. Ross, immediately upon the receipt of said memorandum, caused the same to be recorded in the office of register of deeds in and for Leavenworth county, Kansas. That the property described in said memorandum and intended to be by said Allen and Ross is lots 23 and 24, block 74, in Leavenworth city proper, in the county of Leavenworth, in the state of Kansas.

"(2) That on the 26th day of March, 1887, Kate H. Allen and her husband, Harvey Allen, executed and acknowledged in due form of law their warranty deed to said premises, with full covenants of warranty to Charles J. Ross, and delivered the same to their agent, J. M. Allen, to be by him delivered to Charles J. Ross, under and in pursuance of the contract of purchase of said lots. And on said day said plaintiff caused a mortgage and notes to be prepared and sent to said Charles J. Ross by his directions, for execution, which notes were copied in the mortgage, and of which mortgage and the notes copied therein the following is a copy, to-wit: \* \* \* That the said notes and mortgage were sent to said Charles J. Ross at his request by J. M. Allen, to be executed, and were received by said Charles J. Ross, and by him retained and produced upon the trial of this case.

"(3) That on or about the 29th day of March, 1887, an abstract of title to said lots was procured from Messrs. Spalding & Bowen, abstracters, etc., by J. M. Allen, agent of Kate H. Allen, and delivered by him, under instructions from Charles J. Ross, to John Sorenson, who then and there, as the agent of Charles J. Ross, delivered the same to W. C. Hook, a practicing attorney of Leavenworth, to examine and report upon to Charles J. Ross, which said Hook did on the 11th day of April, 1887, as will more fully appear by a copy of the following letter: 'Leavenworth, Kansas, April 11, 1887. Mr. Charles J. Ross, Iatan, Mo.—Dear Sir: I have examined the abstract of title to lots 23 and 24, in block 74, in Leavenworth city proper, furnished by Spalding & Bowen, dated March 28, 1887. The patents from the United States to Charles Trowbridge to these lots should be procured from the land-office at Washington, and recorded in this county by Mrs. Allen. An affidavit should also be procured that C. E. Trowbridge, who made the deed to John Kerr of these lots on April 10, 1862, is the Charles Trowbridge, the patentee, and also that he was an unmarried man at the time he made the deed. With these exceptions, I believe the title to be clear in Kate H. Allen. Respectfully, WILLIAM C. HOOK.' That said letter and said abstract both referred to and showed that the title to said lots was in Kate H. Allen, and said letter and abstract were sent by said Hook to said Charles J. Ross on the 11th day of April, 1887, and, within a short time after their receipt, said Charles J. Ross delivered said letter and said abstract to J. M. Allen, who at once proceeded to obtain copies of the patents to said lots, and recorded the same, also to obtain the affidavits required in said letter, and completed all such matters on or before the 28th day of April, 1887.

"(4) On March 28, 1887, a letter, of which the following is a true copy, was written by J. M. Allen, agent, etc., to Charles J. Ross, and was sent to and received by said Charles J. Ross: 'Leavenworth Station, March 28th, 1887. Chas. J. Ross, Iatan, Mo.—My Dear Sir: I herewith send you the mortgage and notes for signatures, which you can have signed and also ac-

knowledge up there. Please have both mortgage and notes signed by your wife and yourself. The abstract will be completed Thursday noon, and, if you cannot come down yourself, you can send the mortgage and notes and money for first payment to Jno. Sorenson, and we will deliver the warranty deed, also the abstract, to him, to be forwarded to you. Hoping this will find your family improved in health, I am very truly yours, J. M. ALLEN, Agt. N. B. Will you please sign the notes and mortgage according to the copies of the notes embraced in the body of the mortgage, viz., Charles J. Ross, Nannie B. Ross," and oblige, J. M. A.' That on the 5th day of April, 1887, J. M. Allen, as agent for Kate H. Allen, wrote and mailed another letter to said Charles J. Ross, which said letter was duly received by said Ross, a copy of which is in the words and figures following: 'Leavenworth Station, April 5th, 1887. Chas. J. Ross, Iatan, Mo.—Dear Sir: Your favor of the 4th received this A. M. In reply, I would say everything is in shape here. I gave the abstract complete to your friend Mr. Sorenson several days ago. Of course, under the circumstances, I don't like to try to hurry you, but we really need the money now. In fact, if we hadn't needed the money, the property wouldn't have been in market, as it lies directly in the line of improvement. I trust, therefore, you will have the papers up there fixed up as soon as you can without serious inconvenience. Please let me know about what day I can count on the money, so I can arrange with the party we owe to wait, and greatly oblige, J. M. ALLEN, Agt.' That on April 28, 1887, a letter, of which the following is a copy, was written by J. M. Allen, agent, to and received by said Charles J. Ross: 'Leavenworth Station, April 28th, 1887. Chas. J. Ross, Iatan, Mo.—Dear Sir: I did not go to see you again Tuesday, therefore, by not getting that check, I missed the chance to get the place I told you about. Consequently, I will have to rent of you, I suppose. The party who is living in the little house is going out on the 1st, but I have a customer for it who will take it at \$12.00 per month. I will pay you \$18.00 for the one I live in, if that will be satisfactory. All this, however, has nothing to do with the original agreement "that the balance of the first payment was to be made when abstract was completed and title proven." This is to notify you that same is now completed and recorded as per directions in note of your attorney. I wish, therefore, you would come over tomorrow or Saturday, so we can fix things up and start in O. K. May 1st. Yours, truly, J. M. ALLEN, Agt.' Written across the face of the letter was: 'If you want the mortgage and notes changed, bring them along.' That said Charles J. Ross, by the name of C. J. Ross, answered said letter of April 28, on May 4, 1887, a copy of which is as follows: 'Iatan, Missouri, May 4, 1887. J. M. Allen, Esq.—Dear Sir: Do not know when I will be in 11-worth. Mr. Sorenson does not think he can take half of the property at present, and this throws me considerable off track. I will

try to be in 11-worth before long. Yours, truly, C. J. Ross.' On May 7, 1887, J. M. Allen, agent, sent a letter to Charles J. Ross, which was by him duly received, a copy of which is as follows: 'Leavenworth Station, May 7th, 1887. Chas. J. Ross, Iatan—Dear Sir: Your favor of the 4th I have just read. Found the same here when I got back from trip I referred to. Relative to your answer, would say the business between yourself and Mr. Sorenson of course I know nothing about. In fact, that has nothing to do with the case. We did not know Mr. Sorenson in the trade at all. He had nothing to do with it except that he told me that Mr. Ross's word was just as good as gold. Now I, as the authorized agent of the property, sold you the place in good faith, and I expect, as Mr. Sorenson says you are a man of integrity, that you will come over and fix the business up. I have had several chances to sell the property since you bought it, and in one instance for more money. I would like to have you come over right off, so the business can be brought to a close. We are paying interest on money which we can stop, of course, at least a part of it. That really was the object in selling the place. Otherwise we could and would have kept the property and made the profit of it ourselves. You got the property very low, and could well afford to pay all cash if you wished to. At least Sorenson said so. He seems to have the utmost confidence in your ability. Let me know by return mail what day you will come over, so I will be sure to be here, and oblige J. M. ALLEN, Agt.' On May 17, 1887, J. M. Allen, agent, wrote a letter to Charles J. Ross, which was duly received, a copy of which is as follows: 'Leavenworth Station, May 17, 1887. Chas. J. Ross, Iatan, Mo.—Dear Sir: I wrote to you about two weeks ago, but have received no reply. It seems to me that it is hardly the way for a man of business integrity to act. Common courtesy would entitle a business letter to a prompt reply. Now, what I want to know is this: Are you coming down to complete your contract or not? I am tired of fooling with it, and want you to come and fix up the business some way or other. I am willing to do what is fair and honorable at all times, and expect the same kind of treatment in return. I shall be at home all this week, and expect to see you down before Sunday. Very resp'y, J. M. ALLEN, Agt.' On July 12, 1887, said J. M. Allen, agent, sent to Charles J. Ross a letter, which was duly received, a copy of which is as follows: 'Leavenworth Station, July 12th, 1887. To Chas. J. Ross, Iatan, Mo.—Dear Sir: I want to see you about that lot business. If you don't expect to be in Leavenworth soon, I will come up there so we can talk the matter over. Please advise me by return mail when you will be down, or if you are not coming down, let me know what day next week you will be at home. If you will be at home Sunday next I will be there. Can you meet me at Iatan or Weston? If so, I would be glad, as it is very difficult to get a team at Iatan to take any one out to your place. Now,

Mr. Ross, don't fail to answer me at once, and let me know where and on what day I can meet you, and perhaps we can succeed in fixing up the matter. I will meet you at Iatan or Weston Sunday or Monday next, just as you say, or, if you can't do that, I will come out to your place, if you will tell me what day to come. Yours very truly, J. M. ALLEN, Agt.' On July 16, 1887, said Charles J. Ross, by the name of C. J. Ross, wrote a letter to J. M. Allen, which was duly received, a copy of which is in the words and figures following: 'Iatan, Missouri, July 16th, 1887. J. M. Allen, Esq.: Yours of the 12th received today. In regard to the lots will say I hold no claim on them, and have nothing to show against them, as the receipt I hold was not signed by the owner, nor the number of the lots specified, and can therefore in no way reflect on the title; and the owners can do with the property as they see best. If any particular is wanted, write me at once, and I will reply or come down soon. Yours resp't, C. J. Ross.' On July 20, 1886, J. M. Allen, agent, wrote and sent a letter to Charles J. Ross, which was duly received, a copy of which is in the words and figures following: 'Leavenworth Station, July 20th, 1887. C. J. Ross, Iatan, Mo.—Dear Sir: Your letter of the 16th duly received. In regard to the lot business I think you have acted very strangely. If you did not want to take the property you should have said so long ago, and I think now you should come down right away, so we can get the business in shape. I wish you would let me know what day you will be down, so I will be sure to be at home. When I get out of this business I think I will let real estate deals strictly alone hereafter. Please answer immediately as to the matter, and oblige J. M. ALLEN, Agt.'

"(5) That from the 19th day of March, 1887, up to and until July 26, 1887, said J. M. Allen, at several different times, saw said Charles J. Ross in the city of Leavenworth, Kansas, and at such times urged him to go on and complete the purchase of said lots, and at several times before the institution of this suit tendered him the aforesaid warranty deed herein referred to, executed by the plaintiff and her husband, on the 26th day of March, 1887, and demanded as conditions of the delivery of said deed the payment of \$1,900, and the execution of the notes and mortgage aforesaid, which the defendant refused to do. Said Charles J. Ross, at none of said conversations, made any objections to the terms of said purchase, or to the terms of the notes and mortgage so made as aforesaid, but claimed that he could not take said lots because one John Sorenson had gone back on him, and would not take or pay for one-half of the purchase price of said lots. That said Charles J. Ross did not at any of the various times when the warranty deed was tendered as aforesaid, by said J. M. Allen, make any objections to the said deed, or to the said sale or the terms thereof; nor did he ever offer to perform the contract upon his part. At the times said deed was so tendered by said J. M. Allen, he expected said Charles J. Ross to perform

said contract upon his part, and expected said Charles J. Ross to deliver to him said notes and mortgage so prepared as aforesaid. And said Charles J. Ross never at such times offered to receive said deed or to pay the balance due, and no question was ever made by said Charles J. Ross as to the tender so made by said Allen until the trial of this cause. And that said plaintiff, on the trial of this cause, brought said deed into court for said defendant, and again tendered the same to said Ross, and demanded a performance of said contract upon his part, according to the terms thereof. And the court finds that on July 19, 1887, there was due to the plaintiff from Charles J. Ross the sum of \$3,900, as part of the purchase price of said lots, and that the balance of the purchase price of said lots, to-wit, \$4,000, became due and payable on or before the 19th day of July, A. D. 1889, with 8 per cent. per annum interest thereon. And the court finds that the rental value of said premises up to this date, and chargeable to and against this plaintiff, is the sum of \$300, and that said sum should be deducted from the said \$3,900, leaving due the sum of \$3,600, with 7 per cent. per annum interest from July 19, 1887, until paid."

#### "CONCLUSION OF LAW.

"And, as conclusion of law from the foregoing facts, the court finds that the agreement to purchase the said lots 23 and 24, in block 74, in Leavenworth city proper, in Leavenworth county, Kansas, heretofore made by and between the plaintiff and defendant, should be specifically enforced, and that judgment should be entered accordingly."

Judgment was given in favor of the plaintiff—*First*, that she should recover from Ross the sum of \$3,795, with interest thereon from the rendition of the judgment until paid, at the rate of 7 per cent. per annum, together with costs; *second*, that Ross should execute and deliver his promissory note in writing to the plaintiff for the sum of \$4,000, payable on or before July 19, 1889, at the option of the defendant, with 8 per cent. per annum interest from July 19, 1887, until paid. It was further ordered and adjudged that Ross should execute, acknowledge, and deliver to the plaintiff a mortgage deed upon the lots within ten days of judgment, and, in case of his failure to do so, the judgment should stand as a mortgage lien upon the premises. And it was further ordered that the deed mentioned in the findings of fact should be delivered to the clerk of the court to be by him delivered to the defendant upon payment of the said sum of \$3,795, with interest and costs, and the delivery to him for the use and benefit of the plaintiff of the note and mortgage herein mentioned. Ross excepted to the findings and judgment, and brings the case here for review.

*Waggener, Martin & Orr* and *J. W. Coburn*, for plaintiff in error. *Lucien Baker*, for defendant in error.

*JOHNSTON, J.*, (after stating the facts as above.) The defense made against a specific performance is that the memoran-



dum or evidence of the contract of sale is insufficient within the statute of frauds. Under the statute no action can be brought to charge a party upon a contract for the sale of land unless the agreement upon which the action is brought, or some note or memorandum thereof, shall be in writing and signed by the party sought to be charged, or by his or her agent lawfully authorized. Gen. St. 1889, par. 3166. The only memorandum of agreement set up in the petition as a basis for plaintiff's action is the following: "Leavenworth, March 19, 1887. Received one hundred dollars of Mrs. D. Byington, a/c Chas. J. Ross, to apply on payment of eight thousand dollars (\$8,000) for property number 617 and 619 Delaware street, block 74, city proper; two thousand to be paid when abstract and title is furnished, two thousand in ninety days, and balance two years, with interest at 8%; abstract to be furnished within 30 days. J. M. ALLEN, Agent." Ross contends that this receipt or memorandum is defective in many respects, and wholly insufficient as a basis for the action: (1) It is not signed by the party sought to be charged, nor by any other person lawfully authorized for him. (2) No vendor is named in the receipt relied on. While signed by J. M. Allen, agent, yet the identity of the person for whom Allen was acting cannot be ascertained from the memorandum. (3) The writing does not describe Ross as a vendee or purchaser. (4) The memorandum does not upon its face import an agreement or contract for the sale of any property. It is a mere receipt for money, and a memorandum of another payment to be made by installments, upon some property mentioned therein. (5) The writing does not describe lots 23 and 24 in block 74 in Leavenworth, nor any other real estate, but only refers to street numbers in some city not named. (6) It does not definitely appear from the writing when, where, or how the installments were to be paid, nor what installments should bear interest, nor what was the entire purchase price, and there is no mention of any promissory note or mortgage, both of which the court required the defendant below to give. Under the decisions of this court, we think the memorandum relied on is clearly insufficient. It does not contain the essential elements of a contract which can be specifically enforced. To be sufficient, the memorandum or writing should designate the parties to the contract, give a sufficiently clear description of the property so that it can be identified; the price to be paid or other consideration to be given, together with the terms and condition, should be stated; and the party to be charged, or his agent, must have signed the memorandum or writings. "While the form of the memorandum is not material, it must state the contract with reasonable certainty, so that the substance can be made to appear and be understood from the writing itself, or by direct reference to some extrinsic instrument or writing, without having recourse to parol proof." *Reid v. Kenworthy*, 25 Kan. 701. The writing is obviously vague and indefinite,

both with respect to the parties and the character and description of the property sold. Who was the vendor? For whom was J. M. Allen acting? Was he the agent of Byington, Ross, or some unnamed person? Would not any one infer, looking at the memorandum alone, that Byington and Ross were the parties to the transaction, and that Allen was the agent of the latter? It is conceded, however, that Allen was not the agent of Ross; and, if the writing had been signed by Ross, probably the agency of Allen might have been shown by parol testimony, although the principal's name was not disclosed by any writing. While both parties need not sign the writing or writings, they must in some way show who are the parties to the contract. "The contract necessarily embraces two parties, each contracting with reference to the real estate, either of whom may be charged upon the contract, if the contract or some note or memorandum thereof is reduced to writing and signed by such party, but neither of whom can be charged, unless the contract or some note or memorandum thereof is reduced to writing and signed by the party to be charged. The contract, note, or memorandum must in all cases be in writing. It must in all cases be signed by one of the parties, and must in all cases be signed by the party who is eventually to be charged upon it." *Becker v. Mason*, 30 Kan. 701, 2 Pac. Rep. 850; *Grafton v. Cummings*, 99 U. S. 100. The memorandum is not signed by Ross, nor by any one for him, and the omission of this essential is of itself sufficient to defeat the maintenance of the action. Then, again, the property is not described with sufficient certainty. It is true that an absolutely accurate description of the property is not required, but the property should be so explicitly described that it will be susceptible of identification by reference to other writings and facts which may be shown to the court. If the designation is so definite that the description given in the memorandum can, with the aid of extrinsic evidence, be applied to the exact property intended to be sold, it is enough. *Hollis v. Burgess*, 37 Kan. 494, 15 Pac. Rep. 536. In this case, however, the memorandum does not show that the property is located in any state, county, or city. The memorandum itself is dated at Leavenworth, and the property is described as being on Delaware street of some "city proper." If the name of the owner or vendor had been given, it would have aided in the identification of the property; but her name nowhere appears in the writing. Then, again, there is no certainty upon the face of the writing whether the property sold was real or personal. Only street numbers are mentioned, and it now appears that those are not the ones by which the real estate in question is described. The property is not described as lands, lots, or real estate, and the street numbers may be attached to buildings which may or may not be a part of the real estate. The writing is vague and uncertain with respect to the terms and conditions of the contract, and nothing appears therein with reference to the prom-

issory note and mortgage required, or to any other security for the deferred payments. Although no other writing than the one set out was mentioned in the pleadings, the plaintiff below introduced in evidence and relies to some extent on certain correspondence between the parties. The writings relied on should have been set out in the pleadings, but we have overlooked that objection and find that the correspondence does not recognize or supplement the memorandum pleaded, so as to make complete evidence of a contract within the statute. The evidence of a contract may be gathered from several writings or letters, but their relation to each other should appear upon their faces, and cannot be established by parol evidence. While the memorandum may consist of several parts, all of them must be either physically connected, or, by direct reference made in one to the other, make up the entire agreement of the parties. The letters relied on to supply the essential features omitted from the memorandum should distinctly recognize and adopt the contract. Quite a number of letters were written to Ross, but only two were written by him. One was the letter of May 4, 1887, which we think contains no recognition or affirmance of the contract which supplements or aids the memorandum of March 19, 1887; and the letter written by him on July 16, 1887, is an explicit disavowal of any contract relation, and that he has any claim or interest in the property in controversy. There was no part performance by Ross to take the case out of the statute of frauds; and, taking the memorandum and writings together, they are insufficient to satisfy the requirements of the statute. No application has been made to reform the contract so that it shall contain all the terms and conditions of sale, and, as it now stands, the written evidence of the contract is indefinite, uncertain, and insufficient to sustain an action for specific performance. *Reid v. Kenworthy*, 25 Kan. 701; *Becker v. Mason*, 30 Kan. 701, 2 Pac. Rep. 850; *Fry v. Platt*, 32 Kan. 62, 3 Pac. Rep. 781; *Brunidge v. Blair*, 43 Kan. 364, 23 Pac. Rep. 482; *Sherburne v. Shaw*, 1 N. H. 157; *Bailey v. Ogden*, 3 Johns. 399; *Shipman v. Campbell*, 44 N. W. Rep. 171; *Nichols v. Johnson*, 10 Conn. 192; *Fry*, Spec. Perf. 245. The judgment of the district court will be reversed, and the cause remanded, with instructions to enter judgment upon the special findings in favor of the plaintiff in error. All the justices concurring.

(45 Kan. 197)

## HOLMBERG v. JOHNSON.

(Supreme Court of Kansas. Jan. 10, 1891.)

## VENDOR AND VENDEE—INJUNCTION OF WASTE.

Where J., by written contract, purchases a tract of land of H., and pays a portion of the purchase money down, and, by the terms of the contract, H. is to remain in possession and have the use of the land during a period of five years, for the taxes, care, and improvements put thereon by him in the mean time, J. is entitled to an injunction to restrain H. from committing waste on said land, by quarrying and removing therefrom rock, or removing therefrom trees, except nursery stock.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Wilson county; L. STILLWELL, Judge.

*Hudson & Reed, J. B. F. Cates, and George P. Uhl*, for plaintiff in error. *S. S. Kirkpatrick*, for defendant in error.

STRANG, C. This was an injunction proceeding begun in the district court of Wilson county by the defendant to enjoin the plaintiff from committing waste upon the land described in the petition. The defendant answered: (1) A general denial. (2) Defendant alleges ownership of the land in fee, and peaceable possession thereof. (3) Denies the execution of the contract under which the plaintiff claims to be the equitable owner of the land. (4) Alleges the plaintiff's claim is a cloud upon his title, and asks to have title to the land quieted in him. The plaintiff below replied by general denial. The court directed a jury to be impaneled, and submitted to them the following question: "Did the defendant execute the written contract of which a copy is attached to the plaintiff's petition marked A? Answer. Yes." The court also permitted the parties to submit the following questions to the jury. By the plaintiff: "Question. Did the defendant sign his name to the contract, the base of this action? Answer. Yes. Q. Did the defendant sign his name to the promissory note for \$1,000 offered in evidence? A. Yes." By the defendant: "Question. Did Mrs. Johnson pay Holmberg anything for the contract sued upon? Answer. Yes. Q. If she paid him anything on the contract, what did she pay him in? A. In notes. Q. How much did she pay him for the contract in controversy, if she paid him anything? A. \$2,850. Q. Was Holmberg indebted to Mrs. Johnson at the time this [contract] purports to have been executed, viz., December 3, 1884? A. Yes. Q. If the answer to the above question is in the affirmative, how much was he indebted to her at that time? A. \$2,850. Q. Did Holmberg receive any consideration for the contract sued on? A. Yes." The defendant moved to set aside the findings of the jury, and for a new trial. Motion overruled, and judgment perpetually enjoining the defendant from committing the waste complained of, and for costs, entered.

The plaintiff in this court says the petition does not state a cause of action, because it does not aver the insolvency of the defendant. This court says, in *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. Rep. 367: "Doubtless injunction will lie at the instance of the owner to restrain the cutting of timber, quarrying of rock, mineral, or any other act which is in the nature of waste," and cites *Iron Co. v. Reymert*, 45 N. Y. 703, and *Wilson v. Mineral Point*, 39 Wis. 160. We think the authorities approve of the allowance of injunctions to restrain waste, as distinguished from mere trespass. *High, Inj.* §§ 419-457. So far as the second complaint is concerned, we think the plaintiff misapprehended the language of the amended petition. It does not read as the plaintiff seems to think in his brief it does. The plaintiff does not, in this proceeding, ask for spe-

cific performance. This statement disposes of the third complaint. In the fourth complaint, plaintiff avers that the court erred in permitting the defendant in error to offer evidence of the genuineness of the signature of Holmberg to other papers than the contract sued on. It is the established law of this state, and many other states of this country, to permit proof of the genuineness of a disputed signature by comparison with others signatures, on other instruments in writing, admitted or proved to be genuine. *Macomber v. Scott*, 10 Kan. 335; *Joseph v. Bank*, 17 Kan. 256; *Ort v. Fowler*, 31 Kan. 478, 2 Pac. Rep. 580; *Woodman v. Dana*, 52 Me. 9; *State v. Hastings*, 53 N. H. 452; *State v. Ward*, 39 Vt. 225; *Tyler v. Todd*, 36 Conn. 218; *Koons v. State*, 36 Ohio St. 195; *Rhodes v. Sexton*, 33 Iowa, 540. Plaintiff also says the court erred in excluding the expert testimony of Dr. Willits, as to the sickness of Holmberg, and its effect upon his mind. As the sickness of Holmberg occurred a considerable time after the execution of the contract in question, it could hardly throw any light upon its execution; and, besides, there was nothing in the pleadings justifying an attempt to avoid the contract upon any such ground. The sixth and seventh grounds of complaint relate to the action of the court in refusing to open the case, and hear further evidence, three days after it was tried. The opening of a case by the court for the purpose of hearing further testimony is a matter lodged in the discretion of the trial court, and this court cannot reverse the action of the court in refusing to open a case for such purpose, unless satisfied that the trial court has abused its discretion. We cannot say the trial court abused its discretion in refusing to open a case three days after the trial thereof had closed. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 186)

CHICAGO, K. & W. R. CO. v. HUTCHINSON.

(Supreme Court of Kansas. Jan. 10, 1891.)

RAILROAD COMPANIES—FAILURE TO CONSTRUCT CATTLE-GUARDS.

A railroad company cannot escape from liability for its failure to perform the statutory duty to make proper cattle-guards on its road, when it enters or when it leaves improved or fenced land, on the ground that a contractor grading the road or laying track thereon neglected to put up proper guards.

(Syllabus by the Court.)

Error from district court, Wilson county; L. STILLWELL, Judge.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *J. W. Sutherland*, for defendant in error.

HORTON, C. J. James Hutchinson brought his action against the Chicago, Kansas & Western Railroad Company to recover damages for failure to construct cattle-guards. He claimed damages to his crops in the sum of \$50, and for time and labor in guarding his premises, \$125. The jury returned a verdict in favor of the plain-

tiff and against the railroad company for \$85. Judgment was entered thereon. The railroad company excepted, and brings the case here. From the evidence adduced at the trial, it appears that in 1886 the railroad company constructed a line of railroad through Wilson county, and across the premises of Hutchinson; that upon some portion of the road, and including the track across the land of Hutchinson, the company let to some person the contract to do the grading of the road-bed, and to some other person the contract to lay the track; that the track was laid across the land on the 19th day of July, 1886; that at that time the track-layers and graders moved on west, and were not there any more; that up to that time no damage was claimed; that construction trains commenced running on the road and across the land as soon as the track was laid, but no passenger trains were run until October 2, 1886. At that time the railroad company took full charge and possession of the road. It is claimed that the trial court erred in instructing the jury as follows: "As regards the right of the plaintiff to recover, I will say further that it makes no difference in this case whether the railroad in question was constructed by the defendant company or by the construction company." We perceive no error in the language used. Paragraph 1259, Gen. St. 1889, reads: "When any railroad runs through any improved or fenced land, said railroad company shall make proper cattle-guards on such railroad when they enter and when they leave such improved or fenced land." We think that the duty of making proper cattle-guards by a railroad company when its road enters, and when it leaves, any improved or fenced land on its right of way, is a duty to the land-owner from the railroad company, annexed by statute to the privileges granted the corporation, and that the failure to perform the duty is not excused by alleging or proving the negligence of a contractor grading the road, or of a contractor laying the track upon the road. *Nelson v. Railroad Co.*, 26 Vt. 717; *Railroad Co. v. Meador*, 50 Tex. 77; *Railroad Co. v. Austin*, 21 Mich. 390; *Lowell v. Railroad Corp.*, 23 Pick. 24. See, also, *Railroad Co. v. Sharp*, 27 Kan. 134; *Railway Co. v. Ritz*, 33 Kan. 404, 6 Pac. Rep. 533; *Railroad Co. v. Morrow*, 32 Kan. 217, 4 Pac. Rep. 87; *Railroad Co. v. Shaft*, 33 Kan. 522, 6 Pac. Rep. 908; *Railroad Co. v. Wilson*, 28 Kan. 637; *Railway Co. v. King*, 31 Kan. 500, 3 Pac. Rep. 371; *Railway Co. v. Manson*, 31 Kan. 337, 2 Pac. Rep. 800; *Railway Co. v. Harris*, 28 Kan. 206; and *Railroad Co. v. Curl*, Id. 622. In *Railway Co. v. Fitzsimmons*, 18 Kan. 34; and *Railroad Co. v. Willis*, 38 Kan. 330, 16 Pac. Rep. 728, no statutory duty cast upon a railroad company was involved. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 110)

CHICAGO, K. & W. R. CO. v. WILLETS.

(Supreme Court of Kansas. Jan. 10, 1891.)

TRESPASS—DAMAGES—EVIDENCE—INSTRUCTIONS.

1. A railroad company in constructing its railroad upon its own land went upon adjacent

land and made excavations to the injury of the owner, and he sued the company therefor, and upon the trial the court instructed the jury that the measure of the plaintiff's damages was the difference in the market value of the land immediately before the commission of the injuries and the market value of the land immediately afterwards. *Held* not error.

2. In such case, the owner's land consisted of a tract of six or seven acres, and the excavations covered only about one-fourth of an acre thereof. *Held*, nevertheless, that the owner had the right to recover for the depreciation in the market value of the entire tract.

3. And, in such case, the market value to be considered is the market value of the land for any purpose for which it might be the most advantageously used, and for which it would sell in the market for the highest price.

4. *Held* no material error was committed in the admission of evidence.

5. The court instructed the jury as follows: "You have the right also to take into consideration in this case such knowledge and information as you may have acquired of the plaintiff's land as to the alleged injuries committed there, by the personal examination of the premises, that you have been permitted to make under the directions of the court." *Held*, that no error was committed in giving this instruction.

(Syllabus by the Court.)

Error to district court, Wilson county; L. ST'LLWELL, Judge.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. S. S. Kirkpatrick for defendant in error.

VALENTINE, J. This was an action brought in the district court of Wilson county by J. R. Willets against the Chicago, Kansas & Western Railroad Company, to recover damages for alleged injuries to real estate. The case was tried before the court and a jury, and the jury returned a verdict in favor of the plaintiff, and against the defendant, for \$400 damages, and judgment was rendered accordingly; and to reverse this judgment, the defendant, as plaintiff in error, brought the case to this court. It appears that the plaintiff below, defendant in error, owned about nine acres of land adjoining the city of Fredonia; that he sold and conveyed between two and three acres of the same to the defendant for a right of way, and for station purposes; that the defendant, in constructing its railroad, entered upon the remainder of the plaintiff's land, without his consent, and made excavations thereon from 7 to 10 feet deep, and carried away the earth to the great injury of the land; and for these injuries the plaintiff brought and prosecuted this action.

The first claim of error is that the case was tried by the plaintiff and the court below upon an erroneous theory as to damages. This theory will be apparent from the following instruction given by the court to the jury, to-wit: "The first question for you to consider will be the measure of plaintiff's damages, and upon that point you are instructed that to ascertain the damages to which the plaintiff should be entitled, if any, you will ascertain—*First*, what was a fair, reasonable, market value of the plaintiff's land before the commission of these alleged injuries, and what was the fair market value of the plaintiff's land after the commission of these alleged injuries, and the difference, if

any, between these two sums would be the measure of plaintiff's recovery." It is claimed that this instruction is erroneous for the following reasons: *First*, because it permits the plaintiff to recover for all losses, past, present, and prospective, which he had suffered, or might suffer, by reason of the defendant's wrongs, and not merely for such actual loss only as had occurred prior to the trial; *second*, because it permits the plaintiff to recover for the diminished value of the entire tract of land, which consists of six or seven acres, although, as the defendant claims, the excavations covered only about one-fourth of an acre of the tract. Involved in the first proposition is the claim that the diminished value of the real estate injured is no criterion at all for the recovery of damages. We think it is, however. It must be remembered that this is not an action merely for injuries to the plaintiff's possession, as the old common-law action of trespass *quare clausum fregit* was, but it is an action for injuries to the realty itself, to the inheritance; and damages for such injuries may generally, if not always, be estimated by considering the diminished market value of the land. They may, however, be estimated in various ways, generally at the election of the owner of the land. In cases of trespass upon real estate, where no appreciable injury occurs, only nominal damages can be recovered; but, where the injury is appreciable and computable, and is done willfully and maliciously, punitive or exemplary damages may be allowed. But neither of these cases is the present case, and these rules do not apply. But in all cases of injuries to real estate, including the present case, full compensatory damages may be recovered. In other words, the owner of land, for injuries to it by the wrongful acts of another, may recover exact compensation for his entire loss. In giving compensatory damages, various rules for computing the same are adopted to correspond with the different kinds of cases, and the manner in which they are presented; but generally they are adopted at the election of the owner. Where something is wrongfully taken from the real estate, the owner may, if he chooses, maintain an action of replevin to recover it back; or he may maintain an action for its value; or he may waive the tort, and recover for the amount of the benefit actually received from the thing taken by the wrong-doer; or, where the wrong-doer has occupied the land for some time, the owner may waive all other injuries or losses, and recover merely for the rental value of the real estate while the wrong-doer so occupied it; or, where the injury is of such a nature that the real estate can be restored to its former condition, the cost of restoring the same may be the measure of the damages. But in such cases the restoring of the property to its former condition can generally only be done with the consent of the owner, for the wrong-doer, without the consent of the owner, cannot be allowed to re-enter the premises, and thereby commit another and a new trespass for the purpose of restoring the property. *Railway Co. v. Muhlman*, 17 Kan. 224. In cases

where the wrong-doer has the power, without committing any new wrong, to restore the property to its former condition, it will generally be presumed that he will do so, and he will generally be given an opportunity to do so; and, in such cases, the owner will generally be permitted to recover only for his actual loss up to the time of the commencement of his action, or, at most, only up to the time of the trial. And in such cases, in order that full and complete justice may be awarded to the owner, he will be permitted to commence and prosecute a new action for each and every succeeding or recurring loss occasioned by the original injury until his property shall be finally restored to its former condition. This is particularly true where the wrong-doer has the right, and the owner of the land has not the right, to restore the property to its former condition as where the thing that causes the injury to the owner's land is upon the land of another, and where it only indirectly affects his land. But in cases like the present the owner may recover for his entire loss in one action, and only in one action, and he may so recover the same if he chooses, by recovering for the depreciation in the market value of his land caused by the injuries thereto committed by the wrong-doer. 3 *Suth. Dam.* 372-374, 392-394; 5 *Amer. & Eng. Enc. Law*, 16, 20, 36. This is, in fact, a recovery only for the loss occurring prior to the commencement of the action, although it may also to some extent have in contemplation the future. The loss, as thus recovered for, is precisely the loss which occurred at the very time at which the injury was consummated. In many cases the depreciation in the market value of the land, and the cost of restoring it to its former condition, would be precisely equal. In the first of the above authorities, the following language is used: "In general, this damage is the amount the estate is diminished thereby in value." Page 393. In the last authority cited, the following language is used: "In cases of trespass, the cause of action is the wrongful act of the defendant, and the injury resulting is merely the measure of the damages. Therefore, applying the rule above, all damages for a trespass must be recovered in a single action." Page 16. "In actions for injury to real property, where the injury is done to the realty itself, the measure of damages is the difference in the value of the land before and after the trespass, or, in some cases, the amount necessary to restore the property to the condition in which it was before the trespass was committed." Page 36. Also, in all cases where damages may be recovered for the depreciation in the market value of real estate caused by injuries thereto, the owner may recover for the depreciation in the market value of the entire tract, although the injury may, in fact, be directly only to a portion of the tract. See the above authorities, and also the following: *Railroad Co. v. Merrill*, 25 Kan. 421; *Commissioners v. Labore*, 37 Kan. 480, 15 Pac. Rep. 577; *Railroad Co. v. Andrews*, 41 Kan. 370, 379, 21 Pac. Rep. 276; *Railroad Co. v. McAuliff*, 43 Kan. 185, 23 Pac. Rep. 102.

The plaintiff also in this case showed the

exact location of his land, how it was situated with respect to the city of Fredonia, and its streets, and the railroad, etc., and for what purposes it might be used; and the jury were also permitted to see it. We do not think that there was any error in this; for, when the question of the value of real estate is in issue, the owner is entitled to show its market value for any purpose for which it might be the most advantageously used, and for which it would sell in the market for the highest price. *King v. Railway Co.*, 20 N. W. Rep. 135; *Commissioners v. Labore*, 37 Kan. 480, 484, 485, 15 Pac. Rep. 577; *Cohen v. Railroad Co.*, 34 Kan. 164, 8 Pac. Rep. 138, and cases there cited; *Commissioners v. Hogan*, 39 Kan. 606, 18 Pac. Rep. 611; *Railroad Co. v. Elret*, 41 Kan. 24, 25, 20 Pac. Rep. 538. The question to be considered is really what was the property worth immediately before the injury, if used for the purpose for which it could be the most advantageously used, and what was it worth in the same condition except for the injury immediately afterwards if it were used for the purpose for which it could be the most advantageously used?

It is also claimed that the court below erred in permitting oral testimony to be introduced tending to contradict the effect of the deed executed by the plaintiff to the defendant. The plaintiff's counsel, however, stated at the time it was introduced that it was not introduced for that purpose, and the court did not permit it to go to the jury for that purpose; and the court afterwards instructed the jury that it could not be used for that purpose. The real object of the testimony seems to have been to show that the trespass was committed willfully and maliciously; but, as no exemplary damages were allowed, it really answered no purpose.

It is also claimed that the court below erred in giving the following instruction: "You have the right also to take into consideration in this case such knowledge and information as you may have acquired of the plaintiff's land as to the alleged injuries committed there, by the personal examination of the premises, that you have been permitted to make under the directions of the court." Under the decision of this court in the case of *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 419, this instruction was not erroneous. We do not think that any material error was committed in this case, and therefore the judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 228)

*HARVEY et al. v. KANSAS, N. & D. RY. CO.*  
(*Supreme Court of Kansas. Jan. 10, 1891.*)

EMINENT DOMAIN — INJUNCTION OF PROCEEDINGS.

Where an owner of land entered into a written contract with a railway company to grant, and finally to convey, to the railway company a right of way across the owner's land, upon the condition that the railway company should construct and maintain upon the land a passenger depot, with proper side tracks and stock-yards sufficient to do the business there offered, and permitted the railway company to take the immediate possession of such right of

way under such contract, and to construct thereon its railway, and the railway company did construct thereon its railway and a side track and a passenger depot and stock-yards, but the owner of the land and the railway company honestly differed in opinion as to whether the company had fulfilled all the conditions of the contract, and the owner of the land then instituted condemnation proceedings, under the statutes, for damages, and the railway company then commenced an action to perpetually enjoin the owner from prosecuting his condemnation proceedings, and the court granted a temporary injunction to restrain such owner from so prosecuting his said proceedings until the injunction case should be finally heard and determined upon its merits, held not error.

(Syllabus by the Court.)

Error from district court, Anderson county; A. W. BENSON, Judge.

A. A. Harris, for plaintiffs in error. W. A. Johnson, for defendant in error.

VALENTINE, J. The Kansas, Nebraska & Dakota Railway Company commenced its action, in the district court of Anderson county, to perpetually enjoin the defendants, J. T. Harvey and George E. Harvey and another, from prosecuting certain condemnation proceedings already instituted by them, and pending in that court. A temporary injunction was also prayed for, and the question whether a temporary injunction should be allowed or not was heard before the court, and the temporary injunction was granted, restraining the Harveys from further prosecuting their condemnation proceedings until the final hearing in the injunction case should be had; and, to reverse this order of the district court granting the temporary injunction, the Harveys, as plaintiffs in error, bring the case to this court.

It appears that prior to the construction of the railway, and on April 8, 1886, the Harveys, for the consideration of one dollar and other benefits, entered into a written contract with the railway company to grant, and finally to convey, to it, by a proper deed, the right of way across their land; and they permitted the railway company to take the immediate possession of such right of way under such contract, and to construct thereon its railway. This contract contains the following clause: "The condition upon which said right of way is granted is that the railway company shall erect and maintain a passenger depot, with proper side tracks and stock-yards, sufficient to do the business there offered, at a point on the east half of the north-west quarter of 17, 22, 21, in Anderson county, Kansas." The record shows that the second word in the above clause is "condition;" but it seems to be admitted by the parties that the word in the contract itself is "consideration." It seems to be admitted by the parties that the railway company has constructed its railway across the defendants' land, and that it has erected and is maintaining a passenger depot and a side track and stock-yards; but the Harveys claim that they are not sufficient for the business offered at that point; and that they have not been continuously maintained; and indeed that the extra

track there constructed is not a "side track" at all, but is merely a "spur track;" and this for the reason that it is connected with the main track only at one end. It is between three and four hundred feet long. The railway company, however, claims that it has substantially, at least, if not fully and completely, complied with all the conditions of the contract. It would seem, under such circumstances, that condemnation proceedings under the statutes would hardly be the proper remedy. *Railway Co. v. Hopkins*, 18 Kan. 494. In such proceedings, the Harveys would recover damages precisely the same as though no contract had ever been entered into between the parties, and as though no side track or depot or stock-yards had ever been constructed or maintained. This would seem wrong. Must the company lose all? If the Harveys can maintain ordinary condemnation proceedings, they would have the right, if they should so choose, to maintain an action in the nature of ejectment to evict the railway company entirely from their premises. Would this be right? It would seem that a more proper remedy for the Harveys, if they think that the railway company has not fully performed its part of the contract, would be to commence an action to compel the company to so perform, or to commence an action for damages for its failure to perform, or to commence an action to have a forfeiture declared. In an ordinary action for damages, the Harveys could recover exact compensation for all the losses which they may have sustained by reason of any non-fulfillment on the part of the railway company of any of the provisions of the contract which the railway company should perform. This would seem to be just; while, if they are permitted to maintain their condemnation proceedings, and to obtain full compensation, as though no depot or side track or stock-yards had ever been constructed or maintained, it would seem to permit them to do a great injustice to the railway company. But we shall not decide this case upon its merits, as it has not been brought to this court in such a condition that we can do so. The only question for us now to consider is whether the temporary injunction was properly granted or not. It was granted to remain in force only until the case should be finally heard and determined upon its merits in the district court; and we think it was properly granted. There seems to have been an honest difference of opinion, and an honest dispute between the parties, as to whether the conditions of the contract had been fully complied with or not on the part of the railway company, and, if not complied with, then as to how great the failure on the part of the railway company was; and, certainly, under such circumstances, condemnation proceedings should not be prosecuted prior to the final determination in the district court as to just what had been done or omitted to be done by the railway company. *Railroad Co. v. Dryden*, 11 Kan. 186. We think the temporary injunction was properly

granted, and the order of the court below granting the same will be affirmed. All the justices concurring.

(44 Kan. 470)

**HESS v. SPARKS.**

(*Supreme Court of Kansas. Jan. 10, 1891.*)

**SLANDER—PRIVILEGED COMMUNICATIONS—PLEADING.**

In an action for slander, the question whether the language spoken was a privileged communication is not raised by a general denial. The privilege must be pleaded.

On rehearing. For former report, see 24 Pac. Rep. 979.

*Pyburn & Jeffries, Peckham & Henderson, and C. N. Sterry*, for plaintiff in error. *W. P. Hackney*, for defendant in error.

**PER CURIAM.** It is urged that the opinion handed down in this case wholly ignores the question whether the language spoken by defendant below was a privileged communication or a qualified privileged communication. It is said that defendant below was one of the board of directors, and one of the largest stockholders of the company; and that the communication was made to the then secretary and treasurer of the company, in relation to an employee of the company. The answer in this case was a general denial only. No facts in justification, or privilege or qualified privilege, were alleged as new matter; therefore this question, so forcibly pressed upon the hearing of the motion for a new trial, was not before the trial court under the pleadings. The demurrer to the evidence was properly sustained, and also the instruction prayed for properly refused, considering the pleadings and issues presented. Bliss, on Code Pleading, in section 363, says: "Facts in justification, either as showing the truth of the charge or that the publication was privileged, were always required to be specially pleaded. Facts in mitigation are just as essentially new matter. They disprove no fact which the plaintiff is bound to establish. They create issues upon which no evidence can be offered until raised by the defendant. They should then be set up in the answer." The other facts presented are sufficiently disposed of in the former opinion. The motion for rehearing will be overruled.

(45 Kan. 221)

**GAMMON *et al.* v. BLAISDELL.**

(*Supreme Court of Kansas. Jan. 10, 1891.*)

**VENDOR AND VENDEE—BREACH OF CONTRACT—FAILURE OF TITLE.**

1. Where a person is the equitable owner of real estate, and, as such owner, enters into a written contract with another person to sell to him the same, the purchaser cannot subsequently allege, as a breach of the contract, that the real estate, after the execution of the contract, has been condemned and taken by a railroad company under the right of eminent domain. *Kuhn v. Freeman*, 15 Kan. 423.

2. When the purchaser of real estate brings an action against his vendor for an alleged breach of contract, on the ground that the vendor has neither the legal nor the equitable title to the same, the burden of proof is upon him to establish the allegations of his petition by competent evidence.

3. The evidence in this case examined, and held not to show that, at the date of the purchase by B. from G. and F., the latter did not have the equitable title to the real estate sold by them. (*Syllabus by the Court.*)

Error from district court, Shawnee county; *JOHN GUTHRIE*, Judge.

*J. D. McFarland and Charles Curtis*, for plaintiffs in error. *Hazen & Isenhardt*, for defendant in error.

**HORTON, C. J.** This was an action brought in the court below by Charles H. Blaisdell against F. R. Gammon and M. E. Fowler, partners, as Gammon & Fowler, for damages for an alleged breach of contract for the sale of real estate. On the 22d day of May, 1886, Gammon & Fowler received from Blaisdell \$150, as part of the purchase money for lots 1, 2, and 3, in block 55, in North Cullison, Pratt county, and gave a receipt, a copy of which is as follows: "Topeka, Kansas, May 22d, 1886. Received this day from Charles H. Blaisdell one hundred and fifty dollars as part payment on lots 1, 2, and 3, in block 55, Cullison, Pratt county, Kansas, whole purchase price to be \$300; the \$150, balance due in one year from date. GAMMON & FOWLER." In his petition, Blaisdell alleged that, at the time he paid the \$150, and obtained his receipt, Gammon & Fowler had no legal or equitable title to the lots; therefore, that he was entitled to recover his damages. After his purchase Blaisdell received \$45 from Gammon, and, upon the trial, obtained judgment against Gammon & Fowler for \$124.54, being the balance of the money that he had paid, with interest thereon. Gammon & Fowler excepted to the judgment of the court, and bring the case here.

It appears from the record that on the 2d day of March, 1887, after Gammon & Fowler had executed the receipt to Blaisdell, the Chicago, Kansas & Nebraska Railroad Company condemned and took possession of all of the lots which Gammon & Fowler had agreed to sell. Lot 1 was appraised at the sum of \$20, lots 2 and 3 at \$15 each, making \$50. This amount was deposited by the railroad company with the treasurer of Pratt county. It was subsequently paid to F. R. Gammon, and \$45 of it sent on August 30, 1887, by Gammon, in a letter to Blaisdell. He received the money, but refused to accept it in condemnation of the lots. In the absence of instructions from Gammon, he gave him credit for \$45 on the value of the lots, but stated he would look to him for the balance of the money paid by him. We do not think that the condemnation proceedings gave any authority to Blaisdell to commence or maintain his action for a breach of the contract for the sale of the lots. It was said in *Kuhn v. Freeman*, 15 Kan. 423, that "none of the usual or ordinary covenants in a deed can be broken by a portion of the land covered by the covenant being taken under the right of eminent domain. The exercise of the right of eminent domain is the exercise of a sovereign power, and no person is presumed to covenant against the acts of sovereignty; hence, where the deed has already been executed, and afterwards



the vendor sues the vendee for the purchase money, it is universally held that the vendee cannot set up, as a defense to the action, that a portion of the land has, since the execution of the deed, been taken under the right of eminent domain, and therefore that some of the covenants in the deed have been broken. Nor can the vendee sue the vendor in such a case in a separate action, on the supposed broken covenant. He must pay the vendor the full amount of the purchase money, and receive the condemnation money paid as damages for his compensation. This is the only remedy he has. The case at bar, however, is to some extent different from the above. The deed in this case was not executed at the time when the sale was made, and, before the deed was executed, the easement of the right of way had attached to the land, so that the vendor cannot now make an absolute and perfect conveyance, as he agreed to do. But still this difference in the facts, we do not think, should make a difference in the decision of the question involved. It cannot be presumed when the vendor agreed to make a good and perfect conveyance, that the parties contemplated that he was agreeing to do a thing notwithstanding what might be the future acts of the sovereign authority. When Weisbach agreed that he would make a good title, he had absolute and complete title to the land. By the agreement and sale, the land became in equity the property of Hamaker. The legal title was allowed to remain in Weisbach merely as a security for the payment of the notes, and may be considered merely in the light of an equitable mortgage."

It is urged, however, by the counsel for the plaintiff below, that neither Gammon nor Fowler had any legal or equitable title to the lots sold by them, and, therefore, that the case of *Kuhn v. Freeman* is not applicable. In support of this assertion they say that Gammon testified upon the trial that the only thing that he had at the time of the contract with Blaisdell, and that the only thing that he had at the time the second payment from Blaisdell became due, was a contract with the Occidental Town Company, in which he had agreed to purchase the lots from them. Therefore, as he only had an agreement to purchase, he had no legal or equitable title, because such an agreement does not amount to a sale. Under the petition, the burden of proof was upon the plaintiff below to show that neither Gammon nor Fowler had any legal or equitable title to the lots at the time of the contract with Blaisdell. Gammon testified upon the trial, among other things, as follows: "Question. Prior to the sale of these lots to Blaisdell, who did they belong to? Answer. They belonged to Gammon & Fowler. Q. Who did they buy them of? A. The Occidental Town Company. Q. Did you have a contract? A. Yes, sir. Q. In whose name was the contract? In yours, or in the name of Gammon & Fowler? A. I think in my name. I think these lots were in my name. Q. Did the Occidental Town Company subsequently convey the lots to you under the contract? A. They

did. Q. Have you ever refused to make a deed for these lots to Mr. Blaisdell? A. No, sir. Q. You may state if you now are ready to make a deed conveying these lots to Mr. Blaisdell, subject to the rights of the Chicago, Kansas & Nebraska Railroad Company, acquired by the condemnation proceedings. A. I am." Upon cross-examination, he further testified: "Question. When did you make the contract with the Occidental Town Company for these lots? Answer. I think in April or May following. Q. In April or May following? A. Yes, sir; in 1886. Q. How many lots did you buy at the time you bought them? All of them? A. Oh, no, sir; only a very small portion of them, I think. Q. What kind of an instrument of writing did they give you? A. A regular printed contract like the Arkansas Valley Town Company, which operates on the Santa Fe. Q. You did not have title to this property at the time of your contract with Blaisdell? A. I had a contract. Q. You did not have any deed to this property? A. No, sir; I had a contract with the town company. Q. When did you get the deed from the town company? A. Within the last six months, I should say. It may be longer. Q. Did you have a deed for this property at the time Blaisdell was down to make this second payment? A. No, sir. Q. Then you did not have a deed at the time the second payment became due? A. No, sir. Q. You only had a contract? A. That is all. Q. Where is that contract? Have you got one with you? A. No, sir; it is in Cullison, at home. Q. You have not got any contract with you? A. No, sir; I have not." All of this evidence tends to show that Gammon & Fowler had, at the time of the contract with Blaisdell, the equitable title to the lots mentioned in the receipt, under a written contract from the Occidental Town Company. Subsequently, upon his cross-examination, Gammon used language to the effect that his contract from the town company was only an agreement to sell. This language, however, was more in the nature of an opinion or construction of a written contract, than anything else. The written contract between the Occidental Town Company and Gammon & Fowler will show whether it was a contract to sell or a sale of the lots by the town company. This, of course, should have been produced upon the trial, but as the plaintiff below alleged that Gammon & Fowler had no legal or equitable title to the lots sold by them, they should have established this by competent testimony. Plaintiff below could have obtained this contract, if he had made proper efforts so to do. If the contract could not have been obtained, then secondary evidence of its contents would have been admissible. At the time that defendants below interposed their demurrer to the evidence, it was not sufficient, under the issues of the pleadings, for the plaintiff below to recover. The subsequent evidence of Gammon, which was wholly incompetent, if proper objections had been taken thereto, did not supply the defects. Upon the trial, plaintiff below offered in evidence a copy of a letter

written by him to F. R. Gammon on September 1, 1887, without laying any proper foundation therefor. It is doubtful, however, if the objection made to the copy was sufficiently definite to establish error. *Smith v. Leighton*, 38 Kan. 544, 17 Pac. Rep. 52. The judgment of the district court will be reversed, and cause remanded for new trial. All the justices concurring.

(45 Kan. 179)

AXMAN v. DUEKER *et al.*

(Supreme Court of Kansas. Jan. 10, 1891.)

JUDGMENT—COLLATERAL ATTACK.

Where, in a suit commenced in the district court, garnishment and attachment proceedings have been instituted, and the defendant has made a special appearance to contest the jurisdiction of the court over the subject-matter of the action, and an adverse ruling has been obtained, and there is sufficient in the record to show that the court had jurisdiction over the subject-matter, *held*, that the order of the court requiring the garnishee to answer, and the other proceedings in attachment, cannot be attacked collaterally, and that such order and proceedings are conclusive until reversed or set aside in a direct action.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Geary county; M. B. NICHOLSON, Judge.

*J. R. McClure*, for plaintiff in error. *Thomas Dever, D. Overmyer*, and *J. V. Humphrey*, for defendants in error.

GREEN, C. On the 12th day of May, 1887, C. F. Ziegler commenced an action in the district court of Davis (now Geary) county, against L. C. Pfaffenberger, who was a non-resident of the state, and caused an order of attachment to issue. Service was made upon the defendant by publication. The affidavit for the attachment stated that the defendant was a non-resident, and had property in Davis county, and that one William J. Dueker, of said county, had moneys and credits and effects in his hands and under his control, and was indebted to the defendant. A copy of the order of attachment was delivered to Dueker. On the 19th day of September, 1887, Pfaffenberger entered special appearance in the district court, and made a motion to dismiss the action commenced by Ziegler, and to set aside the service by publication, the order of attachment and garnishee notice, for the following reasons: "(1) That the publication failed to show that service of summons could not be made; (2) that the return of the sheriff to the order of attachment did not show that any property had been attached or garnished; (3) that no legal notice of attachment or garnishment proceedings had been made, as required by law." Upon this motion, the court held that there was sufficient in the record to compel Dueker to answer, as garnishee, touching his indebtedness to Pfaffenberger; to which ruling the defendant excepted. The garnishee answered, and was ordered to retain the money in his hands until the further order of the court. On the 11th day of January, 1888, the plaintiff, R. Axman, as the assignee of Pfaffenberger, commenced an action against Dueker, the garnishee, to recover the amount due upon a promissory

note executed by Dueker to Pfaffenberger. Upon the application of the defendant, Ziegler was made a defendant, and his inter-plea set out the attachment proceedings, and he claimed a lien upon the money due from the defendant by virtue of such proceedings. The court below found that Ziegler had a lien upon the moneys sued for in this action, to the amount of \$565.83, and his costs taxed at \$38.05, under the attachment and garnishment proceedings in the case of *Ziegler v. Pfaffenberger*, and awarded judgment for the plaintiff for the balance due on the note. To this judgment, the plaintiff in error excepted, and brings the case here for review.

The claim is made that, before judgment could have been entered, there must have been a finding by the court in the case of *Ziegler v. Pfaffenberger* that complete jurisdiction had been acquired, both over the person and the subject-matter of the action, in the manner authorized by law; and that where a garnishee pays a judgment against himself, based upon a judgment without jurisdiction, he is not protected by the judgment against a subsequent action by the principal defendant or other creditor. This statement of the legal proposition may be true, but the only question for our determination in this case is whether the court acquired jurisdiction over the subject-matter of the suit. The suit instituted by Ziegler was to subject the money owing by Dueker to Pfaffenberger to the payment of his debt; hence, it was a proceeding *in rem*, and we think there was sufficient evidence in the record to give the court jurisdiction; besides, the defendant in this case made a special appearance for the purpose of contesting the jurisdiction of the court over the very subject-matter of the action, and obtained an adverse ruling, and this ruling still stands of record, and is conclusive until reversed or set aside in a direct proceeding, and the plaintiff in error could not attack the proceedings had in that case in the trial of this. In *re Dill*, 32 Kan. 691, 5 Pac. Rep. 39. The general rule is that a garnishee is protected by the order and judgment of the court, notwithstanding error and irregularity in the proceedings; and an order of court that the garnishee pay into court the sum attached in his hands cannot be collaterally attacked, if the court has jurisdiction, and there has been no appeal. *Wap. Attachm.* 522; *Wilson v. Burney*, 8 Neb. 39; *Gray v. Canal Co.*, 5 Abb. N. C. 131. Upon the question of adjudication in such proceedings, this court has said: "The old rule that the decision made upon a motion is not *res adjudicata*, and does not prevent a re-examination of the question decided, in the more regular form of a suit, either at law or in equity, no longer obtains in its former strictness. Regard is now had, less to the form of the proceedings, and more to the substance and condition of the decision. *Hoge v. Norton*, 22 Kan. 375; *Commissioners v. McIntosh*, 30 Kan. 234, 1 Pac. Rep. 572. The judgment of the court should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 158)

CUNNINGHAM *et al.* v. BARR *et al.*

(Supreme Court of Kansas. Jan. 10, 1891.)

## MECHANIC'S LIEN — NOTICE — SUFFICIENCY OF STATEMENT OF CLAIM.

1. Where, under the mechanic's lien law of 1872, a statement for a subcontractor's lien for materials furnished was filed with the clerk of the district court within 60 days after the contractor had completed the building, but not within 60 days after the subcontractor had fulfilled his contract with the contractor, *held*, that the statement was filed in time.

2. Where it appears from the statement for a subcontractor's lien that the subcontractor, or one of a firm of subcontractors, had appeared before the clerk of the district court and subscribed and swore to the statement, *held*, that the statement was properly verified.

3. Where it is shown from the statement for a subcontractor's lien and otherwise that the contractor purchased of the subcontractor materials to be put into the house of the owner of the land, and that such materials were actually put into such house, *held*, that such statement is not necessarily invalid, although it may also be shown from such statement that the credit was originally given to the owner of the property.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. ABBOTT, Judge.

C. W. Morse and H. R. Boyd, for plaintiff in error. Hopkins & Hoskinson, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Finney county by Henry C. Cunningham, Isaac N. McBeth, and Edward H. McBeth, partners as the Western Lumber Company, against George W. Keeler and E. L. Hudson, partners as Keeler & Hudson, and Benjamin H. Barr, to obtain a personal judgment against Keeler & Hudson, for the sum of \$412.91 and interest, and to foreclose a subcontractor's lien as against the defendant Barr. The defendant Barr demurred to the plaintiffs' petition upon the ground that it did not state facts sufficient to constitute a cause of action, and the court sustained the demurrer; and the plaintiffs, as plaintiffs in error, bring the case to this court for review. It appears that the defendant Barr owned certain town lots in Stevens' second addition to the city of Garden City, and, desiring to build a house thereon, contracted with Keeler & Hudson to build the same, and they purchased the lumber and materials therefor from the plaintiffs, and, failing to pay a portion of the purchase price therefor, the plaintiffs filed a statement in the office of the clerk of the district court to obtain a subcontractor's lien upon the aforesaid property of the defendant Barr; and the only question now involved in the case is whether such statement is valid or not. If such statement is valid, then the plaintiffs' petition stated a good cause of action; but, if such statement is not valid, then the petition did not state any cause of action as against Barr. The grounds upon which it is claimed by Barr that the statement is invalid are as follows: *First*. It is claimed that it was not filed in time. *Second*. It is claimed that it was not properly verified. *Third*. It is claimed that the facts stated therein are not sufficient to authorize a subcontract-

or's lien. We shall consider these objections to the statement in their order.

1. Was the statement filed in time? It shows upon its face, and it is so alleged in the petition, that the contract between the plaintiffs and Keeler & Hudson for the materials furnished by them was made prior to July 13, 1887, and that the contract was completed, and the last portion of the materials was furnished, on that day; and the petition alleges and shows that the house was completed on August 25, 1887, and the statement for the lien was filed on September 12, 1887. Under the statutes as they existed at the time these materials were furnished, and at the time when the statement for the lien was filed, the statement for the lien should have been filed within 60 days after the completion of the building. The words of the statute are as follows: "Within sixty days after the completion of the building, improvements, or repairs, or the furnishing or putting up of fixtures or machinery, or the performing of such labor." Laws 1872, c. 141, § 2; Comp. Laws 1885, par. 4448. Now, the statement in the present case was certainly filed within 60 days after the completion of the building, and this we think was sufficient. *Clough v. McDonald*, 18 Kan. 114; *Davis v. Bullard*, 32 Kan. 234, 4 Pac. Rep. 75; *Seaton v. Chamberlain*, 32 Kan. 239, 4 Pac. Rep. 89; *Seaton v. Hixon*, 35 Kan. 663, 665, 12 Pac. Rep. 22; *Shellabarger v. Thayer*, 15 Kan. 619; *Crawford v. Blackman*, 30 Kan. 527, 1 Pac. Rep. 136.

2. Was the statement for the lien properly verified? The statement for the lien with the verification reads as follows: "State of Kansas, Finney county—ss: In the Finney county district court. On the 12th day of September, A. D. 1887, before me, the undersigned clerk of the district court in and for Finney county, state of Kansas, personally appeared Isaac N. McBeth, a member of the firm of Western Lumber Co., composed of Henry C. Cunningham, Isaac N. McBeth, and Edward H. McBeth, which said firm has been for more than one whole year last past, and is now, engaged in the lumber business at the city of Garden City, Kansas, and that Benjamin H. Barr then was and now is the owner of lots 23 and 24, in block 38, in Stevens' second addition to Garden City, Kansas; that on, to-wit, 1st day of May, 1887, Keeler & Hudson, contractors and builders, contracted with the said Benjamin H. Barr to furnish all labor and material, and build a house for said Benjamin H. Barr on said lots 23 and 24, block 38, in Stevens' second addition to Garden City, Kansas; that in compliance with said contract the said Keeler & Hudson contracted with the Western Lumber Company to furnish a bill of lumber to the amount of six hundred and fifty-four dollars and eighty cents; that said Western Lumber Company did between the 20th day of May, 1887, and the 13th day of June, 1887, both days included, furnish a bill of lumber, an itemized bill of which is hereto attached and made a part hereof, which said lumber actually went into the building erected by said contractors on said lots 23 and 24, block 38, Stevens' sec-

ond addition to Garden City, Kansas, aforesaid. It was then agreed that said Western Lumber Company should receive for bill of lumber the sum of six hundred and fifty-four dollars and eighty cents. That there has been paid on said bill of lumber the sum of two hundred and forty-one dollars and eighty-nine cents. That there is now due the Western Lumber Company the sum of four hundred and twelve dollars and ninety-one cents. Said contract was duly completed on the 13th day of July, 1887. That said Benjamin H. Barr is justly indebted to the Western Lumber Company on said bill of lumber in the sum of four hundred and twelve dollars and ninety-one cents, with interest at 7 per cent. from July 13th, 1887. [Signed] I. N. McBERTH. Subscribed and sworn to before me this September 12th, 1887. [Signed] O. A. HARDING, [Seal] Clerk Dist. Court. [Indorsed] Mechanic's Lien. Owner, Benjamin H. Barr. Contractors, Keeler & Hudson. Subcontractors, Western Lumber Company. Amount due, \$412.91. Filed Sept. 12, 1887. O. A. HARDING, Clerk Dist. Court." Here follows as a part of the statement a long itemized bill of materials furnished. We think the statement was properly verified.

3. Are the facts stated in the statement for the lien sufficient to authorize a valid lien? We think they are when taken in connection with the other facts stated in the petition. The only objection to the statement in this regard seems to be that it shows that the credit was originally given to the defendant Barr, but the petition and the statement, and the original itemized bill filed with the statement and made a part thereof, all show that the lumber was purchased by Keeler & Hudson of the plaintiffs for Barr and for his house; and the petition shows that it was actually used in the house, and therefore we certainly think that the statement is sufficient in this particular. The order and judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

(45 Kan. 189)

CHICAGO, K. & W. R. CO. v. DONELSON.

(Supreme Court of Kansas. Jan. 10, 1891.)

EMINENT DOMAIN—DAMAGES—OPINION EVIDENCE.

In a condemnation proceeding for a right of way of a railroad, it was claimed that the construction of the road interfered with the natural drainage of the land not taken; that the ditches would not carry off the water, and a portion of the land would be overflowed and injured. A witness, who was acquainted with the land, and had seen the road and ditches since they were made, but who had not measured the capacity of the ditches, and had not seen an overflow of the land, there having in fact been none since the construction of the road, was asked, and allowed to answer, what proportion of the plaintiff's land was subject to overflow from the ditches. *Held* that, as the witness was not a surveyor or civil engineer, and had no special skill that would enable him to take levels or make calculations as to the quantity of water which would accumulate, and could be discharged through the ditches, or to make measurements and calculations to the extent of land that would be affected, if there was an overflow of the ditches, was not competent to give an opinion

upon the subject, and that his testimony should have been excluded.

(Syllabus by the Court.)

Error from district court, Chautauqua county; M. G. TROUP, Judge.

George Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. L. C. Whitney and J. D. McBrien, for defendant in error.

JOHNSTON, J. This was an appeal by Samuel Donelson from an award made by commissioners appointed to condemn a right of way through an 80-acre tract of land owned by Donelson in Chautauqua county. The extent of land taken was 548-100 acres, and the amount awarded by the commissioners was \$320. The trial of the appeal in the district court resulted in an award of \$1,095.85, as the aggregate amount of damages sustained by Donelson. In answer to special questions, the jury found that the value of the land taken was \$274; that the damages to the land north of the right of way was \$100, and to the land south of the right of way was \$150. They further found that the land south of the right of way is damaged by the probable overflow of ditches, allowing the water to spread over about 30 acres of land, and damaging it to the amount of \$425. They also allowed \$26 as damages for the overflow of surface water from other lands. An item of damages was allowed for failing to construct a farm crossing. And these items, together with the interest, make up the aggregate of the award. It was claimed that the construction of the road through Donelson's land had interfered with the natural surface drainage of the land, and had diverted the course of the flowage of the water resulting from the rain-fall on the hilly land near that of plaintiff in such a way as to cause damages to his land. A witness named Miller was interrogated by the plaintiff in regard to the damages resulting from the overflow. Over the objection of the railroad company, he was asked, and allowed to answer, what proportion of the plaintiff's land was subject to overflow from the ditches constructed by the railroad company. The objection urged was that the witness was incompetent to state the fact, or give an opinion upon the subject. The witness was not shown to be competent, and his testimony should not have been received. He was a farmer who had lived in the vicinity of the land for 17 years, and had examined the plaintiff's land since the construction of the road. He had seen the ditches and embankments, which he claimed would cause the overflow, but had not measured their depth, and did not know whether they extended through the plaintiff's land. At no time since the construction of the road had he seen an overflow of the land, or any injury which had resulted to it by reason of a freshet or overflow. He was therefore incompetent to testify to any fact from observation or knowledge, and could only give an opinion, as an expert, of the probable overflow which might occur in the future. It was not shown that he had any special skill which would enable him to

give an opinion that would be valuable or admissible. It did not appear that he was a surveyor or civil engineer, or that he had ever taken any levels, or made any calculations, as to the quantity of water which would accumulate and could be discharged through the ditches, or any measurements or calculations of the extent of land that would be affected, if there was an overflow of the ditches. In fact, it appears that he only gave an estimate of the width and depth of the ditches, and was unable to testify whether they extended entirely through the plaintiff's land. The question involved a calculation in engineering, as to the extent of country drained into the ditches, and the dimensions and capacity of the ditches to carry off the surface water that might flow into them. The sloping character of the ground and the level of the ditches should be considered to determine the rapidity of the flow, and the capacity of the ditches to discharge the water. If the ditches were insufficient to carry off the water that would probably fall in that section of the country, and upon the area that would run into the ditches, then the witness would have to determine the extent of the land that would be reached by an ordinary overflow, and the rapidity of such overflow would have much to do with the injury that would result therefrom. A surveyor or civil engineer who had made a survey of the ditches, and had taken levels at various points upon the land liable to be overflowed, would have been a competent witness. But the witness was not skilled, and presented no claims entitling him to give an opinion as a scientific expert. As a farmer, he might give his opinion on matters ordinarily connected with farming, and his testimony was proper, so far as it related to specific facts. We find no testimony of an overflow from the ditches since the construction of the road, nor anything which satisfactorily shows the incapacity of the ditches to carry off the surface water which would probably pass into the same. The jury made a liberal award for the anticipated damages from this cause, based largely upon incompetent testimony; and hence the ground of error assigned must be sustained. We find no objection to the instruction complained of, and there are no other matters upon which we deem it necessary to pass. The judgment will be reversed, and the cause remanded for another trial. All the justices concurring.

(45 Kan. 167)

FT. SCOTT, W. &amp; W. R. CO. v. HOLMAN.

(Supreme Court of Kansas. Jan. 10, 1891.)

## STOCK-KILLING—DEMAND.

Where the owner of a steer, killed by a railroad company in the operation of its trains, makes out a bill, in writing, stating an account in favor of himself, and against the company, for the value of the animal killed, giving the date of the accident, and presents said bill to the company within 30 days from the date of the accident, held, in an action for the recovery of the value of the steer, that the making and delivery of said bill is a sufficient demand upon the company for the value thereof.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

J. H. Richards and C. E. Beuton, for plaintiff in error. J. S. West and Humphrey & Hudson, for defendant in error.

STRANG, C. This was an action by the plaintiff below to recover, as damages, the value of a steer killed by the cars of plaintiff company. It is admitted that the steer was killed by the cars of the company under such circumstances as would render it liable, if the demand for damages is held sufficient. It is also admitted that the value of the steer was \$25. The demand was in writing upon a form furnished by the railroad company, and denominated a "stock application." It was filled up as follows, and presented to said company in due time, under the law: "St. Louis, Fort Scott and Wichita Railroad Company, to E. T. Holman of Bronson, Kansas, Dr.: For the following animals killed by the locomotives and cars of said company on its railroad track. Date of accident, Oct. 6th, 1887. Description. One red steer. Value, \$25." To which was annexed a statement of the purpose of the company, and a series of questions which were answered by the claimant, the whole of which was verified by him. Does such a statement of a claim amount to a demand? We think it does. It is denominated a "stock application," but is it not rather an application for payment for stock injured by the train of the company? Its form shows it is. If it is an application for compensation, by the owner thereof, for stock injured by cars of the company, and it is filled up and delivered to the company by the applicant, is not that a sufficient demand of payment for his stock? We do not see how a better demand could be made. It notifies the company of the injury to the owner's steer, its value, the date of the accident, and says the company is indebted to him therefor. The form of claim furnished by the company and used in this case contains the following printed statement: "It is the desire of this company, after satisfactory investigation, to pay the reasonable value of all stock killed, where a meritorious claim is made out, and it is not deemed improper to ask a claimant to answer the following interrogatories on presenting a claim, and make oath thereto." We see no difference between a claim of payment for stock killed and a demand for payment therefor. "It is not deemed improper to ask a claimant to answer the following interrogatories on presenting a claim." On presenting a claim for what? For the value of stock killed. When are the interrogatories to be answered? On presenting a claim; that is, on making a demand. Then follow the questions submitted by the company for the purpose of eliciting information relating to the accident and the claim founded thereon, which are to be answered by the owner in connection with the demand. The character of the form used, when fully analyzed and considered, satisfies us that it was prepared by the company with a view of being filled up and presented as a claim, or

demand, by the owner thereof, for the value of the stock injured by the company in the operation of its trains; the object of the company in furnishing the form being to secure, in connection with the demand, information that would assist it in looking up the claim to determine whether or not to pay it. At any rate, we think the claim, as presented, amounted to a demand. Another claim made by the plaintiff in error is that the court erred in fixing the amount of the attorney's fee at \$45. The defendant answers this claim by saying it may be disposed of by remitting \$10 of the attorney's fee as found by the court. This offer to remit a portion of the attorney's fee in this court imposes the costs of this court upon the defendant. It is therefore recommended that the judgment of the district court be affirmed upon the condition that the defendant remits \$10 of the attorney's fee, and pays the costs of this court.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 176)

SMITH, Sheriff, v. RANKIN *et al.*

(Supreme Court of Kansas. Jan. 10, 1891.)

SALE—CONSIDERATION—LIABILITY OF SURETY.

The liability of a surety on the obligations of his principal, and the promise of the surety to pay such obligations in the future, is a sufficient consideration to support a *bona fide* sale and transfer of property from the principal to the surety.

(Syllabus by the Court.)

Error from district court, Russell county; S. O. HINDS, Judge.

H. G. Laing, for plaintiff in error. W. G. Eastland and George W. Holland, for defendants in error.

JOHNSTON, J. This was an action of replevin, to recover the possession of a stock of implements, brought by defendants in error against James E. Smith, who, as sheriff, had seized the stock in attachment proceedings brought by the Buford & George Implement Company against Smith Bros. The Smith Brothers, who were engaged in the implement business, procured the defendants in error to join with them in signing certain notes and obligations, as sureties. Afterwards, when the Smith Brothers found themselves in failing circumstances, they transferred the stock of implements which they had on hand to the defendants in error at the stipulated price of \$2,000. The consideration of the transfer was the liability of these sureties on the notes which they had signed for Smith Bros., together with the promise that they would pay the same. Shortly after the sale and transfer, the stock of implements was attached by the Buford & George Implement Company, who alleged that the sale of the property was for the purpose of hindering and delaying the creditors of Smith Bros. in the collection of their debts, and this action to recover their possession immediately followed. The verdict of the jury was in favor of the defendants in error, and, there being sufficient evidence, it establishes the

good faith and honesty of the transaction. The notes which they signed represented a *bona fide* indebtedness, and the stock of goods transferred was insufficient to pay the obligations for which they were liable, and which they agreed to pay. It is contended by plaintiff in error that there was no consideration for the sale of the goods to the defendants in error, and this is the only material question which is discussed in his brief. The insolvency of the Smith Brothers practically settled the liability of the defendants in error on the notes which they had signed, and, more than that, the testimony is that at the time of the sale the sureties agreed to pay these debts. Some of them were paid about the time of the transfer, and others of them have been paid since that time. We think there can be no doubt that the liability of the defendants in error, as sureties, and their agreement to pay these debts, constitutes a sufficient consideration for the sale of the property. The liability of a surety alone is held to be a good consideration for a conveyance of property; but no room is left for question where, as here, there is an express promise to the principal to pay the debt. The Smith Brothers had a right to prefer one creditor over another, and they owed no higher obligation to any creditor than to those sureties who had aided them by their credit in carrying on the business. The goods were in their possession and subject to their disposal at the time of the sale, and it is competent for them to secure the defendants in error by a mortgage on the goods, or to satisfy them by a sale and transfer of the same for the liability which they had assumed, and which, by agreement, they had obligated themselves to pay. The question is not, as plaintiff in error suggests, whether the surety has a right of action against the principal before the maturity and payment of the debt, but it is, rather, whether the principal may honestly indemnify and protect the surety who has become liable for, and must pay, the debt for which he is surety. It is well settled that this liability is ample consideration for either a mortgage or the sale of property to the surety, and therefore, as the good faith of this transaction has been settled, we conclude that the sale in question must be upheld. *Miller v. Krueger*, 36 Kan. 344, 13 Pac. Rep. 641; *McWhorter v. Wright*, 5 Ga. 555; *Mandigo v. Mandigo*, 26 Mich. 349; *Gladwin v. Garrison*, 13 Cal. 330; *Stevens v. Bell*, 6 Mass. 339; *Cushing v. Gore*, 15 Mass. 73; *Swift v. Crocker*, 21 Pick. 241; *Kramer v. Bank*, 15 Ohio, 253; *Brandt*, Sur. §§ 186, 213. This disposes of every substantial objection made by plaintiff in error, and, as we find no error in the record, the judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 132)

EMPORIA MUT. LOAN & SAV. ASS'N v. WATSON.

(Supreme Court of Kansas. Jan. 10, 1891.)

HOMESTEAD EXEMPTION—SALE UNDER EXECUTION.

Action by plaintiff to foreclose a mortgage against Cupp and wife, in which Watson is made a defendant and claims title to the mortgaged

land under a sheriff's deed; and the facts show that the judgment under which Watson claims was obtained in the district court of the county in which the land is situated, on October 26, 1886, and the first day of the October, 1886, term of said court was October 4, 1886. And the facts further show that Cupp and wife purchased the land in controversy October 14, 1886, for a homestead, intending at the time to occupy it as such, immediately, and that they took possession of it as a homestead on the day of purchase, and have occupied it as a homestead ever since to the commencement of this suit. *Held*, that the judgment under which Watson claims never attached to the land; that, under the facts, the homestead right in the land was protected as against the judgment creditor and those who claim under him. And, further *held*, that the reply in this case stated a cause of defense to Watson's claim to the land as set out in his answer, and the demurrer thereto ought to have been overruled.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

*Cunningham & McCarty*, for plaintiff in error. *J. Jay Buck*, for defendant in error.

STRANG, C. Action to foreclose a mortgage against John Cupp and Mary Cupp, his wife, begun in the district court of Lyon county July 21, 1889. John Watson was made a party defendant, because he claimed some interest in the land described in the mortgage. Cupp and wife defaulted. Watson answered and claimed title to the land under a sheriff's deed. Plaintiff replied that the land sought to be foreclosed was the homestead of Cupp and wife; that they purchased it on the 14th day of October, 1886, as and for a homestead, and went into occupation thereof on that day, and continuously occupied it as a homestead from that time to the commencement of this suit. The defendant, Watson, demurred to the reply, and alleged that the reply stated no defense to his cause of action. The demurrer was sustained. The plaintiff elected to stand on its pleading, and judgment was rendered for the plaintiff against the Cupps for the amount of its mortgage, and in favor of the defendant, Watson, against all the other parties to the suit, quieting the title of said Watson to the lot in question. To this decision the plaintiff excepted, and comes here with its case made, asking a reversal of the judgment of the district court. October 14, 1886, Cupp and wife exchanged 80 acres of land with the defendant, Watson, for lot 29 in Coppley's addition to the city of Emporia. The deeds were exchanged by Cupp and wife and Watson and wife on that day, and Cupp and wife on that day went into possession of lot 29, and have ever since continuously occupied it as a homestead. The judgment under which Watson acquired title to said lot was rendered in Lyon county district court, October 26, 1886. The first day of said October, 1886, term was October 4th. The mortgage of the plaintiff company was recorded January 28, 1887. Now, if the judgment under which the defendant, Watson, derives title ever became a lien upon lot 29, it was a lien thereon before the mortgage of the plaintiff company attached thereto, and

the sale under such judgment gave good title; but, if said judgment never became a lien upon said lot, the sale of said lot thereunder conveyed no title. It is admitted under the pleadings that Cupp and wife were on October 14, 1886, occupying lot 29, as a homestead, and have continued to occupy it as a homestead, ever since. It follows then that if said judgment ever became a lien upon said lot, it must have attached thereto on or before the 14th day of October, 1886. But the judgment was not rendered until October 26, 1886. It could not become a lien upon anything before it was rendered, and, when rendered, by relation back it became a lien upon all the real estate owned by Cupp in Lyon county not exempt on the first day of the term at which it was rendered, to-wit, October 4, 1886. It did not become a lien by relation back on lot 29 on the first day of the term, or October 4, 1886, because Cupp did not own the lot until the 14th of October, 1886. So, if it became a lien upon said lot at all, it became such on October 14, 1886; but, as stated above, Cupp, immediately upon the receipt of his deed for the lot, went into possession thereof as a homestead. If, therefore, the judgment in question became a lien upon said lot, the lien must have attached during the brief space of time between the receipt of the deed by Cupp and the occupancy of the lot by himself and family as a homestead. The reply states that at the time Cupp and wife traded for this lot they did so, intending to make it their homestead, and to occupy it as such immediately. It is well settled in this state and other states that where a person, the head of a family, purchases a piece of land intending to make it a homestead for himself and family, and to occupy it as such, at once, and follows such intention up by immediate occupancy of the premises as a homestead, such land is all the while protected by the exemption provision from judgment liens. In *Edwards v. Fry*, 9 Kan. 417, Justice BREWER used the following language: "We know that a purchase of a homestead, and the removal onto it, cannot be made momentarily contemporaneous. It takes time for the party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now the law does not wait till all this has been done, and the purchaser actually settled in his new home, before attaching to it the inviolability of a homestead. A purchase of a homestead with the view to occupancy, followed by occupancy within a reasonable time, may secure, *ab initio*, a homestead inviolability." Also in *Monroe v. May*, Id. 466, the same justice says: "The homestead is something towards which the eye of the creditor need never be turned." In *Swenson v. Kiehl*, 21 Kan. 534, Justice BREWER, upon this subject, again says: "We do not mean that a party occupying a residence under a lease must of necessity wait until the exact instant of the termination of that lease, before making arrangements for his future home. The law favors homesteads,



and arrangements at about the time of the termination of such lease or occupation, and with a view thereto, are, for the purposes of a homestead question, considered as made contemporaneous with such termination." In *Riggs v. Sterling*, 27 N. W. Rep. 705, the court says: "And purchase with intention to use as a residence, followed by actual residence as soon as practicable, will give the premises the character of a homestead from the time of purchase." See *Gilworth v. Cody*, 21 Kan. 702; *Mitchell v. Milhoan*, 11 Kan. 617; *Colby v. Crocker*, 17 Kan. 527; *Reske v. Reske*, 51 Mich. 541, 16 N. W. Rep. 895; *Scotfield v. Hopkins*, 61 Wis. 374, 21 N. W. Rep. 259; *Hanlon v. Pollard*, 17 Neb. 368, 22 N. W. Rep. 767; *Crawford v. Richeson*, 101 Ill. 351; *Harrison v. Andrews*, 18 Kan. 535. It is claimed by counsel for defendant that, as the 80-acre tract of land which Cupp and wife gave in exchange for lot 29 was not a homestead, lot 29 was not purchased with homestead funds, and was therefore not exempt as a homestead. This position is not tenable. We recommend that the judgment of the district court be reversed, and case sent back for further proceedings.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 173)

GEE *et al.* v. THRAILKILL *et ux.*

(Supreme Court of Kansas. Jan. 10, 1891.)

EXPRESS TRUSTS—BY PAROL.

1. Under the laws of Kansas, an express trust concerning real estate can be created only in writing.

2. Therefore, where an owner of real estate conveyed the same in fee to another by a general warranty deed absolute upon its face, with the expressed consideration of \$1,500, but with no actual consideration, except a parol understanding between the parties that the grantee should sell or mortgage the property, and thereby obtain funds for the grantor, and should convey back to the grantor, whenever he might so desire, any part of the property remaining in the grantee's hands, held, that the parol trust, with respect to such real estate, was void, and the deed of conveyance was absolute and valid.

(Syllabus by the Court.)

Error from district court, Harper county; T. J. HERRICK, Judge.

George E. McMahon, for plaintiffs in error. Finch & Finch, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Harper county on June 11, 1886, by M. S. Thrailkill and Dora Thrailkill, husband and wife, against Rachel Ann Gee and Edwin Gee, wife and husband, to obtain the title to certain real estate situated in the city of Harper. The case was tried before the court, without a jury, and the court found generally in favor of the plaintiffs, and against the defendants, and rendered judgment accordingly; and the defendants, as plaintiffs in error, have brought the case to this court for review. The following are among the admitted facts: M. S. Thrailkill and Mrs. Gee were and are brother and sister. On May 3, 1884, the Thrailkills owned and occupied as a homestead the

property in controversy; but on that day they executed a general warranty deed therefor to Mrs. Gee, with the expressed consideration of \$1,500, which deed was duly acknowledged and recorded. Afterwards, the property was occupied at one time by a tenant, at another time by the Gees, but generally by the Thrailkills, and it was occupied by the Thrailkills at the commencement and during the prosecution of this action. With respect to most of the remaining facts, the evidence was directly and irreconcilably conflicting. Thrailkill testified to one state of facts, while Mrs. Gee and her husband testified to a wholly different state of facts, Thrailkill contradicting the testimony of the Gees, and they contradicting his testimony; but, as the court below found in favor of the Thrailkills and against the Gees, we must decide the case upon the theory that the testimony of Thrailkill was and is correct, and the contradictory testimony of the Gees is not true. Thrailkill's testimony is substantially as follows: He testified that, at the time of the execution of the aforesaid deed, his wife and one of his two children, a daughter, were sick, and their physician advised that they should be removed from that locality, and they all finally agreed to remove to the state of Colorado, and, believing that they might need additional funds while there, conveyed the property in question to Mrs. Gee, as aforesaid, without any consideration whatever, except the parol understanding that Mrs. Gee might sell or mortgage the property, and thereby obtain funds to send to them in Colorado, and that she should convey back to them, whenever they might so desire, any part of the property remaining in her hands; that the sick daughter died; that they did not go to Colorado; that Mrs. Gee did not sell or convey any of the property, and has never conveyed back to them any part of the same; and that they have never in fact received from Mrs. Gee, or from any one else, the slightest consideration for the property. Now, if all this testimony of Thrailkill's were true, then the property was conveyed to Mrs. Gee for the sole purpose that she might hold it for them in trust for the aforesaid specified purpose, and such trust was created by the parol agreement of the parties, and was an express trust. Would such a trust be valid? It was not created in writing; but, if created at all, was created only in parol. The deed of conveyance was absolute and unconditional upon its face; conveyed the property in fee, without the slightest reservation or condition. It contained all the usual covenants, and made no attempt to create a trust. Therefore the trust, supposed to have had an existence, was created wholly by the parol agreement of the parties, in contradiction of the written terms of the deed of conveyance, and destroying its terms and its tenor and effect to a great extent. Such a trust cannot be created under the laws of Kansas. Act relating to frauds and perjuries, § 5; act relating to conveyances, § 8; act relating to trusts and powers, § 1; *Morrill v. Waterson*, 7 Kan. 129;

**Knaggs v. Mastin**, 9 Kan. 532; **Ingham v. Burnell**, 31 Kan. 333, 2 Pac. Rep. 804. Under the laws of Kansas, an express trust concerning real estate can be created only in writing. The trust in the present case was not so created, and therefore it was void, and the deed from Thraikill and wife to Mrs. Gee was absolute and valid. We think the court below erred in overruling the defendants' demurrer to the plaintiffs' petition, the defendants' demurrer to plaintiffs' evidence, and the defendants' motion for a new trial. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.

(45 Kan. 162)

**HILL et al. v. LEWIS et ux.**

(Supreme Court of Kansas. Jan. 10, 1891.)

**CANCELLATION OF DEEDS—FRAUD—NECESSARY PARTIES.**

In an action to set aside certain conveyances of real estate, it was alleged that the plaintiffs, L. and husband, owned and resided on a tract of land as their homestead, and that, while so occupying it, the husband executed a conveyance of the same to H., without the consent of his wife; that, subsequently, H. and his wife, Lydia H., executed a deed with the usual covenants of warranty to P. The action to set aside both of these conveyances was brought against H. and P., without joining as a defendant Lydia H., one of the grantors of P. Held, that she is a necessary party in the action to cancel the deed in which she joined as grantor, and that the petition disclosed upon its face a defect of parties defendant.

(Syllabus by the Court)

Error from district court, Graham county; **LOUIS K. PRATT**, Judge.

**Tritt & Roberts**, for plaintiff in error.  
**G. W. Jones** and **W. A. S. Bird**, for defendant in error.

**JOHNSTON, J.** In this action, **Nora Lewis** joined her husband, **J. C. B. Lewis**, with her as plaintiff, and asked for the cancellation of certain conveyances of a quarter section of land, which they acquired by settlement and improvement, under the laws of the United States relating to public lands. The petition states that **Nora Lewis** with her husband have at all times since taking said land resided upon and claimed the same as their homestead; that **J. C. B. Lewis**, singly and without her knowledge or consent, executed and delivered warranty deeds to **W. R. Hill** for the land, which deeds have been duly filed and recorded in the office of the register of deeds; that **W. R. Hill** knew at the times the conveyances were made that **Nora** and **J. C. B. Lewis** were husband and wife, and that they occupied the land as a homestead at and prior to the times the deeds were made; that **Nora Lewis** did not receive any consideration or part of the purchase money paid by **Hill** to **J. C. B. Lewis**; and that, subsequently, **W. R. Hill** and **Lydia Hill**, his wife, executed and delivered to **James P. Pomeroy** a warranty deed to the same tract of land, in consideration of the sum of \$650. **W. R. Hill** and **James P. Pomeroy** were made parties defendant in the action, and the plaintiffs ask that the deeds to **W. R. Hill**, and from **W. R. Hill** and **Lydia Hill** to

**James P. Pomeroy**, be set aside and canceled, and the title to the land be quieted in the plaintiffs. The defendants demurred to the petition, and one of the grounds of demurrer was that there was a defect of parties defendant. The demurrer was overruled, and the defendants electing to stand on the demurrer, the court entered a judgment cancelling the deeds, as prayed for. The demurrer should have been sustained. **Lydia Hill** joined in the execution of the deed to **Pomeroy**, and she was not made a party. The deed in which she joined with **W. R. Hill** contained the usual covenants of warranty, and she will be liable thereon to **Pomeroy**, if the allegations of the petition are true. The plaintiffs seek to have this deed to **Pomeroy** canceled and set aside, without having all the parties who joined in its execution and in its covenants before the court. It is the right of **Pomeroy**, who must ultimately look to the covenants of his grantors, that both of them should be made co-defendants. **Lydia Hill** is liable on the covenants to the same extent as her husband, and it appears on the face of the petition that she is a necessary party to a complete determination of the controversy. It is certain that the homestead cannot be alienated without the joint consent of the husband and wife, and, if the facts alleged are established, the plaintiffs below are entitled to prevail; but, before the deeds which they claim to be a cloud upon their title are canceled and set aside, all the parties who joined in the same, and who are liable upon the covenants therein, should be brought before the court. For the error in overruling the demurrer, the judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(45 Kan. 130)

**DAVIS et al. v. VAN DE MARK et al.**

(Supreme Court of Kansas. Jan. 10, 1891.)

**REPLEVIN—POSSESSION OF PROPERTY.**

Replevin will not lie against a person who is neither in the actual nor constructive possession of the property sought to be recovered at the commencement of the action.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Republic county; **E. HUTCHINSON**, Judge.

**W. T. Dillon**, for plaintiffs in error.  
**Theo. Laing** and **C. W. Van De Mark**, for defendants in error.

**STRANG, C.** Action for replevin for a horse, tried in the district court of Republic county, October 12, 1888, by the court without a jury. The court made special findings of fact and of law, and entered judgment thereon in favor of the defendants. Among other findings of fact, the court found that the action was begun by the plaintiffs below, after the defendants below had sold and finally parted with the horse. Plaintiffs asked for judgment on the findings, which was refused. They then filed a motion for a new trial, which was overruled. The action was tried all the way through as an action of replevin, with an affidavit and bond and order of

delivery. The answer was a general denial. The judgment was for the return of the property and damages, both on account of depreciation in value while in plaintiffs' possession, and for its detention; or if delivery of the property could not be had, for its value, and damages for its detention. With a finding that the action was commenced after the property was sold, and finally parted with by the defendants below, the judgment should have been for the defendants. *Ladd v. Brewer*, 17 Kan. 204; *Moses v. Morris*, 20 Kan. 213; *Brown v. Holmes*, 13 Kan. 482. It is therefore recommended that the judgment of the district court be reversed, with instructions to render judgment for the defendants, for costs.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 103)

**CHAMPION V. HARTFORD INVESTMENT CO.**  
(*Supreme Court of Kansas. Jan. 10, 1891.*)

**ASSIGNMENT OF MORTGAGE COUPONS — PAYMENT — INTEREST IN SECURITIES.**

1. The title to interest coupons passes from hand to hand by mere delivery.

2. Where the owner of a note, with interest coupons attached, secured by a mortgage upon real estate, which he has purchased from an investment company engaged in making loans in this state, and selling them to parties in other states, (such note and mortgage being indorsed and transferred to the owner "without recourse,") receives the money on the first coupon falling due, from the investment company, but not at the bank or office where the note and interest coupon are payable, with notice that it is the custom of the company to advance the interest on loans sold by it, when the interest falls due, whether the same has been paid by the borrower or not, the transaction is presumptively a transfer or an assignment of the coupon, and not a payment or extinguishment thereof.

3. In the absence of an express agreement or controlling equity to the contrary, the assignment of one of a number of coupon interest notes secured by a mortgage carries with it a *pro rata* share of the security.

VALENTINE, J., dissenting.

(*Syllabus by the Court.*)

Error to district court, Sedgwick county; C. REED, Judge.

*Campbell & Dyer*, for plaintiff in error.  
*Moore & Douglas*, for defendant in error.

HORTON, C. J. This was an action commenced by Julia Champion against James Warrell, Mary A. Warrell, the Hartford Investment Company, and George C. Strong, upon a promissory note for \$2,500, dated March 1, 1888, with 10 interest coupons, for \$100 each, attached thereto. The note and coupons were executed by James and Mary Warrell, made payable to the order of George C. Strong, and were secured by a mortgage on certain real estate in Sedgwick county. At the time of the execution of the mortgage the Warrells executed another promissory note to George C. Strong for the sum \$250, and also executed a second mortgage on the real estate to secure the second note, warranting the real estate free and clear of all incumbrances, except the first mortgage of \$2,500. The second mortgage stipulated that, if any money was paid by the

holder of the mortgage to protect himself on any prior lien, the mortgage to be due at once, and the money paid out, to bear 12 per cent. per annum, and to become a part of the debt. The second note and mortgage were transferred by George C. Strong to the Hartford Investment Company. The first coupon was due September 1, 1888, and was for \$100; the second coupon was due March 1, 1889, and was for \$100. The Hartford Investment Company answered, setting up two causes of action,—one on the coupon for \$100, due September 1, 1888, with interest thereon, and asking that the coupon be declared a concurrent lien with the first note and mortgage, and that it, the defendant company, be allowed to prorate with the holder of the first note. The second cause of action was upon the second note and mortgage above referred to. The case was submitted to the court upon the following agreed statement of facts: "The notes and mortgage involved in this action were executed to George C. Strong, who was the agent of the Hartford Investment Company, and were by him indorsed and assigned to Edward G. Robertson, who was the president and financial agent at Hartford, Conn., of the Hartford Investment Company. Robertson sold the notes and mortgage to the plaintiff. The copies of the notes and indorsements thereon, and the mortgages set out in the plaintiff's petition, and in the cross-petition of the Hartford Investment Company, are true copies of the originals. The principal note and the interest notes or coupons were all payable at the Charter Oak National Bank in Hartford, Conn. When the first coupon fell due, the plaintiff presented the same to Edward G. Robertson at Hartford, and Robertson, acting for the company, paid the plaintiff the amount called for by the coupon, and plaintiff then and there delivered to Robertson the coupon uncanceled. The Hartford Investment Company was engaged in making loans in Kansas through George C. Strong, and selling them to parties in the eastern states, and it was the custom of the company to advance the interest on loans sold by it when such interest fell due, whether the same had been paid by the borrower or not; and this fact was known to the plaintiff at the time she purchased the notes and mortgage. Neither the principal note set out in the plaintiff's petition, nor the coupon set out in the cross-petition of the Hartford Investment Company, has ever been paid by the borrower to the company." The district court rendered judgment in favor of Julia Champion for the amount of her claim, and for the Hartford Investment Company for the amount of its claim, and also decreed "that the mortgage set out in plaintiff's petition is a first lien upon the lands and tenements described to secure the indebtedness of James Warrell and Mary A. Warrell in the petition set forth, and also to secure the payment of the indebtedness of Warrell & Warrell to the Hartford Investment Company upon the coupon set forth in the first clause of action in the cross-petition of the Hartford Investment Company for the amount of

\$117, and that the investment company is entitled to share *pro rata* in the security of the mortgage for the payment of the sum last mentioned." Plaintiff excepted to the ruling and judgment of the court, and contends that the Hartford Investment Company is not entitled to prorate with her in the security of the mortgage for the amount of the coupon due September 1, 1888, which was presented by her to Edward G. Robertson at Hartford, and on which Robertson, acting for the investment company, advanced to her \$100, the amount thereof.

We think that the ruling of the district court was correct, and therefore that the judgment must be affirmed. The coupon was indorsed by the original payee "without recourse." The mortgage was indorsed by both the original payee and Edward G. Robertson "without recourse." The coupon, as well as the note and mortgage, was payable at the Charter Oak National Bank, Hartford, Conn. Neither the Hartford Investment Company, nor Edward G. Robertson, were legally liable upon the note, the mortgage, or the coupon. When the plaintiff presented the coupon to Edward G. Robertson, who was acting for the Investment Company, she knew "that it was the custom of the company to advance the interest on loans sold by it when the interest fell due, whether the same had been paid by the borrower or not." The title to the coupon passed by mere delivery, and the transfer of the coupon from the plaintiff to the investment company was presumptively a transfer of title. The transaction concerning the coupon was therefore a transfer or assignment of it, and not a payment. This is especially true, because the transfer was made by the plaintiff to one who was not her debtor, and to one who was not under any legal obligation to pay the coupon. It was not the intention of Robertson or the investment company to pay or extinguish the coupon when the money was advanced thereon, and, as the plaintiff knew that the company would advance the money whether paid or not by the makers, it cannot reasonably be said that she supposed the maker had furnished the money to pay the coupon, or that the company intended to pay the coupon when the amount thereof was advanced to her. Neither do we think that the Hartford Investment Company is estopped from claiming that the coupon is unpaid. The plaintiff was not misled by any statements or representations of the company or its agents. The company acted in all matters in good faith. There can be no estoppel in such a case.

If it be urged that the plaintiff believed, when she received the money upon the coupon, that it was a payment and an extinguishment thereof, the sufficient answer is that she did not present the coupon, or receive payment at the bank or place where the note and coupon were payable; that she knew that Robertson, acting for the company, would pay the interest on the presentation of the coupon "whether the makers had paid it or not:" that on presenting it she did not inquire whether the makers had paid it, or had furnished

any money to pay it, and, finally, that she received the money from one who was not her debtor, and from one who was under no legal obligation to pay the coupon. As the plaintiff did not receive the money at the bank where the coupon was payable, if it was of importance or interest for her to ascertain, she should have inquired, when presenting her coupon to Robertson, whether the makers had paid or had furnished any money to pay the same. If she had so inquired, she would have undoubtedly been informed that no money had been furnished by the makers, but that the company would advance the money upon the coupon. It must also be remembered that the coupon over which this controversy arose is the first coupon falling due upon the note and mortgage, and that the plaintiff had never been paid previously anything upon the mortgage or coupon, through Robertson or the investment company, before her presentation of this coupon. If the plaintiff had received on prior occasions from the makers of the note and mortgage, through Robertson or the investment company, any money upon the note or interest coupons, there might then be some presumption that she believed, when she received the money upon the coupon presented to Robertson, that she was receiving the same from the makers in payment of the coupon, but she had never received any money from the makers of the note and mortgage, as it was the first coupon falling due upon which the money was advanced. The plaintiff cannot rely in this case upon any prior payment, or anything that had occurred before the presentation of her coupon to Robertson, to strengthen her case. Therefore, in our opinion, the plaintiff had no reasonable ground to believe that Robertson or the investment company intended to pay or extinguish the coupon when he handed over to her the sum called for by it, and took the coupon into his possession. It is difficult to find, in the text-books or reports, any case precisely like this. See, however, *Ketchum v. Duncan*, 96 U. S. 659, and *Blair v. White*, 17 Atl. Rep. 49. We do not think there is anything in the agreed statement of facts, or in the record presented, showing, or tending to show, that the Hartford Investment Company paid the coupon to protect the second mortgage. The judgment of the district court will be affirmed.

JOHNSTON, J., concurring.

VALENTINE, J. I do not concur. The note, coupons, and mortgage involved in this controversy were executed by James Warrell and wife to George C. Strong, agent of the Hartford Investment Company, and were by him assigned to Edward G. Robertson, the president and financial agent of such company, who resided and did business for the company at Hartford, Conn., and were by him sold and transferred to Julia Champion, the plaintiff in this action. At the time of the sale it was known and understood by the parties that Robertson, for the company, would advance the interest as it fell

due, whether the same had been paid by the makers and mortgagors or not; and he did advance to Mrs. Champion the amount of the first coupon which represented interest, when it fell due, and Mrs. Champion delivered the coupon to him uncanceled. Under the provisions of the mortgage, if such coupon had not been paid at the time when it became due, the entire debt and the mortgage would have become due, and Mrs. Champion could at once have commenced her action for the debt and the accrued interest, and to foreclose the mortgage. Afterwards the second coupon became due and was not paid, and Mrs. Champion then commenced this action. In my opinion, as between Mrs. Champion and Robertson and the Hartford Investment Company, this advancement of the amount of the aforesaid coupon ought to be considered as a payment, and their lien upon the mortgaged property for the payment of this coupon should be considered as subsequent and inferior to the lien of Mrs. Champion for the payment of her notes, coupons, and mortgage. Evidently, Mrs. Champion did not consider that she was selling said coupon to Robertson and the investment company so as to permit it to remain a lien upon the mortgaged property to the injury of her own security, but evidently she considered that such coupon was paid, and, as between her and the investment company, I think it ought to be so considered, although, as between the investment company and the parties executing the note, coupons, and mortgage, it should be considered as still unpaid and still a lien. It is admitted that the mortgaged property is not sufficient to pay the entire debt; and, if this coupon is permitted to be a lien upon the mortgaged property as against Mrs. Champion, she must lose, although she purchased the mortgage with the note and coupons from a company whose business it was to procure and sell mortgages, and purchased the same with the aforesaid understanding, and although the company advanced the amount of the coupon without even an intimation that it was a purchase or a sale of the coupon. In support of the views herein expressed, see the following authorities: *Union Trust Co. v. Monticello, etc.*, R. Co., 63 N. Y. 311; *Cameron v. Tome*, 64 Md. 507, 2 Atl. Rep. 837; *Com. v. Canal Co.*, 32 Md. 501; *Haven v. Depot Co.*, 109 Mass. 88; *Jones, Ry. Secur.* §§ 329-331.

445 Kan. 255)

*VOORHIS et al. v. MICHAELIS.*

(*Supreme Court of Kansas. Jan. 10, 1891.*)

FRAUDULENT CONVEYANCES—ATTACHMENT—DIS-SOLUTION.

1. An insolvent debtor, as long as he retains possession of his property, may appropriate it to the payment of debts, and may prefer creditors.

2. A voluntary conveyance made to defraud creditors is void only as to prior and existing creditors, and to those designed to be defrauded by the conveyance.

3. Where an attachment on a note not due is dissolved because the grounds therefor are not true, the action is properly dismissed.

Error from district court, Russell county; S. O. HINDS, Judge.

*H. L. Pestana and H. G. Laing*, for plaintiffs in error. *J. H. Franklin and George W. Holland*, for defendant in error.

PER CURIAM. This was an action brought by Voorhis, Miller & Rupel against G. J. Michaelis, on a promissory note for \$456, not due. An order of attachment was granted and issued by the probate judge of the county where the action was commenced, and thereon the property of G. J. Michaelis was taken possession of by the officer. A motion to dissolve the attachment was made by Michaelis. The testimony was partly oral and partly by affidavits,—mostly oral. The motion to dissolve was sustained and the case dismissed. The plaintiffs excepted, and bring the case here. The evidence is conflicting, and against the finding of the district court. We do not think the evidence of such a character as to authorize us to interfere. An insolvent debtor, as long as he retains possession of his property, may appropriate it to the payment of debts, and may prefer creditors. *Dodd v. Hills*, 21 Kan. 707; *Randall v. Shaw*, 28 Kan. 419; *Bailey v. Manufacturing Co.*, 32 Kan. 73, 3 Pac. Rep. 756. A voluntary conveyance made to defraud creditors is void only as to prior and existing creditors, and to those designed to be defrauded by the conveyance." *Sheppard v. Thomas*, 24 Kan. 780. As the order of attachment was set aside for the reason that the grounds therefor were not true, the action was properly dismissed. *Pierce v. Myers*, 28 Kan. 364. The order and judgment of the district court will be affirmed.

(45 Kan. 307)

*CHICAGO LUMBER CO. v. SCHWEITER et al.*

(*Supreme Court of Kansas. Jan. 10, 1891.*)

MECHANICS' LIENS—PRIORITIES—MORTGAGES.

S. entered into an agreement to sell certain lots to J. on credit, which provided that J. was to build a house on the lots to cost not less than \$1,500, and when the house was inclosed, S. was to convey the lots to J. by warranty deed, when J. was authorized to make a mortgage and obtain a loan on the lots for \$1,200, after which J. was to execute a mortgage on the lots to S. to secure the payment of the purchase price of the same. It was also stipulated that until the deed and mortgages were made, as provided, the legal and equitable title should remain in S., and that until that time J. could not subject the property to any liens. The deed and mortgages were made as provided in the contract, but some time prior to their execution J. purchased from a lumber company material for use, and which was used, in the construction of the house, but did not pay for the same, and the lumber company filed a statement for a lien on the lots against J. as owner. *Held*, in an action to foreclose the lien of the lumber company, that the contract under which J. held, limited his interest and ownership, and his right to create liens on the lots, and that the lien of the lumber company is subordinate to the mortgage liens given in pursuance of the contract.

(*Syllabus by the Court.*)

Error to district court, Sedgwick county; C. REED, Judge.

*Hatton & Ruggles*, for plaintiff in error. *Sluss & Stanley and Hallowell & Hume*, for defendants in error.

JOHNSTON, J. This was an action brought by the Chicago Lumber Compa-

ny to enforce a mechanic's lien against real estate in the city of Wichita, for lumber and building material furnished to S. T. Jones. It appears that on April 29, 1887, Henry Schweiter, who was the owner of the real estate mentioned, as well as other lots in the same locality, entered into a written contract agreeing to sell a large number of lots to S. T. Jones, who in turn agreed to build one house on each parcel of four lots, each of the houses to cost not less than \$1,500, and to be worth that sum. It was stipulated that, when each of the houses was inclosed, Schweiter should convey the four lots upon which the same was situated to Jones by a good and sufficient warranty deed, and that Jones should then have the privilege of placing a mortgage for a loan, not exceeding \$1,200, on any one house and parcel of four lots, which should be a first lien on the lots; and that thereupon Jones should execute to Schweiter two notes, each for one-half of the purchase price of the parcel of lots so conveyed, one due in six months, and the other due in one year from date, with 8 per cent. interest per annum until due, and 12 per cent. interest per annum after maturity until paid, together with a mortgage on each parcel of lots to secure the payment of said notes; and that until the execution and recording of each of said mortgages Jones should keep said lots clear of all liens, judgments, and taxes, of every kind and description, on his account, so that the mortgage to Jones should be a lien second and inferior to said first-named mortgage of \$1,200. The purchase price of the lots was \$350, and it was provided that the title of all of the property mentioned in the contract, both legal and equitable, should remain in Schweiter until the mortgages and conveyances aforesaid were made, and that Jones should be liable for interest upon the purchase price of the property at 8 per cent. during that period, which interest should cease when the mortgages for the purchase money were executed, and then the interest therein stipulated should be paid. On May 2, 1887, Jones contracted with the Chicago Lumber Company for lumber and material with which to build a house and barn on four of the lots mentioned in the contract, and the delivery of the same to Jones was begun on that day and completed on June 25, 1887, and the same was purchased for use and was used in the construction of the house and barn. The price of the lumber and material so sold and delivered amounted to the sum of \$963.83. On May 20, 1887, Schweiter executed and delivered a deed of the lots to Jones, and on the same day, and in pursuance of the contract between Jones and Schweiter, Jones and wife executed a note and mortgage to Smedley Darlington, and received thereon the sum of \$1,200, and this mortgage was recorded on May 21, 1887. On May 20, 1887, and in pursuance of the contract, Jones and wife executed and delivered to Schweiter notes for \$1,400, being the purchase price of the lots, and also a mortgage to secure the payment of the same. This mortgage was given subject to the Darlington mortgage, and it stipulated that it was given

to secure the balance of the purchase money of the mortgaged property. This instrument was filed for record on May 23, 1887. On September 9, 1887, the Chicago Lumber Company filed in the office of the clerk of the district court a statement, claiming a lien against the real estate for the lumber and building material furnished under a contract with S. T. Jones, as owner; and it is admitted that Jones was indebted to the lumber company in the sum of \$963.83, with interest thereon, and that the lumber and building material were purchased by Jones from the lumber company to be used in the construction of the house and barn, and were so used. The lumber company brought this action on November 11, 1887, to foreclose its lien, and made Schweiter and Darlington parties defendant, and asks that their interests be held to be inferior and subordinate to the lien of the lumber company. On the trial the court found and decreed Darlington's mortgage to be the first lien on the premises, Schweiter's to be a second lien, and that the Chicago Lumber Company held the third lien.

It is claimed that the court erred in postponing the lien of the lumber company to those of Darlington and Schweiter. The claim of the plaintiff depends on the right of Jones to subject the property to a lien. The contract of the lumber company was made with Jones at a time when Schweiter held the legal and equitable title to the real estate, and no statement for a lien by the lumber company was ever made or filed against Schweiter as owner. He made no agreement and gave no consent which would subject his interest or estate in the land to a lien. It is true, he made a contract for the sale of the lots with Jones which contemplated the erection of buildings thereon, but in this contract it was expressly stipulated that the legal and equitable title should remain in Schweiter until certain conveyances were made, and until that time Jones should have no authority to subject the lots to liens of any kind or description. To create a valid lien for material or labor, it is necessary that the person for whom they are furnished should be an owner within the meaning of the statute, and have a right at the time the contract for the same is made to create a lien. The only claim which Jones had upon the land was derived from his contract with the owner, and any one who relies on the contract to establish ownership in Jones must be governed by the limitations and conditions therein contained. When the lumber and material was purchased and furnished, Jones did not have the legal title, and by the terms of the contract which he made he did not have the equitable title, and he could create a lien on no greater interest than he held. "In general, it must be said that only the interest of the contracting party can be subjected to the lien, and, if he has no interest, there is nothing to which the lien can attach." 2 Jones, Liens, § 1245; Wagar v. Briscoe, 38 Mich. 587; Hayes v. Fessenden, 106 Mass. 230. If the lumber company had examined the public records when the material was sold and delivered, it would have ascertained that

the legal title was in Schweiter; and if they had pursued the inquiry, as they should have done, they would have learned of the contract between Jones and Schweiter, with all of its conditions and limitations. As has been said, "they should have exercised some care and caution as to whether their employers, or the purchasers, had such an interest in the property as they could subject to a lien for the lumber and material furnished. Under the statute, no lien attaches to the building unless the person with whom the contract is made has some interest or estate in the land on which it is situate. The lien is upon the realty, with the building attached, to the extent of the ownership of the one who contracted for the construction of the building, and no further; and, if there is no ownership, there is no lien on either land or building." *Huff v. Jolly*, 41 Kan. 537, 21 Pac. Rep. 646. The lumber company, therefore, can claim only through the contract under which Jones held, and must take subject to the restrictions and limitations therein imposed on Jones. The contract stipulated that the \$1,200 mortgage should be the first lien on the lots when they were conveyed to Jones, and the one given to Schweiter for the purchase money should be a second; and an examination of the contract would have warned the lumber company that they must look to the proceeds of the first mortgage, which was doubtless provided as a fund for the erection of the building, or else they must make a contract with Schweiter, who was both the legal and equitable owner. Whatever equities Jones had in the property under his contract were subject and subordinate to the interest of the owner, as the contract provided; and, as the lien can in no event cover more than the qualified interest that Jones had, it follows that such lien is subject and subordinate to the liens and mortgages expressly provided for in the contract. The contract appears to have been carried out by Schweiter strictly in accordance with its terms and in good faith, and we find no room for the application of the principle of estoppel as against either of the mortgagees. The facts in the cases cited by the plaintiff are unlike those in the present case, where the relations and rights of the parties are fixed by express agreement, by which all must be governed. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 271)

LONG *et al.* v. FIFE.

(Supreme Court of Kansas. Jan. 10, 1891.)

## AFFIDAVIT FOR PUBLICATION—AMENDMENT.

Where an affidavit for publication inferentially, but insufficiently, sets forth a material fact which ought to be expressly stated, the affidavit, if otherwise good, will be held to be merely voidable; and, if the fact inferentially and insufficiently stated was in existence at the commencement of the action, the trial court, even after judgment, may allow the affidavit to be amended concerning the matter so inferentially and insufficiently stated, and the affidavit so amended will relate back to the commencement of the action.

(Syllabus by the Court.)

Error to district court, Wyandotte county; O. L. MILLER, Judge.

*H. M. Meriwether*, for plaintiffs in error.  
*J. O. Fife* and *John A. Hale*, for defendant in error.

HORTON, C. J. On the 1st day of September, 1886, J. O. Fife filed a petition in the district court of Wyandotte county asking judgment against Mrs. M. A. Hays for \$100 for attorney's fees. A summons was issued on the same day, and returned on the 3d day of September, 1886, "Not found." On the same day on which the petition was filed, an affidavit for publication was filed in the clerk's office of the court, which, omitting caption, is in words and figures as follows: "J. O. Fife, Plaintiff, vs. Mrs. M. A. Hays, Defendant. J. O. Fife, of lawful age, being by me first duly sworn according to law, upon his oath says that he is the plaintiff in the above-entitled cause; that defendant is the owner of lot number 6, in block 79, and lot number 42, in block 49, in the old city of Wyandotte, now Kansas City, Wyandotte county, Kan.; that this suit is brought for the purpose of recovering the sum of \$100 due affiant from defendant above named; that defendant is a non-resident of the state of Kansas; and that service of summons cannot be made on said defendant within the state of Kansas. J. O. FIFE. Subscribed and sworn to before me this 1st day of September, 1886. L. C. TRICKEY, Clerk Dist. Ct." On the same day on which the petition was filed, an attachment affidavit was filed, and on the 3d day of September, 1886, the real estate mentioned was attached, pursuant to the affidavit and the order issued thereon. Proceeding upon the affidavit, publication was made and filed on January 8, 1887. The publication notice, which was published for a sufficient time in the Wyandotte Gazette, a weekly newspaper of general circulation in Wyandotte county, Kan., omitting caption, was as follows: "M. A. Hays, defendant above named, will take notice that she has been sued in the district court of Wyandotte county, Kan., by J. O. Fife, plaintiff above named, for the sum of one hundred dollars, and interest thereon at the rate of seven per cent. per annum from April 1, 1885, and that defendant must answer plaintiff's petition on or before the 25th day of October, 1886, or said petition will be taken as true, and judgment rendered in favor of plaintiff against defendant for said sum and costs, and that lot forty-two, in block forty-nine, and lot six, in block seventy-nine, all in Wyandotte, now part of Kansas City, Wyandotte county, Kan., the property of defendant, and heretofore by the sheriff of Wyandotte county attached, will be sold, and the proceeds thereof applied towards the payment of said judgment and costs. [Signed] J. O. FIFE, Plaintiff. By JAS. F. GETTY, Atty. for Plaintiff." On the 19th day of January, 1887, the defendant failing to appear, judgment was rendered for plaintiff in the usual form, and on the 31st day of May, 1887, the sheriff of the county sold the real estate to James Birmingham. On the 6th day of June, 1887, the sheriff's deed was executed.



and the same was filed for record in the office of the register of deeds of the county of Wyandotte on the 13th of June, 1887. On the 28th day of December, 1886, the real estate in question was sold by Mrs. M. A. Hays and husband to Wingate Jackson. The deed was recorded December 30, 1886. On the 6th day of June, 1887, Jackson sold lot 6, block 79, to H. M. Meriwether, which deed was recorded June 11, 1887; and on June 9, 1887, Meriwether sold lot 6, block 79, to Juliette Long. This deed was recorded June 11, 1887. On the 21st day of September, 1887, Wingate Jackson and Juliette U. Long filed their motion to vacate and set aside the judgment on the ground that the affidavit for publication was essentially defective; that the publication of notice was therefore void; that no other service was had; that defendant did not appear, or in any manner waive service; and that consequently the judgment was absolutely void for want of jurisdiction. The district court allowed Fife to file an amended affidavit for publication, on the ground that the affidavit for publication was not void, but voidable only. Thereupon, with leave of the court, an amended affidavit for publication, fully sufficient, was filed. Jackson and Long excepted, and bring the case here.

This court has already decided that if the jurisdictional facts necessary to warrant service upon a defendant by publication were in existence at the commencement of the action, and the affidavit for publication is defective only, and not void, the court, after judgment, may permit an amended affidavit for publication to be filed; and such affidavit, when filed, gives jurisdiction to the court, and relates back to the time of the commencement of the action. *Pierce v. Butters*, 21 Kan. 124; *Wilkins v. Tourtellott*, 28 Kan. 833; *Harrison v. Beard*, 30 Kan. 632, 2 Pac. Rep. 632. The affidavit for publication should have stated that the case commenced in the district court was one of those mentioned in section 72 of the Civil Code. "The rule is, if there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable." *Harris v. Clafin*, 36 Kan. 543, 13 Pac. Rep. 830. The affidavit for publication stated that Mrs. M. A. Hays, the defendant, was a non-resident of the state of Kansas; that service of summons could not be made upon her within the state; that the action was brought for the purpose of recovering from her the sum of \$100 due to the plaintiff; and also set forth a full description of the real estate owned by her in the city of Wyandotte, (now Kansas City.) This was the property that was attached, and which was subsequently sold to pay the judgment. The fair inference from the affidavit is that the real estate described was sought to be taken or appropriated for the debt owing from Mrs. Hays; at least, we do not think the omission in the affidavit so vital, in view of what the affi-

davit did contain, as to render the proceedings void. Therefore our conclusion is that the court did not err in permitting the amended affidavit to be made and filed. This case differs from *Harris v. Clafin*, supra, in which case Mr. Justice JOHNSTON dissented. In that case nothing was stated in the affidavit for publication about the action being one of those mentioned in section 72 of the Civil Code, no real estate was described or referred to, and no debt was alleged as being owed from the defendant to the plaintiff, or to any one else. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 275)

## KANSAS CITY &amp; PAC. R. CO. v. RICH TP.

(Supreme Court of Kansas. Jan. 10, 1891.)

## MUNICIPAL AID TO RAILROADS—PETITION FOR ELECTION—SECOND ELECTION—ESTOPPEL.

1. Before the board of county commissioners of a county shall cause a first election to be held under the provisions of section 1, c. 183, Sess. Laws 1887, (paragraph 1283, Gen. St. 1889,) to determine whether a municipal township shall be permitted to subscribe to the capital stock of a railroad company, constructing, or proposing to construct, a railroad through or within such township, a petition in writing signed, or purporting to be signed, by two-fifths of the resident tax payers of the township in which the election is to be held, must be presented to the board, which is requested to order such an election.

2. A second election under the last proviso of section 1, c. 183, Sess. Laws 1887, (paragraph 1283, Gen. St. 1889,) can only be held for the same purpose for which the proposition was submitted at the first election. If the second proposition is materially different from the first as to the amount of stock to be subscribed, as to the route of the railroad, as to the location of one of its depots, and as to the time for its final completion, it will give no authority for a subscription under the last proviso of said section 1, c. 183.

3. A township may be estopped by its course of dealing with the railroad company to interpose a defense of irregularity in the exercise of the power of issuing bonds in payment of a subscription made upon a majority vote of the qualified electors of the township.

4. If a petition in writing is presented to a board of county commissioners, under the first clauses of section 1, c. 183, Sess. Laws 1887, (paragraph 1283, Gen. St. 1889,) to submit to the qualified voters of a township a proposition to subscribe to the capital stock of a railroad company, constructing a railroad through the township, and the petition, instead of showing, upon its face, that it is signed by two-fifths of the resident tax-payers of the township, recites that the signers are "qualified electors of the township," and the board of county commissioners officially find that the petition is so signed, and call an election upon the proposition presented, of which notice is published, and at which election a majority of the qualified electors voting at the election favor the subscription, and, after such vote has been canvassed and declared, the board of county commissioners orders the county clerk, for and in behalf of the township, to subscribe to the capital stock of the railroad company upon the terms and conditions set forth in the proposition submitted, and the subscription is accordingly made upon the books of the railroad company, and accepted by it, and subsequently the railroad company, relying upon the faith of the subscription, fully completes and operates its road through the township, according to the proposition submitted and the contract of subscription, and the board of county commissioners, the township officers, the tax-payers and citizens of the township, as well as the railroad company, at all times, until the

full completion and operation of the road, treat the petition as sufficient and valid, *held*, that in an equitable action brought by the township to enjoin the issuance of the bonds for a total want of power to make the subscription to the capital stock of the railroad company, upon the ground that the petition is one of "a majority of the qualified electors," and not of "the tax-payers," it is proper, to uphold the proceedings, for the trial court to permit the railroad company to show by competent proof that two-fifths of the resident tax-payers of the township actually signed the petition.

*(Syllabus by the Court.)*

Error to district court, Anderson county; A. W. BENSON, Judge.

On the 2d day of May, 1888, Rich township, in Anderson county, brought its action against the Kansas City & Pacific Railroad Company to enjoin the board of county commissioners of that county from issuing \$21,000 of bonds voted by the township in payment of a subscription to the capital stock of the railroad company. At the time of the commencement of the action, a temporary injunction was granted against the railroad company by the probate judge of Anderson county. Trial had September 24, 1888, before the court without a jury. After hearing the evidence and the arguments of counsel the court took the case under advisement, and on the 20th day of December, 1888, made the following special findings of fact: "The plaintiff is a duly organized municipal township in Anderson county; the defendant is a railroad corporation, duly organized and existing under the laws of this state, having a line of railroad in said county, and the defendants named as officers were and are the duly qualified and acting county commissioners and county clerk of said county. On January the 25th, 1887, the board of county commissioners of said county ordered an election to be held in said township on March the 1st, 1887, on a proposition for the township to subscribe \$25,000 to the capital stock of the railroad company, the same to be paid by a like amount of the bonds of the township. The election was held, the vote canvassed, an order made that the county clerk subscribe — for \$25,000 of the capital stock of the railroad company, for and on behalf of the township, and the subscription was made as ordered on the regular stock book of the railroad company furnished him for that purpose. This proposition, as submitted by the board of county commissioners and as published, by mistake provided, among other things, that a depot and side track should be constructed upon or within six rods of the north-east quarter of the north-east quarter of section seventeen, township twenty-one, range twenty-one, instead of upon the north-east quarter of the north-west quarter of the same section, as was intended by the petitioners and voters, as well as by the railroad company; the latter description covering the land upon which was located the station of Laura, on the Kansas, Nebraska & Dakota Railroad, the place where the citizens of the township desired the depot to be located, and the place actually described in a part of the petitions that were circulated for said election, the other part

specifying the place first above described, the error having been made in copying some of said petitions. This election was held, the vote canvassed, and the subscription made, all following the erroneous description, and without discovering the error, and it was not discovered until after the road had been located via the land intended to be described, and partially graded on that line in the township. When the railroad company discovered that the line was not located as required by the subscription, it at once caused work to be suspended on the road, and made preparations to change that part of the line so as to locate the depot one-half mile further east. This caused great dissatisfaction among the citizens in that part of the township. Threats were made that the issue of the bonds would be enjoined, unless the depot was placed where the citizens generally understood that it was to be located, and after trying in vain to make some arrangement that would enable it to locate the depot where the people wanted it, and not jeopardize its subscription, the railroad company concluded, after consultation with many citizens of the township, that the best way of settling the question to the satisfaction of all would be to have a new election held upon a proposition correctly describing the place where this depot was to be located. The Cherokee Construction Company, which was to receive the bonds of this township in part payment for building the road, agreed to this, with the railroad company, but neither the county board nor township had any knowledge of such agreement, and petitions were accordingly prepared by the railroad company and delivered to citizens for signature. Owing to a change in the law, the amount of the new subscription could not exceed \$21,000. The petitions were in form as follows: 'To the board of county commissioners of the county of Anderson, in the state of Kansas: The undersigned, qualified electors of Rich township, in said county, respectfully represent to you that an error was made in the proposition heretofore submitted to said township to vote upon the question of subscribing stock in the Kansas City & Pacific Railroad Company in describing the land upon which the depot was to be located in the northern part of the said township. Now, in order that said error may be lawfully corrected, we petition you to call another election in said township, and submit to the qualified electors thereof, at a special election to be called for that purpose, a proposition that said township subscribe for twenty-one thousand dollars of the capital stock of the Kansas City & Pacific Railroad Company, said stock to be paid for by a like amount of the bonds of said township, payable to bearer at the fiscal agency of the state of Kansas in New York city, thirty years after the date thereof, bearing interest at the rate of six per cent. per annum, payable semi-annually, for which interest coupons shall be attached, payable at the fiscal agency aforesaid; said bonds to be issued and delivered to said railroad company in exchange for certificates for an equal amount of its cap-

ital stock, when said railroad shall be constructed of standard gauge and in operation through said township, and a depot and side track constructed on the north-east quarter of section one, (1,) township twenty-three, (23,) range twenty, (20,) and within forty rods of the St. Louis & Emporia Railroad; also a depot constructed upon or within six (6) rods of the north-east quarter of the north-west quarter of section seventeen, (17,) township twenty-two, (22,) range twenty-one, (21,) all in Rich township, with side track and stock-yards adjacent thereto: provided, that it is accomplished on or before the 31st day of July, 1888, in default of which said subscription shall become void and said bonds shall not be issued: and provided, further, that if a subscription be made to the capital stock of said railroad company, as herein provided, then the twenty-five thousand (\$25,000) dollar subscription heretofore voted to said company shall be void, and no bonds shall be issued in payment thereof. The form of ballot to be issued at such election in favor of said proposition shall be "Foreextending aid to the Kansas City & Pacific Railroad Company on the new proposition," and against said proposition shall be "Against extending aid to the Kansas City & Pacific Railroad Company on the new proposition." On the same day that these petitions were put in circulation, to-wit, on October 12, 1887, and before any of them had been signed, the vice-president and general attorney of the railroad company, who had the general charge of working up municipal aid for the company, told Mr. Winans of the plan that had been adopted to settle the difficulty, and that the petitions would be ready for presentation to the board on the Friday following, which was the 14th, and asked if he would call a meeting of the board for that day. To this Mr. Winans, who was about to leave the state to be gone several weeks, as he said, assented. A request for a meeting was prepared, signed by him as one of the county commissioners, sent to Commissioner Mann, signed by him, and returned to Mr. Winans, who then signed the call for the meeting, as chairman, and as he was on his way out of the state delivered the same to Commissioner Bearly, at Laura, and requested him to sign the same and attend to the meeting, which Mr. Bearly agreed to do and did. Commissioners Bearly and Mann met on the day named in the call. Mr. Bearly was elected chairman *pro tem*. An envelope was laid before them, containing the petitions, a form for the order of election, and a bond to secure the costs of the election, and they, taking out the petitions and order, after examination found the petition to be in all respects in compliance with the requirements of law, which they caused to be made a matter of record, and thereupon they made an order embracing the terms and conditions set forth in the petition, and fixing November 14, 1887, as the time when said election should be held. The findings and order of the board were as set out in the record hereafter given. The bond for costs was not found by the

commissioners or county clerk, and was not brought to the notice of either, and seems to have been lost before the papers came to their notice. And so in fact no bond for such costs was ever given to or received or approved by said commissioners or clerk. The proceedings of said board in the matter were as follows: 'On this 14th day of October, 1887, at a special meeting of the board of county commissioners of Anderson county, Kansas, a petition, signed by a majority of the qualified electors of Rich township, having been presented and found in all respects in compliance with the requirements of law, and said petition setting forth, among other things, that a mistake was made in the proposition heretofore submitted to said township to vote aid to the Kansas City & Pacific Railroad Company, in describing the land on which the depot was to be located in the northern part of said township, and asking, in order that said mistake might be lawfully corrected, that another election might be called in said township for the purpose of submitting the proposition hereinafter set forth, it is therefore ordered that a special election be held in said township on the 14th day of November, 1887, for the purpose of submitting the proposition that said township subscribe for twenty-one thousand dollars (\$21,000) of the capital stock of the Kansas City & Pacific Railroad Company, said stock to be paid for by a like amount in the bonds of said township, payable to bearer at the fiscal agency of the state of Kansas in New York city thirty years after the date thereof, bearing interest at the rate of six per cent. per annum, payable semi-annually, for which interest coupons shall be attached, payable at the fiscal agency aforesaid. Said bonds to be issued and delivered to said railroad company in exchange for certificates for an equal amount of its capital stock when said railroad shall be constructed of standard gauge and in operation through said township, and a depot and side track constructed on the north-east quarter of section one, (1,) township twenty-three, (23,) range twenty, (20,) and within forty rods of the St. Louis & Emporia Railroad. Also a depot constructed upon or within six rods of the north-east quarter of the north-west quarter of section seventeen, (17,) township twenty-two, (22,) range twenty-one, (21,) with side track and stock-yards adjacent thereto, all in Rich township, in Anderson county: provided, that it is accomplished on or before the 31st day of July, 1888, on default of which said subscription shall become void and said bonds shall not be issued: and provided, further, that if a subscription be made to the capital stock of said railroad company, as herein provided, then the \$25,000 subscription heretofore voted to said company shall be void, and no bonds shall be issued in payment thereof. The form of the ballot used at such election, in favor of said proposition, shall be "For extending aid to the Kansas City & Pacific Railroad Company on the new proposition," and against said proposition shall be "Against extending aid to the Kansas City & Pacific Railroad Company on the

new proposition." Notice of said election shall be given by publishing this order in the Kincaid Chronicle for the time required by law. H. A. BEARLY, Chairman *pro tem*. J. A. MANN, County Commissioner.' On the day of its date, the defendant railroad company caused to be written and delivered to the township trustee the following letter: 'Garrett, Kansas, Oct. 8th, 1887. Dear Sir: It seems that the law places this whole R. R. bond business in the hands of the county commissioners and county clerk. The township board are not mentioned in the matter. We shall not call upon you to act in the matter as a board unless you desire to do so. I spoke to you about holding a meeting next week, but we shall not care to have the meeting held, unless you wish to hold it on your own account. Yours, truly, C. H. KIMBALL.' The election was held on the day named. The returns were made on November 18th; the votes were canvassed, the full board being present. The record of the action of the board at that meeting, (Journal H, 222,) after setting forth the formal matters in regard to the canvass of the vote, etc., closes as follows: 'And having duly canvassed the vote cast at said election, the board doth find and declare that there was cast at said election, in favor of said proposition, 128 votes, and against said proposition, 109 votes, and that due notice of said election was given, and the same held in all respects as required by law; and a majority of the voters voting at said election having voted in favor of the proposition, and all matters and things in connection with the holding of said election having been in conformity with law, the county clerk is hereby ordered for and in behalf of the township of Rich, in said county, to subscribe for \$21,000 of the capital stock of the Kansas City & Pacific Railroad Company, upon the terms and conditions set forth in the said proposition, and upon the construction of said railroad as therein provided the chairman of this board and the county clerk are authorized to issue and deliver the bonds of said township to the amount of \$21,000 in payment of said subscription.' Signed by all the commissioners, and attested by the county clerk. A subscription was accordingly made by the county clerk upon the books of the railroad company, and accepted by it. The bill for printing the election notices, which constituted by far the greater part of the expenses of the election, was sent to the railroad company and paid by it. It has at all times been ready and willing to pay any of the other expenses, but has never been requested to do so. Immediately after the making of the new subscription, work was resumed on the railroad, and by the 1st of January following the track was laid through the township, but the road was not at that time operated north of Kincaid, because of its rough and unfinished condition. The township board, believing that the railroad company was about to have the bonds issued while the road was yet unfinished and not in operation, as required by the subscription, met on February 27, 1888, the trustee, treasurer, and clerk be-

ing present, and took action in the matter, the result of which was they caused to be sent to the company a written notice, signed by all of them, in substance stating that the township board would not accept the railroad in its present condition. About ten days thereafter the township commenced an action to enjoin the issuing of the bonds, in which the railroad company filed an answer, setting forth in substance, among other things, that it did not claim to be then entitled to receive said bonds in payment of the subscription, and did not propose asking for them until said railroad was completed and in operation in all respects as required by the terms of the subscription; and thereupon the township caused the action to be dismissed without prejudice. On April 30, 1888, the company had the railroad completed and in operation, with depots and side tracks and stock-yards, in all respects in compliance with the terms of the subscription, and thereupon notified the proper county and township officers of that fact. And on May the 2d the board of county commissioners met as requested, and, accompanied by the county clerk and township officers, went over and carefully inspected the road, and found it to be in all respects completed as aforesaid. A certificate for \$21,000 of the capital stock of the railroad company was thereupon tendered to the township treasurer, which he refused to receive. The record of the meeting of the board of county commissioners (Journal H, 281, 282) shows, among other things, that 'the board went over the said railroad on May the 2d, 1888, \* \* \* and noted carefully the construction thereof, and finds that said railroad is fully completed and in operation, in accordance with the subscription of said township to the capital stock,' and, after reciting the facts about the tender of the stock, the refusal thereof, and demand for the bonds, the record further shows that 'the board find that while the company \* \* \* is entitled to the bonds, yet, the board having been, on May 2d, at seven o'clock P. M., enjoined from issuing them, it cannot take further action until said injunction suit is settled.' The railroad company has been regularly operated through the township since its completion. But for the subscription of Rich township the road would have been located and built, by an equally favorable route, through Blue Mound township, about six miles east of its present location. Relying upon the first subscription, the company located the railroad into and through the township, and commenced the construction thereof, as it supposed, in compliance therewith. In building the road through the township the line had to be lengthened several thousand feet and considerable additional expense incurred in order to comply with the terms of the subscription. This was all done in reliance upon the validity of the contracts (the first until the last was made) between the railroad company and the township, and in compliance therewith. In the same newspaper in which the notice for the last election was published, and on the 22d day of October, 1887,

the railroad company defendant caused to be published a history of the facts in substance of the former vote and subscription for \$25,000, together with what purported to be the opinion of Hon. Geo. W. McCrary, headed 'Judge McCrary's Opinion,' in which it was stated in substance that said vote and subscription were legal and binding obligations of the township, which could be enforced, and on November 12, 1887, in the same paper, and along-side of said notice of election, said company caused to be published an article, signed by its vice-president and general attorney, stating in substance that the company was entitled to said \$25,000 of bonds first voted, but if the voters would vote in favor of the proposition then pending for \$21,000, the company would release said former subscription. Said publications were intended by the company to induce the voters to vote for the pending proposition. The newspaper was printed and published in said Rich township. The railroad company has never asked for, or claimed, said \$25,000 of bonds first voted, nor has it relinquished or released the right thereto, except as hereinbefore stated. The railroad company prepared and caused the petitions for both propositions to be circulated and presented, and prepared the form of order made and entered by the board on the 14th day of October, 1887, and had full knowledge of the steps and proceedings herein set out, upon which said subscriptions, and each of them, were founded.

Thereon the court made the following conclusions of law: "(1) The conditions precedent to a valid subscription for stock in a railroad corporation under chapter 183, Laws 1887, are a petition of two-fifths of the resident tax-payers, an order by the commissioners for the election, a proper notice for such election, and an affirmative vote upon the proposition so petitioned for. (2) A second election, under the last proviso of section 1 of the act, can only be held to vote upon the proposition submitted at the first election. If the second proposition is materially different from the first, it will give no authority for a subscription, for in such case the tax-payers' petition is wanting. (3) The tax-payers' petition was for a proposition to subscribe for \$25,000 of stock, the road to go to a designated point in the township, and that was the question voted upon at the first election. A second election was held upon a petition of the voters only upon a proposition for a subscription for \$21,000 of stock in the same company, the road to go through a different point. The affirmative vote upon the last proposition gave no authority to make the subscription, and it is invalid. (4) Such subscription being in its inception illegal for want of power to make it, and the railroad company having had full knowledge of and actively participated in the proceedings that made it illegal, the township is not estopped from asserting such illegality. (5) The subscription being invalid, and no estoppel being shown, the bonds so attempted to be voted should not be issued and a perpetual injunction should be granted as prayed for. (6) Judgment will

be rendered for the plaintiff accordingly."

To each of the findings of fact and to each of the conclusions of law the railroad company excepted. Upon the findings of fact and the conclusions of law the court found the issues in favor of Rich township, and further found that the township was entitled to the relief prayed for in its petition, and was also entitled to have the temporary injunction heretofore granted made perpetual. Judgment was entered accordingly. The railroad company excepted, and brings the case here.

*Kimball & Osgood*, for plaintiff in error.  
*A. A. Harris & Son* and *J. D. Snoddy*, for defendant in error.

HORTON, C. J., (after stating the facts as above.) This was an action brought by Rich township, in Anderson county, to enjoin the board of county commissioners of that county from issuing, and the Kansas City & Pacific Railroad Company from receiving, bonds, amounting to \$21,000, voted by the township in payment of a subscription to the capital stock of the railroad company. The facts in this case are substantially as follows: On January 25, 1887, under the provisions of chapter 107, Sess. Laws 1876, as amended by chapter 142, Sess. Laws 1877, (Comp. Laws 1885, p. 783,) the board of county commissioners of Anderson county ordered an election to be held in Rich township on March 1, 1887, on a proposition for the township to subscribe \$25,000 to the capital stock of the railroad company, the same to be paid by a like amount of the bonds of the township, the road to be constructed on or before the 31st day of December, 1888. The election was held, the vote canvassed, an order made that the county clerk subscribe for \$25,000 of the capital stock of the railroad company for and on behalf of the township, and the subscription was made as ordered on the regular stock book of the railroad company furnished for that purpose. Several petitions were circulated asking for this submission. Some of them designated one point in the northern part of the township as the site of a depot to be erected by the company, while the others designated another point a half mile east. This discrepancy grew out of a mistake in copying the forms for the petition prepared by the railroad company. When the order was made, one of the petitions containing the mistake was taken as correct, so that the same mistake was carried into the order, notice, and proposition submitted, by which the depot was designated at a point a half mile east from the point really intended by the company and by the people of the township. Relying upon the subscription, the company proceeded to and did build its road from the south into the township, before it discovered that its line as located did not extend to the point named for a depot in the proposition voted. Thereupon it suspended work, and finally, as a proposed way out of the difficulty, the company prepared and circulated petitions reciting the former vote and mistake, and asking for an election for \$21,000 of bonds, and a like subscription, upon the route as located, designating the depot site at the

point originally intended; the railroad to be constructed on or before the 31st day of July, 1888. On the 14th of October, 1887, at a special meeting of the board of county commissioners of Anderson county, at which two members of the board were present, an order was made for another election to be held on the 14th day of November, 1887, for the township to subscribe \$21,000 to the capital stock of the railroad company, the same to be paid for by a like amount of the bonds of the township. The petition upon which the board ordered the election to be held was signed "by a majority of the qualified electors of Rich township." A majority of the legal voters favored the proposition, and the board declared it carried, and made a second subscription for stock for \$21,000. The road was built within the time and according to the terms stated in the second petition and vote. In the order and proposition of the board upon which the last vote was had was a recital that "if the subscription for \$21,000 was made, then the \$25,000 subscription before voted should be void, and no bonds should issue in payment thereof." The second petition was presented and the election thereon held under the provisions of chapter 183, Sess. Laws 1887, (paragraph 1283, Gen. St. 1889.) The railroad company, through its general attorney and vice-president, initiated and had general charge of the proceedings upon which both subscriptions were based. The railroad company offered a certificate of its stock for \$21,000 to the proper officers, and demanded the issuance of a like amount of township bonds, as provided in the second subscription, after the board of county commissioners had gone over the road and declared the terms of the subscription complied with.

The first question in this case is whether, under the provisions of chapter 183, Sess. Laws 1887, the election of the 14th day of November, 1887, was "a second election for the same purpose" for which the prior election of March 1, 1887, was ordered and held. Section 1, c. 142, Sess. Laws 1877, provides "that at any subsequent election to be held for the same purpose, the same shall not be held unless upon a petition of a majority of the legal voters of such county, township, or city." Section 1, c. 183, Sess. Laws 1887, provides "that a second election, for the same purpose, shall not be held unless upon a petition of a majority of the legal voters of such county, township, or city." The petition for the proposition submitted at the first election was for a subscription for \$25,000 of stock, the road to go over a definite route to a particular place specified for one of the depots. In the last election the petition was for a subscription of \$21,000, the road to take a different route to a point where one of the depots should be built. The proposition submitted at the first election was for the construction of the railroad on or before the 31st day of December, 1888. In the second election the proposition was for the construction of the road on or before the 31st day of July, 1888. The second election was for a different purpose than the first election. The amount of the subscription was different,

the route of the railroad was different, the location of one of the depots of the road was different, and the time for the completion of the road was different. Therefore we cannot decide, upon the facts found by the trial court, that the second election was "for the same purpose" as the first election. The propositions as submitted were not substantially the same, but materially different. As the jurisdictional facts or conditions precedent to a valid subscription by the township under the last proviso of section 1 of said chapter 183 were not complied with in voting or subscribing the \$21,000 of stock to be paid for in township bonds, the railroad company has no right to have issued to it, under such proviso, the \$21,000 of bonds. In this connection we copy the following from the able opinion of the learned trial judge, delivered at the time of rendering judgment: "If this be not the proper construction of the statute, then almost any proposition may be voted upon in the first instance providing for a subscription by a township for stock in a railroad company, and then, if defeated, or if carried, a vote can be had upon another proposition asked by a majority of voters entirely different from the one asked for by the tax-payers in the first instance. This construction would break down completely one of the statutory barriers against the hasty assumption of burdens by municipalities, viz., the tax-payers' petition." The trial court, after properly holding that there was no valid second election under the last proviso of section 1 of said chapter 183, further ruled that the second subscription to the stock of the railroad company in its inception was illegal for want of power to make it, because the petition presented to the board of county commissioners was not signed by two-fifths of the resident tax-payers of the township. The railroad company vigorously contests this finding of fact and the conclusion of law of the trial court thereon. Counsel for the company say that "this point was not raised upon the trial of the case at all. The reasons set forth in the petition why the railroad company was not entitled to the bonds in substance were (1) because of the first subscription, for \$25,000, which, it is alleged, has never been canceled or annulled; (2) because there were only two commissioners present at the meeting at which the election was called, and because the petition for the election had never been presented to the chairman of the board, and there had been no call for the meeting, and the meeting at which the election was called was held without authority of law; (3) because there was no security given for the expenses of the election; and (4) because certain articles were published by the railroad company in a newspaper circulated in the township, wherein it was claimed that the first subscription was valid, and would be enforced unless the last proposition was carried, and if the last proposition was carried, the first would be released, and because these publications, together with the proviso in the last proposition to the same effect, operated as an inducement and bribe to the

voters of the township to vote in favor of the last proposition, but for which the same would have been defeated." This covered and included the substance of every allegation of fact in the petition except the formal allegations of incorporation, official character, etc. Not a single allegation, not a word, attacking the sufficiency of the petition for the election, can be found in the petition. No testimony was introduced upon the trial showing, or tending to show, that the petition did not contain two-fifths, or any other proportion, of the resident tax-payers of the township. The case was taken under advisement by the court, and briefs were filed. The only attack made upon the petition was because it "did not contemplate a 'completed' railroad, as the word 'constructed' was used instead of 'completed'." The opposing counsel answers as follows: "The railroad company press the alleged fact that the point upon which the district judge decided the case in favor of the township was not urged in the court below. The principle underlying this point was pressed with all the force at our command. The broad general allegation in the petition is that the railroad company is not entitled to these or any other bonds of Rich township. It is true that the allegations are very general, but they were sufficient to present the question considered and decided. If the defendant was not satisfied with the petition it should have filed its motion to have it made more definite and certain. The sufficiency of the petition for the last election was assailed at the outset, and continuously, and after all, in the opinion of the district judge, the case turned upon it. A copy of it was attached to the petition of the township in this case. It showed on its face that it was signed by voters only, and the board of county commissioners so found. What more could have been required? The question was presented upon the pleadings. It was in the case, and the trial judge considered it as conclusive in the township's favor."

This is an equitable suit, and in considering the complaint against the ruling of the trial court, that the second petition was not a tax-payers' petition, various other matters disclosed by the record should be referred to. The township trustee signed the second petition, and voted for the proposition. Everybody supposed the second subscription contract to be valid, and all parties interested treated it as valid until the trial before the district court. The form of ballots used at the second election, in favor of the propositions, was "For extending aid to the Kansas City & Pacific Railroad Company on the new proposition;" and against the proposition was "Against extending aid to the Kansas City & Pacific Railroad Company on the new proposition." In building the railroad through the township, the line had to be lengthened several thousand feet and considerable additional expense incurred in order to comply with the terms of the subscription. But for the subscription of Rich township the road would have been located and built by an equally favorable route, through Blue Mound

township, about six miles east of its present location. The railroad has been regularly operated through the township since its completion. On February 27, 1888, the township board, believing that the railroad company was about to have the bonds issued while the road was yet unfinished and not in operation, as required by the subscription, met and took action in the matter, the result of which was that the treasurer, trustee, and clerk caused to be sent to the company a written notice, signed by all of them, in substance stating that the township board would not accept the railroad in its present condition. About 10 days thereafter, the township commenced an action to enjoin the issuing of the bonds, in which the railroad company filed an answer, setting forth in substance, among other things, that it did not claim to be then entitled to receive the bonds in payment of the subscription, and did not propose asking for them until the railroad was completed and in operation in all respects as required by the terms of the subscription, and thereupon the township caused the action to be dismissed without prejudice. On April 30, 1888, the company had the railroad completed and in operation, with depots and side tracks and stock-yards, in all respects in compliance with the terms of the subscription, and thereupon notified the proper county and township officers of that fact; and on May 2d, the board of county commissioners met as requested, and, accompanied by the county clerk and township officers, went over and carefully inspected the road. The record of the meeting of the board of county commissioners shows, among other things, that "the board went over the said railroad on May 2, 1888, \* \* \* and noted carefully the construction thereof, and finds that said railroad is fully completed and in operation, in accordance with the subscription of said township to the capital stock;" and, after reciting the facts about the tender of the stock, the refusal thereof, and demand for the bonds, the record further shows that "the board find that while the company \* \* \* is entitled to the bonds, yet, the board having been, on May 2d, at seven o'clock, P. M., enjoined from issuing them, it cannot take further action until said injunction suit is settled." In 1887 Rich township, including the little villages within it, had 999 inhabitants. At the first election 136 votes were cast for the proposed subscription, and 124 against. At the second election 128 votes were cast for the subscription, and 109 against. The act of 1877, as also the act of 1887, prescribes that before a first election shall be held in any township to subscribe to the capital stock of any railroad company a petition in writing should first be presented to the board of county commissioners, signed by two-fifths of the resident tax-payers of the township. The petition presented to the board of county commissioners on the 14th day of October, 1887, did not show upon its face that it was signed by two-fifths of the resident tax-payers. If the petition was merely defective, or irregular only, within the authorities, the township is not in a posi-



tion to refuse the payment of its subscription. "A municipality may be estopped by its course of dealing with the railroad company to interpose a defense of irregularity in the exercise of the power of issuing bonds; and its position then in regard to the company is similar to that which it occupies to *bona fide* holders of the bonds without notice. A distinction is to be observed that ratification by acquiescence, or by affirmative acts, has been established only in cases of irregularities in the exercise of the power to issue bonds, and not in any case where there was a total want of power to issue the bonds." Jones, Ry. Secur. § 280, and cases there cited; Commissioners v. Hinchman, 31 Kan. 729, 3 Pac. Rep. 504; Chicago, K. & W. R. Co. v. Commissioners of Osage Co., 38 Kan. 597, 16 Pac. Rep. 828; Railroad Co. v. Evans, 41 Kan. 94, 21 Pac. Rep. 216; Railroad Co. v. Stewart, 39 Iowa, 267; Hitchcock v. Galveston, 96 U. S. 340; Brown v. Kramer, 25 N. W. Rep. 356. Even in judicial matters this court has already decided that if the jurisdictional facts necessary to warrant service upon a defendant by publication were in existence at the commencement of the action, and the affidavit for publication is defective only and not void, the court, after judgment, may permit an amended affidavit for publication to be filed, and such affidavit, when filed, gives jurisdiction to the court, and relates back to the time of the commencement of the action. Long v. Fife, ante, 594, (just decided; ) Pierce v. Butters, 21 Kan. 124; Wilkins v. Tourtellott, 28 Kan. 833; Harrison v. Beard, 30 Kan. 532, 2 Pac. Rep. 632. The railroad company has proceeded upon the faith that it was to receive the bonds in due time; has complied with all the conditions upon which it was to become entitled to them; has expended large sums of money in constructing its road through the township, which it would not have done but for the promise of the legal voters that the bonds should issue in payment of the township subscription when the company had performed its part of the contract. During all of this time the board of county commissioners, the township officers, the tax-payers, and citizens of the township, seeing and knowing that the railroad company was expending its money within the township, in the construction of a public improvement which was to benefit the township and the property therein, stood by and made no complaint or objection to the petition presented for the second election. The first time that it was suggested that the proceedings were wholly void, because of the absence of a tax-payers' petition, was upon the trial of this case, and if the statement of the counsel of the railroad company is correct the suggestion was not seriously considered by the parties until the decision of the trial court was rendered.

In view of all the facts presented, we think that the question whether the petition for the second election was signed by two-fifths of the resident tax-payers of the township ought to be fully litigated. The evidence *pro* and *con* upon this question should be presented to the trial court. We think, considering the conduct of the coun-

ty and township officers, the tax-payers and citizens of the township, and the form of the petition praying for the injunction against the issuance of the bonds, that the railroad company never understood, until after the decision against it, that the validity of the petition presented to the board of county commissioners was challenged. It was not specifically informed on the trial by the allegations of the pleadings, or any evidence offered, that the petition was defective upon the ground of not having been signed by tax-payers, so it had no fair opportunity on the trial of supplying proof in that regard. Of course, the rule is that if a petition is not sufficiently definite, a defendant may file his motion to have it made more specific, but the petition for the injunction nowhere alleged that the proceedings were void for the want of a tax-payers' petition, and the petition did specifically state several other reasons why the railroad company was not entitled to the bonds. These specific allegations limited and qualified the general allegations of the petition, and therefore we cannot say that the counsel of the railroad company was negligent or guilty of laches in failing to file a motion to make the petition more certain, or in failing to understand that the question of a tax-payers' petition was in controversy. Wiley v. Keokuk, 6 Kan. 94; Armour Bros. Banking Co. v. Riley Co. Bank, 30 Kan. 163, 1 Pac. Rep. 506. The allegations of a pleading are to be taken most strongly against the pleader. If, upon a new trial, it shall be made to appear that the petition presented to the board of county commissioners was signed by two-fifths of the resident tax-payers of Rich township, then, at most, the petition for the second election was merely defective, or irregular only. It ought to have stated upon its face that it was signed by two-fifths of the resident tax-payers of the township, or the board, in ordering the election, should have so found; but if, as a matter of fact, it was actually thus signed, then section 1 of chapter 183, for a first election, would be so far complied with as to uphold the proceedings, considering all the other facts of the case. The jurisdictional facts or conditions precedent to a valid subscription by a township under the act referred to are a petition of two-fifths of the resident tax-payers, an order by the commissioners for an election, a notice for such election, and an affirmative vote upon the proposition. The power of the township to vote aid was not exhausted by the election of March 1, 1887, if the second election be regarded as a vote upon a new proposition. If irregularities only intervened, and the second subscription was otherwise valid, it annulled and canceled the prior subscription. Supervisors v. Galbraith, 99 U. S. 214. If it can be established by sufficient proof that the petition for the second election was signed by two-fifths of the resident tax-payers of Rich township, as it is conceded that the commissioners ordered the election, that notice of the election was given, and an affirmative vote of a majority of the legal voters of the township was cast upon the proposition, it cannot well be urged that there was a

total want of power to make the subscription. If there was power to make the subscription, although the proceedings were irregular, then, in view of all the equities favoring the railroad company, the bonds ought to issue. It is not contended that there was anything unfair in the election, or that the voters of the township did not generally participate therein. As before stated, all of the parties interested treated the second petition as sufficient and valid until the perpetual injunction was granted. If, as a matter of fact, this petition was signed by two-fifths of the resident taxpayers of the township, then the proceedings precedent to making the subscription were irregular only, not fatally defective,—not void. There is nothing in the petition presented to the board of county commissioners, or in the order or notice for the election, stating or showing that the signers to the petition were not taxpayers of the township. The petitioners were qualified electors of the township, and may have also been taxpayers. Generally a majority of the qualified electors of a township in this state embraces two-fifths of the taxpayers of the township; at least, a majority of the qualified electors of a township are more likely to include two-fifths of the taxpayers of a township than a majority of the qualified electors of a city or large village are likely to include two-fifths of the taxpayers of such city or village. Whether the majority of the qualified electors of Rich township signing the petition included among them two-fifths of the taxpayers of the township will be determined upon the new trial. *Noffziger v. McAllister*, 12 Kan. 315, referred to, was a slight herd law decision. The only evidence introduced on the trial in that case to show that any petition was ever presented to the board of county commissioners was merely the order of the board mentioning the same. Of course, the mere recital in the order of the county commissioners, that a petition had been previously presented to them to consider and act upon, is not sufficient evidence of such fact if it be specifically denied. Other questions in the record as to alleged conditions precedent to a valid subscription need not be considered, because they all concern irregularities merely, and the township is "estopped by its course of dealing with the railroad company to interpose a defense of irregularity in the exercise of the power of issuing the bonds." In view of another trial the pleadings should be amended so as to specifically allege that the petition upon which the second election was called was not signed by two-fifths of the resident taxpayers of the township. Then this matter will be clearly in issue. The judgment of the district court will be reversed, and the cause remanded for new trial in accordance with the views herein expressed. All the justices concurring.

(45 Kan. 147)

## TALLEY v. BURTIS et al.

(Supreme Court of Kansas. Jan. 10, 1891.)

## GUARANTY.

Where a promissory note, signed by T. and B. on its face, was indorsed by a third person, a

stranger to the note, by writing her name across the back thereof, in the absence of any knowledge of the relation of T. and B. on said note, beyond what appears from the note itself, she had a right to presume that T. and B. were both principal makers of the note, and her liability on such note is that of a guarantor; but her liability would remain the same though she knew, when she indorsed the note, that T. was an accommodation maker on said note for Brown.

(Syllabus by Strang, C.)

Commissioners' decision. Error to district court, Shawnee county; JOHN GUTHRIE, Judge.

C. N. Sterry, for plaintiffs in error. J. H. Moss, for defendant in error.

STRANG, C. Action on a promissory note, of which the following is a copy: "\$1,400. Topeka, Kansas, May 16th, 1887. Ninety days after date we promise to pay to the order of the First National Bank, Topeka, Kansas, fourteen hundred dollars, at the First National Bank of Topeka, Kansas, value received, with ten per cent. interest after maturity. [Signed] L. J. TALLEY. [Signed] FRANK S. BROWN. Due August 17th, 1887." Indorsed on the back: "MARY E. BURTIS." The defendant Mary E. Burtis claims that L. J. Talley and Frank S. Brown were joint makers of the note sued on, and that she was indorser and guarantor. When the note became due, it was renewed by giving a new note exactly like the original, and executed by the several parties thereto in the same manner. When the second note became due, the said Talley and Brown failing to pay the same, it was paid by Mrs. Burtis, and indorsed to her, and she brought suit on it against Talley and Brown as makers. Talley and Brown filed separate answers; Brown answering by general denial only, while Talley answered by general denial, and also pleaded that he signed the note as a surety with Mrs. Burtis for Brown. The defendant replied the general denial. The case was tried by the court without a jury, the court making the following findings of fact and of law:

## "FINDINGS OF FACT.

"(1) That, 90 days preceding the making of the note sued on in this action, the defendant Brown presented to the plaintiff a promissory note of that date, and of the same form, for the sum of \$1,400, payable 90 days after date to the First National Bank, and signed by the defendant L. J. Talley, and the said Frank S. Brown requested the plaintiff to indorse the said note by writing her name across the back of said note, and thereupon the said note was then by the said Brown negotiated to the First National Bank of Topeka, Kan., and he received the proceeds of said note. (2) That, when the plaintiff indorsed the said note by writing her name across the back of said note, she did not know that Talley was, or had executed said note as, surety for Brown, and believed that both Talley and Brown were makers of said note, and believed that she was only assuming the liability of indorser for the principals, Talley and Brown. (3) That Brown received the proceeds of said note from the bank, and appropriated the same to his own use and

benefit, and that Talley received no benefit from the said note, or proceeds of the same. (4) That, when the first note above described matured, the note described in plaintiff's petition was made by Talley and Brown as shown and indorsed by the plaintiff, as appears on said exhibit, as a renewal of said first note first above described. (5) That after the note described in plaintiff's petition matured, and was dishonored for non-payment, the plaintiff took such note up from the bank by paying the bank the full face value of the note, and became the owner, and now is the owner and holder, of said note. (6) That the plaintiff is aged 68 years, and is a widow, her husband having died several years ago, and is quite hard of hearing, and her eye-sight greatly impaired.

"CONCLUSIONS OF LAW.

"(1) That when the defendant Brown presented the first note, indorsed with the name of Talley and his own name written on the face of the note, and asked plaintiff to indorse the note by writing her name across the back of the same, she had the right to assume that both Talley and Brown were makers of said note, and that her liability was that of an accommodation indorser, and with the understanding that Talley was an accommodation maker of the note for Brown. (2) That, as between Talley and Brown, Brown is principal, and Talley is surety for Brown."

Judgment was entered for the plaintiff for the amount of the note and costs. Motion for new trial was overruled. An application was then made to the court to have the judgment reduced one-half, which was refused.

The first error complained of was the refusal of the court to strike out the statements of Sharritt and Brown, made immediately prior to Mrs. Burtis' indorsement of the first note. While the statements complained of could not bind the plaintiff, Talley, they were evidence for some purpose. They tended to show Mrs. Burtis' understanding of the relation of Talley and Brown to the note at the time she indorsed it. The case was tried without a jury. If it had been tried by a jury, it would have been proper for the court to have limited the application of this evidence. The evidence should not, however, have been stricken out. There is another view of this matter. Talley having signed his name to the note, and intrusted it to Brown, he thereby gave Brown implied authority to represent him as a maker of the note for the purpose of procuring other joint makers, sureties, or guarantors sufficient to discount it on the market. *Kelth v. Goodwin*, 31 Vt. 268. In this view of the case, the statements of Brown, at least, obtained an additional force. His statements at the time, and immediately before, Mrs. Burtis indorsed the note, that she would have no trouble with the note; that Mr. Talley would pay it,—were equivalent to saying that Mr. Talley was a principal, and she had a right to so understand it, and rely upon it.

The second complaint is that there is no evidence to support the second finding of

fact. It seems to us there is considerable evidence in the record that supports finding No. 2. The position of Talley's name on the note is some evidence that, at the time Mrs. Burtis indorsed the note, she believed he was a maker of the note. Mr. Brown's statement that she would have no trouble with the note; that Talley would pay it,—also had a tendency to make her believe Talley a maker of the note; and she swears Brown did not tell her Talley had signed as surety. Again, she testifies: "I merely indorsed these men; not to pay the money, but to pay it if they did not. They were responsible for the money, and I merely indorsed these men." If she believed Talley was a maker, she could not believe he was only surety. She also says she relied on Mr. Talley's responsibility to pay the note, and on him alone; that she knew Brown had not a dollar. Certainly, there is some evidence to support the finding. It is true there is some evidence in the record that tends to prove that she knew the money was for Brown; but that would not necessarily prove that Talley was only a surety. Talley had a right to become a joint maker of a note upon which to raise money for Brown, if he chose to do so. It is claimed that Mrs. Burtis knew that Brown was the principal; and her only belief that Talley would pay, and save her, lay in the understanding that she had that Talley was to be secured. She did not know that Talley was to be secured until after she had indorsed the note. The talk she had with Brown in which he mentioned that he was going to secure Talley with a mortgage on furniture was after she had indorsed the first note, and before she indorsed the second. It is asserted that Mrs. Burtis has no stronger equity to have the case determined for her on what occurred when she signed than has Talley to have the case determined for him upon what occurred when he signed. We think she has a much stronger equity as against him than he has against her. At the time he signed the note there was no name on it. He signed first. There is nothing on the paper to show any liability on the part of any one when he signed it. On the other hand, both Talley and Brown had signed the note when it was presented to her for her indorsement, and both had apparently signed it as principals. In the absence of any statement at all, she had a right to assume that the parties already on the note sustained the relation to the note and to each other that they appeared to; that is, joint makers. It seems to us that, as between Mrs. Burtis and Talley and Brown, they are principals, joint makers of the note, while she, by her indorsement, assumed the liability of guarantor. *Firman v. Blood*, 2 Kan. 496; *Fuller v. Scott*, 8 Kan. 25; *Sarbach v. Jones*, 20 Kan. 497; *Withers v. Berry*, 25 Kan. 373. *Pahlman v. Taylor*, 75 Ill. 629. It is therefore recommended that the judgment of the district court be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 286)

MAYOR, ETC., OF ATCHISON *et al.* v. PRICE  
*et al.* SAME v. LAMPHEAR *et al.* SAME  
v. BURNS' ESTATE *et al.*

(Supreme Court of Kansas. Jan. 10, 1891.)

**MUNICIPAL IMPROVEMENTS—CONSTRUCTION OF SEWERS—ASSESSMENTS—ISSUE OF BONDS.**

1. A city of the first class may construct sewers by districts or otherwise; and when done by districts, and at the expense of the property specially benefited, it is not essential that the districts shall be defined by ordinance, but it will be sufficient if the records of the tax proceedings clearly show the property specially taxed for the improvement.

2. The fact that a sewer constructed in one district or portion of the city connects with, or is an extension of, another already constructed, does not make the territory drained by both a single and distinct district; nor does it require that all the property within that territory shall be assessed for the sewer last constructed. When a section is built or extension made, only the territory drained and specially benefited by the construction of such section or extension can be assessed for its cost.

3. Property which abuts upon and is specially benefited by the sewer constructed will not be relieved from bearing its proportionate share of the expense of the same because the owners thereof have previously constructed private drains or sewers, which have not been authorized or adopted by the city as a part of its system.

4. An objection was made to the special assessment upon a lot fronting upon the improvement because the whole of the same was not owned by one person, and that one owner could not avail himself of the benefits of the sewer except by passing over the property of the other. When the assessment was made, the recorded plat of the city did not show any subdivision of the lot, or that the frontage of the same had been changed, and it did not appear that any of the public records showed that the title of the lot was in more than one person, and the court held that the whole of the same was subject to taxation. *Held* no error.

5. The provisions of paragraph 558 of the General Statutes of 1889 do not apply to the construction of sewers or the levy and collection of special assessments to pay for the same.

6. The whole expense, including the engineering and supervision of the construction of sewers, is to be borne by the property specially benefited.

7. A city of the first class may construct a sewer on credit when there are no funds on hand or set aside in the city treasury to pay for the same; but installment bonds of the city may be issued to the contractor constructing the sewer in payment thereof, which bonds shall be redeemed by special taxes levied upon the property specially benefited, as provided in chapter 101 of the Laws of 1887.

(Syllabus by the Court.)

Error to district court, Atchison county; ROBERT M. EATON, Judge.

Three actions were brought in the district court of Atchison county to enjoin the issuance of improvement bonds, and the levy and collection of special taxes, to pay for the construction of a sewer which had been built and completed in the city of Atchison by contractors Shaw & Downing. One action was brought by John M. Price and W. W. Guthrie against the city of Atchison, the mayor and councilmen thereof, and Shaw & Downing; the second action was brought by A. H. Lamphear and 67 others against the same defendants; the third action was brought by the Burns estate and 14 others against the same defendants. For the purposes

of trial and judgment, the cases were consolidated, and submitted as one case, and in due time the court made and announced the following conclusions of fact and law:

**"CONCLUSIONS OF FACT.**

"(1) That each and all of the said plaintiffs are the owners of the several lots and pieces of ground as set forth herein in their several petitions. That the city of Atchison is, and ever since about the year 1880 has been, a city of the first class. That Fourth street, which, by the authority of the city council, in the summer of 1889, was changed to Fourth avenue, is and has been a public street in said city, running north and south. That running parallel with said Fourth street in said city, and east thereof, is Third street, in said city; and that running parallel to said Fourth street, and west thereof, is Fifth street, in said city.

"(2) That said Fourth street, from its intersection with Main street and White Clay creek, in said city, running north, crosses the following streets at right angles, as follows: Commercial street, Kansas avenue, Santa Fe, Atchison, Parallel, Laramie, Kearney, Riley, and Mound streets.

"(3) That in the summer and fall of 1884 the city council of the city of Atchison caused to be constructed a circular brick sewer, six feet in diameter, from the intersection of Main street and said Fourth street, at a point where said sewer would empty into White Clay creek, north, and in the center of said Fourth street between blocks 17 and 18, crossing Commercial street, and north to a point twenty-nine and one-half feet south of the south line of the alley running east and west in blocks 13 and 14. From this terminus of said brick sewer, arms, four feet in diameter, extended to the intersection of said alley on the east and west side of said Fourth street, at which point suitable catch-basins were made, and which conducted the surface water of said street into said sewer, and carried the same into White Clay creek. That the cost of said sewer was paid by all the property holders of the city of Atchison; a levy having been made therefor by the council upon all the property of said city.

"(4) At the time said sewer was constructed there was a rock drain in the alley in block 14, on the west side of Fourth street, which extended westwardly about half-way of said block, which old rock drain was at the time of the construction of the said brick sewer turned into and connected with the west arm of said brick sewer. That afterwards, in the year 1885, upon recommendation of the city engineer, the chairman of the committee on improvements of the council of the city of Atchison was ordered to, and did, lay from the west terminus of said rock drain, heretofore referred to, in the alley in block 14, an 18-inch pipe, westward through said alley to Fifth street, thereby making a suitable connection for sewerage purposes with the brick sewer on said Fourth street; which said last improvement was paid for by the city of Atchison, all property thereof contributing its proportion thereto.

"(5) On the 6th day of February, 1888,

ordinance No. 954 was passed by the council of the city of Atchison, entitled 'An ordinance authorizing the mayor and clerk to enter into a contract with Rosewater & Christie to furnish said city with plans and specifications for a complete sewer system;' which said ordinance was passed February 6, 1888, approved February 8, and was published February 9, 1888. That in pursuance of said ordinance, on the 16th day of February, 1888, the then mayor of Atchison and clerk did enter into a contract with Messrs. Rosewater & Christie to prepare and furnish said city with plans, specifications, and estimates for a complete sewerage system of said city; which said sewerage system, with plans and specifications and a map thereof, was duly prepared and furnished by said Rosewater & Christie on the 1st day of June, 1888, in pursuance of their said contract, for which said city paid the said Rosewater & Christie the sum of \$1,995.

"(6) No ordinance was ever passed by the mayor and council of the city of Atchison establishing or forming sewer districts, unless it be ordinance No. 954, referred to in the conclusion of fact No. 5.

"(7) On the 20th day of May, 1889, the city council of the city of Atchison passed a resolution as follows: 'Resolved, that it is necessary to at once commence the construction of the Fourth-Street sewer, it having been made a separate sewer under the plans of the Rosewater & Christie system of sewerage.' No publication of this resolution was made except the publication of the council proceedings of said May 20th, which was published in the Atchison Champion on the next day, to-wit, the 21st day of May, 1889. On June 3, 1889, the city clerk was instructed by the city council to advertise for bids for the construction of the North Fourth street sewer, and the city engineer was ordered to prepare plans, specifications, and estimates of the work, which was accordingly done, and which estimate, including — cents per foot for superintending, engineering, and contingencies, was afterwards filed in the office of the city clerk on the 8th day of July, 1889, duly sworn to by the city engineer. On the 6th day of June, 1889, the city clerk, in pursuance of the resolution of June 3d, caused a notice to be placed in the Atchison Daily Globe, the official newspaper of said city, for bids for the construction of the North Fourth street sewer, for the period of ten days, and no bids were received. And thereafter, on June 25, 1889, the city clerk, in pursuance of the resolution of June 3d, caused another and second notice of and advertisement for bids for the construction of the North Fourth street sewer to be made in the Atchison Daily Globe of that date for the period of ten days; and in this and all other like notices the city reserved the right to reject any and all bids. And thereafter, on the 8th day of July, 1889, the bid of John Shaw and Oscar Downing, partners as Shaw & Downing, for the construction of said Fourth-Street sewer system under the estimate of the city engineer, was received and accepted, and the contract awarded to said Shaw & Downing; the amount of said contract to be paid

by the city in cash or bonds, at the option of the city of Atchison. And on said July 8th an ordinance (No. 1019) was duly passed by the mayor and councilmen of the city of Atchison authorizing the mayor and clerk to enter into a contract with Shaw & Downing for constructing the North Fourth street sewer system. [Ordinance omitted.] And thereafter, on the 20th day of July, 1889, in pursuance of said ordinance, the mayor and clerk duly entered into a contract with said Shaw & Downing for the construction of said North Fourth avenue sewer system, to commence at the termination of the brick sewer near the south line of the alley between Commercial street and Kansas avenue, thence extending north along Fourth avenue to the line of the center of the alley running east and west between Riley and Mound streets, together with all lateral sewers, in accordance with the plans thereof on file in the office of the city engineer; and that in pursuance of said agreement, as hereinafter shown, said Shaw & Downing constructed said North Fourth avenue sewer to the acceptance of said city.

"(8) At the meeting of the council July 8, 1889, and before the contract for constructing the Fourth-Avenue sewer was awarded to Shaw & Downing, a remonstrance signed by a majority of the resident property owners in the territory sought to be assessed for the construction of said sewer, outside of block 14, was presented to the council, and ordered received and filed.

"(9) No ordinance was passed by the city council of the city of Atchison appropriating or setting apart a fund for the payment of the construction of said Fourth-Avenue sewer before the commencement of the work, and that there were no funds in the city treasury at that time applicable for that purpose; and this sewer is the only one constructed since the Rosewater & Christie system was made.

"(10) That on July 26, 1889, by resolution, the mayor and council of the city of Atchison duly appointed Henry Denton, Phillip Krohn, and H. T. Smith as three disinterested appraisers to make a true and impartial assessment of all lots and pieces of ground liable under the law for the payment of special assessment for the work of building the Fourth-Avenue sewer, without regard to buildings or improvements thereon, and that the engineer be instructed to immediately prepare a plat showing the lots and pieces of ground liable to said appraisalment, and file the same with the city clerk for the use of said appraisers. And thereupon the city engineer of the city of Atchison made out and furnished to said appraisers a list of all the property owners, together with a description of their property, in the territory in which said sewer is constructed, from Commercial street, in said city, north to Mound street, and from the center of Third street on the east side of Fourth avenue to the center of Fifth street on the west side of Fourth avenue, together with a map of said territory showing the property benefited by the construction of

said Fourth-Avenue sewer, a copy of which said map is hereto attached.

"(11) That said appraisers on the 31st day of July, 1889, in pursuance of their appointment, were duly qualified as such appraisers by taking the oath required by law, and thereupon proceeded to the discharge of their duties, and made report in writing of their appraisal, which was duly filed in the office of the city clerk on the 17th day of August, 1889.

"(12) In the list of property, together with the owners thereof, which was furnished to the appraisers for the purpose of valuation for assessment for the construction of said sewer, block 17, lying between Main and Commercial streets, and abutting upon said Fourth avenue, and also block 14, except the north 50 feet of lots one and two, and the south 25 feet of the north half of lots one and two, were not placed upon said list, and were not valued by said appraisers for assessment or the construction of said North Fourth street sewer, although said blocks are drained and benefitted by the said sewer, and are a part of the territory under the Rosewater & Christie system.

"(13) In the list of property, together with the owners thereof, prepared for the use of said appraisers, as hereinbefore stated, the following property upon said list was erased therefrom by drawing red ink lines across the same, and marking thereon in red ink the words, 'Not liable,' and which property is as follows: The north 70 feet of lots 5, 6, and 7, in block 13, in the name of John M. Price, and is the same property upon which the Price Opera-House in said city is situated. The south 90 feet of the west half of lot 14, in block 13, in the name of Manuel Frank. This property cannot be connected with the lateral of said sewer, which runs through the alley in the center of block 13, without going through or over other property, because the north 60 feet of said lot No. 14 is owned by another individual, to-wit, A. G. Otis. The north 22 feet of the south half of lot No. 8, in block No. 7, in the name of Mary Kinney, was not assessed, for the reason it could not be connected with said sewer, only by going through or over other property owned by other parties. The west 25 feet of the south 50 feet of lot No. 8, in the name of W. W. Guthrie, and on which property is located what is known as the 'Pioneer Hall Building,' was not assessed. That the north half of lots 1, 2, and 3, in block 63, in the name of L. Friend, was not assessed because it cannot be connected with said sewer without going through or over other property owned by other parties. The north 90 feet of lots 6 and 7, in block 64, in the name of Mrs. M. W. Horan, was not assessed, because no connection with said sewer could be made therefrom without going through or over property not owned by her. Lot No. 13, in block 74, in the name of S. A. Frazier, was not assessed, because such lot was so much lower than the lateral of said sewer on which it abuts that it would be impossible to connect it with said sewer. All of which said property was not assessed by said appraisers, and no valuation was

placed thereon, at the time they filed their said report in the office of the city clerk, to-wit, the 17th day of August, 1889.

"(14) After the report of the appraisers was filed in the office of the city clerk, the appraisers were notified by the city clerk to appear at the city clerk's office and make some corrections in their report which had been filed; and thereupon, on the 26th day of August, 1889, Henry Denton and H. T. Smith, two of the appraisers, met at the city clerk's office, whose action in the matter was afterwards approved by Dr. Phillip Krohn, one of the appraisers, who met them at the foot of the stairs immediately after it was done; and the property of John M. Price, to-wit, the north 70 feet of lots 5, 6, and 7, in block 13, and the property of W. W. Guthrie, to-wit, the west 25 feet of the south 50 feet of lot 8 in block 8, which had been placed upon the list furnished them as not liable, was placed thereon by said appraisers, and each of said pieces of property, respectively, was valued at the proportion fixed upon the balance of said lots, which the appraisers had agreed should be the amount when they were determining their assessments upon all other property furnished them, and the same was at that time inserted in their report.

"(15) The property of John M. Price, hereinbefore described, and known as the 'Opera-House Property,' and the property of W. W. Guthrie, hereinbefore described, and known as the 'Pioneer Hall Building,' after the construction of the old circular brick sewer, had been connected with it by a private sewer from each of said pieces of property at their own expense, in the sum of two hundred and forty dollars. Each of said pieces of property, respectively, lies on the east side of Fourth street, separated only by Kansas avenue, and each abuts on said Fourth street.

"(16) After the construction of the old circular brick sewer, a private sewer or drain was constructed in the alley in the center of block 13, from lot 11, in said block, by Kathrens, to connect with the east wing at the corner of the alley with said old sewer, and with which sewer or drain, by permission of Kathrens, A. G. Otis, the owner of the east half of lot 10, in said block, connected therewith. The east half of the south 90 feet of lot No. 14, in block 13, is owned, and has been for many years, by Amelia J. Otis, and the north 60 feet of said lot 14 is owned by A. G. Otis, and A. G. and Amelia J. Otis are husband and wife, and Amelia J. Otis can only connect with said sewer over or through the property of A. G. Otis. There is no recorded plat showing any subdivision of this lot.

"(17) On the 21st day August, 1889, a notice was published in the Atchison Daily Globe for ten days, which was a notice of the report of the appraisers, and that the city council would sit as a board of equalization on the 2d day of September, 1889; a copy of which notice is as follows: [Notice omitted.]

"(18) On the 2d day of September, 1889, the council met as a board of equalization, and heard complaints from property owners, and adjourned until September 4th,

when, there being no quorum present, they adjourned until September 6th, when they met a number of the property holders before them,—among them, A. G. Otis, A. H. Lamphear, C. D. Walker, A. D. McConaughy, E. S. Ehrhart, attorney for property holders, W. W. Guthrie, who appeared for himself and John M. Price, whose property was in a similar condition to his own,—and objected to their property being included because not legally assessed, and already having sewer facilities, and did not further appear. H. R. Bostwick, for the Burns estate, A. F. Martin, attorney, appeared for J. A. Harouff, and Henry Luth, J. P. Adams, S. A. Frazier, and a number of others, and, after hearing the complaints, the council adjourned until September 16th, when they again adjourned, there being no quorum present, until September 23, 1889, when they met as a board of equalization, and after a consideration of all complaints which had been made to them, all of which said complaints were mainly to the amount of the assessment of property, except the complaint of W. W. Guthrie, for himself and John M. Price, whose property was similarly situated with his own, who claimed they ought not to be assessed because they had already built private sewers upon their properties at their own expense; and all said complaints were disallowed by the said board of equalization, except the complaint of A. D. McConaughy, the assessment of whose property was reduced at said meeting, and the report of the appraisers was adopted.

"(19) Shaw & Downing, in pursuance of their contract entered into with the mayor and city clerk, on the 20th day of July, 1889, as hereinbefore stated, commenced the construction of said sewer according to the plans and specifications on file in the office of the city engineer, and the construction of the same was prosecuted by them without delay, under the supervision of an inspector appointed specially by the city authorities, in connection with the city engineer, and accepted by said city through its engineer, about December 2, 1889.

"(20) The North Fourth avenue sewer, as constructed by said Shaw & Downing, commences at the north terminus of the old brick sewer, into which it empties twenty-nine and one-half feet south of the south line of the alley running east and west through blocks 13 and 14, and runs north in the center of Fourth avenue, with its lateral east and west, into the alleys between the blocks, with its man-holes and catch-basins, on each side of Fourth street, to the alley between Riley and Mound streets. The laterals connect directly with the main sewer. In addition to the laterals which are laid in the alleys midway of the blocks as you go north from the north terminus of the old brick sewer, to the alley between Mound and Riley streets, there are also laterals constructed in Kansas avenue, Santa Fe, Kearney, and Riley streets, which also connect with the main sewer; and in all the laterals, and in many instances in the main sewer, openings have been made with which each and every piece and parcel of ground within the ter-

ritory drained by said sewer, by private sewers from said pieces of property can be therewith connected; catch-basins on each side of said sewer, located at all the cross-streets for the purpose of conducting the surface water off, are connected with the main sewer by separate pipes, and do not in any case run into the laterals. The fall from the alley between Mound street and Riley street, south of where the sewer empties into the old brick sewer, is one foot in every twenty-four feet. The main sewer from where it commenced at the north terminus of the old brick sewer is built of glazed sewer tile pipe; the first pipe laid being twenty-four inches in diameter, the next twenty inches in diameter, the next eighteen inches in diameter, the next fifteen inches in diameter, and the next eight inches in diameter, respectively, as you go north to the crest of the elevation. The laterals are constructed of glazed sewer tile pipes, eight inches in diameter, and said sewer is abundantly and amply sufficient in capacity to carry off all drainage from property and surface water, which in the ordinary course of things would fall upon or be carried away in said territory. The alley at the north terminus of said Fourth-Street sewer, between Mound and Riley streets, is at the crest of the surface of earth at that place. Beyond and north of it the water naturally flows into another depression. Fifth street, on the west side of Fourth avenue, is now a paved street, oval, and highest in the center, and no water on the west side of Fifth street will flow into the territory drained by this sewer from the west side of said street, but will naturally flow westward into another depression of the ground. All surface water and drainage on the east side of third street, in said city, naturally flows from the topography of the ground into another depression of earth, which is naturally drained into the Missouri river, with the exception, perhaps, of a few isolated pieces of property from which the surface water might flow over and across said Third street, and into the territory drained by the North Fourth street sewer.

"(20½) In the construction of said North Fourth street sewer, the private sewer which had been made heretofore with the Opera-House, the property of John M. Price, and the building known as the 'Pioneer Hall Building,' and the property of W. W. Guthrie, and which crossed said Fourth street to the west side thereof, was connected with the present new Fourth-Street sewer at the point in said Fourth street where it crosses the same, without their knowledge.

"(21) Lot No. 8, in block number 13, which lot is on the east side of Fourth street and abuts thereon, owned by Anna M. Marbourg, was connected with the old brick sewer by a private sewer constructed about a year prior to the commencement of the construction of the present Fourth-Avenue sewer, by the owner of said lot at her own expense.

"(22) The lots in block 14 in an unimproved condition are worth from 25 to 40 per cent. more than the corresponding lots in block 13, and the improvements of block



14 are much better than those in block 13; and the lots in block 17, unimproved as well as improved,—that is, taking into consideration the buildings thereon,—are about the same as block 14, and are worth from 25 to 40 per cent. more than lots in block 13. The lots in block 18 are of about the same value as the lots in block 13, unimproved, and the improvements thereon are of about the same value as those in block 13. The south half of block 13, and which abuts on Commercial street, is improved with buildings for the purpose of carrying on trade and business therein, and on the north half of said block 13 is the Opera-House building. The south half of block 14, abutting on Commercial street, is improved with buildings suitable for carrying on business and trade, as well as the greater part of the north half of said block 14. Outside of the two blocks just mentioned, (13 and 14,) the balance of the territory drained by said sewer consists of vacant lots and private residence property.

“(23) Of the parties plaintiff in the actions herein, the following named persons during the time said sewer was being constructed, and since and before the commencement of this suit, made connection of their property with the said sewer, as follows: Ella J. Fisk, 2 houses; L. Kiper, 2 houses; Anna Moore, 4 houses; Mrs. K. D. Shipley; George Searles; John Beltz; John Perkins; F. W. Downs; and George Tofte.

“(24) The total cost of said sewer amounted to the sum of \$11,516.41, which includes 25-100 per cent. of the cost of the work, which was allowed for engineering and superintending the said sewer, and paid by the city of Atchison, to be reimbursed from special levy. The estimated cost of the work as made by the city engineer, and filed in the office of the city clerk, amounted to \$13,047.28.

“(25) On the 28th day of October, 1889, ordinance No. 1097 was passed by the city council of the city of Atchison, approved by the mayor and published as required by law, and is as follows: [This ordinance, which determined the amount of special assessment to be charged against the different parcels of property, and provided for the issuance of internal improvement bonds, is omitted.]

“(26) The city of Atchison, electing to pay the contractors, Shaw and Downing, for the construction of said sewer, as under its contract it had the option so to do, had printed, and were about to dispose of, in pursuance of section 3 of ordinance No. 1098, internal improvement bonds of the city of Atchison, bearing seven per cent. interest, payable semi-annually, and covering a period of 10 years, payable in annual installments, one-tenth of the principal, with the interest due on the unpaid principal on the bond each year, which said bonds shall have proper coupons attached thereto, and shall be of such denominations as the mayor shall deem proper, to the amount of \$11,500.00, for the purpose of paying for the Fourth-Avenue sewer in said city; and that in due time the city of Atchison will cause to be levied upon the lots and parcels of lots,

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as described in said ordinance No. 1097, annually, such assessments as will meet the payment of such internal improvement bonds, as they shall fall due, respectively, with the interest thereon for the period of ten years next ensuing. A blank form of said series of said internal imp. bonds is hereto attached.

“(27) After the passage of ordinance No. 1097, the city clerk caused notices to be sent to all lot-owners mentioned in the report of the appraisers, one of which said notices was sent to W. W. Guthrie, and is as follows: [Notice omitted.]

“(28) Said Rosewater & Christie made a complete survey of said city, including the sewers and parts of sewers already put in, which then consisted of the said Fourth-Street sewer, with its lateral connections in alley in block 14, so far as completed, and a sewer reaching from White Clay creek north up Sixth street, with some lateral connections, and a sewer reaching from the river up Third street, with some lateral connections, and made their system of sewerage to discharge into White Clay creek, and then reaching therefrom so far as the natural connections could be made therewith, and otherwise discharging into the Missouri river, and made a map locating such sewerage system thereon, and showing same, as hereinbefore stated, and the most of the sewerage of said city thereby to empty into White Clay creek, or the main sewer to take its place, and so discharge into the Missouri river, and showing contemplated extensions of said Fourth-Street sewer, north, with laterals reaching to 3d and 5th streets, on each side, substantially as afterwards completed, and showing the extension of the said Sixth-Street sewer, north, with lateral connections reaching to 5th and 7th streets on either side, and so throughout the city, providing for sewerage, into White Clay creek, or the sewer to take its place, according to the natural trend of the ground. The original map of said system of sewerage now on file in the city engineer's office here referred to and made a part hereof. [Form of the improvement bonds, and map and plan of the Fourth-Street sewer, are omitted.]

“(29) The construction of the Fourth-Avenue sewer was a matter of general notoriety throughout the city of Atchison, and each and all of the plaintiffs, in common with all other citizens, had knowledge of its construction, and no suit was brought until these actions were commenced, which was after the completion of the same, and its acceptance by the city engineer of said city.

“(30) That at, and for long prior to, the making of the contract between the defendant the city of Atchison, and its co-defendants, John Shaw and Downing, partners as Shaw & Downing, the bonds of the character of those sought to be issued by the city for the purpose of raising money to pay for the construction of the Fourth-Avenue sewer were generally known to be below par, and the city had never been able to dispose of bonds of such character and corresponding value, except by allowing the purchaser two per cent. commission for taking them at their par

value, which two per cent. when paid was paid by the city out of its general revenue fund. In this case the city had the option, under the contract, to pay in cash or bonds, and the contractors had elected to take the bonds at their par and face value, and the city had elected so to deliver them.

"CONCLUSIONS OF LAW.

"(1) That the proceedings of the mayor and council adopting the Rosewater & Christie system of sewerage for said city were valid.

"(2) That the action of the city council in directing the city engineer to prepare plans, specifications, and estimates for the construction of the Fourth-Street or Fourth-Avenue sewer, it having been made a separate sewer under the Rosewater & Christie system of sewerage, was valid, and in substantial conformity with law.

"(3) That the estimates submitted by the city engineer for the construction of said sewer were in substantial conformity to the law, and therefore valid.

"(4) That the contract entered into between the city and the contractors for said work was in substantial compliance with law, and therefore valid.

"(5) That the appraisal and valuation of the property for the purpose of levying a tax thereon for the payment of said sewer were in substantial compliance with law, and valid.

"(6) That the proceedings of the mayor and council of said city in charging and assessing the amounts against the property of the plaintiffs for the cost of said sewer is void, for the reason that blocks fourteen (14) and seventeen (17) are omitted from said charge and assessment for their appropriate share of the costs of said sewer."

The defendants moved for judgment in their favor, and against the plaintiffs, upon the conclusions of fact, notwithstanding the conclusions of law, and also to set aside the conclusions of fact and law, and grant a new trial; both of which motions were overruled. The plaintiffs in each of the cases moved for full judgment and decree upon the conclusions of fact, the conclusions of law to the contrary notwithstanding, and also filed motions to set aside and vacate the conclusions of fact and law, as found and stated by the court, and for a new trial of the actions; all of which motions were overruled. The court thereupon, and for the reasons stated in the sixth conclusion of law, adjudged and decreed that the defendants be enjoined from issuing any installment improvement bonds of the city of Atchison, or from making any levies of special improvement taxes against the properties of the plaintiffs in any one of the three actions, to pay for the construction of said sewer. The defendants bring the case to this court for review.

*H. C. Solomon*, for plaintiff in error. *W. W. & W. F. Guthrie, Henry Elliston*, and *A. F. Martin*, for defendant in error.

*JOHNSTON, J.*, (after stating the facts as above.) The decision and decree of the court holding the special taxes to be illegal, and enjoining the making of any provision for their payment, is placed upon

the failure of the city and its officers to make an assessment upon the property in blocks 14 and 17 for a proportion of the cost of the sewer. The other conclusions are against the defendants in error; and although they excepted to the rulings adverse to them, and asked for a new trial, they have presented no petition or cross-petition in error asking for a review of such adverse rulings, as they might have done. The property in blocks 14 and 17 which was omitted from the assessment is contiguous to another sewer, which, with laterals now built or that may be built, will afford adequate sewer facilities for the occupants of these blocks. The same may be said of block 18, which is in a similar situation. The property omitted from the assessment in these blocks was not accommodated or benefited by the construction of the new sewer, and such taxes can only be imposed in proportion to the special benefits received. A part of lots 1 and 2 in block 14, which could not be reached by the sewer already constructed, and which was so subdivided as to abut on the new sewer, was benefited, and was properly assessed. It is contended, however, that no sewer district was ever created or defined by which the expense of the construction of the sewer could be placed exclusively upon the owners of the territory upon which the assessment was made by the city council; but that, if there was a distinct sewer district which might be held liable for the entire cost of the sewer, it extended south to White Clay creek, and included blocks 14, 17, and the most of 18, as also the other property within this territory. It appears that in 1884 a six-foot brick sewer was built from White Clay creek and Main street northward along the center of Fourth street for a distance of a block and a half, and to a point 29½ feet south of the alley running through blocks 13 and 14, with wings extending to the ends of the alleys in said blocks, and on either side; and a lateral sewer was afterwards constructed through the alley in block 14, which emptied into the brick sewer. This improvement was made at the expense of all the tax-payers of the city. The sewer in question, which was constructed in 1889, connected with the brick sewer, and extended from the connection northward along the center of Fourth avenue, near to Mound street, with laterals through the alleys of the blocks on either side, thus draining the territory from Third to Fifth streets.

It is claimed that the new sewer is simply an extension of the one built in 1884, and that the entire territory between Third and Fifth streets, from White Clay creek northward to Mound street, constitutes a sewer district, and that the special taxes should be apportioned to the entire property within that district. The district court appears to have adopted the view that this territory should be treated as a distinct district, and that the exemption of the property in blocks 14 and 17 from contributing towards the cost of the sewer rendered the assessment that was made illegal. We think this entire territory is not to be treated as a single district, and that the exemption of the

property not assessed in blocks 14, 17, and 18, which is and may be accommodated by the brick sewer built prior to 1889, did not invalidate the assessment that was made. A general system of sewerage for the entire city has been adopted, and the construction of the whole at once may be impracticable and unnecessary. The fact that a sewer constructed in one district or portion of the city connects with or is an extension of another already constructed does not make the territory drained by both a single and distinct district, nor does it require that all the property within that territory shall be assessed for the sewer last constructed. It is for the city to determine how early and rapidly the system shall be completed, and any section or extension of the system may be built whenever it is deemed necessary and expedient. When a section or extension is made, the territory drained and specially benefited by the construction of an extension or section, however small, may be regarded as a district. A lateral running through an alley of a single block, and connected with another sewer, may be constructed by the city, and the territory specially benefited will alone constitute a district upon which the entire cost of the lateral may be assessed. In this case, only the property contiguous to the new sewer, and specially benefited by it, was assessed for its cost. To have apportioned any share of the expense to the omitted property in blocks 14 or 17 would have been palpably unjust and illegal. The owners of the lots not assessed received no benefit from the extension of the sewer; and, as has been said, "only those whose property is specially benefited by the improvement can be compelled to pay such taxes. Special taxes to pay for sewers and drains can be levied only upon the property of persons who can use such sewers and drains, and not upon persons who cannot use them; and the taxes should be apportioned in accordance with the special benefits received by each individual severally." *Gilmore v. Hentig*, 33 Kan. 167, 5 Pac. Rep. 781. Even property that may be within the exterior lines or boundaries of what may be called a "district," but which does not abut on the sewer, or, from the topography of the ground or other cause, cannot be drained or specially benefited by the sewer, cannot be specially assessed or taxed for its construction. It is not required, nor is it necessary, that the boundaries of a sewer district shall be defined by an ordinance; and indeed the statute contemplates that sewers may be constructed by district or otherwise. Gen. St. 1889, par. 563. When a sewer system is adopted and is being built by districts, it is then important that the records shall show the territory or property assessed for any part of the sewer which is constructed, so that it shall not be again assessed for a sewer in another portion of the city. When property has paid its full proportion for a sewer in a certain territory or district, it cannot be transferred to another district, nor held liable for the construction of sewerage facilities in another district of the city. So far as the sewer in controversy is con-

cerned, the public records sufficiently show the extent of the district, as well as the property benefited and assessed for the sewer; and no dispute can arise in the future in this regard. Under an ordinance adopted in 1888, the city of Atchison was authorized to and did enter into a contract with certain engineers to furnish the city with plans and specifications for a complete sewer system. In pursuance of this contract, maps, plans, and specifications were duly prepared and furnished, which were paid for by the city. The system thus provided was adopted by the city, and the Fourth-Street sewer was made a separate one, under the plans and system provided. These plans and specifications, together with the map made and furnished by the city engineer, and the assessment which has been made, sufficiently indicate the existence of the district and the property taxed to fully protect the tax-payers from a second assessment for the same purpose. The further fact referred to by counsel, that a short section of the sewer was formerly built at the expense of the city, is no objection to the validity of the assessment made in this case.

We might stop here, as the other points were decided against the defendants in error, and they have taken no steps to obtain a review of such rulings. It will not be improper, however, to briefly notice other of the objections to the assessment urged in the district court, and somewhat discussed here. Some of the defendants in error had constructed private sewers or drains at their own expense, and they now claim that they should not be taxed for the sewer built by the city. While one of these drains was quite expensive, it is not found or stated that any of them were authorized or adopted by the city as a part of the sewer system, nor that they are suitable or adequate for the purposes intended. The legislature has conferred upon the city authorities the discretion and power to provide sewerage facilities, and for that purpose has given them control of the streets and alleys where the sewers are built. They are to determine the necessity for sewers, as well as the character and capacity of those that are required to be built. To allow property owners to decide for themselves whether their lots needed sewerage facilities, or to permit them to provide private ditches, drains, sewers, or cess-pools as they might determine to be sufficient, would be wholly impracticable, and would prevent the adoption of a general sewerage system under the control of the city, as the statutes evidently contemplate. The property of those who had built private sewers adjoined upon the new sewer; and we think the district court ruled correctly in holding their property liable to contribute towards the construction of the sewer.

Another objection to the assessment was that the east half of lot 14, in block 13, was assessed, although the whole of the same was not owned by one person. It is stated that Amelia J. Otis owned the south 90 feet, while her husband, A. G. Otis, owned the north 60 feet, of the half lot; and it is said that she cannot avail

herself of the benefits of the sewer except by passing over the property of her husband. In addition to the fact that the question was not properly brought here, a sufficient answer to this objection is that there is no recorded plat showing any subdivision of this lot, or that the frontage of the same had been changed; and it does not appear that any of the public records showed that the title to the lot was in more than one person at the time the proceedings were taken and the assessment made.

A remonstrance of a large number of the property owners was filed with the city council before the letting of the contract for this sewer, and, under the provisions of paragraph 558 of the General Statutes of 1889, it is suggested that this is a ground of objection to the assessment. The provisions of this statute apply only to paving and macadamizing a street, and the making of assessments therefor, and is not applicable to the building of sewers. We find no statute authorizing the filing or considering of such a remonstrance where sewers are about to be built. Neither the preliminary proceedings, nor the mode for the apportionment of such taxes, are fully prescribed by the statute. The council is therefore left to adopt such proceedings and mode of apportionment as will be fair and equitable. An examination of the proceedings which have been set out at length in the statement of facts leads us to agree with the conclusion of the court that the proceedings were fair, and in substantial compliance with law. The city council first adopted a resolution that the construction of the sewer was necessary, and this resolution was published. Under the direction of the city council, the city clerk advertised for bids for the construction of the work, and the city engineer prepared plans, specifications, and estimates of the work, which were filed in the office of the city clerk. Bids were received, and one made by Shaw & Downing was accepted, and the contract awarded to them. The compensation for the work was to be paid by the city in cash or bonds, at the option of the city; and, in pursuance of an ordinance duly enacted, the mayor and council entered into a contract with Shaw & Downing for the construction of the sewer. The estimate of the cost of the sewer, made by the city engineer, was \$13,047.28, while the contract price was \$11,500. In pursuance of a resolution, appraisers were appointed to make an assessment of all lots and pieces of ground liable to assessment, without regard to buildings and improvements thereon, and after their appointment and qualification they proceeded to the discharge of their duties, and made a report in writing of their appraisal. This report was subsequently amended and corrected. Thereafter, and upon due notice, a board of equalization met to hear any complaints which might be made of the appraisal, and all the property owners were given a fair opportunity to test the fairness and validity of the valuation and assessment that were made. Quite a number of the property owners appeared and presented

objections, but these were mainly disallowed; and the report of the appraisers, with one correction, was adopted. The contractors commenced the construction of the sewer, and prosecuted the work without delay, under the supervision of an inspector appointed by the city, in connection with the city engineer, and the work was completed about December 2, 1889, at a total cost of \$11,516.41. All of the complaining parties knew that the sewer was being constructed, and quite a number of them connected with the sewer during its construction, and since, and are now using the same, and these legal proceedings were not begun by any of them until after the completion of the work and its acceptance by the city. It thus appears that, before the tax was made a permanent charge upon the property, the owners had full notice of the proceedings, and had an opportunity to contest the validity and the fairness of the valuations and assessments that were made.

An objection was also made that the cost of the construction of the sewer, and the assessments made to pay the same, included an item for the expense of engineering and superintending the construction of the sewer. The entire expense of such an improvement is to be charged to the property peculiarly benefited, and the engineering and supervision of the work are as essential as the excavations to be made, and we see no reason why the expense of the same should not be included in the assessment. Gen. St. 1889, par. 563; *In re Lowden*, 89 N. Y. 548; *City of St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. Rep. 424; *In re Tappan*, 36 How. Pr. 390; *State v. Council of Elizabeth*, 30 N. J. Law, 365.

The validity of the tax proceedings was assailed upon the ground that there were no funds in the treasury at the time with which to pay for the improvements, and that no ordinance had been enacted setting aside in the city treasury the money to pay therefor; and reference is made to the fortieth subdivision of paragraph 555, Gen. St. 1889, and also to section 3, c. 34, Laws 1883. The provisions of the statute cited, however, are not controlling. Whatever might be the rule where the improvements are to be made by a general tax levy, it is clear that the legislature has provided specifically for the construction of improvements at the expense of the abutting property, and to pay the costs thereof by installments, and that for such installments they may issue improvement bonds of the city, to run not more than 10 years, nor to bear interest exceeding 7 per cent. per annum. These bonds may be issued to the contractor in payment of the improvement, and provision is made for the levying of special assessments upon the property specially benefited for the redemption of such bonds. This is a later act of the legislature, and is framed upon the theory that the work shall be done upon credit, and when there is no money provided or set apart for the payment of the same. Laws 1887, c. 101.

There are no other objections which we deem it necessary to notice. From an examination of the record, we are satisfied

that the tax proceedings are in substantial compliance with law, and should be sustained, and that the injunctions prayed for should be denied. The judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment on the findings in favor of the plaintiffs in error. All the justices concurring.

(45 Kan. 164)

ARKANSAS VAL. AGR. SOC. *et al.* v. EICHHOLTZ.

(Supreme Court of Kansas. Jan. 10, 1891.)

CORPORATIONS—ISSUE OF STOCK—FRAUD BY DIRECTORS.

Where a corporation has been organized with a capital stock of \$5,000, divided into 1,000 shares of \$5 each, and 590 shares of said stock were subscribed, but no notice was ever given and published where books of subscription would be open; and the corporation continued in existence some seven years, and became possessed of valuable real estate, and afterwards sold the same, and after such sale, the officers and directors of the corporation, without the knowledge or consent of the other stockholders, issued to themselves the remaining stock at par value, and then declared a dividend upon the entire stock issued, of \$25 per share, *held*, that such action was without authority, and in fraud of the rights of the other stockholders, and a plain breach of duty upon the part of the officers of such corporation.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Sedgwick county; T. B. WALL, Judge.

*Sluss & Stanley*, for plaintiff in error. *Dale & Wall*, for defendant in error.

GREEN, C. The Arkansas Valley Agricultural Society was incorporated on the 5th day of June, 1880, with a capital stock of \$5,000, divided into 1,000 shares of \$5 each, and had its place of business at Wichita, in Sedgwick county. The corporation had for its object the encouragement and advancement of agriculture and horticulture, and the mechanic arts. The full amount of the stock was not subscribed, and no notice was ever given of the opening of books to receive subscriptions, as required by section 16 of the act concerning private corporations. It seems that up to March 19, 1887, 590 shares of the stock of this society had actually been issued, and on and after that date the remaining 410 shares were issued by the authority of a majority of the directors to the directors and officers of the association, without the knowledge or consent of the balance of the stockholders. It is claimed that, at the time of the issuance of the last stock, all the property of the corporation had been sold, which had consisted of 36 acres of land on the west side of Wichita, and known as the "Fair Grounds," and the proceeds were then in the hands of the directors and officers of this association; that the shares were worth, about this time, including the entire issue of stock, \$55 per share, and not including the 410 shares, about \$93 a share; that the directors and officers knew at the time they took and paid for said stock at the par value of \$5 per share, the exact value of the stock of the society and the property it then held; that, after all the shares had

been issued, a dividend was declared on the 1,000 shares of \$25 per share; and that the total assets of the corporation were about \$56,900. On the 26th day of April, 1887, the defendant in error, one of the stockholders of the society, commenced this action in the district court of Sedgwick county to enjoin the directors and officers from paying any dividend or dividends on the stock claimed to have been fraudulently issued, and that the same might be canceled, and for further equitable relief in the premises. Upon the filing of his petition, a temporary injunction was allowed, which was made perpetual upon a final hearing by the court below. The plaintiffs in error bring this case here, and claim that the taking of the stock in a corporation stands upon a different footing than ordinary contracts of corporations, in prosecuting the business enterprises for which they are organized. That any person has a right to subscribe for stock in any corporation, so long as there are shares to be taken. That the corporation has no power to prescribe the character, or qualification of its stockholders. That the policy of the law, as declared by the express terms of the statute, is to make corporations open to all persons alike to become members and stockholders. That the only favor given by the law is the advantage resulting from diligence, the idea being, the first to come is first to be served; that is, the first man who subscribes may subscribe for all he wants, and the last man to subscribe may subscribe for all he can get. This rule, as applied to the directors or officers of a corporation, cannot be upheld. The principle of public policy forbids transactions of this kind. It appears from the evidence that the property owned by this corporation had been sold, and the proceeds held by its officers. The assets at the time of the sale belonged to the then stockholders, and the directors and officers had no right to subscribe for the remaining stock at par, and enrich themselves to the detriment and loss of the other shareholders. The directors cannot lawfully benefit or favor any particular shareholder, or class of shareholders. Every authority possessed by them is a power and discretion in the directors, who are trustees, for the benefit of all the shareholders alike, which is to be exercised for the benefit of all of them. 1 Wat. Corp. p. 620; *Harris v. Railroad Co.*, 20 Beav. 384. The effort on the part of the directors and officers of a society to obtain the unsubscribed stock at par, when they know that each share of the stock already issued was worth 18 times its face value, was clearly a fraud upon the rights of the other stockholders, and a flagrant violation of their duties as directors and officers of such association. The officers and directors of a corporation are trustees of the stockholders, and, in securing to themselves an advantage not common to all the stockholders, they commit a plain breach of duty. *Koehler v. Iron Co.*, 2 Black. 715; *Shorb v. Beaudry*, 56 Cal. 446; 1 Mor. Priv. Corp. § 518. The law does not permit directors to manage the affairs of a corporation for their personal and private advantage, and this rule, we think,

applies to the disposition of unsubscribed stock, as well as to other contracts. The character and relation of directors and officers of a corporation require of them the highest and most scrupulous good faith in their transactions for the corporation and the stockholders. *Hale v. Bridge Co.*, 8 Kan. 466, and authorities there cited; *Ryan v. Railway Co.*, 21 Kan. 365; *Hentig v. Sweet*, 33 Kan. 244, 6 Pac. Rep. 259. The judgment of the court below should be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 145)

#### STATE V. MOON.

(*Supreme Court of Kansas. Jan. 10, 1891.*)

CRIMINAL LAW—APPEAL BY STATE—JUDGMENT OF ACQUITTAL.

In a criminal prosecution, where a jury has been impaneled and some evidence has been introduced upon the part of the state, and the state rests, and afterwards asks leave of the court to introduce further evidence, and the court, without passing upon the application, concludes that the statute under which the defendant is prosecuted is unconstitutional, and orders a judgment of acquittal and discharges the jury, such judgment is conclusive, and this court cannot, on appeal by the state, set aside or reverse the judgment of acquittal.

(*Syllabus by Green, C.*)

Commissioners' decision. Appeal from district court, Grant county; THEO. BORKIN, Judge.

L. B. Kellogg, Atty. Gen., and Wm. E. Hutchison, for the State. F. M. Thompson, for appellee.

GREEN, C. The defendant in this case was charged with unlawfully permitting 90 head of cattle, under his control, to run at large in Grant county, in violation of chapter 128 of the Session Laws of 1874, as adopted by the board of county commissioners. A trial was had before a justice of the peace, and the defendant found guilty, and fined in the sum of \$50, and he appealed to the district court. At the April term, 1890, of the district court, a jury was impaneled and sworn to try the defendant, when counsel objected to the introduction of any evidence, because the section of the statute under which defendant was prosecuted was unconstitutional. The court, in the first instance, overruled this objection, and a number of witnesses were then called and testified in behalf of the state, and the state rested. The defendant, by his counsel, then asked the court to instruct the jury to find for the defendant, for the reason that the complaint did not charge a public offense, and that the evidence offered by the state failed to prove a crime against the defendant. Pending this motion, the state asked leave of the court to introduce other evidence, and in passing upon this application the court held that section 2 of chapter 128 of the Session Laws of 1874 was unconstitutional, because it was in conflict with sections 16 and 17, art. 2, of the constitution, and thereupon ordered a judgment of acquittal to be entered for the defendant, and discharged the jury.

The state excepted to the ruling of the court, and appealed. We must dispose of the case without passing upon the validity of the law under which the defendant was prosecuted, for the reason that the state cannot appeal where the defendant has been tried and acquitted. This court has no authority to set aside such a judgment. The decisions of this court in *State v. Carmichael*, 3 Kan. 102, *City of Olathe v. Adams*, 15 Kan. 391, and *State v. Crosby*, 17 Kan. 396, are decisive of this case. We recommend that the appeal be dismissed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 133)

#### STATE V. BUSH.

(*Supreme Court of Kansas. Jan. 10, 1891.*)

REGISTRATION OF VOTERS—PROSECUTION OF REGISTERING OFFICER—INTENT.

1. That portion of section 15 of chapter 80 of the Laws of 1879 which prescribes a criminal punishment for improperly registering the names of voters is not unconstitutional or void.

2. A criminal information setting forth that B., the city clerk of a city of the second class, registered the name of a person as a voter who did not appear in person, and was not present, and did not give his name, age, occupation, or place of residence, may be sufficient, without expressly alleging any criminal intent.

3. When the commission of an act is made a crime by statute, without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act, and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to allege the commission of the act, and the intent will be presumed.

(*Syllabus by the Court.*)

Appeal from district court, Butler county; C. A. LELAND, Judge.

L. B. Kellogg, Atty. Gen., and E. H. Hutchins, for the State. Clogston, Hamilton, Fuller & Cubbison and E. N. Smith, for appellee.

VALENTINE, J. This was a criminal prosecution in the district court of Butler county, under section 15, c. 80, Laws 1879, (Gen. St. 1889, par. 711,) in which prosecution the defendant, W. O. Bush, who was the city clerk of the city of El Dorado, a city of the second class, was charged, upon information in two counts, with registering J. N. Hanna as a voter, Hanna not being present, nor appearing in person, nor giving his name, age, occupation, or place of residence. The title to the act in which the aforesaid section 15 is found, and sections 8 and 15 of such act, read as follows: "An act to provide for and to regulate the registration of voters in cities of the first and second class, and to repeal all prior acts in relation thereto." "Sec. 8. No person shall be registered unless he appear in person before the city clerk, at the city clerk's office, during usual office hours, and apply to be registered, and give his name, age, occupation, and particular place of residence, as required to make the proper entries in the poll-books." "Sec. 15. If any officer shall neglect or refuse to perform any duty required by this act, or in the manner required by this act, or

shall neglect or refuse to enter upon the performance of any such duty, or shall enter, or cause or permit to be entered, on the registry books, the name of any person in any other manner, or at any other time than as prescribed by this act, or shall enter, or cause or permit to be entered, on such list, the name of any person not entitled to be registered thereon, according to the provisions of this act, or shall destroy, secrete, mutilate, alter, or change any such registry books, he shall, upon conviction, be punished by confinement and hard labor in the penitentiary, not exceeding one year, and shall forfeit any office he may then hold." The portions of the foregoing sections particularly applicable to this case are those which read as follows: "No person shall be registered, unless he appear in person before the city clerk, at the city clerk's office, during usual office hours, and apply to be registered, and give his name, age, occupation, and particular place of residence."

"If any officer [a city clerk] shall enter, or cause or permit to be entered, on the registry books, the name of any person in any other manner, or at any other time, than as prescribed by this act, \* \* \* he shall, upon conviction, be punished," etc. The defendant moved the court to quash the information, upon the following grounds, to-wit: "First, that the act of the legislature of the state of Kansas, under which said information is pretended to be drawn, to-wit, chapter 80 of the Session Laws of 1879, is unconstitutional, being in contravention of section 16 of article 2 of the constitution of the state of Kansas; second, that no offense is charged against the defendant in said information; third, that neither of the counts of said information states and charges an offense against the laws of the state of Kansas." The court sustained the motion, and discharged the defendant, and the state of Kansas appeals to this court. No brief for the defendant has been filed in this court, but, from the plaintiff's brief, and the defendant's motion to quash, we can probably obtain a correct understanding as to what were the grounds upon which the court below quashed the information. It is claimed, as we understand, that the title to the act is not broad enough to authorize a provision in the body of the act creating a criminal offense, or prescribing a punishment therefor. We think it is. *State v. Barrett*, 27 Kan. 213, and cases there cited; *Durcin v. Pontious*, 34 Kan. 353, 8 Pac. Rep. 428. The offense in the present case, and the punishment therefor, have relation to the general subject contained in the title to the act, which is the registration of voters in certain cities, and such offense and punishment are included within such subject, within the meaning of the constitution. They clearly relate to the registration of voters.

It is further claimed, as we understand, that the information is defective, for the reason that it does not allege any criminal intent on the part of the defendant. Of course, a crime cannot be committed

unless the person committing the acts supposed to constitute the crime entertains a criminal intent, and that criminal intent must, in some manner, be averred in the information or indictment, either expressly or impliedly. But when the commission of an act is made a crime by statute, without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act, and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to allege the commission of the act, and the intent will be presumed. In the present case, the wrong committed was the registration of the name of J. N. Hanna as a voter, without his appearing in person, or being present, and without his giving his name, age, occupation, or place of residence. In such a case, all that is necessary is simply to allege the fact that the defendant so registered the name of Hanna, without also stating that he so registered such name with the intent to so register the same. It is alleged in the information that the defendant "unlawfully and feloniously" so registered the same. Mr. Bishop, in his work on Criminal Procedure, (volume 1, § 521,) uses the following language: "Starkie says: 'To render a party criminally responsible, a vicious will must concur with the wrongful act. But, though it be universally true that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment.' For, in a large part of the crimes, the vicious will appears, *prima facie*, in the act itself; hence to allege simply the act makes the required *prima facie* case, and any non-concurrence of the will therein is matter of defense." And, in note 2 to the same section, he uses the following language: "Where the act is in itself unlawful, an evil intent will be presumed, and need not be averred, and, if averred, is a mere formal allegation, which need not be proved by extrinsic evidence." In the American and English Encyclopedia of Law (volume 4, p. 681) the following language is used: "Where the statute contains nothing requiring acts to be done knowingly, and the acts done are not *malum in se*, nor infamous, but are merely prohibited, the offender is bound to know the law, and a criminal intent need not be proved."

\* \* \* The intent is immaterial where the statute declares it a misdemeanor to obstruct a public road. When the statute does not make intent an element of the crime, intent need not be alleged, although, under general principles, it must be proved; and it is held that one who does that which the law forbids is presumed to have had the criminal intent." In the present case, we think, the criminal intent was impliedly and sufficiently alleged by the allegations setting forth and averring the commission of the prohibited acts. The judgment of the court below will be reversed, and cause remanded for further proceedings. All the justices concurring.



(45 Kan. 142)

**STATE V. GRIFFITH.***(Supreme Court of Kansas. Jan. 10, 1891.)***EMBEZZLEMENT BY BAILEE—INFORMATION.**

An information under section 90 of the crimes act against a bailee must set forth the character of the bailment, and the purpose for which the defendant was intrusted with the property. A charge that the defendant embezzled certain property of another which had been, prior thereto, delivered to defendant as bailee, without alleging from whom the property was received or the purpose for which it was delivered to him, will be held fatally defective on a motion to quash.

*(Syllabus by the Court.)*

Appeal from district court, Finney county; A. J. ARBOTT, Judge.

L. B. Kellogg, Atty. Gen., H. F. Mason, and Brown, Blerer & Cotteral, for the State. J. T. Whitelaw and Hopkins & Hoskinson, for appellant.

JOHNSTON, J. T. E. Griffith was convicted under section 90 of the crimes act of embezzling a certain inventory of household goods and furniture. The information on which he was convicted alleged that "on the 22d day of August, A. D. 1889, in Finney county, and state of Kansas, one T. E. Griffith did then and there unlawfully and feloniously embezzle and convert to his own use, and did then and there unlawfully make way with and secrete, with intent to embezzle and convert to his own use, the following property of one Simpson W. Day, then and there being, which property had been prior thereto delivered to him, the said T. E. Griffith, as bailee, said property being an inventory of household goods and kitchen furniture." After giving a copy of the inventory, it is alleged that it was of special value to Day, and the reasons therefor are set out. The money value of the property is alleged to be \$100. Nothing is stated in the information as to the character or circumstances of the bailment, why or by whom it was delivered to the defendant, or anything indicating the special purpose for which it was placed in his hands, or the conditions upon which he was expected to hold, dispose of, or return it. The sufficiency of the information in this respect was raised early in the prosecution by a motion to quash, but the motion was overruled. The charge against the defendant should have stated the principal facts and circumstances constituting the bailment, and the acts of the defendant that were inconsistent with the trust confided to him. It is necessary at the trial that proof of these facts should be made, and the information should contain the essential facts to be proved, and whatever is necessary to put the defendant on notice of that with which he is charged, and of which he is to be convicted. The mere allegation that he was a bailee is too general and indefinite, and does not fairly inform the defendant of the nature and cause of the accusation made against him. The information should state who placed the property in the hands of the defendant, the purpose or use to which it was to be applied, and the time within which this purpose was to be carried out, or the time within which the property

was to be returned. The details need not be set out with unnecessary particularity, but the defendant should, so far as is reasonably practicable, be informed by the information of the precise nature of the charge made against him. Was the inventory given to him for safe-keeping for a stated period, and had that time elapsed before he actually returned it? Was it given to him to accomplish a purpose of his own, or to accomplish some purpose of Day's, and was the purpose effected when the prosecution was begun? Was it intrusted to him to deliver to another upon the happening of a certain contingency? And has that contingency happened? Was it given to him in pursuance of some agreement for his own or Day's use? And, if so, is he not entitled to know what the agreement was, and wherein he has violated it? Bailments are so numerous and various in their character that one charged with a violation of his contract and his trust, and of a misapplication and embezzlement of property, should be informed of the object of the trust as claimed by the prosecution, and wherein he has failed to conform to that object. In the present case, the charge does not even state the name of the person from whom the inventory was received. It has generally been held under similar statutes that the indictment or information should not merely state the bailment or trust, but should aver the facts and circumstances which made the case embezzlement; and it is also necessary to state the purpose for which the defendant was intrusted with the property. *People v. Cohen*, 8 Cal. 42; *People v. Poggi*, 19 Cal. 600; *People v. Peterson*, 9 Cal. 313; *Com. v. Smart*, 6 Gray, 15; *State v. Grisham*, 90 Mo. 163, 2 S. W. Rep. 223; *Gaddy v. State*, 8 Tex. App. 127; *State v. Mims*, 26 Minn. 191, 2 N. W. Rep. 492; *Whart. Crim. Law*, § 1061. One author doubts the necessity of alleging the character of the bailment, but he cites no contrary decisions. *Bish. St. Crimes*, § 422. We think the information was fatally defective, and hence the judgment of the district court must be reversed, and a new trial granted.

HORTON, C. J., concurs.

VALENTINE, J. With grave doubts, I concur. The defendant was prosecuted upon an information which was not filed until after he had had a preliminary examination. In addition to *Bish. St. Crimes*, § 422. See, also, 6 *Amer. & Eng. Enc. Law*, 498c, which cites *People v. Hill*, 3 Utah. 334, 3 Pac. Rep. 75.

(45 Kan. 152)

**KNOX et al. v. BOARD OF EDUCATION OF THE CITY OF INDEPENDENCE et al.**

*(Supreme Court of Kansas. Jan. 10, 1891.)*

**CITY SCHOOLS — SEPARATION OF WHITE AND COLORED.**

1. Until the legislature clearly confers power upon boards of education of cities of the second class to establish separate schools for the education of white and colored children, no such power exists.

2. The legislature of the state has not given,

or attempted to give, to the boards of education of cities of the second class, the power to establish separate schools for the education of white and colored children, or to exclude from the schools established for white children the colored children for no other reason than that they are colored, or of African descent. Board of Education v. Tinnon, 26 Kan. 1.

(Syllabus by the Court.)

*Original proceeding in mandamus.*

This is an action on *mandamus*, commenced in this court on October 8, 1890, by Bertha Knox and Lilly Knox, both colored, by their next friend, Jordan Knox, to compel the board of education of the city of Independence and S. M. Nees, superintendent of the public schools of that city, to permit the plaintiffs to attend the school-rooms of the public schools of that city, to which they allege they are entitled, according to their grade, regardless of, and without any distinction of, their race or color. After the return or answer was filed to the alternative writ, the case was submitted upon the following agreed statement of facts: "That the city of Independence, Kan., is a city of the second class; that G. L. Remington, J. M. Nevins, J. H. Spencer, Goodell Foster, H. P. Wiltzie, E. A. Hamilton, A. B. Wiltzie, M. Westbrook, E. B. White, H. L. Payne, W. Stephenson, and W. R. Brown are the duly-elected and acting members of the board of education of said city, and that S. M. Nees is the duly-elected and acting superintendent of the city schools of said city; that in said city there are four school buildings, to-wit, First ward school building, Second ward school building, Fourth ward school building, and Fifth ward school building; that there are employed by the school board, besides the superintendent, nineteen (19) teachers, and that the number of pupils enrolled is about eleven hundred; that both white children and colored children of scholastic age reside in each of the five wards of said city; that the said plaintiffs, Bertha Knox and Lilly Knox, colored children, are residents of the Second ward of said city, and are, respectively, ten years and eight years of age, and that they are of scholastic age; that they reside 130 yards from the Second ward school building of said city, and 2,300 yards from the Fourth ward school building in said city; that in attending school at the Fourth ward school building they are required to pass by or near the Second ward school building; that Bertha Knox belongs to the second primary grade, and that Lilly Knox belongs to the first primary grade, and that said grades are taught in the Second ward school building of said city; that the room in the Second ward building known as the 'Second Primary' is taught by Miss Belle Bates, and that in said room there are thirty-five desks with a seating capacity of seventy; that the enrollment in said room on September 15, 1890, was as follows: Twenty-two in one class, and eighteen in another,—and that on October 10, 1890, the enrollment was twenty-nine in one class, and twenty-two in the other, or a total of fifty-one; that the room in said Second ward building known as the 'First Primary' is taught by Miss Bertha Canary, and in said room

there are thirty-five desks, with a seating capacity of seventy; that the enrollment in said room on September 15, 1890, was as follows: A class, 11; B class, 14; C class, 9,—total, 34; on October 10, 1890, the enrollment in said room was as follows: A class, 15; B class, 18; and C class, 20,—total, 53; that on September 15, 1890, the said plaintiffs, with their father and next friend, Jordan Knox, applied to the respective teachers, as aforesaid, at the Second ward school building, and asked to be admitted to said Second ward school building, and into the grades as follows, to-wit: Bertha Knox asked to be admitted to the second primary, and Lilly Knox asked to be admitted to the first primary,—and that plaintiffs were referred by the respective teachers of said two grades to the superintendent, Mr. S. M. Nees; that thereafter, and upon the same day, the said plaintiffs, with their said father and next friend, Jordan Knox, applied to the said superintendent, Mr. S. M. Nees, and asked to be assigned to the first and second primary grades at the Second ward school building in said city; that the said superintendent, Mr. S. M. Nees, assigned said plaintiffs to a room in the Fourth ward school building, where said first and second primary grades are taught, and where the said board of education had made convenient, suitable, and sufficient provision for said plaintiffs, and each of them, at said designated room; that said room in which said first and second primary grades are taught, as aforesaid, at said Fourth ward school building, as aforesaid, is taught by Mrs. Clara McCord, a competent and well-qualified teacher, and that said room is furnished in the same manner, and just as well, and is just as comfortable, as any other room in said Fourth ward building; or as any room in the First, Second, or Fifth ward school buildings; that other children, both colored and white, who live in the Second ward and in the Fifth ward of said city, and who live near where said plaintiffs reside, and who live just as far from the Fourth ward school building as do said plaintiffs, are required and compelled to attend school at the Fourth ward school building, notwithstanding the fact that the grades to which they belong are taught at the Second ward school building and at the Fifth ward school building, but that there are no white children who belong to the same grade that plaintiffs do, who now live in said Second ward, who are sent, at the present time, outside of said Second ward; that all of the colored children of the said city who belong to the primary and intermediate grades are assigned to the room in the Fourth ward school building, which is taught by Mrs. Clara McCord, and are required to attend there, but that whenever they are capable of passing the examination (the usual and customary examination required by the board of education for those who are to be advanced) they are advanced from said grades, and are assigned to the 'grammar school,' which is in the First ward building, and whenever the said aforesaid children are competent, and can pass the usual and customary examination,

they are advanced from the grammar school to the high school, which latter is also in the First ward school building; that the said grammar school and the said high school are attended by both white and colored children whenever they are sufficiently advanced; that if the enrollment in said aforesaid room, taught by Mrs. Clara McCord, is fifty pupils or over, the said board of education, in that event, have authorized and instructed the said superintendent, Mr. S. M. Nees, to employ another and an additional competent teacher for said aforesaid grades taught in said room; that said plaintiffs object to attend said Fourth ward school building, and ask to be assigned to said Second ward school building; that about ten years ago a number of the colored people of the said city requested that their children be permitted to attend school at a certain designated building in said city, to-wit, the Fourth ward school building, as a matter of convenience, and that certain designated rooms in said building be assigned for their use, which request was granted by the school board, as far as the grades, to-wit, the first and second primary, were concerned, but that the said Jordan Knox did not join in said request; that in the fall of 1887 the majority of the colored people of said city, and also this said plaintiff, Jordan Knox, petitioned the board of education of said city to employ one Mr. E. M. Wood, a colored man, to teach said grades taught at said room in said Fourth ward school building aforesaid, which said petition was granted by said board, and said Wood was employed; that neither the said plaintiffs nor their said father, Jordan Knox, at any time made any objection to the order of said board of education to said board as aforesaid, but that at a regular meeting of the board in July, 1890, said Jordan Knox appeared and informed the said board that he desired his children to go to the Second ward school building."

W. A. Price and A. M. Thomas, for plaintiffs. W. E. Zeigler, for defendant.

HORTON, C. J., (after stating the facts as above.) The question presented in this case is whether the facts agreed to bring it within the decision of Board of Education v. Tinnon, 26 Kan. 1. The city of Independence, like the city of Ottawa, is a city of the second class, and our attention has not been called to any section of the statute changing the control and regulation of the public schools of cities of this class since the affirmance of the judgment in the Tinnon Case. The agreed statement of facts showed that Bertha Knox and Lilly Knox, who are colored children, and, respectively, 8 and 10 years of age, reside in the Second ward of the city of Independence, 130 yards from the Second ward public school building, but are compelled to attend the Fourth ward school, 2,300 yards from their home. In attending school in the Fourth ward, they are required to pass near the Second ward school building. Bertha Knox belongs to the second primary grade, and Lilly Knox to the first primary grade.

At the time these children demanded admission to the Second ward school, neither the second primary room nor the first primary room were filled. There was room for the plaintiffs. No white children belonging to the same grade that plaintiffs do, living in the Second ward, are required by the board of education or the superintendent of the public schools to attend the Fourth ward school building, or to go to school outside of the Second ward; but all of the colored children of the city who belong to the primary and intermediate grades are required by the board of education to attend school in the Fourth ward, taught by Mrs. Clara McCord. The grammar school and high school of the city are open to both the white and colored children whenever they are sufficiently advanced. These facts are sufficient to show that plaintiffs are excluded on account of their color or race from the public school of the Second ward, where white children of the same age and grade are permitted to attend. The case of Board of Education v. Tinnon, supra, therefore applies. The plaintiffs attended the Fourth ward school, taught by Mrs. Clara McCord, not from choice of themselves or their parents, but under compulsion of the board of education. The boards of education of cities of the second class have no more right to have separate schools for white and colored children of the first and second primary grades than they have to establish separate grammar and high schools for white and colored children. In Independence, the grammar and high schools are free to all, white and colored alike, but not so with the schools of the first and second primary grades. The plaintiffs are therefore entitled to the writ demanded. It was said in the Tinnon Case "that, unless the legislature has clearly conferred power upon the school boards to establish separate schools for the education of white and colored children, no such power has been conferred. Under a statute which reads, 'In each subdistrict there shall be taught one or more schools for the education of youth between the ages of five and twenty-one years,' the supreme court of Iowa held that the school board could not establish separate schools for the education of white and colored children, and could not exclude colored children from attending schools established for the white children alone. It was further said in that case that 'the legislature of this state has not given, or attempted to give, to the boards of education of cities of the second class, the power to establish separate schools for the education of white and colored children, and to exclude from the schools established for white children all colored children for no other reason than that they are colored children. \* \* \* If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has the power, because of color, to establish separate schools for black children, then it has the power to establish separate schools for red-headed children and blondes. We do

not think that the board has any such power. We have conceded, for the purpose of this case, that the legislature has the authority to confer such power upon school boards, but in our opinion the legislature has not exercised, or attempted to exercise, any such authority." A peremptory writ will be granted as prayed for, and the plaintiffs will recover their costs.

All the justices concurring.

(45 Kan. 116)

CLAY *et al.* v. WOODRUM *et al.*

(Supreme Court of Kansas. Jan. 10, 1891.)

NOVATION—RIGHT TO SET-OFF.

1. In a contract between two parties involving mutual agreements, and for the sale of property, in which the first party made a promise to the second for the benefit of a third person, such third person may maintain an action against the first on the promise; but, if he avails himself of the contract, and claims under its provisions, he will be affected by the equities growing out of the contract between the first and second parties, and a failure of consideration will be a good defense in an action by the third party upon such contract.

2. In such an action, where a personal judgment is sought against the first party, and where the third party is indebted to the first, such indebtedness is a proper subject of set-off, and the two demands must be deemed compensated, so far as they equal each other.

(Syllabus by the Court.)

Error from district court, Washington county; E. HUTCHINSON, Judge.

James G. Woodrum brought this action in the district court of Washington county against Clay, Robinson & Co., George S. Elwood, and the Washington National Bank. He alleged in his petition, that in 1887 he was the owner of 360 head of two and three year old steers, kept by him in Washington county, and which were in perfect health until July 1, 1887; that on or about April 2d, George S. Elwood drove into the county of Washington a large number of cattle which were capable of communicating, and liable to impart, Texas, splenic, or Spanish fever; that George S. Elwood drove these cattle through the highways and unclosed pastures, knowing that the cattle were from the prohibited district, south of Kansas, and liable to communicate fever to others; that Woodrum's cattle contracted the fever, and that 166 of them sickened and died; that 93 of these were yearlings, 63 two-year-olds, and 10 three-year-olds; that the yearlings which died were worth \$19 per head, in all the sum of \$1,767; that the two-year-olds were worth \$27 per head, in all the sum of \$1,701; that the three-year-olds were worth \$32 per head, in all the sum of \$320; and that the surviving portion of the herd—194 head—were damaged in the sum of \$970; that the plaintiff was compelled to expend money for medicines and extra labor in taking care of the cattle, in the sum of \$200. He alleged that the total damages sustained by reason of this disease being imparted to his cattle, was \$4,598. He then alleged, in substance, that on September 10, 1887, Clay, Robinson & Co. entered into a written contract with George S. Elwood, by which Elwood sold to them the herd of cattle which communicated the fever, to-

gether with a large amount of other property, for certain considerations, and, by the terms of the contract, Clay, Robinson & Co. assumed and agreed to pay Woodrum all damages sustained by reason of his cattle dying or being injured from having contracted the fever. The following is a copy of the contract: "Article of agreement between Geo. S. Elwood, of Washington Co., Ks., and Clay, Robinson & Co., of Chicago, Ill., witnesseth: That said Geo. S. Elwood hereby agrees to sell, and does sell to Clay, Robinson & Co. the following property, viz.: 560 head of cattle, more or less, being all the cattle on Rock Hill ranch belonging to said Elwood or Elwood and Morehead; also all the cattle, being 260 head, more or less, now on Tootle's pasture near Greenleaf; also 500 head of cattle in the Indian Territory in the vicinity of Arkansas City in the McCormick, Brown & Co. pasture; said three bunches of cattle to aggregate 1,320 head; also 2,200 head of sheep and lambs, to be delivered within 20 days from September 12, 1887, on section 23, in Logan township, in Washington Co.; also 100 head of horses to be delivered on section 19-4-4, Washington Co., Ks., said horses to be of the following description: 1 Clydesdale stallion, 1 sorrel stallion, between 50 and 60 brood mares, 1 pair of broken work mares, 20 colts, part Clyde, balance yearlings and two-year-olds, said horses having been kept on said section heretofore. Also said Elwood agrees to convey, this Sept. 10, 1887, or Sept. 12, 1887, or cause to be conveyed, to said Clay, Robinson & Co. the following real estate, viz.: W.  $\frac{1}{2}$  & N.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , & S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  sec. 19-4-4, 480 acres, now mortgaged for \$5,000, com. \$—; E.  $\frac{1}{2}$  sec. 32-1-2, 320 acres; N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  28-1-2, 40 acres; N.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  29-1-2, 80 acres; S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  29-1-2, 40 acres; W.  $\frac{1}{2}$  & N. E.  $\frac{1}{4}$  23-3-4, 480 acres; this last 480 mortgaged for \$3,700, & int.; S. E.  $\frac{1}{4}$ , 28-3-4, (to be deeded by Sept. 17, 1887,) 160 acres, mortgaged for \$2,300, & int.; S.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  & N.  $\frac{1}{2}$  S. E.  $\frac{1}{4}$  23-4-4, 160 acres, mortgaged for \$2,000, & int.; N. E.  $\frac{1}{4}$  10-5-4, 160 acres, mortgaged for \$2,000 & int.; N.  $\frac{1}{2}$  sec. 5-5-4, 320 acres, mortgaged for \$4,700; 11 lots and 1-acre tract in the city of Greenleaf, mortgaged for \$1,500; north half of 2 lots on corner of Commercial street, in Lavan's add., to Greenleaf, mortgaged for \$1,000—immediate possession of all said real estate to be given Clay, Robinson & Co. None of said mortgages or any incumbrances are to be assumed by said Clay, Robinson & Co. Also said Elwood hereby sells and conveys to said Clay, Robinson & Co. all the feed belonging to him on the above-described land. Also said Elwood agrees to turn said cattle over to said Clay, Robinson & Co. at once, and said Elwood further agrees to pay all claims against said cattle for losses by reason of Texas, splenic, or Spanish fever having been communicated by said cattle, except losses sustained by Woodrum & Boyles, or in the Woodrum & Boyles pasture. The said Geo. S. Elwood further agrees to give a satisfactory bond in the sum of \$15,000.00, to be approved by said Clay, Robinson & Co., or their attorney or

agent, that he will deliver said sheep and horses, above mentioned, at the time and place designated, and that he will pay said losses sustained on account of the Texas, splenic, or Spanish fever, as above specified, said losses to be paid on or before Dec. 1st, 1887. Said Clay, Robinson & Co. agree, when said bond is given and the Rock Hill ranch cattle and the cattle in Tootle pasture are turned over to them, to deliver to said Elwood \$16,000.00, in the notes of said Elwood & Morehouse, or Elwood, Morehouse & Porter; and, when said land is delivered, said Clay, Robinson & Co. agree to turn over to said Elwood \$15,000.00 more of said notes; and, when said Indian Territory cattle are turned over, they agree to turn over \$10,000.00 more of said notes; and, when said horses and sheep are turned over, then the said Clay, Robinson & Co. are to turn over to said Elwood all notes they or Clay & Forrest hold against him, or of which they or either of them are payees as maker or as one of the makers, except one note of \$1,000.00, given to Clay & Forrest, which is now the property of the Cattle-Ranch & Land Co., and release him from all liability to them as indorser or guarantor upon other notes. The said Elwood warrants the title to all of said personal property to be perfect, except liens for expenses of quarantine, and liens for damages by reason of said cattle having communicated Texas, Spanish, or splenic fever above mentioned, all of which liens are assumed by Clay, Robinson & Co., except as hereinbefore mentioned; and said Clay, Robinson & Co. hereby agree to furnish said Elwood, as fast as he may pay the same out, the sum of \$1,650, to be applied in paying the liens against said cattle occasioned by their having communicated said Texas, Spanish, or splenic fever, which said Elwood has agreed to pay. If said \$1,650 more than pay said losses which Elwood is to pay, he is to have the surplus, but, if said \$1,650 should not be enough to pay said losses, he is to pay the balance, said money to be paid to Elwood as fast as he produces satisfactory evidence that he has paid losses. Said Clay, Robinson & Co. also agree to deed to said Elwood E.  $\frac{1}{4}$  & S. W.  $\frac{1}{4}$  sec. 31-2-2, 480 acres; E.  $\frac{1}{4}$  & S. W.  $\frac{1}{4}$  sec. 6-3-2, 480 acres; S. E.  $\frac{1}{4}$  sec. 7-3-2, 160 acres; S. E.  $\frac{1}{4}$  of sec. 3-3-2, 160 acres; N. W.  $\frac{1}{4}$  sec. 11-3-2, 160 acres,—subject to all mortgages, incumbrances, and liens on the same, none of which are to be paid by said Clay, Robinson & Co. Clay, Robinson & Co., also release a chattel mortgage they now hold on about 300 head of hogs near Haddam; the title to all the land which is to be deeded by Elwood, either directly or through others, to Clay, Robinson & Co. to be perfect, except the incumbrances mentioned herein, and except one 80-acre tract, for which said Elwood holds a bond for a deed from Alfred Mitchell, which bond is to be assigned to Clay, Robinson & Co. Said Elwood reserves the posts and wood now cut on the 480-acre tract in town 2, range 1. All the land mentioned herein is in Washington county, Kansas. Witness our hands, this 10th day of September, 1887. GEORGE S. ELWOOD. CLAY, ROBINSON & CO."

The plaintiff alleged that the Washington National Bank claimed some interest in the controversy, the nature of which is not fully known. He further states that the Elwood cattle, sold to Clay, Robinson & Co., were in the possession of the sheriff of Washington county, by order of the live-stock sanitary commission, and he asks for a personal judgment against Clay, Robinson & Co. and George S. Elwood for the sum of \$4,958; and that the judgment be a first and prior lien upon the herd of cattle sold by Elwood to Clay, Robinson & Co. Clay, Robinson & Co. answer—*First*. By a general denial. *Second*. That the plaintiff Woodrum negligently placed his cattle in the pasture with those affected with the fever, and that any loss which he suffered was caused by his own fault and negligence. *Third*. That the contract set up by plaintiff was made with Elwood after they had loaned a large amount of money to him, and were having difficulty with him with reference to the collection thereof; that Elwood's financial affairs were in such condition that they were in great danger of losing the money which they had loaned to him, and, under these circumstances, the contract heretofore set up was made in order to effect a settlement of the indebtedness of Elwood, referred to in the contract, and that the property mentioned in the contract was received in payment of this indebtedness; that the contract was entire and indivisible, but that Elwood has only performed in part that which was required of him, and has not delivered the property which was to have been turned over to these defendants, and the failure to deliver the cattle is set forth as a defense to the recovery of a personal judgment by Woodrum against them. *Fourth*. That Woodrum is indebted to them upon a promissory note, given March 4, 1887, for the sum of \$8,000, on which note there is still due the defendants, from Woodrum, the sum of \$8,000, with interest from July 11, 1887, at 10 per cent. per annum. It is further stated that the note was secured by a chattel mortgage. The Washington National Bank answered that it claimed a right to the possession and control over the damages to be recovered by Woodrum from Clay, Robinson & Co., on the ground that Woodrum had executed a chattel mortgage to them on a part of the stock and cattle set forth and described as damaged by the Elwood herd of cattle; that there was due on the chattel mortgage from Woodrum to the bank the sum of \$5,400, with interest thereon. It is further alleged that the security of the bank upon the cattle so mortgaged was impaired by the death and sickness, resulting from the Texas fever, to the extent of \$2,954; and that Woodrum, who had mortgaged the cattle, is insolvent; and that the bank was compelled to look to the security upon the cattle only for the payment of its debt. It prayed that \$2,954 of the judgment which Woodrum might recover from Clay, Robinson & Co. should be turned over and paid to the bank, to apply on the indebtedness due from Woodrum to the bank. Elwood filed a general denial, and, further answer—

ing, said that he admitted that he had driven the diseased cattle into the country, but denied that he knew that they were affected with the fever. He also admitted entering into the contract with Clay, Robinson & Co., and alleged that he had fulfilled his part of the contract, except as to turning over a portion of the cattle mentioned, and that he was prevented from doing that by the refusal of Clay, Robinson & Co. to accept the same. Elwood further answered that the plaintiff Woodrum knew of his contract with Clay, Robinson & Co., and agreed to look to them alone for any damages which he sustained, and that he released him from any claim for the same. A trial was had with a jury, which resulted in a judgment in favor of Woodrum, and against Clay, Robinson & Co., in the sum of \$4,836.88; and it was adjudged that the Washington National Bank should be subrogated to the rights of Woodrum, under the judgment, to the extent of \$2,359.10. Clay, Robinson & Co. allege error in the proceedings, and ask a reversal of this judgment.

*A. S. Wilson*, for plaintiffs in error. *Lowe & Smith, J. W. Rector*, and *Omar Powell*, for defendants in error.

JOHNSTON, J., (*after stating the facts as above.*) The action of Woodrum is based on the contract made between Elwood and Clay, Robinson & Co., which has been set out at length in the statement of the case. It appears that, in the spring of 1887, Elwood drove a herd of southern cattle into Washington county which had been brought from the prohibited district south of Kansas, and were liable to, and did, impart to native cattle a disease known as Texas, splenic, or Spanish fever. At that time, Woodrum was the owner of a herd of native steers, and was keeping them in Washington county. About July 4, 1887, they became diseased, and it is stated that 167 of them sickened and died from the Texas fever. Clay, Robinson & Co. are livestock dealers, with head-quarters in Chicago and Omaha, who furnished money to stock growers and feeders in the west, taking security on their cattle, it being a part of the arrangement that when the cattle were ready for the market they should be shipped to, and sold by, Clay, Robinson & Co., whose compensation was the interest on the money furnished, and the commission obtained for selling the cattle. Prior to that time, they had furnished Woodrum quite a sum of money, and in 1887 he was owing them about \$8,000. They also had similar relations with Elwood, who was indebted to them in a large sum of money at the same time. The herd of cattle driven into the state by Elwood in 1887 seems to have communicated the Texas fever to several herds of cattle in that section of the state, and heavy claims for damages were made against Elwood for loss and damages resulting from that cause. It is alleged that he was financially embarrassed, and Clay, Robinson & Co., to protect themselves, as they aver, entered into the contract above mentioned. This contract, as will be seen, provides that land and personal property belonging to Elwood should be conveyed

and sold to Clay, Robinson & Co., in consideration of which certain acts were to be done by them, certain payments made, and notes surrendered, and certain obligations assumed. Among other things, and as a part of the consideration for the sale and conveyance of the property, they were to assume the payment of the claim and lien for damages to the Woodrum cattle by reason of the fever having been communicated to them by the Elwood cattle. Woodrum claimed that he sustained damages on account of the Texas fever to the extent of \$4,958, and he brought this action on that provision of the contract wherein Clay, Robinson & Co. assumed the payment of such damages, and asked a personal judgment against them for that sum. He also asked that it might be declared a lien against the Elwood herd of cattle, but this claim appears to have been abandoned on the trial, and only a personal judgment was sought for or obtained. In the course of the trial, Clay, Robinson & Co. offered testimony tending to establish the defense which they set forth, namely, that Elwood had failed to comply with the terms of the contract, in that he was required to deliver 1,320 head of cattle, but that he fell short of what was required of him, and only delivered 1,105 head. The court excluded this, and all testimony tending to show a failure of consideration, or a non-compliance, by Elwood, with the provisions of the contract on his part; and this is one of the principal objections urged by plaintiffs in error. This ruling was prejudicially erroneous. The defense was proper, and properly pleaded. Woodrum relied on the contract alone, and whatever right he had to a personal judgment against Clay, Robinson & Co. was derived through this contract, to which he was not a party. Unless he has released Elwood, he has a right of action against him for the damages sustained, and it was competent for him to bring this action against Clay, Robinson & Co.

It is well settled in this state that where one person agrees with another to do some act for the benefit of a third person, such third person, though not a party to the promise, may maintain an action against the first party for a breach of the agreement. *Manufacturing Co. v. Burrows*, 40 Kan. 361, 19 Pac. Rep. 809; *Mumper v. Kelley*, 43 Kan. 256, 23 Pac. Rep. 558. The third party, however, who avails himself of such a contract, and claims under its provisions, is subject to the defenses arising out of the contract between the original parties. The contract in this case, as we construe it, is executory, and is entire and indivisible. Its provisions appear to have been dependent on each other, and mutually binding on each of the parties. Elwood agreed to convey numerous tracts of land, and to sell and turn over horses, cattle, and sheep, and, in consideration of which, Clay, Robinson & Co. agreed to assume and pay certain liens and obligations against Elwood, furnish a certain sum of money for payment of other claims, deliver certain promissory notes of Elwood and others, release a lien which they had on a bunch of hogs,

and were to allow Elwood to retain certain posts and wood on the land which he agreed to convey. There were incumbrances and liens on a great deal of the real and personal property mentioned, some of which were assumed by Clay, Robinson & Co., and others which they did not assume, but expressly stipulated that they should be satisfied and discharged by Elwood. It is true that certain acts were to be performed at certain times, when the other party was required to do certain things on his part, but no one of these provisions appears to be distinct and independent of the others. It appears to us to have been intended as a complete settlement between the parties, and we cannot say that Clay, Robinson & Co., would have purchased any part of the stock, and assumed the obligations which they did, unless all were delivered, as promised, or that the parties understood that the delivery of certain notes, or the doing of certain things, was to be full compensation for any part of the cattle which was the subject of the contract. While certain notes were to be surrendered when certain property was to be delivered, it cannot be said that each constitutes a distinct and severable item which is independent of the other conditions of the contract. The liens or damages assumed by Clay, Robinson & Co. cannot be apportioned to any particular part of the cattle agreed to be delivered. Elwood agreed to sell and turn over 1,320 head of cattle, whereas it is claimed that 215 of that number were never delivered. Would Clay, Robinson & Co. have assumed an obligation to the extent of \$1,958, upon a promise to deliver a part of the 1,320 head? Would they be liable on this provision of the contract if none of the property had been conveyed or delivered? Woodrum is claiming the benefit of a promise made to Elwood, which was based on conditions to be performed by Elwood, and how can he recover unless those conditions have been performed? He is in no better position to enforce the contract, derived through the promise to Elwood, than Elwood himself would be. In *Benedict v. Hunt*, 32 Iowa, 27, an action was brought by a mortgagee against a purchaser of mortgaged premises who had assumed the payment of the mortgage, and it was held that it was a good defense that the grantor of the defendant had no title to the property, and that the consideration wholly failed, and it is also stated that the party for whose benefit the promise is made cannot claim to occupy any better position than the party who made the contract. The New York court of appeals, in a case where a party for whose benefit a promise was made was seeking to enforce it against the promisor, held that a failure of consideration was a good defense, and stated that "there is no justice in holding that an action on such a promise is not subject to the equities between the original parties springing out of the transaction or contract between them. It may be true that the promise cannot be released or discharged by the promisee, after the rights of the party for whose benefit it is said to have been made

have attached, but it would be contrary to justice and good sense to hold that one who comes in by what Judge ALLEN, in *Vrooman v. Turner*, [69 N. Y. 280,] calls 'the privy of substitution,' should acquire a better right against the promisor than the promisee himself had." *Dunning v. Leavitt*, 85 N. Y. 30. See, also, *Flagg v. Munger*, 9 N. Y. 483. We do not decide that the testimony which was rejected was sufficient to show a failure of consideration, but simply that such failure is a proper defense in the action, and that the testimony offered was competent and material to establish that defense, and should have been received.

Another point only of those presented requires attention. Clay, Robinson & Co. alleged that Woodrum was indebted to them in the sum of \$8,000 upon a promissory note, executed March 4, 1887, and which has been heretofore mentioned; and they ask that the same should be set off against any claim for a personal judgment that might be made against them under their contract. The court found that there was due to them from Woodrum upon this note on September 10, 1887, which was the date of the contract between Clay, Robinson & Co., and Elwood, the sum of \$7,923.26, no part of which has been paid, and, with accrued interest thereon, there was due at the time of the trial the sum of \$8,535, which draws interest at the rate of 10 per cent. We think the note and claim thereon was a proper subject of set-off in this proceeding, as it was tried. Only a personal judgment was rendered in the action. Woodrum sought a recovery under the contract of Clay, Robinson & Co. When the contract was made, he was indebted to them in a greater amount than was found to be due from them under their contract. They have contracted with reference to this indebtedness, and assumed the obligation to Woodrum in the expectation that whatever their liability under the contract might be, it would be set off against his indebtedness to them. There were cross-demands between the parties which in equity, and under the statute, should be set off against each other, and neither party can deprive the other of the benefits thereof by assignment, "but the two demands shall be deemed to be compensated so far as they equal each other." Civil Code, § 100. See, also, sections 27, 94, 98; *Sponenbarger v. Lemert*, 23 Kan. 55; *Gardner v. Risher*, 35 Kan. 93, 10 Pac. Rep. 584; *Story*, Eq. Jur. c. 38. We have treated the case as the parties thereto appear to have treated it, as an action upon contract for the recovery of money, in which only a personal judgment against Clay, Robinson & Co. was given. We determine nothing as to what the rights of the parties may be under the liens mentioned in the pleadings.

The plaintiffs in error insist that the Washington National Bank should have been dismissed from the case; but we think that, under the pleadings, they were entitled to be heard, and have their rights determined. Their rights, however, depend on the course of the next trial, the relief sought, and the testimony then



offered; and, hence, we refrain from expressing any opinion as to their rights under the evidence given at the last trial. The errors mentioned will require a reversal of the judgment, and a new trial, and it is therefore unnecessary to notice the objections with reference to the jury, and the findings which they returned. The judgment will be reversed and a new trial granted. All the justices concurring.

(45 Kan. 264)

WICHITA & C. RY. CO. v. SMITH.

(Supreme Court of Kansas. Jan. 10, 1891.)

RAILROAD IN STREET—OBSTRUCTION—DAMAGES TO ABUTTING OWNER.

1. An abutting lot-owner cannot recover damages by reason of the location of a railroad, duly authorized by the city council, along one of the regularly laid out streets of a city, unless there has been a practical obstruction of the street in front of his premises, and he is virtually deprived of access to his property. *Railway Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051, followed.

2. The failure alone of a railroad company to properly ballast its road-bed, where sufficient space is left in the street for ordinary vehicles and teams to pass in front of abutting property, will not authorize a recovery for damages alleged to have been sustained for the destruction of one's right of ingress and egress, where there is no evidence to show the terms and conditions upon which the privilege to build such railroad was conferred by the city authorizing the same.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Reno county; L. HOUK, Judge.

J. H. Richards and C. E. Benton, for plaintiff in error. F. L. Martin, for defendant in error.

GREEN, C. This action was commenced by C. J. Smith, in the district court of Reno county, to recover damages for the alleged illegal, unlawful, and wrongful destruction of his right of ingress and egress to and from his premises, upon a legally laid out street in the city of Hutchinson. The plaintiff below alleged that he was the owner of lots 55 and 57, avenue G east, in Handy's addition to said city; that prior to the 16th day of September, 1886, he had erected a house upon said lots, and was at said date using and had since used the same as a residence; that the only outlet and inlet he had to said property was from said avenue; that the railway company, on or about the 16th day of September, 1886, illegally, wrongfully, and improperly obstructed said avenue by erecting its track and switches much higher than the grade, and had kept its track and switches in such a condition as to obstruct the avenue and deprive the plaintiff of the use and benefit of the same as a means of ingress to and egress from his dwelling, and had further obstructed the avenue by improperly leaving large piles of ties and other building material in front of plaintiff's residence, and permitting large numbers of cars to stand upon the said track on said avenue. The railroad company answered that it was authorized to build its railroad along said avenue by an ordinance of the city of Hutchinson, and that its line of road was

constructed in conformity with the terms and conditions of such authority; that the track of the railroad company was located 50 feet from the residence of the plaintiff.

The jury returned a verdict for the plaintiff, for \$225. With the verdict, the jury returned the following interrogatories and answers: "(2) When the defendant located its road and built its track on avenue G, was the grade of said avenue established adjacent to and abutting upon the plaintiff's property in question? Answer. No. \* \* \* (4) State what is the approximate height of the embankment on said avenue G in front of plaintiff's property. A. A cut of fifteen inches. (5) Did the defendant make any ditches in said avenue G in front of plaintiff's property, or any part thereof? A. No. \* \* \* (7) What is the width of avenue G in front of plaintiff's property, or any part thereof? A. 120 feet. (8) Where on avenue G, in front of plaintiff's property, is the main line of the defendant's road located? A. 30 feet to center of track. (9) Where on avenue G, abutting upon plaintiff's property, is any side track or switch located, and how many side tracks and switches, if any, are located at that point? A. One switch north of main line. (10) What is the distance at the nearest point between plaintiff's property and any switch or side track of defendant? A. 44 feet to center of said track. (11) What is the nearest distance between plaintiff's property on said avenue G and the defendant's main line? A. About 27 feet. (12) Is there room for an ordinary vehicle and team to be driven on avenue G between the nearest track and plaintiff's property? A. Yes. \* \* \* (14) Is there room for ordinary vehicles to turn around in said space? A. No. (15) What is the average distance between the north line of plaintiff's property and the nearest track of the defendant? A. About 27 feet. \* \* \* (17) If, in estimating damages, you take into consideration the standing of cars or of coaches on avenue G, state whether the said standing of cars or coaches was in the said avenue G adjacent to or abutting upon the property of the plaintiff in question. A. We do not. (18) Does the testimony introduced show that defendant's cars were permitted to stand upon said avenue G, adjacent to plaintiff's property, if at all, only for temporary time and temporary purposes? A. Yes. (19) If you answer the last question in the negative, state whether cars were permitted to stand at such place more than is usual, customary, or incidental to the necessities of railroad business. A. They were not. (20) Were the cars and coaches complained of at all times the same cars and coaches, or did they consist of different cars and coaches, which came and went in the regular course of traffic business? A. Different cars. (21) What was the market value of plaintiff's property immediately before defendant's road was located and its tracks constructed in said avenue G immediately abutting thereon? A. One thousand dollars. (22) What was a fair market value of plaintiff's property immediately after defendant's road was

located and its tracks constructed in said avenue G abutting thereon? A. Seven hundred and seventy-five dollars. \* \* \*

(24) In estimating damage done to plaintiff's property, what do you take into consideration? A. By taking market value immediately before and after constructing said road. \* \* \* (27) If the plaintiff has sustained damage, by reason of the construction of defendant's tracks, did the damage occur by reason of the plaintiff not being able to use the said avenue G for the purpose it had been used prior to the construction of the said tracks? A. Yes. \* \* \*

(34) What, if any, obstruction to the passage of vehicles and teams is there in that part of the said avenue G between the plaintiff's property and the main line of defendant's road? A. None.

(35) What, if any, obstruction to the passage of vehicles and teams is there in that part of the said avenue G south of the main line of the defendant's road, between Maple street, on the east, and Poplar street, on the west? A. None at present.

(36) Is plaintiff prevented by any act proved to have been committed by the defendant from having access to his said property at any point on said avenue G abutting thereon? A. Yes. (37) If you answer the last interrogatory in the affirmative, state what it is. A. By not having the road properly ballasted. \* \* \*

(43) Can the plaintiff use the said avenue G adjacent to and abutting upon his said property in passing and repassing to and from the same, either to Poplar street, on the west, or Maple street, on the east? A. Yes. (44) Has the defendant, with its tracks and cars, permanently obstructed plaintiff's means of ingress to and egress from his said lots? A. Yes; to a certain extent. \* \* \*

(46) In estimating plaintiff's damage, do you take into consideration the general inconvenience and annoyance incident to the operation of defendant's railway so near plaintiff's said property? A. No. (47) Is plaintiff prevented from traveling upon said avenue G, and using the same as a public thoroughfare, by reason of the locating and constructing of defendant's tracks therein? A. Yes."

It is claimed by the plaintiff in error that, to justify a recovery in this case for damages by the abutting lot-owner, there must be such an obstruction of the street in front of the lots owned by the defendant in error that he is practically denied ingress to and egress from his premises; that the findings show quite conclusively that the plaintiff below was not deprived of such right; that, notwithstanding the construction of the railroad track in the street, he still has 27 feet of such street in front of his place, free from obstruction; that there is room for ordinary vehicles and teams to pass between the railroad track and his property, and that he can still use avenue G, adjacent to and abutting upon his property, in passing to and from the same, either to Poplar street, on the west, or Maple street, on the east; and, hence, this case comes within the rule of non-liability of railroad companies, for constructing their lines along public streets, to abutting lot-owners for damages.

On the other hand, the defendant in error contends that, if the railroad company had lawfully constructed its track, and legally operated its trains, it might be within the rule of non-liability heretofore adopted by this court, but that the defendant below constructed its line of road along the street in question in an illegal, improper, and wrongful manner, and because of the manner of the construction and operation of the road, he was entitled to recover; that, as an abutting lot-owner, he has the right to every part of the street, and for the reason that the road was so constructed that he was deprived of the use of a portion of the avenue, he was thereby damaged.

The question of damages to abutting lot-owners, by reason of the location of railway tracks in streets and avenues, has been settled by this court, and the rule is that, "to entitle a person owning lots abutting on a city street, along which a railroad company has constructed and is operating its line, by authority of the city council, to recover damages, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress to and egress from them." *Railway Co. v. Cuykendall*, 42 Kan. 234, 21 Pac. Rep. 1051. In that case, the court said: "But where the location of the track is such that space enough is left in the street in front of the lots of the abutting owner, so that he can pass between the sidewalk and track, and the railroad is operated in a legal and proper manner, the lot-owner cannot recover because the space within which he has heretofore passed from and to his lots is restricted." *Railroad Co. v. Garside*, 10 Kan. 552; *Railroad Co. v. Twine*, 23 Kan. 585; *Heller v. Railroad Co.*, 28 Kan. 625; *Railroad Co. v. Hicks*, 30 Kan. 288, 1 Pac. Rep. 396; *Railroad Co. v. Andrews*, 30 Kan. 590, 2 Pac. Rep. 677; *Railroad Co. v. Larson*, 40 Kan. 301, 19 Pac. Rep. 661. From the special findings, it appears that the plaintiff below had 27 feet of the street in front of his lots unobstructed, so that it cannot be said that he is deprived of the right of ingress and egress, but that the use of the full width of the street in front of his premises has been restricted, and for this alone, under the previous decisions of this court, there can be no recovery.

This brings us to the question of the right of the plaintiff to recover for the improper construction of the road. The special finding of the jury upon this branch of the case is to the effect that the plaintiff was deprived of free access to his premises, because the railroad track was not properly ballasted. The complaint is made that the ties were laid upon the street, and no provision made for vehicles to cross over the railroad track on that part of the street in front of plaintiff's lots. Did the failure of the railroad company to properly ballast its track deprive the plaintiff of his right of ingress and egress? The jury found that there was no obstruction to the passage of vehicles and teams in that portion of the avenue south of the main line of the defendant's railroad, between Maple street, on the east, and Poplar street, on the west, so the

plaintiff had the unobstructed use of 27 feet of the street. There is no question but the city of Hutchinson authorized the construction of the railroad on this particular street, and, while the ordinance conferring this authority is not before us in the record, we must assume that the terms and conditions imposed by its provisions were complied with. There is no evidence to show that the railroad was not constructed in accordance with the ordinance. Now, can it be said that the plaintiff's property was damaged, or any right to its proper use affected by the failure of the railroad company to properly ballast its road-bed? That seems to be the only finding of the jury, with reference to the constructing of the railroad, of which plaintiff below can complain. Can it be said that the failure, upon the part of the railroad company, to properly ballast its road-bed, is such a wrongful and unlawful construction as would give the plaintiff below the right to recover damages for depriving him of his right of access to his property? Text-writers and courts make a distinction between the right of the public to pass and repass along a highway, and the right of the owner of road-side or abutting property to have access to the same. If the claim of the plaintiff is to be sustained, it must be based upon the ground that a private right has been interfered with,—that is, the right to pass from his premises to the street, or from the street back again; and this is quite different from the public right of using the street. This court has said, in the case of *Railway Co. v. Cuykendall*, supra: "So that if the location and construction of a line of railroad are authorized by the city council, and its location in the street is such as to give the lot-owner ingress to and egress from his lots, such use of the street by the railroad company does not interfere with the use of the lot-owner, and consequently he cannot recover for those remote and indirect inconveniences arising from smoke, noise, offensive vapors, sparks, fires, shaking of the ground, and other annoyances." As stated, the ordinance authorizing the construction of the railroad is not before us, and we cannot say whether there was such a departure, by the railroad company, from the terms and conditions of the ordinance authorizing the location, as would entitle the plaintiff to recover. It does not appear to us that the failure to ballast the road-bed in front of the plaintiff's lots interfered with his right of access to his property from and to the street; and a judgment based upon such a finding alone is erroneous. We recommend that the judgment of the district court be reversed, and judgment entered upon the special findings of fact for the railway company.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 52)

STANDARD IMP. CO. v. SCHULTZ *et al.*

(Supreme Court of Kansas. Dec. 6, 1890.)

FRAUDULENT CONVEYANCES — CHANGE OF POSSESSION — CHATTEL MORTGAGES.

When neither by the terms of a chattel mortgage, nor a contemporaneous oral agreement v.25p.no.9—40

between the mortgagors and mortgagees of a stock of hardware goods, a power of sale or of daily sales is given to the mortgagors, but the mortgagors, with the knowledge and acquiescence of the mortgagees, had the same control over the stock of goods that they exercised before the execution of the chattel mortgage, made daily sales, and applied the proceeds at their discretion, such a mortgage is, as a matter of law, fraudulent as to the creditors of the mortgagors.

VALENTINE, J., dissenting

(Syllabus by Simpson, C.)

Commissioners' decision. Error to district court, Saline county; S. O. HINDS, Judge.

*Garver & Bond*, for plaintiff in error.  
*Lovitt & Sturman*, for defendant in error.

SIMPSON, C. The Standard Implement Company commenced an action in the district court of Saline county against the firm of T. C. Ritter & Co., and attached their stock of hardware. Schultz & Hosea, who claimed to have a chattel mortgage on their stock, interpleaded, and claimed that their chattel mortgage was a first lien. A trial was had on the interplea, and the court made the following findings of fact and law:

"FINDINGS OF FACT.

"(1) On January 3, 1887, and for several months prior thereto, the defendants T. C. Ritter and his wife, P. J. Ritter, were engaged in the hardware business in the name of T. C. Ritter & Co., in the city of Salina, Kan.

"(2) On said January 3, 1887, T. C. Ritter & Co., being indebted to Schultz & Hosea in the sum of \$683.37, executed to them three notes for \$—— each, due in sixty, ninety, and one hundred and twenty days, respectively, and to secure the same gave a chattel mortgage on their stock of hardware and the store fixtures. The mortgage provided for possession of the mortgaged property by the mortgagors until default in payment or until the mortgagees deemed themselves insecure. There was no special agreement by the mortgagors and mortgagees as to selling the property. The mortgagees, Schultz & Hosea, resided at St. Joseph, Mo., and were represented by Smith George, of Salina, Kan., who had the claim against T. C. Ritter Co. for collection, and who attended to the taking of said notes and mortgage. George retained the notes for collection, and continued to represent Schultz & Hosea in the matter of this claim continuously up to the time of plaintiff's attachment. The mortgage was filed in the office of the register of deeds of Saline county, Kan., on January 4, 1887.

"(3) In the month of February, 1887, T. C. Ritter & Co. removed from their then business location into a room in another block of the town, taking with them their goods and the store fixtures.

"(4) The business, after the giving of the mortgage, was carried on the same as before, and goods were sold in the usual manner and other goods purchased from time to time and put into the stock. No separation was made of the new goods from those on hand when the mortgage was given, and no account kept showing the proceeds of sales of either class of goods. The proceeds of sales were used

by Ritter & Co. as they saw fit for the payment of general expenses and debts, and without special regard to this mortgage debt.

"(5) Smith George was in the store of T. C. Ritter & Co. occasionally from and after January 3, 1887, knew the manner in which the business was being conducted, and never made any objection thereto. Ritter & Co. were not asked to apply the proceeds of sales of the mortgaged goods on this debt, nor to keep any account thereof.

"(6) Ritter & Co. paid to Smith George on said notes the following sums: On March 5, 1887, \$50; on March 16, 1887, \$120; on May 12, 1887, \$60; on May 25, 1887, \$113.90; on June 25, 1887, \$100,—leaving a balance of \$66, and interest, due on the last note.

"(7) T. C. Ritter & Co. continued in business until August 30, 1887, when they made a general assignment for creditors. At that time there was a general stock of hardware on hand, valued at two or three thousand dollars, but the evidence does not show what articles were in stock that were on hand when the mortgage was given, except the following: Thirteen stoves, one show case, two counters, one scale, lot of shelving; \* \* \* which were worth more than the sum yet due said mortgagees.

"(8) In March, 1887, a half interest in the business of T. C. Ritter & Co. was sold to Henry Sturdevant, who continued in the firm to the end. Sturdevant paid in about \$500 in money.

"(9) The Standard Implement Company and other creditors began suits with attachments against Ritter & Co. in September, 1887, and levied on the stock of hardware. The legal and valid claims of such attaching creditors amounted to more than the total value of the stock. These goods were afterwards sold by the receiver, and the proceeds are in his hands.

"(10) The mortgagees, Schultz & Hosea, never had possession of any part of the mortgaged property.

#### "CONCLUSION OF LAW.

"The mortgage of Schultz & Hosea is a valid lien, and is entitled to preference over attachments of plaintiff."

The implement company moved for judgment on the findings of fact, and also made a motion for a new trial. Both motions were overruled.

The case is here for review, the sole question being as to whether or not the mortgage is fraudulent as to creditors. Both sides cite and rely on the cases of *Frankhouser v. Ellett*, 22 Kan. 127, and authorities cited in that case; *Howard v. Rohling*, 36 Kan. 357, 13 Pac. Rep. 566; *Whitson v. Griffs*, 39 Kan. 211, 17 Pac. Rep. 801. To these may be added the case of *Leser v. Glaser*, 32 Kan. 546, 4 Pac. Rep. 1026. The true test of the validity of a chattel mortgage, under similar circumstances, is stated in the case last cited, and is as follows: "All cases in which a power of sale of the goods by the mortgagor is provided for are therefore to be tested by the questions whether such sales are to be made in his own behalf and at his own discretion, and with the control of the proceeds reserved to

him; or whether they are to be made solely in pursuance of the trust as a real one, that is, for the benefit of the mortgagee, and with provision that the proceeds shall be applied on his debt." The only stipulation in this chattel mortgage is that "the mortgagors shall retain possession of all of said described property. All of which he agrees, in consideration of such possession, shall be kept in as good condition as it now is, and taken care of at his sole expense." There is no stipulation about the manner of daily sales, or how the proceeds of daily sales shall be applied; in fact the court states, as a conclusion of fact in the second finding, that there was no special agreement between the mortgagors and the mortgagees about selling the property. If the chattel mortgage gave no power to the mortgagors to sell, and if there was no express oral agreement between the mortgagors and mortgagees about daily sales and the application of the proceeds, it is probable that the mortgage would be held good, but the findings of facts recite that "the business, after the giving of the mortgage, was carried on the same as before." \* \* \* The proceeds of sales were used by Ritter & Co. as they saw fit,—for the payment of general expenses and debts, and without special regard to this mortgage debt." The resident agent of the mortgagees knew the manner in which the business was being conducted, and never made any objection thereto. By these findings a case is presented in which the power of sale by the mortgagors is recognized and acquiesced in, and this power of sale, and the application of the proceeds of such daily sales, are made by the mortgagors on their own behalf, and at their own discretion, the proceeds being subject to their absolute control, and the sales are not made and the proceeds applied solely in pursuance of the object and purposes of the chattel mortgage for the benefit of the mortgagees. In other words, by the course of dealing pursued by the debtor, with the knowledge and acquiescence of the mortgagors, the debtor had the same control over the property, exercised the same right to sell it, and to make an application of the proceeds of sale, as if the chattel mortgage had never been executed. The chattel mortgage could be used by the debtor as a shield against one class of creditors, while preferences could be given to others. While the mortgage may have been executed in good faith and with honest purposes, the subsequent action of both mortgagors and mortgagees renders it obnoxious to the test of validity as stated by this court in *Leser v. Glaser*, 32 Kan. 546, 4 Pac. Rep. 1026. We think that, as a matter of law, the chattel mortgage was void as against creditors. It is recommended that the judgment be reversed, and the case remanded, with instructions to enter judgment for the plaintiff. Error upon the findings of fact.

BY THE COURT. It is so ordered; HORTON, C. J., and JOHNSTON, J., concurring.

VALENTINE, J. It is difficult to say that the judgment of the court below should

be reversed in this case. The contest is between two creditors of T. C. Ritter & Co., who were a firm of hardware merchants at Salina, and who were the defendants in the court below, but who are not parties in this court. The plaintiff in error, the Standard Implement Company, a corporation of Illinois, which was plaintiff in the court below, was an attaching creditor of the defendants below, while the defendants in error, Schultz & Hosea, a copartnership firm of St. Joseph, Mo., and who were interpleaders in the court below, were mortgage creditors of the defendants. The grounds upon which the attachment was issued are not shown by the case as made and brought to this court by the plaintiff in error, but they were evidently merely allegations of fraud; for no other possible grounds for the attachment can be imagined under the facts of this case; but it does not appear that any fraud existed in the case, certainly not any fraud in fact or any actual fraud. The mortgage executed by T. C. Ritter & Co. to Schultz & Hosea was executed and recorded long before any attachment suit was commenced. It was valid upon its face; it was executed in good faith; and it does not appear that any fraud in fact or actual fraud ever existed in connection with the mortgage, or in connection with any of the mortgaged property. The mortgagors were to have the possession of the mortgaged property until default, or until the mortgagees deemed themselves insecure. By sufferance of an agent of the mortgagees, the mortgagors carried on their business after the execution of the mortgage the same as they had done before, and in doing so sold some of the mortgaged property. The findings of fact of the court below show, among other things, that "the proceeds of sales were used by Ritter & Co. as they saw fit for the payment of general expenses and debts and without special regard to this mortgage debt." The mortgage debt, however, was nearly all paid. It was originally \$683.37, but the mortgagors, Ritter & Co., paid portions of this debt from time to time from the proceeds of sales until they paid all the debt except \$66 and a small amount of interest. How much of the proceeds of the sales of the mortgaged property was used in keeping up the stock, or for paying expenses and debts other than the mortgage debt, is not shown. From anything appearing in the case, it might have been \$1 or \$10 or \$100, or any other sum greater or less, but all was done in good faith. All the proceeds were used in replenishing the stock, and in paying debts and expenses, including the mortgage debt. Ritter & Co. did not use the proceeds as they saw fit, but only "as they saw fit for the payment of general expenses and debts;" and this, under the eye of an agent of the mortgagees. No fraud in fact of any kind, or in any degree or manner, at any time intervened. Some stoves and furniture and fixtures covered by the mortgage were worth more than enough to pay all the remainder of the mortgage debt, and none of these were sold by the mortga-

gors. All the property was afterwards converted into money by a receiver. Upon the foregoing facts and others, the court below held that the mortgage was a valid lien upon the funds in the hand of the receiver for \$66 and interest, and that the lien was prior to any supposed rights of the attaching creditor. The plaintiffs in error claim that this decision was erroneous, and ask for a reversal thereof by this court. It would seem that they rely largely upon the case of *Leser v. Glaser*, 32 Kan. 546, 4 Pac. Rep. 1026, but that case is not in point, for in that case there was actual fraud, and the trial court upon that question found in favor of the attaching creditor, and against the mortgagee, and this court simply affirmed the decision of the trial court. And in that case, in the opinion delivered by this court, the following among other language was used: "A chattel mortgage is not necessarily void because it contains a stipulation that the mortgagor may retain the possession of the mortgaged property, nor is it necessarily void because the parties have stipulated either in the mortgage or elsewhere that the mortgaged property may be sold by the mortgagor, provided that all is done in good faith, and the proceeds of the sale or sales are to be used only for the purpose of paying the mortgagor's debts and the necessary expenses for keeping the property and in converting the same into money. \* \* \* A chattel mortgage executed in good faith is always valid unless void for some technical reason, and, whether void or valid, it will probably never support an attachment; while, on the other hand, a mortgage executed in bad faith, or to hinder, delay, or defraud the mortgagor's creditors, is generally void, and will probably always sustain an attachment issued on the ground of such fraud. The fraud alone is sufficient to sustain the attachment without reference to the validity or invalidity of the mortgage." 32 Kan. 553, 554, 4 Pac. Rep. 1030, 1031. In the case of *Gay v. Bidwell*, 7 Mich. 519, 525, the supreme court of Michigan says: "To hold that a merchant cannot mortgage his goods without closing his doors would be to hold that no mortgage of a merchant's stock can be made at all." See, also, *Jones, Chat. Mortg.* §§ 424, 425, and the authorities there cited. See, also, *Frankhouser v. Ellett*, 22 Kan. 127; *Howard v. Rohlfing*, 36 Kan. 357, 13 Pac. Rep. 566; *Whitson v. Griffin*, 39 Kan. 211, 17 Pac. Rep. 801; *De Ford v. Nye*, 40 Kan. 665, 20 Pac. Rep. 481; *Hosea v. McClure*, 42 Kan. 403, 22 Pac. Rep. 317; *Arn v. Hoersemann*, 26 Kan. 413; *Randall v. Shaw*, 28 Kan. 419; *Tootle v. Coldwell*, 30 Kan. 125, 1 Pac. Rep. 329. The presumption *prima facie* is that the judgment of the court below is right, and I cannot say that sufficient appears in this case to show affirmatively that it is erroneous, or that it should be reversed. All presumptions from silence or absence on the part of the record or case brought to this court should be construed in favor of the judgment of the court below, and not against it.

(45 Kan. 200)

**DOUGLASS V. BISHOP et al.**

(Supreme Court of Kansas. Jan. 10, 1891.)

**TAX-DEED—SUFFICIENCY OF ACKNOWLEDGMENT.**

Where a tax-deed, issued by the county clerk of Jackson county, in this state, is acknowledged before a justice of the peace, and the caption or venue to the certificate of acknowledgment is: "State of Kansas, Jackson county—ss.,"—it will be presumed, in the absence of any evidence to the contrary, that such acknowledgment was actually taken by a justice of the peace of Jackson county, within this state, and in the township where the justice of the peace resides and holds his office.

(Syllabus by the Court.)

Error to district court, Jackson county; ROBERT CROZIER, Judge.

John C. Douglas and J. H. Keller, for plaintiff in error. Hoaglin & Crawford, for defendants in error.

HORTON, C. J. This was an action by H. P. Bishop against Hattie R. Douglass and John A. Bolz to quiet his title to one quarter section of land in Jackson county. The case turns on the question of the validity of the tax-deed to Bishop. The certificate of acknowledgment to the tax-deed is alleged to be fatally defective. The acknowledgment is as follows: "The state of Kansas, county of Jackson—ss.: I hereby certify that before me, W. S. Hoaglin, justice of the peace, personally appeared the above-named E. D. Rose, clerk of said county, personally known to me to be the clerk of said county at the time of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance, as clerk of said county, and who acknowledged the execution of the same to be his voluntary act and deed, as clerk of said county, for the purposes therein expressed. Witness my hand this 6th day of May, A. D. 1872. W. S. HOAGLIN, Justice of the Peace." Paragraph 6991, Gen. St. 1889, prescribes the general form of a tax-deed, and to this form is annexed the form of a certificate of acknowledgment. That reads: "The state of Kansas, ——— county—ss.: I hereby certify that before me, ———, a ——— in and for said county, personally appeared the above named, C. D., clerk of said county, personally known to me to be the clerk of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as clerk of said county, and who acknowledged the execution of the same to be his voluntary act and deed as clerk of said county, for the purpose therein expressed. Witness my hand (and official seal) this ——— day of ———, A. D. ———."

It has already been decided that "a tax-deed that is substantially in the form prescribed by the statute is valid on its face, although immaterial words of the statutory form are omitted, if everything of substance required by the statute as to form is found in the deed, when all of the recitations of the deed are taken together and so considered. Mack v. Price, 35 Kan. 136, 10 Pac. Rep. 521." In the certificate of acknowledgment to the tax-deed, under which H. P. Bishop claims, the words "in

and for said county" were omitted. The question presented is whether this omission renders the deed invalid. We think not. The caption shows that the acknowledgment was taken in Jackson county, and in this state, and the certificate also shows that the tax-deed was signed by E. D. Rose, the county clerk of Jackson county, in this state, and that as such clerk he appeared before W. S. Hoaglin, a justice of the peace, in Jackson county and the state of Kansas, and acknowledged the execution of the tax-deed, as clerk of Jackson county, in this state, for the purpose therein expressed. We think that, even in the absence of the words "in and for said county," the presumption is that W. S. Hoaglin exercised his functions as a justice of the peace within his jurisdiction; that is, within his own township, in the county of Jackson and state of Kansas. In Bradley v. West, 60 Mo. 33, WAGNER, J., in delivering the opinion of the court, said: "An objection was raised to the introduction of one of plaintiff's deeds in evidence, on the ground that it was not acknowledged in conformity with the law of the state of New York, where the acknowledgment was taken, or in accordance with the provisions of the statute of this state. The acknowledgment was taken before a justice of the peace in Delaware county, and is in all things in due form except that the certificate does not state that he took it in the town for which he was officially acting, the law giving justices of the peace power to take acknowledgments in the town in which they resided. But we think the objection is not tenable. Where a conveyance is acknowledged before an officer authorized to take such acknowledgment, within the limits of his jurisdiction, it will be presumed that such acknowledgment was actually taken within such limits. In Sidwell v. Birney, 69 Mo. 144, it is stated that 'the objection to the acknowledgment is that it does not appear to have been taken before an officer known to the laws of this state, and that it does not appear of what county the officer making the certificate was circuit clerk. 'Circuit clerk' is the title by which the clerk of the circuit court is ordinarily designated both by lawyers and laymen, and while, as an official designation, it is not rigorously exact, yet being in common use, and reasonably certain, we are of opinion that it sufficiently identifies the officer taking the acknowledgment as the clerk of the circuit court. We are also of opinion that it sufficiently appears from the face of the certificate that the person taking the certificate was circuit clerk of Schuyler county. The venue of the certificate is, 'State of Missouri, Schuyler county.' This shows that the certificate was granted in Schuyler county, and the presumption is that the officer exercised his functions within his jurisdiction." In Carpenter v. Dexter, 8 Wall. 513, it is decided that "it will be presumed that a commissioner of deeds in New York, whose authority to act is limited only to his county, exercised his office within the territorial limits for which he was appointed, although the only venue given to his certificate of acknowledgment

be, 'State of New York.' Mr. Justice FIELD, in delivering the opinion in that case, among other things said: "Now, the certificate of proof produced in this case shows a substantial conformity with the law of New York of 1813 on the subject, which was in force when the certificate was made. The venue to it is simply 'State of New York,' and it is objected that the certificate has no assignable locality, and is therefore fatally defective. In support of this position the case of *Vance v. Schuyler* [1 Gilman, 163] is cited. In that case the supreme court of Illinois held a certificate insufficient to authorize the admission of a deed without proof of its execution, because the only means of determining where it was acknowledged was the venue, 'Lincoln ss. Wiscasset.' This is a different case from the one at bar. The words 'State of New York' present some definite locality, at least, while there can be none to the words 'Lincoln ss. Wiscasset.' The commissioner of deeds in New York had authority to act only in his county, and it will be presumed, although the state be named, that the officer exercised his office within the territorial limits for which he was appointed. \* \* \* As already stated, courts will uphold a certificate if possible, and for that purpose will resort to the instrument to which it is attached. Thus, in *Brooks v. Chaplin*, [3 Vt. 281.] the certificate of acknowledgment did not show in what state the acknowledgment was taken, and the omission was supplied by reference to the deed, in which the grantor described himself as a 'resident of Suffield, in the county of Hartford, and state of Connecticut.' The acknowledgment was taken, two days after the date of the deed, having as its venue simply 'Hartford county,' and the court said that it was a fair presumption, in the absence of evidence to the contrary, that the deed was executed at the time it bore date, and at the place of the grantor's residence, and that, finding the acknowledgment taken so soon afterwards in the county of Hartford, it could intend no other than the same county of Hartford where the deed was supposed to have been executed."

Against the certificate of acknowledgment it is urged that no presumption can be indulged in. If this were true, then the certificate must not only embrace the omitted words, but must also recite in what particular township of Jackson county the acknowledgment was taken. *Phillips v. Thralls*, 26 Kan. 780; *Wilcox v. Johnson*, 34 Kan. 655, 9 Pac. Rep. 610; *Railroad Co. v. Rice*, 36 Kan. 593, 14 Pac. Rep. 229. It is not the practice for an acknowledgment taken before a justice of the peace to state that it was taken in the township where the justice holds his office. If the statute had been literally followed in this case, it would be necessary to presume that the acknowledgment was actually taken within the limits of the jurisdiction of the justice of the peace; that is, within his own township. So it seems that some presumption must be allowed. Among the many cases cited to sustain the views of the plaintiff in error are *Willard v. Cramer*, 36 Iowa, 22, and *Smith v.*

*Garden*, 28 Wis. 685. These are the strongest cases referred to. In the Iowa case it does not appear that the certificate of acknowledgment had any venue or caption. It wholly failed to show the county of the notary public making the certificate; therefore that case is unlike this, because it did not show that it was taken within the jurisdiction of the officer, and therefore it could not be presumed that the officer took the acknowledgment in Marshall county, or in any other county for which he was a notary public. In the Wisconsin case the judge taking the acknowledgment failed to recite that the grantors of the deed "were known to him, or, not being known to him, that their identity was satisfactorily proved." In that case the statute was not substantially complied with, and differs from this, because we cannot presume that the grantors in the deed were known to the officer taking the acknowledgment. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 250)

## CONTINENTAL INS. CO. OF NEW YORK V. WILSON.

(Supreme Court of Kansas. Jan. 10, 1891.)

## INSURANCE—ARBITRATION CLAUSE—WAIVER.

1. A clause in a policy of insurance, which simply provides that any difference of opinion between the company and the insured, as to the amount of loss sustained by the latter, may be arbitrated, does not constitute such arbitration a condition precedent to bringing suit thereon. Such provision leaves arbitration optional with the parties, and either may decline to arbitrate.

2. Where a policy contains an arbitration clause, and, by its terms, makes arbitration a condition precedent, and the insured, who has suffered a loss thereunder, demands arbitration, and the company refuses, such refusal is a waiver of the provision, and the company may not subsequently insist upon arbitration, and is also estopped from setting up failure to arbitrate as a defense to an action on said policy.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Linn county: C. O. FRENCH, Judge.

*James D. Snoddy*, for plaintiff in error.  
*Biddle & Smith*, for defendant in error.

STRANG, C. March 8, 1887, the plaintiff in error issued its policy of insurance to the defendant in error, promising therein to indemnify him against loss or damage by cyclone, in the sum of \$1,300, upon his stoned dwelling-house and household effects therein. April 21, 1887, the neighborhood of the defendant in error was visited by a heavy wind storm, cyclonic in its character, which struck and severely wrecked his house, and also destroyed some of his household goods therein, resulting in a loss to him, as he alleges, of \$1,040.—\$1,000 on his dwelling-house, and \$40 on his goods. On the same day, he notified the insurance company of his loss by the storm. May 31, 1887, he made and sent to the company proof of his loss. A few days after the storm, O'Dell and Forward, agents of the company, visited the premises, and looked them over. Afterwards, there was some talk between the defendant in error and agents of the plaintiff in



error about arbitrating the matter, but no arbitration was ever had. January 2, 1888, Wilson began his action in the district court of Linn county. January 12th, the insurance company filed its answer, challenging the amount of loss sustained by Wilson, and pleading that, by the terms of their policy, they had a right to arbitrate the difference between the company and Wilson: that the company had demanded arbitration, and Wilson had refused to join therein, and claiming that, as Wilson had refused to arbitrate, he could not maintain his action. The company also claimed an offset, in the form of a premium note given by Wilson to the company for \$52, and which, they allege, had never been paid. January 22, 1888, a reply was filed confessing the offset, and averring that the plaintiff below was ready and willing to arbitrate: but the insurance company had refused to submit to arbitration. The case was tried to the court and a jury April 5, 1888: the jury returned a verdict for the plaintiff below, assessing his damages at \$838.95. A motion for a new trial was overruled, and time given to make a case for this court.

As we view the record, there is but one question for this court to determine. The alleged error in the assessment of the amount of damages hardly rises to the dignity of a question, under the oft-repeated decisions of this court, and the evidence in the case. There is certainly evidence to support the finding of the jury in the sum returned by them. Some of the witnesses fixed the amount of damages suffered by Wilson at much more than the amount returned by the jury. The trial court approved the verdict. The real question is, was Wilson estopped from maintaining his action by any refusal of his to submit the question of the amount of his loss to arbitration, or by failure to submit to the company proper proof of loss? The policy upon which this action is founded requires that the insured shall give the company notice in writing of his loss, in case loss occurs, within 15 days, and that he make and transmit to the company his proof of loss within 60 days after it occurs. In this case the defendant gave the agents of the company notice the next day after the storm, and 40 days thereafter made and sent the company proof of his loss. There is no complaint of want of notice of the loss within 15 days, and actual notice was given the next day after the storm. Plaintiff in error does complain of the sufficiency of the proof of loss. As the proof of loss was made and sent to the company May 31, 1887, 20 days before the expiration of the period of time fixed in the policy during which it must be made, and the company held it, without making any objection thereto, until the 29th of July, 1887, and until long after the time, as fixed in the policy, for making the proof of loss, had expired, it is estopped from making any complaint now. *Insurance Co. v. Flynn*, 98 Pa. St. 627; *Insurance Co. v. Davidson*, 67 Ga. 14; *Insurance Co. v. Vining*, Id. 661; *Butterworth v. Assurance Co.*, 132 Mass 489; *Williams v. Insurance Co.*, 54 Cal. 442; *Killips v. Insurance Co.*, 28 Wis. 472; *O'Connor v. Insur-*

*ance Co.*, 31 Wis. 160; *Lewis v. Insurance Co.*, 52 Me. 492; *Insurance Co. v. Schueller*, 60 Ill. 465; *Post v. Insurance Co.*, 43 Barb. 351; *Insurance Co. v. Tyler*, 16 Wend. 385; *Insurance Co. v. Kyle*, 11 Mo. 278. The arbitration clause of the policy reads as follows: "Differences of opinion arising between the parties hereto, as to the amount of loss or damage, may be settled by arbitration; each party to select one arbitrator, and, in case of disagreement, they to select a third, and their award in writing, under oath, shall be binding as to the amount of loss, the cost of said arbitration to be borne by the parties hereto equally." There is nothing in the above provision to render the arbitration proceeding a condition precedent to the maintenance of an action on the policy for loss sustained under it. *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Reed v. Insurance Co.*, 138 Mass. 572; *Gere v. Insurance Co.*, 67 Iowa, 272, 23 N. W. Rep. 137, and 25 N. W. Rep. 159; *Canfield v. Insurance Co.*, 55 Wis. 419, 13 N. W. Rep. 252; *Nurney v. Insurance Co.*, 30 N. W. Rep. 350; *Wallace v. Insurance Co.*, 4 McCrary, 125, 41 Fed. Rep. 742. The language of the provision quoted allows arbitration, but leaves it optional with the parties to the contract, and it therefore follows that either may decline arbitration. 2 Wood, Ins. pp. 1014, 1015. Counsel argues that the following provision renders the arbitration clause absolute and binding upon the parties, and also makes it a condition precedent: "And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted upon and with reference to the foregoing terms, conditions, stipulations, and restrictions, all of which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise especially provided for in writing." This provision adds nothing to the one in relation to arbitration. It simply refers to all preceding "terms, conditions, stipulations, and restrictions," and declares they are to be used and resorted to to determine the rights and obligations of the parties to the policy. It can hardly be claimed that this very general provision at the end of the policy changes any of the preceding terms, conditions, stipulations, and restrictions of the policy, rendering an optional provision absolute and imperative. It would require a much more definite provision than this one to oust the jurisdiction of the courts; but the contention of the plaintiff has been settled against him by frequent decisions of the courts of this country. *Nurney v. Insurance Co.*, (Mich.) 30 N. W. Rep. 350, and cases there cited. There being nothing in the policy requiring arbitration as a condition precedent to the maintenance of an action thereon by the plaintiff below, it follows that the trial court did not err in holding that evidence in relation to arbitration was irrelevant, and therefore incompetent, nor in taking such evidence from the jury.

There is one other phase of the question to which our attention is called. The ev-

idence shows that the defendant very soon after the injury to his property notified the plaintiff that he wanted to arbitrate the question of damages, and was informed by O'Dell, agent of the company, that he did not have time, then, to attend to it. That some days after he notified Mr. Forward, agent of the company, that he wanted to arbitrate, who said, in reply, he bed—d if he would arbitrate, and added, "You may sue if you want to." If the arbitration provision in the policy in this case required arbitration as a condition precedent, the reply of Mr. Forward to Wilson's demand for arbitration would amount to a waiver of the arbitration provision. When, in response to Wilson's demand for arbitration, the company, by its agent, refused to arbitrate, it was estopped from calling on Wilson subsequently to arbitrate, and estopped from claiming any right of arbitration thereafter. The company could not decline arbitration when demanded by Wilson, and still hold him to it. The company having declined arbitration, Wilson would have the right to bring suit at once. It is recommended that the judgment of the district court be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 136)

#### STATE v. WRIGHT.

(Supreme Court of Kansas. Dec. 6, 1890.)

##### JURY—CHALLENGE TO THE ARRAY.

All challenges to the array upon the ground that the jury was not selected, drawn, or summoned according to law must precede those made to the poll for favor, undue influence, or prejudice, and should a defendant, after a lengthy examination of the individual members of the jury, challenge to the poll for favor, undue influence, or prejudice, he will be held to have waived his right of challenge to the array.

(Syllabus by the Court.)

Appeal from district court, Ford county; A. J. ABBOTT, Judge.

J. T. Whitelaw, for appellant. L. B. Kellogg, Atty. Gen., and Ed. H. Madison, for the State.

HORTON, C. J. Henry Wright was prosecuted for a violation of the prohibitory law. He was convicted, and sentenced to imprisonment in the county jail for 60 days, and to pay a fine of \$100, and costs of prosecution. It was also ordered by the court that he remain committed to jail until the fine and costs were paid, and until he executed a bond in the sum of \$500, conditioned for his good behavior, and for his abstaining from any violation of the prohibitory law of the state for the space of two years from the date of his sentence. From this conviction and sentence, he appeals to this court.

The only question presented concerns the challenge to the array, which the defendant claims to have made, and which he maintains the trial court should have sustained. He alleges as a reason for making the challenge that the jury was not selected, drawn, or summoned accord-

ing to law, and he asserts that the record not only shows this affirmatively, but that it also shows that the lists furnished were taken from the rolls of the year 1890. The counsel for the state insists that the challenge to the array was made too late. We agree with this. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. In this case, it was alleged that the jury was not selected, drawn, or summoned according to law. If such was the case, the defendant had full knowledge thereof when the jury were first called upon the panel. Instead, however, of making a challenge to the array at the convenient and proper opportunity, both plaintiff and defendant examined the jurors at great length, and challenges to the polls for cause were made and allowed. After the state had passed for cause, and the defendant had passed for the same reason, then a challenge to the array was made by the defendant. The examination of the jurors, upon which the challenges for cause were made, covers 34 pages of the record. This examination all took place before the challenge to the array. We think that all challenges to the array must precede those made to the polls for favor or prejudice, and we think that, should a party make challenge to the polls for favor or prejudice, he will be held to have waived his right of challenge to the array. Co. Litt. 158; Bac. Abr. tit. "Juries," (E) 11; People v. Roberts, 6 Cal. 214; Whart. Crim. Pl. & Pr. (9th Ed.) § 610; State v. Bryan, 40 Iowa, 379; Cooley v. State, 38 Tex. 636; Gropp v. People, 67 Ill. 154; State v. Davis, 14 Nev. 439-448; Thomp. & M. Jur. p. 284, § 266. The trial court, in sustaining the demurrer to the challenge to the array, very pertinently said: "The court does so because no specific ground of challenge to the array is urged that can apply to all of the members of the jury now selected, as the court takes judicial knowledge of the fact that a portion of the jury was drawn by the direct order of the court after the commencement of the present term, under an order on file for said drawing, and that another portion of the jury are talesmen selected by the sheriff upon the order of the court from among the bystanders." The counsel for the defendant refers to State v. Jenkins, 32 Kan. 477, 4 Pac. Rep. 809, and insists that this court has decided that the challenge to the array may be made at any time before the jury are sworn to try the issues in the case. Incidentally, it was said in that case that the objection to the panel must be made before the jury are sworn. But, in that case, the question was not raised as to the proper time of making the challenge to the array, therefore we assume it was made in that case at the proper time. It was not intended to decide that the challenge to the array could be made after challenges for favor, undue influence, or prejudice had been allowed. The judgment of the district court will be affirmed.

All the justices concurring.

(45 Kan. 128)

## STATE V. EIGLE.

(Supreme Court of Kansas. Dec. 6, 1890.)

Appeal from district court, Ford county; A. J. ABBOTT, Judge.

J. T. Whitelaw, for appellant. L. B. Kellogg, Atty. Gen., and Ed. H. Madison, for the State.

PER CURIAM. This case presents the same question as in the case of State v. Wright, ante, 631, (just decided.) We must hold in this case, as in that, that the challenge to the array, or to the panel, always precedes a challenge to the polls. These challenges are taken separately. When the latter is made, the former is regarded as waived.

(1 Wash. St. 325)

## COFFER V. TERRITORY.

(Supreme Court of Washington. Oct. 23, 1890.)

NUISANCES—ABATEMENT—KEEPING HOUSE OF ILL FAME.

A lessee pleaded guilty to an indictment for maintaining a nuisance by keeping a house of ill fame, and an order was issued to the sheriff to abate the same. No measures were taken to execute the order, but the lessee abandoned the premises, and the owner went into possession. About five months later, the sheriff placed a keeper in the house, and maintained him there for nearly two months, and made an affidavit that this was necessary in order to prevent a continuance of the nuisance, and asked for an order against the owner to show cause why an execution should not issue against her property for the expense thereof, at the rate of five dollars per day. Defendant demurred to the affidavit, the demurrer was overruled, and judgment was given against her for said expenses. *Held*, that the proceeding was erroneous, and that if the owner kept a house of ill fame on the premises it was not a continuance of the former nuisance, and she could not be held responsible without a regular proceeding against her.

Error to district court, Pierce county.

Struve, Haines & McMicken, for plaintiff in error. W. H. Snell, Pros. Atty., for the Territory.

ANDERS, C. J. This case is *sui generis*. It appears from the record that some time prior to October 10, 1888, the plaintiff in error, being the owner of certain premises known as "No. 1430 C Street," in the city of Tacoma, in Pierce county, leased the same to one Nettie Parnell, who, on said date, was indicted for maintaining a nuisance on the premises by keeping a house of ill fame. To this indictment the defendant Nettie Parnell pleaded guilty, and thereafter, and on the 19th day of October, 1888, an order was made by the court, directed to the sheriff of Pierce county, to abate said nuisance. The plaintiff in error was not made a party to the action. Whether she resided in Tacoma or elsewhere at the time is not shown by the record. Soon after the issuance of said order, Nettie Parnell vacated the premises, and turned the same over to her lessor, the plaintiff in error, who went into possession, and continued to reside therein up to the rendition of the judgment, by the court below, in this proceeding. It nowhere appears in the record that the order to the sheriff of October 19, 1888, to abate the nuisance, for the maintaining of which Nettie Parnell was indicted, was ever executed by the sheriff; but it does appear that on the 4th day of March, 1889, and long after the defendant had ceased to occupy or con-

trol the premises, he placed a keeper in the house without the consent and against the will of the owner thereof, the plaintiff in error, and so continued him there until the 23d day of April following, at an alleged expense of five dollars per day. Up to this time, the plaintiff in error had been charged with no violation of law in any manner pointed out by our statutes. On the 7th day of May, 1889, however, the said sheriff filed with the clerk of the district court, holding terms at Tacoma, an affidavit setting forth the issuing of the order of October 19, 1888, above mentioned, for the abatement of the nuisance, and alleging that, on investigation, he had discovered that the nuisance was being continued by the plaintiff in error, and in consequence thereof he had been obliged to place a keeper in charge of the premises, during the period above specified, at an expense of five dollars per day; and that he would be obliged, on account of the continuance of such nuisance, to retain such keeper therein; and concluding with a prayer that an order be issued to the plaintiff in error to show cause why an execution should not issue against her property to satisfy the costs and charges so incurred. Upon motion of the prosecuting attorney, based upon this affidavit, the court made and entered an order citing her to appear on the 10th day of May, 1889, and show cause why an execution should not issue against her property, as prayed for in the affidavit. On that day the defendant appeared and demurred to the affidavit. Her demurrer was overruled, and exception duly taken and allowed by the court. The hearing then proceeded, by the examination of witnesses, after which judgment was rendered against the defendant for the sum of \$514.60, being the costs and expenses of abating said nuisance, and execution ordered thereon. From this judgment defendant appeals to this court, and assigns for error the making of the order to show cause; the overruling of the demurrer to the affidavit; the entering of judgment against the defendant; and ordering execution.

The only charge attempted to be made against the defendant in the court below was that contained in the affidavit of the sheriff, and that was manifestly insufficient in law to warrant the subsequent action of the court. The evident object of the affidavit was not to charge the plaintiff in error with the commission of an offense against the law, but to obtain an order from the court to enable the sheriff to collect from her the expenses of abating a nuisance carried on or maintained by a third party, and which, as we have before stated, was never abated at all by him. It is true the house itself in which the nuisance had been maintained by Nettie Parnell was taken charge of by the sheriff's deputy for a considerable length of time, and, as it seems, at no inconsiderable expense; but that was in no sense an execution of the order of the court. No such methods are sanctioned either by custom or the law. Under the circumstances of this case, this keeper had no more right to invade or take possession of the prem-

ises of the plaintiff in error than any other stranger; and, in so doing, he was a mere trespasser, whatever may have been her character or reputation. If she was guilty of continuing or maintaining a public nuisance at the place indicated by the affidavit, or elsewhere, a formal complaint should have been made against her before a committing magistrate or the grand jury, charging her with the commission of the crime. She could then legally have been held to appear before the district court to answer to the accusation. Had this been done, and had she been indicted and convicted of the offense charged, it would then have been properly in the discretion of the court before whom the action was tried to issue a warrant for the abatement of the nuisance at the cost of the defendant. See Code, §§ 1248, 1249. Under no other circumstances would the court be authorized to issue such an order. Indeed, even after conviction, the court should not in all cases issue a warrant or order of abatement. The judgment should be adapted to the nature and circumstances of the case. Where the building or structure complained of is itself a nuisance, the court will, if necessary, order its removal or destruction. But where the use of the building constitutes a nuisance whose effects are merely immoral and intangible, such nuisance can only be abated by the administration of such punishment as will be likely to cause the guilty party to desist. Wood, Nuis. (2d Ed.) pp. 43-45. Under our statutes, especially, the judgment of the court, after conviction, would almost certainly result in the abatement of a nuisance of a character growing out of the conduct of the defendant. Upon conviction the judgment of the court should be, in effect, that the defendant pay a fine of ——— dollars, and the costs of prosecution, and, when expedient or necessary, forthwith abate the nuisance at his own costs, and stand committed to the custody of the sheriff until the fine and costs be paid, or secured as provided by law. Code, §§ 1119, 1247-1249; Wood, Nuis. (2d Ed.) pp. 993, 994. And should any defendant, ordered into custody of the sheriff, fail to pay or secure the payment of the fine and costs adjudged against him before the final adjournment of court, he may then be imprisoned in the county jail until such fine and costs are paid or secured, until he has been imprisoned one day for every three dollars of such fine and costs. Code, § 1125. If the plaintiff in error had been indicted, tried, convicted, and sentenced according to law, it seems hardly probable that it would have become necessary, even if proper, to place her under the surveillance of a deputy-sheriff or any other person in order to abate the nuisance complained of.

The fundamental error committed by the learned judge in this proceeding consisted in his assuming that the conduct of the plaintiff in error at number 430 C street, Tacoma, being of like character with that of Nettie Parnell at the same place, amounted to a continuance of the nuisance, for the maintaining of which the latter was indicted. The acts and conduct of Mary E. Coffey were not the

acts or conduct of Nettie Parnell, though they may have been of like character; nor was the one in any manner whatever responsible for the acts of the other. The former may, in fact, have been guilty of a violation of the law concerning nuisances, but that could only be legally determined by the verdict of a jury, a jury not having been waived, or on her plea of guilty. The fact is she had a hearing before the court, but no formal and legal trial. She appeared by counsel, who demurred and objected to the whole proceeding. The demurrer should have been sustained, and no judgment should have been entered against the plaintiff in error. For the foregoing reasons, the judgment of the court below must be reversed, and the cause dismissed, with costs, and it is so ordered.

(20 Or. 323)

SWEGLE v. BELLE *et al.*

(*Supreme Court of Oregon. Jan. 12, 1891.*)

DEED ABSOLUTE—MORTGAGE—PAROL DEFESANCE  
—LIABILITIES OF MORTGAGEE IN POSSESSION.

1. A deed absolute on its face may be shown by parol evidence to have been intended as a mortgage to secure the payment of money.

2. A mortgagee in possession is liable to account to the mortgagor for the rents and profits, and in suit for an accounting and redemption no tender is necessary before the commencement of the suit.

(*Syllabus by the Court.*)

Appeal from circuit court, Marion county; R. P. BOISE, Judge.

The object of this suit is to have a certain deed made and executed by the plaintiff to Charles Swegle in his life-time declared to be a mortgage, and for an account of the rents and profits of the land described in said deed, and for the redemption of said real property, or such other relief as may be proper. The findings of the court are as follows: "(1) That the plaintiff on the 1st day of April, 1887, was the owner of the premises described in the complaint, and that on that day he executed a mortgage on said premises to W. and E. Breyman, due from him and his wife, to them for the sum of \$4,000. That afterwards, on the 31st day of August, 1887, Charles Swegle, the father of the plaintiff, paid to said W. and E. Breyman said \$4,000, and had said note and mortgage assigned to him. That afterwards, on the 3d day of September, 1887, the plaintiff and his wife executed to Charles Swegle a deed to said premises, which is made Exhibit A, and attached to this complaint. (2) That, at the time of the execution of said deed marked 'Exhibit A,' it was agreed and understood between the plaintiff and his father, Charles Swegle, that said George Swegle should have the right to redeem said premises on the payment to him, Charles Swegle, of the amount of money which Charles Swegle had paid W. and E. Breyman, with 7 per cent. interest; and that said Charles Swegle was to collect the rents and profits of said premises, and apply the same on said debt. (3) That the said debt on the 1st day of June, 1889, was the sum of \$4,719.61. (4) That the amount of the rents and profits of said premises accruing

to Charles Swegle and his estate was, June 1, 1889, the sum of \$685.15, leaving a balance due said estate at that time, the sum of \$4,034.46. (5) That, about and prior to the commencement of this suit, the plaintiff offered to pay to the estate of said Charles Swegle the said sum of \$4,034.46, and served upon the defendants an offer in writing to pay the same, and that the offer was not accepted by the defendants." As conclusions of law the court finds "(1) that said deed marked 'Exhibit A' was, at the time the same was executed, intended to be and operate as a mortgage to secure the sum of money which Charles Swegle paid to W. and E. Breyman for the transfer of the mortgage of plaintiff and wife to said W. and E. Breyman; (2) that plaintiff is entitled to redeem said premises on the payment to the estate of said Charles Swegle of the said sum of \$4,034.46; (3) that the plaintiff, on the payment of said sum of \$4,034.46, will be entitled to a conveyance of said premises to him from the heirs of said Charles Swegle. It is therefore ordered and decreed by the court that the plaintiff pay into this court for the use of the estate of Charles Swegle, deceased, the sum of \$4,034.46, within thirty days from the date of this decree, and that, within thirty days thereafter, to-wit, within sixty days from the date hereof, the defendants execute in due form a conveyance or conveyances of all their interest in said premises; and, in case of any failure of said defendants, or either of them, to so execute such conveyance or conveyances, then this decree shall stand in lieu thereof, and be effectual to transfer from said defendants to this plaintiff all of the estate or interest which said defendants or either of them may have in said premises. And that plaintiff have and recover of and from the defendants his costs and disbursements in this cause, taxed at \$278.20, and that execution issue therefor. [Signed] R. P. Boise, Judge." The heirs at law of said Charles Swegle are made parties defendant: also the husbands respectively of his daughters, who are married; also the administrator of his estate, and the guardian of one minor heir. From the decree above set out this appeal is taken by the defendants Nancy Belle, Henry S. Belle, Olivia E. Holmes, H. R. Holmes, Charles A. Brown, and Emma Brown, Frank E. Brown, and A. Bush, administrator of the estate of Charles Swegle, deceased.

*Bonham, Holmes & Hayden* for appellants. *Wm. M. Kaiser and Tilton Ford*, for respondent.

STRAHAN, C. J., (*after stating the facts as above.*) The main question presented by this appeal is one of fact, and that is whether or not the deed made by George Swegle and wife to Charles Swegle on the 3d day of September, 1887, was intended as a mortgage or an absolute conveyance of the real property therein described. All other questions are subordinate to this. Since the decision of this court in *Stephens v. Allen*, 11 Or. 188, 3 Pac. Rep. 168, the law must be regarded as settled in this state that a deed absolute on its face may be shown by parol to have been designed

and intended by the parties as a mortgage for the security of money, or to secure the performance of some act; and as was said in that case, "as such transaction receives its character from what the parties intended to make it at its inception, the ascertainment of that intention always becomes the important inquiry. This necessarily requires evidence of the situation of the parties, of the price fixed, in connection with the value of the property, the conduct of the parties before and after, and all the surrounding facts and circumstances, so far as they are adapted to explain the real character of the transaction." A brief reference to the facts disclosed by the record therefore becomes necessary. At the time of the execution of the deed in question, George Swegle was the owner in fee of the land in controversy, which was then of about the value of from \$7,000 to \$8,000. About the month of April, 1887, George Swegle borrowed \$4,000 of Breyman Bros., for which he executed his promissory note, and a mortgage on said real property, to secure the same. In the month of August thereafter, Charles Swegle purchased said note and mortgage of Breyman Bros., paying the full face value therefor, and the same were regularly assigned to him without recourse. In the month of September, 1887, the deed in question was executed. A somewhat critical examination of the testimony of all of the witnesses shows that it was not intended as an absolute deed. The value of the property conveyed was nearly double the amount of the mortgage. Though careful and prudent in his financial matters, there is nothing in the evidence tending to show that Charles Swegle would strip one of his children of his property by only paying one-half of its value. On the contrary, before this deed was executed, he offered to carry the debt at 7 per cent., which was a lower rate than the note to Breyman Bros. bore. In addition to this, he told the plaintiff that he would sell the land, and that he should have all it would bring over and above the amount of the debt. The plaintiff testifies to this, and the tendency of the testimony of Mrs. Swegle, the widow of the deceased, J. G. Evans, W. F. Herran, and Robert Ford, and Leander Bender was to establish that fact. So entirely satisfied were several of the children of Charles Swegle, as well as the widow, of the justice of the plaintiff's claim, that they executed deeds of release to him of all interest in said real property. Being satisfied that the deed in question was executed as a security for money, it must be adjudged to be a mortgage to which will attach the right of redemption, and every other incident of a mortgage. Something was said upon the argument as to the insufficiency of the plaintiff's tender in writing made before the suit was commenced; but we do not think it necessary to pass upon that question at this term. The plaintiff could not make a tender in writing or otherwise of the amount actually due, for the reason that Charles Swegle had the possession of said land two or three years, and the rents and profits, to which the plaintiff was enti-

tled, remained unaccounted for. He had the right to know the amount of these, and to have the same deducted from the amount due Charles Swegle. The balance remaining due is what he must pay, and that could not be known till an account was taken. Finding no error in the decree appealed from, the same must be affirmed.

(20 Or. 229)

RAYBURN v. HURD *et al.*

(Supreme Court of Oregon. Jan. 6, 1891.)

RIGHT TO SET-OFF—ASSIGNMENT OF CHOSE IN ACTION.

1. Where an account for goods sold and delivered is definite and exists in the form of a debt, which was then due and payable at the time of the transfer, it is a proper matter of set-off.

2. The principle is well established that the purchaser of any thing in action, not negotiable, takes it subject to all the defenses which the debtor or promisor had at the time of the assignment.

3. An assignee of a chose in action, not negotiable, takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or the time notice was given of it.

4. The court may, in its discretion, relieve a party from default in failing to furnish a bill of items when it is made to satisfactorily appear that a good and sufficient reason existed for such failure, and one is furnished, etc.

(Syllabus by the Court.)

Appeal from circuit court, Benton county; R. S. BEAN, Judge.

This is an action brought by the plaintiff against the defendants to recover the sum of \$350, with interest, on a non-negotiable promissory note, made by the defendants to J. C. Young on the 28th day of August, 1888, and sold and assigned by him to the plaintiff, etc. The defendants admit the making of said note, but deny the assignment, and then allege affirmatively by way of set-off that the said Young on the 28th day of August, 1888, was indebted to James C. Taylor in the sum of \$299.29 for balance due on account for goods and wares sold and delivered to the said Young by the said Taylor at his special instance and request, at the various dates and times therein specified, and that the said sum of \$299.29 has not been paid, nor any part thereof; that on the 28th day of August, 1888, the said James C. Taylor sold and assigned the said account to the defendant L. L. Hurd; and that on the same day, for value received, he sold and assigned the undivided three-fourths of said account to the other defendants, and that the defendants in said action were the *bona fide* owners of said account since the 28th day of August, 1888. It is enough to say that an account for \$63 in favor George Taylor was similarly assigned, and is set out as a defense, in substance, to the same effect. The reply denied all the material allegations of the complaint. Upon a trial the jury found a verdict for the plaintiff for the sum of \$381, offset by accounts for \$360.94, leaving a balance due the plaintiff for the sum of \$20.06, for which judgment was rendered by the court, and from which the plaintiff appeals to this court.

L. Flinn, for plaintiff. W. S. McFadden and J. R. Bryson, for defendants.

LORD, J. (after stating the facts as above.) The principal question presented by this record relates to the defense of set-off. The objection is that the accounts for goods sold and delivered are not liquidated, and that the defendant ought not to be permitted to plead them as a set-off, because the defendants owned the accounts at the time of the execution of the non-negotiable note by them. The accounts are for goods sold and delivered, and the amount is ascertained and definitely fixed by arithmetical computation; and they exist in the form of a debt which the defendants claim were then due and payable at the time of the transfer. An itemized account of them was furnished the plaintiff, and there is no pretense of mistake, or that they were not just and valid; nor that the assignor of the plaintiff did not owe them, and defendants own them, and upon which they could have maintained action before the transfer. It is an old rule that, wherever the demand is so certain that an *indebitatus assumpsit* would lie, it is the proper subject of the set-off. *Burgess v. Tucker*, 5 Johns. 104. The defendants' demand was for money on an account for goods sold and delivered, and for its recovery an *indebitatus assumpsit* would lie; and this, as the authorities show, furnishes the test for its allowance as a set-off. In *Smith v. Hule*, 14 Ala. 202, it was held that a demand for the value of the corn delivered may be pleaded as an offset, though the price of the corn had not been agreed on, the court saying: "It has been held that a demand for which an *indebitatus assumpsit* would lie may be pleaded as a set-off to a debt due on a note, and that it is not necessary, to constitute a money demand, that the price should have been agreed for articles sold which compose it." The cases cited have no relevancy to the point involved, as note *Boyer v. Clark*, 3 Neb. 161, or *Pierce v. Hoffman*, 4 Wis. 291. As an *indebitatus assumpsit* will lie for goods sold and delivered, being a money demand in the form of a debt, necessarily goods sold and delivered is good matter of set-off, because the demand is liquidated, and the amount definitely ascertained and alleged, and a debt then due and payable at the time of the transfer. This result is fatal to the objection raised.

As to the next, the instrument upon which the action is brought is a non-negotiable note, and, before reaching the real objection urged, it is necessary to consider its assignment, and the subjects to which it is liable as set-off in the hands of the assignee. Our statute provides that, "in case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due." Hill, Code, § 28. This section, and section 27, preceding it, requiring in most cases that the real party in interest be plaintiff, has enabled the assignee of a thing in action to sue in his own name; but in all other respects the rights of the parties re-

main unchanged. The principle is well settled that a purchaser of a thing in action, not negotiable, takes it subject to all the defenses which the debtor or promisor had at the time of the assignment, and which he could have made available as a defense. When the maker of a non-negotiable instrument is sued by the assignee, he may set up as a defense against him any such matter by way of set-off or other defense as he could have set up against his assignor. The complaint shows that the instrument upon which the action is brought is a non-negotiable note, and that the day after its execution it was assigned to the plaintiff. This entitled the defendant to set up any defense which he could have interposed against the assignor, and which existed at the time and before notice of the assignment. "An assignee," said Wright, J., "of a chose in action, not negotiable, takes the thing assigned, subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it when there is an interval between the execution of the transfer and the notice." Callahan v. Edwards, 32 N. Y. 483. The defendants had acquired the accounts prior to the transfer, and owned them at the time the note was executed. They gave the non-negotiable note, and on the same day received a transfer of the accounts against the assignor of the plaintiff which was prior to the assignment. This shows that there was an existing indebtedness against the assignor of the plaintiff, then due and payable before, as well as at the time of, the assignment, upon which an action might have been maintained by the defendants. When the defendants, as promisors of such an instrument, were sued by the assignee, the defenses which they had at the time of the assignment against the original creditor alike avail to them against the plaintiff as the substituted creditor. When the plaintiff sued them on this note, it was then due and payable, and there existed two opposing demands in a perfect condition at the same time; and in such case, either may insist upon a set-off. Pom. Rem. § 163. "A set-off," said SANDFORD, C. J., "is made where the defendant has a debt against the plaintiff arising out of a transaction independent of the contract on which the plaintiff sues and desires to avail himself of that debt in the existing suit, either to reduce the plaintiff's recovery, or to defeat it altogether." Avery v. Brown, 31 Conn. 401. The accounts held by the defendants were mature for collection on their part, and complete as matters of set-off as the cause of action upon the note. As a consequence, the right of set-off existed at the time of the assignment, and the plaintiff took subject to it. This result obviates all objections urged upon this phase of the case, except the contention that, as the defendants owned the accounts at the time the note was executed, they ought not to be permitted to plead it as a set-off. While it is true that the giving of a note is *prima facie* evidence that an existing indebtedness of the payee to the maker is paid, yet the fact may be alleged and shown to be otherwise. The fact that the assignor of the plaintiff owed

the defendants at the time they gave him their note, in the absence of any explanation, might be considered as a settlement between the parties; but such is not the case when it is alleged and proved that such indebtedness is not paid, and is offered as a matter of set-off. In Graves v. Shulman, 59 Ala. 406, the court say: "Although the giving of a note is *prima facie* evidence that a previous indebtedness of the payee to the maker is or has been discharged, it is allowable to allege and show in any particular case that in such case this is not true; and, in the plea under consideration, it is alleged that the prior indebtedness of the plaintiffs to the debt set up in the plea of set-off was not discharged." In the present case, it is distinctly alleged that the demands pleaded as a set-off are not paid, nor any part thereof. If, after the assignment, the defendants had promised the assignee to pay the note, there might be some force in the argument that the defendants ought to be estopped from setting up their demands. But, as the case stands, it is difficult to understand its applicability, or that the doctrine we have been considering encourages litigation. That argument, once earnestly urged, has long since been exploded, for practical experience has utterly refuted it. The position which the plaintiff, as assignee, occupied was the same which his assignor occupied at the time of the transfer; and, standing in his shoes, he must abide the consequences of his position, and cannot avoid defenses to which his assignor was liable at the time of the assignment.

This disposes of all questions, except one other to which little objection was urged, and which we shall dispose of by saying that the trial court may, in its discretion, relieve a party from default in failing to furnish a bill of items when it is made satisfactorily to appear that a good and sufficient reason existed for such failure at the time, and one is furnished. Robbins v. Butler, 22 Pac. Rep. 803. Judgment affirmed.

(20 Or. 223)

#### BRITT v. MARKS *et al.*

(Supreme Court of Oregon. Jan. 6, 1891.)

#### VENDOR AND VENDEE — FRAUD — SALE IN GROSS — WARRANTY.

1. In a suit by a vendee against the vendor in which fraud is relied upon as the grounds of relief, it must appear from the complaint, among other things, that the vendor knew that the representations relied upon were untrue, and that they were made with the intent to defraud the plaintiff. Rolfes v. Russel, 5 Or. 400, and Dunning v. Cresson, 6 Or. 241, approved and followed.

2. Where a tract of land is sold for a sum in gross, and not by the acre, and the quantity stated is qualified by the words "more or less," there is no warranty of the quantity, and there can be no abatement, if the number of acres is less than stated, nor compensation allowed for any excess.

(Syllabus by the Court.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

This suit was commenced on the 11th day of April, 1889. The complaint, in substance, alleges that on the 9th day of November, 1889, the defendant S. Marks fraudulently and falsely, represented and told



the plaintiff that a certain farm contained 169.09 acres, and thereby induced plaintiff to purchase the same from defendants; and plaintiff, not knowing how much land the farm did contain, and relying on the statements and representations of said Marks, did purchase said farm from defendants, and paid therefor the sum of \$1,700. That the farm contained only 141.01 acres, instead of 169.09 acres, the quantity sold to plaintiff. That plaintiff was damaged \$282.20 thereby. That on said 9th of November, 1889, plaintiff paid defendants \$600 cash, and gave his note for the balance, (\$1,100,) and a mortgage on said farm to secure the same. That plaintiff gave his note to defendants on the 13th June, 1885, for \$151, and on the 23d July, 1886, for \$50. That there was no consideration for the note of \$1,100, except the balance of the purchase price of said farm, which balance, in fact, was only \$817.80, and not \$1,100, and it was by reason of the mistake as to the amount of land in said farm that the note was given for \$1,100, instead of \$817.80, the correct amount, and the amount intended. That plaintiff has paid on note for \$1,100, December 18, 1883, \$700; October 18, 1884, \$100; November 9, 1885, \$30; November 18, 1885, \$100; April 16, 1887, \$50; and upon note for \$151, November 28, 1885, \$100. That defendants still retain said three notes in their possession, and on April 2, 1889, plaintiff offered to pay them \$50, in addition to what had been paid, and requested them to deliver up said notes, which they refused. Plaintiff prays that the defendants be enjoined from transferring said notes; that \$282.80 be deducted from the note for \$1,100, at its date, and that an account be taken between the plaintiff and said defendants of such sum as may be due them; and that said notes be delivered up, together with said mortgage, for cancellation, and for general relief. The answer denies each material allegation of the complaint. The answer then contains this further and separate defense: That on November 9, 1883, for \$1,700, defendants, by deed, conveyed to plaintiff the following described premises, to-wit: East half of the donation claim of John W. Burch, which entire claim is there described, giving the courses and distances but not the number of acres contained; also the north-west part of the donation claim of A. J. Tiller, giving commencing corners and courses and distances, but not the number of acres contained,—reserving from said lands so conveyed, that certain parcel of land heretofore sold by J. R. Jennings to Ezekiel Lyttel, which deed is referred to in deed of defendants, as recorded in Douglas county, Or., which land, it is said in defendants' deed, comprises all of the donation claim of J. W. Burch, lying on the north side of Cow creek, and was dated May 23, 1863. That said deed of defendants to plaintiff does not mention the number of acres intended to be conveyed, and was so understood between the plaintiff and defendants at the time. That plaintiff has ever since been in possession of the whole of said property, which is the same land referred to in plaintiff's complaint. The reply denies that the dona-

tion claim of Burch is described in plaintiff's deed, and alleges that it is described as follows, giving courses and distances: Containing in township 30 S., range 6 W., 221.18 acres, and in township 30 S., range 5 W., 97 acres; also the north-west part of land claim of A. J. Tiller, giving courses and distances, containing 60 acres, more or less,—reserving from the above-described premises, and not herein conveyed, that certain 50 acres heretofore sold by J. R. Jennings and wife to Ezekiel Lyttel, comprising all the claim of Burch on the north side of Cow creek. Denies that the deed from defendants to plaintiff is without mention of the number of acres intended to be conveyed, but alleges that said deed does mention that the Burch claim contains 318.18 acres, and the east half is 159.09 acres, and, except 50 acres, is 109.09 acres. Denies that defendants delivered possession to plaintiff of all the lands intended to be conveyed, but alleges that it was expressly stated by S. Marks, and so understood by plaintiff and defendants at the time the deed was executed, that the east half of the claim on the south of Cow Creek contained 109.09 acres, and the whole of said farm contained 169.09 acres, when in fact the east half of said claim south of Cow creek contained only 81.01 acres, and the whole of said farm contained only 141.01 acres. Upon these issues, the court below tried the case, and rendered a decree against the plaintiff dismissing the suit, from which he has appealed to this court.

*Wm. R. Willis, for appellant. Hamilton & Hamilton and Lane & Lane, for respondents.*

STRAHAN, C. J., (after stating the facts as above.) 1. It is nowhere alleged in the complaint that, at the time Marks made the representations complained of, he knew that the farm did not contain 169.09 acres, or that they were made with the intent to defraud the plaintiff. By omitting these allegations, the plaintiff fails to make a case in his complaint which would entitle him to any relief on the ground of fraud. *Rolfes v. Russel*, 5 Or. 400; *Dunning v. Cresson*, 6 Or. 241.

2. But the plaintiff's counsel argued that mistake is alleged in the complaint, and that, of itself, is sufficient to entitle the plaintiff to relief. Waiving all question as to the insufficiency of the pleading on this point, we will proceed to examine the facts briefly. The plaintiff holds under a deed from Marks and Wollenburg and wife, dated the 9th of November, 1883. The consideration expressed in the deed is \$1,700. The premises conveyed are described as follows: "The east half of that certain donation land claim of John W. Burch, which entire donation claim is described as commencing at a point 6.14 chains west and 22.30 chains south, from the corner of sections 24 and 25 in T. — S., R. 6 west, (claim No. 61;) thence east 23 chains; thence north 58.50 chains; thence west 74 chains; thence south 36.20 chains; thence east 50.80 chains; thence south 22.30 chains, to the place of beginning,—containing in township 30 S., R. 6 west, 221.18 acres and in township 30 S.,

R. 5 west, 97 acres. Also the north-west part of the donation land claim of A. J. Tiller, commencing 20.63 chains south, and 7.16 east, from the north-west corner of section 30 in township 30 S., R. 5 west; thence running east 29.50 chains; thence south 20.34 chains; thence west 29.50 chains; thence north 24.30 chains, to the place of beginning,—containing 60 acres, more or less. Reserving and excepting from the above-described premises, and not herein conveyed, that certain fifty acres heretofore sold by J. R. Jennings and wife to Ezekiel Lyttel, which said deed therefor is recorded in volume No. 2 of deeds, page 599, in the clerk's office of Douglas county, Oregon, and which land, so excepted from this conveyance, comprises all of the land of the said donation claim of J. W. Burch lying and being on the north side of Cow creek, which said deed is dated May 23, 1863." This deed contained general covenants of warranty, but did not specify the amount of land conveyed. The deed of Jennings and wife referred to conveys to Lyttel "all of the land belonging to the donation land claim of John Wesley Burch lying on the north side of Cow creek, containing fifty acres, more or less." Marks and Wollenburg, by the reference which they make to this last-named deed in their deed to the plaintiff, have made its descriptive words a part of their deed as completely as if they were written out at large in such deed; so that the plaintiff was bound to know that all of that part of the Burch claim north of Cow creek was conveyed away. The descriptive words in no manner fix the amount. Whatever may have been the plaintiff's impression, as to the amount of land contained in the farm purchased from Marks and Wollenburg, his own evidence shows that it was a purchase of the farm in gross, and not by the acre. "Question. What did you agree to pay him for this farm? Answer. I went and looked at the farm, and wrote him that I would give him \$1,700 for the farm." These facts clearly bring this case within the principle that, where a tract of land is sold for a sum in gross, and not by the acre, and the quantity stated is qualified by the words "more or less," there is no warranty of quantity, and there can be no abatement, if the number of acres is less than stated, nor compensation allowed for any excess. 2 Suth. Dam. 250, and authorities cited in note 2; Noble v. Googins, 99 Mass. 231; Canal Co. v. Emmett, 9 Paige, 168; Board v. Younger, 29 Cal. 179; Cram v. Bank, 42 Barb. 434; 2 Warv. Vend. 925. These authorities effectually dispose of the appellant's contention, and require the affirmance of the decree appealed from, and it is so ordered.

(20 Or. 236)

#### STATE V. LAWRENCE.

(Supreme Court of Oregon. Jan. 6, 1891.)

##### LARCENY—INDICTMENT—ROBBERY.

1. An indictment which charges that L. on the 28th day of October, 1890, in the county of M. and state of Oregon, did feloniously in and upon G. L. make an assault, and him the said G. L. did put in fear and in danger of his life and of great bodily harm, and one silver watch, of the

value of \$10, did forcibly, violently, and against his, the said G. L.'s, will feloniously steal and carry away the said watch, and then and there being the personal property of the said G. L., will not sustain a conviction of the crime of larceny from the person.

2. An indictment for the crime of robbery under section 1742, Hill's Code, is defective, which fails to charge that the offense was committed by force and violence, or by putting in fear of force and violence, or assault, as the case may be.

3. A conviction for the crime of larceny from the person cannot be sustained under an indictment for robbery, which fails to charge that the property was taken from the person.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. B. STEARNS, Judge.

The defendant was indicted for the crime of robbery, and convicted of the crime of larceny from the person. The charging part of the indictment is as follows: "The said Abe Lawrence, on the 28th day of October, A. D. 1890, in the county of Multnomah, and state of Oregon, did feloniously in and upon one Geo. Lebo made an assault, and him, the said Geo. Lebo, did put in fear and in danger of his life and of great bodily harm, and one silver watch of the value of ten dollars did forcibly, violently, and against his, the said Geo. Lebo's, will, feloniously take, steal, and carry away, the said watch then and there being of the personal property of said Geo. Lebo, contrary," etc. No bill of exceptions is contained in the record, and the sole question therefore is whether or not the indictment is sufficient to sustain the judgment of conviction.

Gilbert J. McGinn, for appellant. T. A. Stevens, Dist. Atty., and W. T. Hume, for the State.

STRAHAN, C. J., (after stating the facts as above.) Section 1742, Hill's Code, defines the crime for which the pleader attempted to indict the defendant. That section provides: "If any person not being armed with a dangerous weapon shall by force and violence, or by assault, or by putting in fear of force and violence or assault, rob, steal, or take from the person of another, any money or other property which may be the subject of larceny, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years." It will be observed that this indictment fails to charge that the property in question was taken from the person of George Lebo. The jury having convicted the defendant of the crime of larceny from the person, he was sentenced to the penitentiary for a crime not charged in the indictment.

The indictment is fatally defective in another particular. It is not charged that this crime was committed "by force and violence, or by putting in fear of force and violence or assault." It is the violation of the sacredness of the person by any of the means enumerated in the statute whereby one's property is taken which the law punishes, and not the mere fact that a larceny is committed. The pleader ought therefore to aver that the property was taken from the person by some of the means mentioned. The defendant

may have used force and violence, or assaulted the prosecutor, or put him in fear of force and violence or assault, yet if he did not rob, steal, or take from the person the property in question by some one or more of the means enumerated, the crime is not made out. If the crime were properly charged and any of the acts mentioned in the statute were committed at the time the property was taken, a jury would have no difficulty in reaching a correct conclusion. Counsel for appellant cite section 1765, Hill's Code, which provides: "If any person shall commit the crime of larceny by stealing from the person of another, such person shall," etc. From this he argues that, inasmuch as the taking from the person is not charged, that part of the verdict of the jury is to be rejected as surplusage, and the cause remanded to the court below, with directions to sentence the prisoner for the crime of petit larceny. But we are not satisfied that such disposition of the cause would be proper. The grand jury were evidently of the opinion that a felony had been committed, and aimed to charge the defendant therewith. If the defendant has committed a felony there is no legal reason why he should not be tried for that crime, if the court below and district attorney so elect. The judgment will therefore be reversed, and the cause be remanded to the court below for such further proceedings as may be according to law and the practice of that court.

(20 Or. 234)

## STATE v. MACK.

(Supreme Court of Oregon. Jan. 6, 1891.)

## BURGLARY—INDICTMENT—APPEAL—RECORD.

1. An indictment for burglary which charges that M. on the 3d day of November, A. D. 1890, in the county of M., and state of Oregon, did unlawfully, feloniously, and burglariously break and enter a dwelling-house, namely, the dwelling-house of one E. A. C., with the intent on the part of him, the said M., to commit the crime of larceny therein, is insufficient to sustain a conviction.

2. Where the error relied upon on appeal appears from the judgment roll, no bill of exceptions is necessary.

3. The objection that the facts stated in an indictment do not constitute a crime may be taken for the first time in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court.

(Syllabus by the Court.)

Appeal from circuit court, Multnomah county; L. E. STEARNS, Judge.

The defendant was indicted by the grand jury of Multnomah county, and convicted, from which judgment this appeal is taken. There is no bill of exceptions, and the only error relied upon for a reversal is the insufficiency of the indictment to sustain the judgment. The charging part of the indictment is as follows: "The said John Mack on the 3d day of November, A. D. 1890, in the county of Multnomah, and state of Oregon, did unlawfully, feloniously, and burglariously break and enter a dwelling-house, namely, the dwelling-house of one E. A. Cunningham, with intent on the part of him, the said John Mack, to commit the crime of larceny therein, contrary," etc.

Gilbert J. McGinn and S. H. Green, for appellant. T. A. Stevens, Dist. Atty., and W. T. Hume, for the State.

STRAHAN, C. J., (after stating the facts as above.) This record presents but a single question, and that is the sufficiency of the indictment. The pleader by this indictment attempted to charge the crime of burglary defined and made punishable by section 1758, Hill's Code. That section punishes any person who shall break and enter any dwelling-house in the night-time, in which there is, at the time, some human being, with intent to commit a crime therein; or, having entered with such intent, shall break any such dwelling-house in the night-time; or be armed with a dangerous weapon therein; or assault any person lawfully therein. The indictment fails to charge that the breaking and entry was in the night-time, or that there was in the house some human being. Under this section, these are a part of the essential elements of the crime of burglary, without which the defendant is not brought within the statute punishing that offense. Section 1759 makes the same acts punishable if committed in the day-time, and, for the reason already suggested, a conviction could not be sustained under this section. Section 1760 punishes whoever shall break and enter any building within the curtilage of any dwelling-house, but not forming a part thereof, or shall break and enter any building or part thereof, booth, tent, etc., in which property is kept, with the intent to steal therein, or commit any felony therein. The indictment in this case does not charge any of the elements of burglary under this section. Counsel for the state cite *State v. McGinnis*, 17 Or. 332, 20 Pac. Rep. 632, in which there was no bill of exceptions, and the court refused to examine the errors relied upon; but the appellant attempted to bring into the record by affidavit the facts upon which he relied. But here the error is in the judgment roll; in the indictment itself, in that it fails to charge a crime. Such an error is not waived by silence or cured by judgment. Counsel for the state also cite *State v. Jarvis*, 18 Or. 360, 23 Pac. Rep. 251. In that case the indictment charged both incest and rape, and we held that, if the objection had been taken by demurrer in the court below, it would have prevailed; but, not having been so taken, it was waived. The distinction is manifest. In the one case a crime is charged in the indictment; in the other it is not. It is true in the *Jarvis* Case more than was necessary to constitute a single crime was charged, but that did not necessarily vitiate the indictment. In this case there is not enough charged. In *State v. Bruce*, 5 Or. 68, this court held that the particular objection made to the indictment in that case was waived by failing to demur; but that there might be no misunderstanding of the ground upon which the decision was placed, the court, by BONHAM, J., added: "This reasoning of course does not apply to an indictment which is subject to the objections raised by the first and fourth grounds of demurrer as specified by stat-

ute, (Crim. Code, §§ 123, 131.)" These sections are numbered 1322 and 1330 respectively of the present Revision. For the reason that the indictment in this case fails to charge a crime, the judgment must be reversed; but no order for the defendant's discharge will be made, for the reason that the objection may probably be obviated by another indictment, if the court below shall so direct.

(20 Or. 315)

HUBBARD v. TOWN OF MEDFORD.

(Supreme Court of Oregon. Jan. 12, 1891.)

MUNICIPAL CORPORATIONS—ESTABLISHMENT OF FIRE LIMITS.

The grant to a municipal corporation of power to provide for the prevention and extinguishment of fires necessarily implies the right to establish fire limits, and prohibit the erection of wooden buildings therein.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

In October, 1889, the common council of the town of Medford duly passed an ordinance for the prevention of fires, and the protection of persons and property endangered thereby, which, among other things, established fire limits, and provided that no wooden buildings should be built within said limits. On February 24, 1890, the plaintiff was tried and convicted before the recorder's court for a violation of the provisions of said ordinance, and fined \$50. On a writ of review this judgment was affirmed by the circuit court of Jackson county, from which judgment this appeal is taken.

H. K. Hanna, for appellant. Francis Fitch, for respondent.

BEAN, J., (after stating the facts as above.) The only question which we are required to decide in this case is, does the city of Medford have authority under its charter to establish fire limits, and prohibit the erection of wooden buildings therein? The provisions of the charter of Medford, so far as they are applicable to the case in hand, are as follows: The board of trustees shall have power—"First. To adopt resolutions and by-laws, and make ordinances, not repugnant to the laws of this state, or of the United States. \* \* \* Seventh. To regulate the storage of gunpowder, tar, pitch, resin, and all other combustible materials, and the use of candles, lamps, and other lights in stores, shops, stables, and other places; to prevent, remove, and secure any fireplace, stove, chimney, oven, or boiler, or other apparatus which may be dangerous in causing fire, and to provide for the prevention and extinguishment of fires. \* \* \* Tenth. To prevent and restrain any riot or disorderly assemblage in any street, house, or place in town, and to provide for the public security, peace, and tranquillity; to provide and maintain either or both a day and night police; to regulate the rate of speed upon all railroads within the corporate limits of the town." Laws 1889, pp. 363, 364.

The contention of appellant is that, before a municipality can establish fire limits, and prohibit the erection of wooden

buildings therein, the power to do so must be conferred by express legislative grant, and that, since no such express grant is contained in the charter of defendant, the ordinance in question is void. A municipal corporation can exercise no powers but such as are granted in express terms, or necessarily or fairly implied as incident to those expressly granted, or essential to the manifest object and purposes of the corporation. The charter is the organic law. From its charter its powers are originally derived, and to its charter every attempted exercise of power must be ultimately referred. As its powers are conferred by its charter, so they are necessarily limited by it, and the corporation is prohibited from exercising those which are not authorized. Any act or attempted exercise of power which transcends the limits expressed, or necessarily inferred from the language of the charter, is beyond the authority of the corporation, and is therefore void. *City of Corvallis v. Carille*, 10 Or. 139; *Dill. Mun. Corp. § 89*. While a corporation can exercise no powers but such as are expressly conferred by the act by which it is incorporated, or are necessary to carry into effect the powers thus conferred, or are essential to the manifest object and purposes of the corporation, yet, when an express power is granted, there is also impliedly granted the power necessary to carry it into effect. *City of Portland v. Schmidt*, 13 Or. 17, 6 Pac. Rep. 221. The charter of defendant expressly confers upon it the power "to provide for the prevention and extinguishment of fires." The grant of this power necessarily carries with it the power to enact any and all reasonable rules, regulations, or ordinances necessary to carry into effect the powers thus granted. The object sought to be accomplished by this provision is the prevention of damages to, and destruction of, property by fire, and, unless the municipality, through its constituted authorities, has the power to enact ordinances necessary to accomplish that purpose, the grant is of no avail. The power to provide for the prevention of fires is granted in express terms, but the mode of exercising it is vested in the trustees, who are the chosen representatives of the whole people, and the sole legislative body of the corporation. They are presumed to act for the best interests of the entire inhabitants of the town. The power, however, being an implied one, all ordinances passed in virtue of it must be reasonable and not oppressive, and must be reasonably calculated to attain the object sought; that is, the prevention of fires. *Dill. Mun. Corp. (4th Ed.) §§ 319, 327*. The prevention of fires and their spread is of prime importance to every community. Every precaution possible should be taken to prevent the destruction of property and the danger of life incident to conflagration, and for this purpose as great a degree of interference with personal rights is permitted as under any other power of a municipal corporation. In cities and densely populated towns, the first step usually taken is to establish fire limits, and prescribe the material of which build-

ings erected therein shall be constructed. Owing to the extreme importance of such regulations, and the necessity therefor, it has been held that municipal corporations have the power to enact ordinances of this kind under their general police powers. *Id.* § 405; *Horr & B. Mun. Ord.* § 222; *Mayor v. Hoffman*, 29 La. Ann. 651; *Wadleigh v. Gilman*, 12 Me. 403; *Baumgartner v. Hasty*, 100 Ind. 575. These authorities proceed largely upon the theory that the erection of wooden buildings in cities and towns compactly built would be so eminently dangerous to surrounding property that the public necessity requires that they be prohibited. The authorities on this question are however not harmonious, and there are many decisions holding a contrary doctrine to those above referred to. *Mayor v. Thorne*, 7 Paige, 261; *Pye v. Peterson*, 45 Tex. 312; *City of Keokuk v. Scroggs*, 39 Iowa, 447; *Kneedler v. Borough of Norristown*, 100 Pa. St. 368. But none of these cases, except *Mayor v. Thorne*, hold that an express grant to a municipality of powers "to provide for the prevention and extinguishment of fires" does not confer the authority to establish fire limits, and prohibit the erection of wooden buildings therein. The case of *Mayor v. Thorne* was a suit by the city of Hudson to enjoin the defendants from erecting a building upon a vacant lot owned by them, intended to be used as a hay-press, in violation of a city ordinance, and was decided in 1838. What was said by Chancellor WALWORTH in relation to the power of the city to restrict the erection of wooden buildings has been considered as *dicta*, and the authority of the case on that question is much impaired by the criticism it has received by the courts and text-writers. But it is unnecessary for us to pursue the examination of the question of the right of a city to enact ordinances of this kind under general police powers any further, or express any opinion thereon. The charter of defendant expressly grants to it the power to prevent fires, which we think necessarily implies the right to establish fire limits, and prescribe the kind of buildings to be erected therein. It was so held by CAMPBELL, J., in the case of *Alexander v. Town Council*, 54 Miss. 659, and *ANDERS, C. J.*, in *City of Olympia v. Mann*, ante, 337. The judgment of the court below must therefore be affirmed.

(45 Kan. 318)

DEFORD v. HUTCHINSON.<sup>1</sup>

(*Supreme Court of Kansas. Jan. 10, 1891.*)

REPLEVIN — PLEADING—GENERAL DENIAL—COUNTER-CLAIM.

In an action of replevin by a mortgagee for the possession of mortgaged property, the defendant in possession thereof may, for the purpose of defeating the plaintiff's right of recovery, prove, under the general denial, a sale of the property by her to the plaintiff, subsequent to the execution and delivery of the mortgage, and his refusal to take the goods and pay her the contract price. Further held, that in such action, where the plaintiff is permitted to retain the goods, the defendant may plead such sale as a counter-claim, and, if maintained on the trial, may recover a judgment against the plaintiff in the alternative for a return of the property, or

for the difference between the amount of plaintiff's lien on the property and the price agreed on in the sale thereof.

(*Syllabus by Strang, C.*)

Commissioners' decision. Error from district court, Franklin county; A. W. BENSON, Judge.

*John W. Deford*, for plaintiff in error. *W. Littlefield*, for defendant in error.

STRANG, C. Action for replevin. Plaintiff held a chattel mortgage upon a stock of millinery goods, store furniture and fixtures, in possession of the defendant. By the terms of the mortgage the goods were to remain in possession of the defendant until condition broken, or the plaintiff deemed himself insecure. The plaintiff, deeming himself insecure, demanded possession of the goods, which was refused. He then commenced his action of replevin in the district court of Franklin county, Kan., April 23, 1887. Defendant first answered by a general denial, and afterwards filed an amended answer, in which she admitted the execution and delivery of the note and mortgage sued on, but averred that, after the execution and delivery of the note and mortgage, the plaintiff agreed to purchase of her the entire stock of goods, furniture, and fixtures, at a price to be determined by an invoice to be taken by Mr. Holt, the agent of the plaintiff, and to pay her the difference between the value of the goods so ascertained and the amount of plaintiff's lien in cash. She also alleges that Mr. Holt, under the instructions of the plaintiff, took an invoice of the goods, furniture, and fixtures, and that, after the defendant had submitted to the interruption and inconvenience necessarily incident to the taking of the invoice, the plaintiff failed and wholly refused to carry out his said agreement to take the goods, and pay the defendant therefor the difference between the amount of the invoice and the amount of the plaintiff's note, notwithstanding she offered the plaintiff the goods according to said agreement, and demanded the money due her thereon. The invoice of said goods amounted to \$1,259.09, and the furniture and fixtures to \$335.75,—a total of \$1,494.84. There was a third defense in the amended answer, in which defendant claimed damages for the wrongful taking of the property by the plaintiff. The plaintiff replied to the general denial, and the case went to trial by the court and jury. Verdict for the defendant for \$808.37, as the value of her interest in the property, and as damages, \$28.29. Afterwards, on motion for a new trial, the court required the defendant to remit \$88.14 of the amount of her interest in the goods, and \$3.09 from the amount of her damages, which was done; whereupon the court overruled the motion for a new trial, and entered judgment upon the verdict as modified for \$720.23, as the interest of defendant below in the goods, and \$25.20 for damages.

The first ground for reversal discussed by the plaintiff in his brief is the refusal of the court to require the defendant, in the trial below, to elect upon which defense set out in her answer she would rely. Plaintiff suggests that the second and third de-

<sup>1</sup>Modified on rehearing, 26 Pac. Rep. 60.

fenses set out in the answer are inconsistent with each other. The second defense sets out a sale of the goods replevied by the defendant to the plaintiff after the execution and delivery of the note and mortgage, and his refusal to carry out the contract of sale. This defense is based upon matters arising subsequent to the execution of the plaintiff's mortgage. The third count in the answer sets up matters and things which, if they amount to a defense, relate to the original transaction between the parties. This count may contain some things that are not matters of defense at all, but no motion to make it more definite and certain was interposed, and no demurrer was pleaded to it. Whatever matter of defense it stated was not inconsistent with the second defense. If the second defense failed, she might still have whatever benefit could be derived from the matters stated in her last defense. The sale of the goods subsequent to the making and delivery of the note and mortgage was not inconsistent with the defendant's version of the original transaction sought to be detailed in the third count.

The plaintiff complains of the action of the court in overruling his objection to the following question: "Who first suggested the mortgage being given?" This was objected to as being incompetent. It cannot be said that this question was incompetent. It would be immaterial, unless followed by something rendering it material; but, as a preliminary question, it was not incompetent. The next question objected to was: "You may state all the conversation." To this question the plaintiff objected, but stated no ground of objection, and the court properly overruled it. The following question was asked: "Did you read it [the mortgage] before you signed it?" The answer was: "Mr. Deford read it, but I did not understand it." There was no objection to this question, but plaintiff objected to the answer, failing, however, to assign any ground of objection, and he made no motion to strike the answer out. This ruling cannot be complained of. The next question was: "What part of it was it that you didn't understand?" This question was objected to as incompetent, and sustained by the court; showing the court to be with the plaintiff, so far as the substance of this part of the examination was concerned, as soon as the counsel put himself within the rule, and stated his ground of objection.

The next complaint is the ruling of the court against the plaintiff's objection to the following question: "What would have been the aggregate value, in your judgment?" This question was probably not competent, since, if the sale of the goods by the defendant to the plaintiff is enforced, the invoice of the goods is their fair value; and, if said sale is not enforced, the plaintiff is only required to return to the defendant any surplus in his hands after paying his debt and costs. But, under the instructions of the court, and the verdict of the jury, the admission of this evidence is not prejudicial error. The court instructed the jury that, if they found the existence of the contract of sale contended

for by the defendant, the value of the goods would be the invoice of the same, made by Holt. The jury evidently found for the defendant on the allegation of sale of the goods by her to Deford, and in enforcing said contract considered the amount of the invoice of the goods as the value of the goods. But if the plaintiff is right in his argument upon his tenth assignment of error, when he says that the jury should have found what the whole property was worth, then this question might have been competent and proper.

Plaintiff complains of the exclusion of testimony. We do not think any error exists here. The witness was asked her understanding in relation to the matter of inquiry, and if she understood certain things from either Deford or Miss Hutchinson. Her understanding was not evidence. What she understood from Deford or Miss Hutchinson was not evidence. What she heard Miss Hutchinson say in regard to the matter might have been, but she was not asked that question.

The sixth complaint relates to the charge of the court. The averment is that the court erred in telling the jury that it was necessary that plaintiff "should have some reasonable ground for deeming himself insecure." The instruction, as a whole, shows that the court did not instruct the jury that the plaintiff should have some reasonable grounds for deeming himself insecure. After using the above words, the court adds: "But that is not the question we are trying here. If he deemed himself insecure, he must be the sole judge of that question, and we are not trying the question of whether he had reasonable grounds or not, but the fact whether or not he deemed himself insecure." We do not think the instruction, as a whole, misled the jury.

We think the instruction complained of in the seventh assignment is the law. If, subsequent to the delivery of the note and mortgage, and while the defendant was in the actual possession of the goods, the plaintiff purchased the goods of the defendant, and agreed to pay her the difference between the amount of his lien thereon and the invoice of the goods, he waived his rights as mortgagee, and stood upon his rights as vendee; and, the goods being in the defendant's actual possession, she had a right to hold them until he paid her the purchase price, or the difference between his lien and the amount of the invoice.

The next error assigned relates to the instructions of the court, in which the court told the jury they might find the value of the fixtures from the evidence. There is, at least, no reversible error in this instruction, when considered in connection with the evidence, the verdict of the jury, and its modification by the court. Holt did invoice the fixtures. The evidence shows that he put them down in the book, and attached a value to them. It is true he put them in at the price the defendant said they were worth, instead of putting them in at a value fixed by himself; but he had a right to do so, and, having done so, they were none the less invoiced because of the fact that he had them put in at a price

fixed by her. He might have taken her judgment upon the goods, and if he had, and had actually put them in at a valuation fixed by her, it would still have been his invoice. A little figuring shows that the jury took the fixtures at the invoice. The invoice of the goods and fixtures was \$1,494.70. The amount of the plaintiff's lien, including the sum paid the First National Bank, taken from the invoice of the goods and fixtures, leaves the amount of the defendant's interest in the same as found by the jury: and, taking the amount of the goods from the amount of the goods and fixtures, the remainder is the invoice of the fixtures. It follows that the jury accepted the invoice of the fixtures as taken, and did not find the value of the fixtures from the evidence; and hence the instruction did no harm. But the court finally required the defendant to remit \$88.14 from the amount found by the jury, and the probability is that the court cut down the price of the fixtures that much, which would likely place them at a fair valuation.

The failure of the court to instruct the jury in relation to matters set up in the third count of defendant's answer did not work any injury to the plaintiff, since it is patent that the jury gave that defense no consideration. They took the invoice as to the value of the goods, and the damages found was evidently the interest on the sum the jury found as due the defendant from the plaintiff on the sale of the goods.

The tenth and eleventh errors relate to the verdict, and the action of the court in modifying it. There is nothing in the complaint as to these matters that requires this court to reverse. The jury in effect found the aggregate value of the property. They said the defendant's interest in the property was \$808.37; that her interest in the property remained at that sum, after paying the First National Bank mortgage and the amount due the plaintiff on his mortgage; and, as we have already said, the whole value of the property is thus shown, and is \$1,494.70. It was not necessary in this case to find the general value of the property. *Earle v. Burch*, 33 N. W. Rep. 254.

The plaintiff also complains because the court did not grant him a new trial. The evidence on the application for new trial was conflicting, and that which was new was impeaching in its character. All of this was addressed to the discretion of the trial court. Not being satisfied that the court abused its discretion, its ruling will not be disturbed. These are all the questions that are seriously discussed in the plaintiff's brief. In his oral argument, however, counsel for plaintiff discussed another, and perhaps the most important, question of the case. In this argument he claimed the second count of defendant's answer could not be set up in this action; that this action is *replevin*, an action in tort, and the defendant's cause of action, being founded on contract, cannot be set off against the plaintiff's second cause of action. In the argument the cause of action set up in defendant's second count was treated as a set-off. Considering it

in this light, the question is not free from doubt. But should the cause of action complained of be considered as a set-off? Is it not rather a counter-claim? Paragraph 4178, Gen. St. 1889: "The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action." A counter-claim must be a claim existing in favor of a defendant and against a plaintiff to an action under such circumstances as that a several judgment might be had between them in relation thereto; and, *first*, it must arise out of the contract set forth in the petition as the foundation of the plaintiff's claim; or, *second*, it must arise out of the transaction set forth in the petition as the foundation of the plaintiff's claim; or, *third*, it must be connected with the subject of the action. The cause of action set out in the defendant's second count is a cause of action existing in favor of the defendant and against the plaintiff under such circumstances as that a separate action might have been maintained thereon in favor of the defendant against the plaintiff, and, if maintained, a several judgment rendered therein. In fact the plaintiff claims that the defendant should have so proceeded. The cause of action set out in the defendant's answer as her second defense did not arise out of any contract set forth in the petition as the foundation of the plaintiff's claim. If any contract may be said to be the foundation of the plaintiff's claim, it was that contained in the plaintiff's mortgage on the defendant's goods, which is a distinct contract from that set up as the foundation of the defendant's second cause of action. Did said cause of action of the defendant arise out of the "transaction" set forth in the petition as the foundation of the plaintiff's claim? What is to be understood by the word "transaction," as found in our statute? In *Remedies and Remedial Rights*, by Pomeroy, in discussing a statute like ours, the author says: "As already stated in a former chapter, the difficulty in arriving at the true interpretation of the term 'transaction' lies in the fact that it had no strict legal meaning before it was used in the statute. Being placed in immediate connection with the word 'contract,' and separated therefrom by the disjunctive 'or,' one conclusion is certain, at all events, namely, that the legislature intended by it something different from and additional to 'contract.' The most familiar rules of textual interpretation are violated by the assumption that no such signification was intended. The only question at all doubtful is, how far did the law-makers design to go, and how broad a sense did they attach to the words? Is it to be used in the widest popular meaning, or must it be narrowed into some limited and technical meaning, and thus be made a term of legal nomenclature?" Section 769. From the same author we learn that the whole of a fraudulent scheme, or all the connect-



ing statements and acts constituting a cheat, would form a transaction in its broadest sense; and so we may say that the connecting acts and statements, oral and in writing, concerning a trade, may be in the same sense a transaction. A contract is the result of a transaction, while the transaction covers all things done and said which result in a contract. In *Woodruff v. Garner*, 27 Ind. 4, Judge FRAZER puts it thus: "The plaintiff's cause of action is the alleged fraud of the defendant in procuring the deed sought to be rescinded. The defendant's cause of action averred in the counter-claim does not arise out of the plaintiff's cause of action, for it cannot even exist consistently with it. If the fraud alleged by the plaintiff was perpetrated, then the defendant cannot have any right of action whatever, so the defendant found it necessary to deny the fraud. But the deed sought to be set aside constitutes a part of the transaction upon which the plaintiff and defendant both rely for a recovery. It is the link which forms the direct connection between the two diverse causes of action. The transaction set forth in the complaint was not simply the alleged fraud,—it was the entire business or matter of agreeing to sell and purchase the land, and of executing and delivering the deed in pursuance of such agreement. The plaintiff averred that the defendant was guilty of fraud, and such fraud was therefore a part of the transaction, according to the plaintiff's version. The defendant's cause of action arose out of the same transaction; in fact, it was the entire transaction, except the element of fraud, which he asserted did not exist. The term 'transaction' refers to the actual facts and circumstances from which the rights result, and which are averred, and not to the mere form and manner in which the facts are averred." "Transaction," then, as employed in our Code, would seem to include all that is said and done in connection with a purchase and sale or other trade, and all that is said and done in connection with the perpetration of a fraud or cheat. *WOODRUFF, J.*, in *Bank v. Lee*, 7 Abb. Pr. 372, 389, uses the following language: "This division of the section shows that there may be a counter-claim when the action itself does not arise on contract, for the second clause is expressly confined to actions arising on contracts, and allows counter-claims in such or any other causes of action also arising on contract; and this may embrace probably all cases heretofore denominated 'set-off,' legal or equitable, and any other legal or equitable demand, liquidated or unliquidated, whether within the proper definition of set-off or not, if it arise on contract. The first subdivision by its terms assumes that the plaintiff's complaint may set forth, as the foundation of the action, a contract or a transaction. The legislature, in using both words, must be assumed to have designed that each should have a meaning; and, in our judgment, their construction should be according to the natural and ordinary signification of the terms. In this sense, every contract may be said to be a transaction;

but every transaction is not a contract."

The form of plaintiff's action is in tort. The cause of his action, as set forth in his petition, is the alleged wrongful detention of the goods and fixtures described in his petition. This cause of action, technically considered, does not arise out of a contract, though it would not be far out of the way to say the note and mortgage are the foundation of the plaintiff's claim. In the light of our Code, and judicial interpretations of similar Codes, can we look beyond the technical cause of action, to the whole transaction set forth in the petition as the plaintiff's cause of action,—that is, to the taking of the note and mortgage, the allegation of insecurity, the demand and refusal to deliver the property, and the detention of them by the defendant,—and say that the defendant's second defense arises out of the "transaction" set forth in plaintiff's petition, and thus sustain said defense? Some cases go quite as far as this. *Bank v. Lee*, 7 Abb. Pr. 372; *Judah v. Trustees*, 16 Ind. 56-60; *Bitting v. Thaxton*, 72 N. C. 541-549. But we prefer, so far as this case is concerned, to put the matter upon what we consider safer ground, and justify the defendant's second cause of action upon the ground that it is directly connected with the subject of the plaintiff's action. In *Bank v. Lee*, above cited, which is referred to with approval in *Pomeroy* in his work cited herein, (section 773, and note,) Justice *WOODRUFF* reaches the conclusion that, even if the defendant's cause of action does not arise out of the "transaction" set forth in the complaint, it is directly and immediately connected with the subject of the action. This was an action in trover for damages for the conversion of certain bills of exchange. The answer was pleaded as a counter-claim. It set up the drawing of the bills, their indorsement by plaintiffs, their delivery to the Ohio Trust Company, their transfer to the defendants for full value, and without notice, demand of payment, non-payment, and notice thereof to plaintiffs, and prayed judgment against the plaintiffs as indorsers for the amount due on the drafts. The judge says: "The subject of the action is either the right to the possession of the bills of exchange or the bills themselves. The defendant's counter-claim is not only connected with, but is inseparable from, either or both. The object of the action is damages, but the subject is the bills of exchange, or the right to their possession." Again, referring to *Pomeroy*, we quote: "Some judges have said that in all possessory actions, and all actions to establish property, the 'subject of the action' denotes the things to assert a right over which, or to obtain the possession of which, the action is brought,—as the land in ejectment, and many equity suits, or the chattels in replevin." The author himself puts it thus: "It would, as it seems to me, be correct to say, in all cases, legal or equitable, that the 'subject of the action' is the plaintiff's main primary right. Thus, the right of property and possession in ejectment and replevin, the right of possession in trover or trespass, the right to money in all cases of debt and

the like, would be the subject of the respective actions."

So far as the case at bar is concerned, it is immaterial whether we treat the chattels themselves, for the possession of which the action is brought, as the subject of the action, or adopt the other view, and say that the "primary right of the plaintiff," to-wit, his right to recover the possession of the chattels described in his petition, is the subject of the action; for, in either view of the matter, the defense complained of relates to the subject of the action, since it affects equally the chattels themselves and the plaintiff's right to recover their possession. The defendant would have had a right, under the general denial, to prove her contract of sale set up in her second defense, for the purpose of showing that the plaintiff was not entitled to the possession of the property, the possession of which he sought. The plaintiff's right to recover the possession of the goods is founded upon his mortgage. But if the defendant's contention that she sold the goods to him subsequent to the execution of the mortgage, by which sale he was to pay her the difference between the sum of his own lien on the property and the lien in favor of the national bank, and the invoice of the goods, is true, she had a right to refuse their delivery until he paid her the money coming to her on the sale. Under the general denial, she is entitled to any defense that defeats the plaintiff's right to recover the possession of the property, but not to prove a cause of action in her favor against the plaintiff. Can the defendant, by pleading the sale, recover a judgment against the plaintiff for a balance her due? It seems clear to us that she can, under our statute relating to counter-claims. Since the adoption of Codes in most of the states, the doctrine of set-off and recoupment has undergone much change. In New York, the former rule that in an action for a tort, a counter-claim, no matter whether arising on contract or based upon another tort, could not be allowed, has been so far modified as to allow the interposition of a counter-claim in the full sense of the Code, whether arising on contract or based upon a tort, in an action for a tort, whenever such counter-claim is founded upon a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or whenever it is connected with the subject of the action. *Wat. Set-Off*, § 616; *Woolen Mills v. Eull*, 37 How. Pr. 299; *Dougherty v. Stamps*, 43 Mo. 243; *Kisler v. Tinder*, 29 Ind. 270; *Tinsley v. Tinsley*, 15 B. Mon. 454; *Railroad Co. v. Thompson*, 18 B. Mon. 735. The action was brought for injuries done the plaintiff's boat while passing through the canal, caused by a break in the canal, alleged to have resulted from defendant's negligence. The defendant set up a counter-claim that the break itself was caused by the plaintiff's negligence, and prayed a judgment for the damages. This counter-claim was sustained, the court saying: "If it does not arise out of the transaction set forth in the complaint, it certainly is connected with the subject

of the action." *McArthur v. Canal Co.*, 34 Wis. 139-146. "A claim on the part of the defendant for the price and value of the identical goods which are the subject of the action is the cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is at least connected with the subject of the action, and is strictly a counter-claim." *Thompson v. Kessel*, 30 N. Y. 383. "Since the Code, however, of 1852, it seems if the defendant's demand is sufficient, a defendant may not only defeat a plaintiff's claim by recoupment, but recover a balance notwithstanding the former rule \* \* \* that a defendant could only use his claim to defeat that of the plaintiff." *Woolen Mills v. Eull*, 37 How. Pr. 301; *Ogden v. Coddington*, 2 E. D. Smith, 317. "Counter-claims under the Code [since 1852] embrace both set-offs and recoupments, as they were understood prior to that time." *Pattison v. Richards*, 22 Barb. 140. "But while the counter-claim authorized by the Code embraces both set-off and recoupment, it is broader and more comprehensive than either." *Vassear v. Livingston*, 13 N. Y. 256; *Beardsley v. Stover*, 7 How. Pr. 204. "It secures to the defendant the full relief which a separate action at law, bill in chancery, or a cross-bill would have secured him on the same state of facts." *Woolen Mills v. Eull*, 37 How. Pr. 301; *Gleason v. Moen*, 2 Duer, 642. "It may be for either liquidated or unliquidated damages, (*Schubart v. Harteau*, 34 Barb. 447.) and for unliquidated damages arising on contract, different from the contract on which the action is brought, (*Lignot v. Redding*, 4 E. D. Smith, 285.) and of an equitable or legal nature." *Woolen Mills v. Eull*, 37 How. Pr. 301; *Currie v. Cowles*, 6 Bosw. 453. "It is not required that the counter-claim itself shall be founded in, or arise out of, the contract set forth in the petition; but it is sufficient that it arise out of the transaction set forth in the petition, or is connected with the subject of the action." *Tinsley v. Tinsley*, 15 B. Mon. 454-459; *Wadley v. Davis*, 63 Barb. 500; *Bank v. Lee*, 7 Abb. Pr. 372-389; *Walsh v. Hall*, 66 N. C. 233-237. The counter-claim is allowed, though the plaintiff's form of action is in tort. "The plaintiffs, trustees of the Vincennes University, sue to recover the value of certain bonds belonging to the corporation, received by the defendant as its attorney, and converted by him to his own use. He admits the receipt and detention of the securities, and alleges, by way of counter-claim, that the university was indebted to him for certain professional services, particularly described, including his services in procuring these very bonds, among others, to be issued to it by the state, and prays judgment for the amount of such indebtedness. In pronouncing upon the validity of this answer as a counter-claim, the court says: "The point is that the action is in the form of trover,—an action *ex delicto*,—and that under such action the defendant cannot avail himself of any claim which he may have against the plaintiffs for services rendered, or money expended on their behalf, even if it was in

the recovery of the identical property which is the subject of the action. We are clear it was the intention of those who initiated and inaugurated the present Code of Procedure that parties litigant might, and perhaps should, determine in each suit all matters in controversy between them which could legitimately be included therein, keeping in view their substantial rights. As proceedings so distinct as those were at law and in equity are no longer required to be separated, but are now blended in one action, we are unable to see any reason for requiring two actions to determine a controversy in which the rights of each party are so dependent upon the rights of the other as in the case at bar." *Judah v. Trustees*, 16 Ind. 56-60; *Blitting v. Thaxton*, 72 N. C. 541-549; *Bank v. Lee*, 7 Abb. Pr. 872; *Ayres v. O'Farrel*, 4 Rob. (N. Y.) 668, 10 Bosw. 143; *Barhyte v. Hughes*, 33 Barb. 320; *Taylor v. Root*, \*43 N. Y. 335.

After a careful reading of our Code in relation to counter-claims, and a somewhat thorough examination of the books upon the question involved in this last assignment of error, we conclude that the defendant not only had the right, under her general denial, to prove the matter set up in her second count to defeat the plaintiff's cause of action, but that, having pleaded it, she should be allowed to prove it as a counter-claim, as an affirmative cause of action against the plaintiff, and recover in this case a balance against the plaintiff. We therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered. All the justices concurring.

(45 Kan. 182)

YORK DRAPER MERCANTILE CO. v. LUSK.

(Supreme Court of Kansas. Jan. 10, 1891.)

SALES—FAILURE TO DELIVER—MEASURE OF DAMAGES.

1. In an action by the buyer against the seller for breach of contract for the delivery of corn, the measure of damages is, as a general rule, the market value of the corn at the time and place of delivery, less the contract price.

2. In such case, when the seller, after his contract of sale is made, notifies the buyer that he will not fill the contract, *held*, that in the absence of any evidence on the part of the defaulting seller, that the buyer, after notice that the seller would not fill the contract, and before date of delivery, could have purchased corn in the market of the place of delivery, upon such terms as to have mitigated his loss, the measure of damages remains the same.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error to district court, Rice county; ANSEL R. CLARK, Judge.

M. A. Thompson, for plaintiff in error. Bailey & Foley, for defendant in error.

STRANG, C. August 2, 1887, the defendant contracted to sell and deliver to the plaintiff at Dodge City, Kan., all the corn he then owned, at 80 cents per hundred pounds. The said corn was in crib at Stafford, Kan., and amounted to 5,091 bushels, or 285,096 pounds. The jury found the corn was to be delivered in a reasonable time. On the same day, August 2d, after the

contract was completed between the parties, the defendant wrote a letter to the plaintiff at Dodge City, which was received there on the 3d, notifying him (the plaintiff) that he would not deliver the corn at 80 cents per hundred pounds, but said he would deliver it at 85 cents per hundred. And on the next day, August 3d, the defendant wrote the plaintiff at Dodge City that he would not deliver the corn at 85 cents, which letter was received by plaintiff, August 4th. August 3d corn was worth 80 to 85 cents per hundred at Dodge City. August 8th it was worth \$1 per hundred, and continued at that price until the 1st of September, when it went to \$1.15. The case was tried to a jury, which gave a verdict for the plaintiff for \$153.31. The plaintiff filed a motion for a new trial, which was overruled. The only question in the case is, what is the proper measure of damages? The plaintiff claimed the measure of damages was the difference between the contract price and the price of corn at the time and place of delivery, and asked the court to so charge the jury. The court refused to charge the jury as requested, and instructed them that the measure of damages was the difference between the contract price and the price of the corn at Dodge City at the time the defendant notified the plaintiff that he would not deliver the corn. This instruction, and the refusal of the court to grant a new trial, are complained of as error.

It is well settled that the general rule for the measure of damages in cases like this is the difference between the contract price and the market value of the article purchased at the time and place of delivery. *Stewart v. Power*, 12 Kan. 596; *Gray v. Hall*, 29 Kan. 704. Where the buyer refuses to accept the goods purchased, Benjamin on Sales lays down the rule as follows: "Sec. 1118. The date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract, and to refuse accepting the goods." *Phillipotts v. Evans*, 5 Mees. & W. 475; *Follansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170. We do not find the exact converse of this rule stated in Benjamin, but we know of no reason why it should not be equally the law. "The same doctrine prevails in cases where the contract is to be performed on a certain day, and before that time the vendor declines to carry out the contract." *Wood, Mayne Dam.* § 205; *Leigh v. Pater-son*, 8 Taunt. 540; *Phillipotts v. Evans*, 5 Mees. & W. 476. The time of delivery, and not the time when the seller gives notice that he intends to break the contract, is the rule. Thus where the defendants renounced a contract for the delivery of iron rails, it was held that the time when the contract was to be considered as broken was at the time of delivery. *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. Rep. 436, (February 11, 1889.) "If the vendor puts it out of his power to comply with his contract by a sale of a portion of the goods to another, before the time stipulated for the delivery, the vendee is entitled to the difference between the contract price and

the market price of all the goods purchased at the time and place of delivery." Field, Dam., § 247; *Crist v. Armour*, 34 Barb. 378. "In the absence of any evidence on the part of the defendants that the plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss, the measure of damages was the sum of the difference between the contract price and the market price at the period of delivery." *Benj. Sales*, § 1333. "As to the effect of breach of contract of sales, when the bargain was for delivery by installments, it is held that, in the absence of any evidence on the part of the defaulting seller that the buyer could have gone into the market and obtained another similar contract, on such terms as would mitigate the loss, the measure of the damages is the sum of the difference between the contract price and the market price at the several periods of delivery." 5 Wait, Act. & Def. 623; *Brown v. Muller*, 3 Eng. R. 429; *Ex parte Llansamlet Tin Plate Co.*, 6 Eng. R. 689, there cited. The rule of the last two citations requires the defaulting seller, if he wishes to take his case out of the general rule as to damages, as above stated, to show by proof that the vendee could have gone into the market, and purchased the goods he wanted without loss. This seems to be a very proper rule. The goods purchased may be of a kind not readily found in the market, but, if they may be had in the market, it would seem to be more in accord with fairness to require the defaulting seller to prove that the goods could readily have been procured in the market without loss to the vendee than to require the vendee to show that he could not obtain the goods in the market. In the case at bar, if the plaintiff could not have obtained the amount of corn purchased of the defendant in the market, and thus saved himself from partial or total loss from defendant's default, they would be entitled to damages under the general rule. And, in the absence of any proof on the part of the defaulting seller that the corn could have been purchased by the plaintiffs so as to save themselves, they should have been allowed their damage under the general rule, and recovered the difference between the contract price, and the value of the corn at Dodge City at the time of delivery. The delivery was to be within a reasonable time. The evidence shows that it would take from one to two weeks to shell and deliver the corn. The average time as fixed by the evidence would probably be a reasonable time. The average time would, under the evidence, be about 10 days. Considering, then, the reasonable time for delivery to be ten days, the measure of damages would be the difference between the contract price and the value of the corn at Dodge City about the 13th of August, 1887. But, as this case goes back for a new trial, the question of reasonable time will be one for the jury.

There is another matter we desire to call attention to which should have some force in this case. The defendant, after accepting, by wire, on August 2, 1887, the proposition of the plaintiffs to purchase all his

corn at 80 cents per hundred, wrote them a letter which was received by them the next day, in which he said he would not fill the contract at 80 cents per hundred, but would fill it at 85 cents. On the 3d he wrote them another letter, received by them at Dodge City, on the 4th, in which he said he would not fill the contract at 85 cents, and did not state any price at which he would fill it. Under such circumstances, the plaintiffs could hardly know what to do, as they did not know how soon they might receive another declaration from the defendant, and it may be questioned whether, if this case had been, in other respects, taken out of the general rule, the general rule should not still apply, because of the uncertainty as to what the defendant would do. Under the circumstances of this case we recommend that it be reversed and sent back for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(1 Ariz. 237)

WOFFENDEN v. BOARD SUP'RS PIMA  
COUNTY.<sup>1</sup>

(*Supreme Court of Arizona*. Jan., 1875.)

COMPENSATION OF JURORS—MANDAMUS.

1. Jurors are entitled to full pay though excused from daily attendance.
2. *Mandamus* will issue to compel the commissioners to allow such claims.

Petition for writ of *mandamus*.

*Hugh Farley*, for petitioner. *John Titus*, for respondents.

TWEED, C. J. In the matter of the petition of Richard Woffenden for a writ of *mandamus* against the board of supervisors of Pima county, all the material facts set forth in the petition are admitted by the answer of the respondents. They are substantially as follows: At the October term of the district court held in and for the county of Pima for the year A. D. 1874, the chief justice ordered a *venire* to issue for the summoning of trial jurors for the term. Of those summoned and in attendance during the term certain jurors were excused from daily attendance for a portion of the term when their services as jurors were not required. The trial jurors were summoned to appear on the 16th day of November, and the jurors in whose behalf this petition is presented were in attendance upon the court as trial jurors from the 16th day of November until the 26th day of December, except when excused from daily attendance, as above stated. After the trial jurors were discharged for the term, the clerk of the court refusing to include in the certificates given to jurors, as to the time of attendance, "the days in which such jurors had been excused by the court from actual attendance," such jurors applied to the court to have said days included in said certificate, whereupon the court ordered that the clerk issue to said jurors separate certificates for the time

<sup>1</sup>This case, filed January, 1875, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

during which such jurors had been excused from personal attendance. The clerk delivered to said jurors the certificates contemplated by said order of the court, and the same being presented to the board of supervisors as claims against the county, were disallowed. Certain of said jurors have assigned their claims for such services to the petitioner, who is now the owner and holder of the same.

The writ of *mandamus* will not be granted to control the action of any inferior court, board, or officer, where their acts are of a judicial character, or in which they are called upon to exercise discretion; but when their acts are ministerial only, and they fail or refuse to perform any act required by law, and the party injured has no other speedy and adequate remedy, such party is entitled to this writ. The admission by respondents that the jurors named in the exhibits accompanying the petition were summoned, were in attendance, and were excused by the court for certain days during the term, is conclusive of their right to the usual compensation, and of the regularity of the clerk's certificate, and leaves the board no discretion in the matter. Their duty was to audit the claims. We do not intend to say that the clerk's certificate would always be conclusive; he might purposely issue a false certificate, and in such a case the board might, as provided in sections 474-479 of the civil practice act, concerning *mandamus*, in their answer to the petition, raise the question of fact. The court would then order the question of fact to be settled by a jury, and, on the finding of a jury, the court would grant or deny the writ as justice might require, it being always remembered that the writ will not be granted where the party has a plain, speedy, and adequate remedy in the ordinary course of law. But in this case the admission by respondents of the facts set up in the petition are equivalent to an admission that the clerk's certificate was properly issued, and left no discretion in the board to reject the claim. Let peremptory writ issue, as prayed for by petitioner.

(1 Ariz. 401)

**ZECHENDORF et al. v. ZECHENDORF et al.**<sup>1</sup>  
(Supreme Court of Arizona. Jan., 1881.)

**APPEAL—TIME OF TAKING—DISMISSAL.**

An appeal from an order dismissing an appeal from justice's court not perfected and entered within 30 days after judgment rendered, in accordance with Act Ariz. § 1, regulating appeals from justices of the peace, will be dismissed.

Appeal from district court, Pima county.  
*Morgan & Price*, for appellants. *Farley & Pomroy*, for respondents.

**FRENCH, C. J.** This is an appeal from the order of the district court dismissing the appeal to that court from the justice's court, and also from the order of the district court denying defendants' motion to set aside said order of dismissal. It ap-

pears from the first page of transcript that the judgment was rendered in the justice's court on the 15th day of March, A. D. 1880; that an appeal was perfected, except payment of costs, on March 24, 1880, and that on that day the papers were ordered to be transmitted to the district court on the payment of the appeal costs of four dollars; that the papers were not transmitted to the district court, or there filed, until May 8th; and that the appeal costs then remained unpaid. Section 1 of act to regulate appeals from justices' courts reads as follows: "Any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court held at the county in which such justice's court is situated. Such appeal shall be perfected, and the papers filed in the district court within thirty days after the rendition of the judgment in the justice's court; and, if the appeal is not perfected, and the papers are not filed in the district court, within such time, the district court shall, on the production of a certificate from the justice, to the effect that an appeal has been taken, but not perfected, or that the papers have not been ordered up, or the proper costs not paid, or any other necessary step not taken, dismiss the appeal at the costs of the appellants. In which case, a certificate of dismissal shall be transmitted under the seal of the district court to the justice's court, with a statement of the costs in the district court; and no other or further appeal shall be taken." Appeal is the creature of statute. Without statutory authority there is no appeal, or right of appeal. A party, therefore, invoking the statute must conform to its provisions, or lose his right of appeal. But this act (section 42) affirmatively provides that appeals from justices' courts shall be taken and determined only in the manner herein provided. It appears from the record, and also from the justice's certificate, that the papers in this cause were not filed in the district court until May 8th, more than 50 days from the time of the rendition of the judgment, (March 15th,) and that the appeal costs had not been paid. Under either of these circumstances,—failure to pay the appeal costs, or to file the papers in the district court within 30 days after judgment in justice's court,—the peremptory provision (section 1, above recited) is that the district court shall dismiss the appeal. Courts cannot disregard the direct and positive provisions of the statute. The appeal is utterly without merit, and the orders appealed from have therefore been affirmed, with damages.

**PORTER and STILWELL, JJ., concur.**

(1 Ariz. 227)

**GROUND'S v. RALPH.**<sup>2</sup>

(Supreme Court of Arizona. Jan., 1875.)

**APPEAL—JURISDICTIONAL AMOUNT—RECORD.**

1. In Arizona an appeal to the supreme court will not lie from a civil judgment involving less than \$100.

<sup>1</sup>This case, filed January, 1881, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports, from volume 1, p. 1.

<sup>2</sup>This case, filed January, 1875, is now published by request with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

2. The appeal being from the judgment, the statement of evidence on motion for new trial forms no part of the transcript, in the absence of stipulation that it shall stand as the statement on appeal.

Appeal from district court, Mohave county.

A. E. Davis, for appellant. Murphy & Blakely, for respondent.

DUNNE, C. J. This cause was commenced in a justice's court, and was a money demand for \$250. Ralph obtained a judgment there for \$150. Grounds appealed to the district court. Judgment was there given in favor of Ralph, for \$62.50, and costs. Grounds appeals to this court from the judgment.

An appeal to this court does not lie in such a case. The appellate jurisdiction of this court is established by law, as follows, (Comp. Laws Ariz. p. 365:) "Sec. 3. The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds one hundred dollars, when the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony, on questions of law alone. Sec. 4. The supreme court shall have jurisdiction to review, upon appeal or other proceeding provided by law, (1) a judgment in an action or proceeding commenced in the district courts, when the matter in dispute exceeds two hundred dollars, or when the possession of land or tenements is in controversy, or brought into that court from another court, and to review, upon the appeal from such judgment, any intermediate order involving the merits, and necessarily affecting the judgment; (2) an order granting or refusing a new trial, sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding." As this case was not commenced in the district court, and is not one of those which could be heard here in any event, if the amount in dispute exceeded \$100, the appeal must be dismissed.

Even if the appeal could be entertained, the judgment of the court below would be affirmed. Appellant asks us to set aside the judgment, on the ground that the evidence is insufficient to support it, but he has furnished us no evidence to examine. The transcript contains a statement of evidence which was used on the motion for new trial, but there is no statement on appeal, nor any stipulation that the statement used on motion for a new trial should stand as the statement on appeal. There is no appeal here from the order denying a new trial. The appeal is from the judgment only. In such case the only thing before the court is the "judgment roll," as defined by statute, and, no matter how many other papers the clerk may choose to embody in the transcript, this court cannot act upon anything but the judgment roll. The statute prescribes means by which this roll may be made full enough to cover every point made on the appeal, viz. by allowing a party to file a statement of points and evidence, even when the appeal is directly from the judgment. Then the party has also his motion for a new trial, and his appeal

from an order denying it. In this case the party appealing has come up with a naked appeal from the judgment, and no statement whatever on appeal. In this case the judgment roll consists of an account filed in a justice's court, and a copy of the judgment in the district court, and nothing else. Comp. Laws, p. 417, § 205. It is not claimed by the appellant that there is any error in this part of the transcript; neither, on examination, do we find any. The appeal is dismissed, with costs.

(1 Ariz. 229)

FORD v. HAYES.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1875.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

Assignments giving preferences are valid as against creditors who do not proceed in the way provided by the bankruptcy law to set them aside.

Appeal from district court, Maricopa county.

John A. Rush, for appellant. G. H. Oury, for respondent.

DUNNE, C. J. One Strode, being on the 3d of June, 1873, insolvent, preferred certain of his creditors, the plaintiff, Ford, being of the number, and assigned to Ford for himself, in trust for the other preferred creditors, certain property in payment of his indebtedness to them, and possession of the property was delivered, and it is admitted that the assignment was for the purpose of paying *bona fide* existing debts. Certain other creditors of Strode sued, and Hayes, the defendant herein, as sheriff, attached the property held by Ford under the assignment, and sold the same upon execution, whereupon Ford sued the sheriff for the value of the property so taken from him, and got judgment therefor in the court below. Hayes, the sheriff, appeals.

Counsel for appellant claims that, under the existing bankrupt laws of the United States, an insolvent cannot prefer creditors. He cites Chancellor KENT, in *Riggs v. Murray*, 2 Johns. Ch. 565, to the effect that, "as we have no bankrupt laws, the right of the insolvent to select one creditor, and exclude another, is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored." Appellant herein states, what is undoubtedly the law, that, unless a bankrupt act makes such assignments void, they stand good, although they work a hardship on the creditors who are left out. We have the United States bankrupt law in force in this territory, which furnishes relief in such cases. But how? By declaring all such assignments void *per se*? By no means. The bankrupt law merely provides that any creditor who has been left out in the case of an insolvent debtor assigning his property may file his petition, cause the insolvent debtor to be declared a bankrupt, have all assignments which were made to a cred-

<sup>1</sup> This case, filed January, 1875, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

itor within four months, or to any other person within six months, prior to the filing of the petition, set aside, bring the property into a common fund, and make an equal distribution of it; but, even when a creditor proceeds strictly under the bankrupt act, he cannot touch assignments to creditors made more than four months prior to the institution of the bankruptcy proceedings. In notes of decisions in *Bump's Bankruptcy*, p. 471, it is declared: "After the lapse of four months, the preferences—simple preferences which an insolvent debtor may have made—are to be held valid, as against all the world, so far as the preferred creditors are concerned." See the 12 cases therein cited. But the appellant is not proceeding under the bankrupt act, and its provisions therefore afford him no relief in this case. The law views such assignments with an unfriendly eye, and legislatures pass bankruptcy laws to enable a creditor to set them aside; but, unless he proceed regularly under the bankrupt law, they stand good. It is because they do stand good in law that bankrupt acts are necessary to enable a creditor to avoid them. Judgment affirmed, with costs.

(1 Ariz. 511)

#### FEDERICO V. HANCOCK.<sup>1</sup>

(*Supreme Court of Arizona*. Jan., 1882.)

##### TRANSCRIPT ON APPEAL—PRESUMPTIONS.

Where the transcript consists only of the complaint, answer, findings of fact, and conclusions of law, judgment, notice of appeal, and clerk's certificate, all regular on their face, the judgment cannot be disturbed, as the proceedings will be presumed regular.

FRENCH, C. J. The only papers contained in the transcript in this case are the following: The complaint, answer, findings of fact, and conclusions of law, the judgment, notice of appeal, and clerk's certificate. Nothing whatever is asked of the court in the brief of appellant. It simply discusses matters of law, none of which can by any possibility be raised on this record, and no relief or action of this court is asked for, or even suggested. There is no statement, no exceptions, none of the evidence, no specifications. The transcript contains only the six papers aforementioned, which are all regular on their face.

Error must be affirmatively shown. In the notice of appeal, certain averments are made. For example, it is there (in the notice of appeal) averred "that the court erred in finding of fact that there was no fraud on the part of defendant." There are many reasons why this proposition cannot be reviewed, or even considered, by the appellate court: (1) Because there is not a word of the evidence in the record. How, without any of the evidence, can the appellate court determine whether the finding is sustained by the evidence or not? (2) There was no exception or objection whatever taken to any of the findings in the court below. (3)

There was no motion for a new trial. The findings of the court below will not be reviewed on appeal unless there was a motion for a new trial. *Gagliardo v. Hoberlin*, 18 Cal. 395; *Allen v. Fennon*, 27 Cal. 69; *People v. Banvard*, Id. 475. No motion for new trial having been made, the findings are conclusive as to the facts. It is averred, secondly, in the notice of appeal, "that the court erred in its conclusions of law that the defendant was the rightful owner of said lots; that the court erred in decreeing the defendant in lawful possession, and that he is the legal owner, and entitled to the possession of said lots." These are general averments, made for the first time long after the trial, that the court erred. There are no specifications whatever. When, where, or wherein did the court err? Legal errors of the court should be pointed out. They should be excepted to in a legal manner, as the statute prescribes. Both the statute and practice require that the party alleging error shall specify and point out specifically the alleged error, wherein it occurred; put his finger, as the decisions express it, upon the precise error. It is never sufficient to allege error in a general manner. The same may be said of the fourth averment in the notice of appeal.

If the facts claimed in plaintiff's brief, as established by the pleadings, etc., were believed by plaintiff to be so established, she should have moved the court for a decree in plaintiff's favor, and excepted to the action of the court, if refused. So, all through the proceedings in the court below, if any ruling or action of the court was against the plaintiff's rights, an exception should have been taken. The same in regard to the findings and decree. If error was committed, the court below should have had at least an opportunity of correcting it; and, if not remedied, then upon proper exceptions and statement, or bill of exceptions, it might be corrected here.

The case is one purely in equity. In an equity case there is no right of trial by jury. The case was heard by the court without a jury, and the pleadings, findings, and decree are all regular upon their face, without any statement, bill of exceptions, or any evidence. They cannot be changed or disturbed by the appellate court. The appellate court will presume in favor of the judgment below, unless the record clearly shows error. *Thompson v. Monrow*, 2 Cal. 99; *Kilburn v. Ritchie*, Id. 146. The supreme court will not presume error, or that facts exist which would show error. If the court below commits error in its finding or judgment, that error, or the facts necessary to establish it, must be shown affirmatively by the appellant. *Herriter v. Porter*, 23 Cal. 385. All intendments must be in favor of sustaining the judgment of courts of original jurisdiction; and, to disturb such judgment, it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. *Nelson v. Lemmon*, 10 Cal. 50. If the court makes a finding of facts, but does not include a finding upon one of the issues raised, and the judgment rendered is based upon that

<sup>1</sup>This case, filed January, 1882, is now published by request, with others, in order that the *Pacific Reporter* may cover all cases in the *Arizona Reports* from volume 1, p. 1.



issue, the presumption will be that the court found upon that issue in such a way as to sustain the judgment. *Sears v. Dixon*, 33 Cal. 326. Every intendment is in favor of a judgment of a court of record; and, until the contrary be made clearly to appear, the appellate court is bound to suppose that it was based on proper evidence. *Grewell v. Henderson*, 7 Cal. 291. In the light of the foregoing authorities, and all authorities in equity practice and proceedings, and the practice of appellate courts, the record in this case is worthless for the purposes of an appeal, and utterly without merit, and the appeal is frivolous.

PORTER and STILWELL, JJ., concurred.

(1 Ariz. 232)

MILLER v. FISHER *et al.*<sup>1</sup>

(*Supreme Court of Arizona*. Jan., 1875.)

POWER OF MARRIED WOMAN TO CONTRACT—PLEADING.

1. Act Nov. 10, 1864, (How. Code Ariz. c. 32, § 1.) gives a married woman control of her separate property, and permits her to contract and convey as if unmarried. Amendatory Act Dec. 30, 1865, (Comp. Laws Ariz. p. 300, c. 32, § 6,) gives the husband control of the wife's separate estate and provides for his joinder and her privy examination. Second Amendatory Act Jan. 22, 1871, (Comp. Laws Ariz. p. 310,) gives to the wife, if 21 years old, exclusive control of her property, and declares that the husband need not join in conveyances. *Held*, that a married woman 21 years old could contract to convey her personal property without a privy examination.

2. It is not a ground of general demurrer to a complaint that it does not aver that defendant was 21 years of age.

J. P. Hargrave and J. A. Rusk, for appellants. A. E. Davis, for respondent.

TWEED, J. The appeal is from the district court, second judicial district, Mohave county. As appears by the complaint, the action was brought to enforce the performance of a verbal contract entered into by the defendant Jenny H. Fisher, a married woman, for the sale and delivery of certain personal property to the plaintiff, the same being her separate property, and claimed and held by her as such. A demurrer to the complaint was interposed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, from the judgment thereon, the appeal is taken. The counsel for the respondent relies upon two points made in his brief, and argued at the hearing of the cause: (1) That the sale or alienation of the property mentioned in the complaint was not evidenced or accompanied by any instrument in writing, signed by the said Jenny H. Fisher, and by her acknowledged upon an examination, separate and apart from her husband, before a proper officer, and that the same was therefore void; (2) that it is nowhere alleged in the complaint that the said Jenny H. Fisher is of the age of 21 years.

Upon the points first made, the counsel cites section 6 of amendments to chapter 32, p. 306, Comp. Laws, approved December, 1865, and insists that the act relating to the separate property of married women, approved January 22, 1871, (Comp. Laws, p. 310,) modifies the section cited to the extent only that the wife need not be joined with her husband in a sale or alienation of her separate property, but that such sale or alienation must be made or accompanied by some written instrument signed by her, and by her acknowledged upon an examination separate and apart from her husband, etc. It is pertinent, in considering this point, to refer to the provisions of the law upon the subject prior to the passage of the act 1865, hereinbefore referred to. The first section of chapter 32, How. Code, approved November 10, 1864, and passed at the first session of the legislature of the territory, reads as follows: "The real and personal property of every female acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her, in the same manner and with the like effect as if she were unmarried." The chapter was amended by the act of December 30, 1865, hereinbefore referred to, the sixth section of which reads as follows: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by instrument in writing, signed by husband and wife, and acknowledged by her upon an examination separate and apart from her husband before a justice of the supreme court, probate judge, or notary public; or, if executed out of the territory, then acknowledged by some judge of a court of record, or before a commissioner appointed under the authority of this territory to take acknowledgments of deeds." The act of January, 1871, reads as follows: "Married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property, and may convey and transfer lands, or any estate or interest therein vested, in or held by them in their own right, and without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried." It will be seen that the act of 1864, the first legislation upon this subject had in the territory, placed the wife upon precisely the same footing with unmarried women as to any contract, sale, transfer, or mortgage of her separate property. The husband had no legal interest in such property, nor need he in any manner be consulted as to its disposition. She was competent to make contracts concerning it by parol or in writing, in the same manner as any other person might do as to his or

<sup>1</sup> This case, filed January, 1875, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

her separate property. Then, in 1865, the law was changed, and the entire control of the property was given to the husband, guarded, however, by requiring proof of the wife's consent to any alienation, and herein arose the necessity for the provision as to an examination and acknowledgment separate and apart from her husband. We have examined these several statutory provisions with care, and we cannot adopt the construction which the counsel for the respondent applies to the act of 1871. On the contrary, we think it clear that that act was intended wholly to exempt married women of the age of 21 years and upwards from the operation of section 6 in the act of 1865 and to place them precisely where they stood in regard to their separate property, under the law of 1864, leaving said section in full force as to married women under that age, who might well be supposed to need the security from imposition provided by the act of 1865, more than persons of more mature age.

The second point made by the respondents is not well taken. It does not appear from the complaint that the defendant Jenny H. Fisher was under the age of 21 years. If such was the fact, it might have been pleaded as matter of defense, but the failure to aver in the complaint that she was of the age of 21 years is not ground for a general demurrer. Judgment must be reversed, and the cause remanded for further proceedings, and it is so ordered.

(1 Ariz. 243)

CHARAULEAU V. WOFFENDEN.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1876.)

MARRIED WOMEN—ACKNOWLEDGMENT OF DEED—EJECTMENT—EVIDENCE.

1. Act Ariz. 1871, allowing a married woman to control and convey her separate property "as fully and perfectly as she might do if unmarried," and repealing all inconsistent acts, repealed the requirement of Acts 1865, § 6, of a separate acknowledgment apart from the husband. Following *Miller v. Fisher*, 1 Ariz. 232, ante 651.

2. Act Ariz. 1871, giving a married woman exclusive control of her separate property, repeals the provision of Act 1865, § 9, that rents and profits of separate property shall be common property, and under control of the husband, and she may acquire separate property by purchase with such rents, though Act 1865, § 2, recognizes its acquisition only by "gift, bequest, devise, or descent."

3. Evidence that on one occasion the husband disclaimed any interest in the land, and that, while the wife was negotiating its sale as her separate property, he was present and made no objection, is admissible in ejectment by her grantees to recover possession from her husband, as tending to show that the land was hers, and therefore capable of conveyance by her separate deed, and to rebut any presumption that it was common property, arising from the fact that it was acquired for a moneyed consideration during coverture.

DUNNE, C. J., dissenting.

Appeal from district court, Pima county. *Titus & Hughes*, for appellant. *Farley & Pomroy*, for respondent.

<sup>1</sup> This case, filed January, 1876, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1

TWEED, J. This action was ejectment for three quarter sections of land being in Pima county, and contiguous to other lands described in the complaint by their legal subdivisions, and as being generally known as the "Robledo," "Moreno," and "Duran" ranches. In this complaint, the plaintiff alleges that he was seised in fee of the premises on the 11th day of February, 1874, and while so seised, to-wit, on the 5th day of July, 1875, he was ousted by the defendant. The answer denies that the plaintiff was ever seised of the premises, or was ever entitled to the possession of the same, or any part thereof; denies that the defendant entered into the possession of the premises while the plaintiff was so seised as alleged in the complaint; and denies that he unlawfully withheld, or at any other time has withheld, the possession of the premises from the plaintiff; alleges seisin in himself of one quarter section of the lands on the 1st of October, 1873, by virtue of a deed of bargain and sale, for the consideration of \$500, from Abram Moreno and his wife, Mariana Moreno, to Anna C. Woffenden, the wife of the defendant, bearing the date above mentioned; and alleges seisin of the other two quarter sections on the 10th day of December, 1873, by deed of bargain and sale of that date, for the consideration of \$2,100, from Ygnacio Robledo and Romula Robledo, his wife, to the said wife of the defendant; alleges that the said Anna C. Woffenden was, on the 1st of October, 1873, and on the 10th day of December, 1873, and still was at the date of the answer, the wife of the defendant. On the trial, the plaintiff offered in evidence a deed for the premises from Anna C. Woffenden to the plaintiff, made February 11, 1875, for the consideration of \$5,000. Defendant's counsel objected to the admission of the deed on three grounds: (1) That the acknowledgment was defective, having been taken before a justice of the peace, not a proper officer; (2) that it did not contain the declaration required by the statute as to the person signing the same having been examined separate and apart from, and without the hearing of, her husband, etc.; (3) that it had not been shown that Anna C. Woffenden had power to convey the premises; that it had been admitted in open court, by plaintiff's counsel, that from August, 1872, the said Anna C. Woffenden had been and then was the wife of the defendant; and that no showing had been made or offered that the premises were her separate property. Those objections were collectively sustained by the court, and the plaintiff excepted to the ruling.

Assuming for the present that the premises in controversy were the separate property of the grantor, and passing for the present also the question whether any acknowledgment on the part of the grantor of the deed was necessary to entitle it to be received in evidence in the case between the parties, was the acknowledgment defective in having been taken before a justice of the peace, or in that it was not made upon an examination separate and apart from, and without the hearing of, her husband? In *Miller v. Fisher*,

1 Ariz. 232, ante, 651, (decided at the last term of this court, on a hearing had before a full bench,) it was held, without dissent on the part of either member of the court, that, under the act of 1871, it was not necessary that a contract by a married woman of the age of 21 years and upwards, as to her separate property, should be evidenced by a writing signed by her, and acknowledged by her upon an examination separate and apart from her husband, etc. We are now asked to reconsider the ruling, and adopt the theory that the act of 1871 operated to change the law in this regard to this extent only: that the wife may convey without being joined with the husband in the conveyance, but must still acknowledge the execution of the instrument separate and apart, etc., as required by the act of 1865. One year has passed since the decision in *Miller v. Fisher* was made and published, and important rights have doubtless grown up and vested under the construction which we then gave to the statutes in question. In such a case, the reasons for overruling a former decision should be very clear and conclusive. Besides this, unless it very clearly appears that the former ruling was erroneous, the court may properly consider whether the construction given to the statute by its former decision on the ruling it is now urged to make is most beneficial to the parties whose rights are to be controlled thereby. Conceding, then, for the present, that there may be reasonable doubts as to the former ruling, does the construction thus given to the statute deprive the wife of any substantial rights, or in any manner make such rights less secure? Does it deprive her of any safeguard in the control or disposition of her separate property, or make less simple or safe the rules for its disposal? In other words, is or was the provision in our statutes requiring this acknowledgment of a contract or conveyance by the wife on an examination separate and apart from her husband, etc., of any practical use whatever? Of course there can be no doubt that, under the act of 1871, the wife may convey her separate property by her deed, without being joined by her husband. This she may do without any consultation with, or consent from, him. To what end, then, having executed a deed for her separate property, should she be required to go before a notary or other officer and make this acknowledgment upon an examination separate and apart from her husband, etc.? If she desires to convey her property, she may do so without his knowledge. If the husband has coerced or overpersuaded her into the execution of the conveyance, and she has been submissive to his will, is she likely to assert her own wishes and make the acknowledgment when in the presence of a notary? If this "safeguard," so called, for the wife's interest was ever, under any law for the conveyance of her separate property, of any practical value, (which we very much doubt,) there can be no doubt that, under a law allowing the wife to convey without being joined with her husband, and without his consent or even knowledge, such a provision is a vain thing, a needless, useless requirement,

productive of no possible beneficent result.

But the statute, in Howell's Code of Conveyance, (Comp. Laws, pp. 362, 363, § 22,) which it is insisted should be taken in connection with the act of 1865, provides "that upon this examination, separate and apart from the husband," etc., "the wife shall be made acquainted with the contents of the conveyance," etc.; and it was gravely and earnestly urged by counsel for respondent that this was an important safeguard to the wife, the presumption of law being that the wife would not know the character of the instrument until so informed by the officer taking the acknowledgment; and it is not without some regret that we admit that there were American authorities cited sustaining the counsel in his position. What is the basis of such a presumption? It must be found, if anywhere, in the supposed ignorance or stupidity of the wife. Before her marriage, if of the age of 21 years, and after her husband's death, the law presumes her competent to buy and sell and convey property, and supposes she acts in such matters as intelligently as if she were of the opposite sex; but, during the existence of the marriage relation, somehow this condition of ignorance and stupidity is supposed to settle down upon her, to benumb her faculties, to cast a cloud upon her intelligence, to be lifted only by the death of her spouse, or other severance of the marriage bond. We are quite sure that the presumption contended for by the counsel for the respondent, that a woman of mature years, and an American wife ceases from the day of her marriage to know what she is doing in the execution of a conveyance until advised of the contents of the instrument by a notary or other officer, obtains nowhere else than in a court of justice, and should no longer obtain there; and we are equally certain that the legislature of Arizona, in enacting the law of 1871, which gives to the wife the sole and exclusive control of her separate property, enabling her to convey the same without being joined by her husband, "as fully and perfectly as if unmarried," did not intend that any such presumption of the wife's ignorance or stupidity should obtain hereafter.

Again, as to the utility of the provision for this acknowledgment of the wife upon an examination separate and apart, etc. It is somewhat remarkable, considering the learning and research which have been bestowed upon the matter, that not a case has been reported, so far as we can discover, wherein it appears that this "safeguard," so-called, even in a single instance, operated to protect the interest of the wife, or to save her from coercion or imposition. We do not remember the citation of such a case, nor have we in our own experience, nor in our association with the legal profession, known or heard of any case where the provision ever operated as a safeguard to the wife in any respect whatever. Again, while we deem the provision referred to to be valueless to the wife as a safeguard against the coercion of the husband and impositions from others, the provision is not simply harm-

less, but has been the occasion of frequent fraud and wrong, for it has often happened that when a wife has joined her husband in a conveyance under laws requiring her to do so, and her acknowledgment has been made to the officer separate and apart as fully and completely in all respects as required by law, and the officer purposely or ignorantly has failed to write the certificate of acknowledgment in the exact form required, the wife, being controlled by the husband, has refused to aid in the correction of the error, and the purchaser is left without a remedy. It is very safe to say that greater frauds and more injustice have resulted from the requirement of this form of acknowledgment on the part of the wife than would belikely to obtain when the wife's acknowledgment may be taken as in other cases. Again, the provision, if valueless to the wife, is not harmless. It treats the wife as an inferior person, especially liable to coercion and imposition, and as being incapable of caring for and guarding her own interests as other sane persons are capable of doing. If our statutes of 1864 and 1865, which counsel for respondent insists are still in force, are so, and not repealed by the act of 1871, the woman who married yesterday, and was possessed of a fortune acquired by her own learning, labor, or skill, cannot to-day make a valid sale of a dilapidated sewing-machine without putting the contract in writing, and going before a justice of the supreme court or other officer and acknowledging, upon an examination separate and apart from her husband, upon being made acquainted with the contents of the instrument, (which she may have written herself,) that she executed the same freely and voluntarily, etc.

We will now examine the several acts of our legislature bearing upon the question under consideration, and in the light of these enactments revise the decision in the case of *Miller v. Fisher*; for, if that decision was erroneous, if it clearly appears that the law was not what it was declared to be in that case, the construction we then gave to the statute must be overruled, however beneficial that construction may appear to be to those whose rights and interests are involved in the question. Section 1, c. 32, "Of the Rights of Married Women," Howell's Code, reads as follows: "The real and personal estate of every female acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with like effect as if she were unmarried." Section 2, c. 42, Howell's Code, "Of Conveyances," reads as follows: "A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed, if she were unmarried." Section 19, same chapter, reads as follows: "A married woman may convey any of her real estate, by any

conveyance thereof executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided, by the proper officer taking the acknowledgment." Section 21, same chapter, reads as follows: "Any officer authorized by this chapter to take the proof or acknowledgment of any conveyance whereby any real estate is conveyed, or may be affected, may take and certify the acknowledgment of a married woman to any such conveyance of real estate." Section 22, same chapter, reads as follows: "No such acknowledgment shall be taken unless such married woman shall be personally known to the officer taking the same to the person whose name is subscribed to every conveyance as a party thereto, or shall be proved to be such by a credible witness; nor unless such married woman shall be made acquainted with the contents of such conveyance, and shall acknowledge, on an examination apart from, and without the hearing of, her husband, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same." The next section prescribes merely the form of the certificate of acknowledgment, and need not be quoted. The same chapter designates the officers who may take acknowledgments of deeds in the territory, among whom are notaries public and justices of the peace of the proper county.

In the case of *Miller v. Fisher* the court overlooked the provisions in the statutes of conveyances contained in the Howell Code and quoted above; and, regarding the first section, "Of the Rights of Married Women," Howell's Code, as controlling upon the questions as to what the law was upon the subject in 1864, held that it was the intention of the legislature by the act of 1871 to reinstate married women of the age of 21 years and upwards as to their rights to their separate property to the same *status* in which they stood, as was supposed by the court, under the provisions referred to in the act of 1864, "Of the Rights of Married Women." An attempt was made by the counsel for the respondent to reconcile this section with the several sections of the chapter on conveyances, above quoted, but to us the provisions of those two chapters seem irreconcilable. The first section quoted authorizes the wife "to contract, sell, transfer, mortgage, convey, devise, or bequeath her separate property in the same manner and with the like effect as if she were unmarried." Her conveyance, as soon as made, would become effectual. The delivering of the deed by her would divest her of all interest in the property without any acknowledgment whatever; whereas, under the section referred to in the chapter on conveyances of the year 1864, the wife's deed of her separate property would be a nullity until acknowledged as in that statute provided. Standing alone, and uncontrolled by other provisions, there can be no doubt that, under the first section of the act of 1864, a married woman, without being joined by her husband, could convey her separate property in the same man-

ner and without other observances as to forms or acknowledgment than would be required if she were unmarried, and it was so considered by the court in deciding the case of *Miller v. Fisher*; for, as has been already stated, in passing upon that case, the court only looked to this section as controlling the law upon this subject under the original Howell Code, overlooking the provisions touching the matter in the chapter on conveyances. But, giving effect to the provisions in the last-named chapter, the husband must join in the conveyance, and the manner and form of the conveyance is clogged by the condition of the wife's acknowledgment separate and apart before the deed can become effectual for any purpose whatever. The Howell Code was prepared in great haste, immediately after the organization of the territory, and acted upon at the first session of our legislature, and there was little time for careful consideration of the provisions of the statutes of other states which were incorporated into the Code, and it is not derogating from the just praise to which its author and the legislature are fairly entitled to say there was much that was incongruous and unsystematized in its provisions. We have quoted the statutes bearing upon the subject of the wife's acknowledgment as they stood at the adjournment of the session of the legislature of 1864. In 1865 an act was passed, the first section of which reads as follows: "All property, both real and personal, of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, shall be his separate property." The second section of the same act provides "that all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." The third, fourth, and fifth sections of the same act provide for inventory and registration of the separate property of the wife; and the sixth section, from the operation of which, in *Miller v. Fisher*, we held married women of the age of 21 years and upwards exempt as to this acknowledgment, by force of this act of 1871, reads as follows: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage, but no sale or alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination, separate and apart from her husband, before a justice of the supreme court, probate judge, or notary public, or, if executed out of the territory, then acknowledged before some judge of a court of record, or before a commissioner appointed under the authority of this territory to take acknowledgment of deeds." It will be observed that this section does not provide that the wife shall be "made acquainted with the contents of the instrument"

she is executing, nor that she shall acknowledge upon an examination, separate and apart, that she executed the same "freely and voluntarily, without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same," as provided in the act of 1864, on conveyances; but the observance of these requirements of the last-mentioned act was probably contemplated by section 6 of the act of 1865, now under consideration.

We have set out the several enactments bearing upon the question we are considering up to the time of the passage of the act of 1871. That act is in these words: "Section 1. Married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property, and may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right, and without being joined by the husband in conveyance, as fully and perfectly as they might do if unmarried. Sec. 2. All acts, and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed." It was under this act, with its repealing clause, that this court held, in the case of *Miller v. Fisher*, the provisions of the sixth section of the act of 1865, and all former provisions upon the subject under consideration, inoperative as to married women of the age of 21 years and upwards. It is true that in that case the question before the court was as to the right of a married woman to make a conveyance of her separate personal property without a writing so acknowledged, etc.; but this section referred to in the act of 1865 includes "all the separate property of the wife," and provides that no sale or other alienation of any part of such property shall be made, except by such writing, so acknowledged, etc. Upon the argument in that case, and we think in the brief of the counsel for the respondent therein, the attention of the court was called to some of the leading authorities cited by the counsel for the respondent in this, and the same positions insisted upon which are now urged, that the act of 1871 only operated to repeal the provisions of section 6 of the act of 1865 so far as it required that the wife should be joined by her husband in the conveyance, etc., and yet the court were unanimously of the opinion that the provisions in that section touching the acknowledgment of married women of the age of 21 years and upwards were swept away by the act of 1871. And, as the court then held, the majority of the court now hold that, by the act of 1871, the legislature, in providing that a married woman's separate property should no longer be left to the management of her husband, but should be under her own sole and exclusive control, and that she might convey and transfer the same as fully and perfectly as if unmarried, intended in all respects to place the wife of the age of 21 years in precisely the same attitude, as to the conveyance of her property, as if she were a *feme sole*; that she should no longer be hampered with conditions and provisions in the transfer and conveyance of her

separate property which are not imposed upon unmarried women. Among all the rules for the construction of statutes, so liberally quoted by the respondent's counsel, no one is more likely to lead to a true interpretation of the intention of the legislature in an enactment than that of giving to its language and scope the meaning it would convey to the common mind. It was upon such a reading of this act of 1871 that this court held that the acknowledgment separate and apart, etc., by the wife, as to her separate property, was no longer necessary to her conveyance thereof. The act was certainly calculated to mislead those acting under it, if it is to be construed as requiring any other act, or the observance of any other formula, on the part of a married woman than is required of an unmarried one. We think it clear that the legislature intended by the act just what any person of ordinary intelligence would understand by it, and would receive and adopt as its obvious meaning; and we have no doubt that the common understanding of intelligent persons as to the meaning of the act would be in precise accordance with the construction we gave to it in *Miller v. Fisher*.

Again, had the act been intended in this regard only to relieve married women from being joined in a conveyance of their separate property by their husbands, and not to extend further, it seems to us the legislature would have used other terms than those with which the section concludes, and would have said, "as fully and perfectly as if so joined," rather than the terms, "as fully and perfectly as they might do if unmarried." Certainly such a wording of the statute would make the construction given to it by the counsel for the respondent much more plausible than the terms therein used, but the counsel for the respondent insists that the requirement as to the acknowledgment contained in section 6 of the act of 1865 does not operate as a hindrance or obstruction to the perfect freedom of the wife in conveying her property; that the requirement has to do with the "mode" only, and that not in such a way as to prevent her from conveying as fully and perfectly as if unmarried. Is this so? Unnecessary machinery impedes, and is an obstruction in, the prosecution of any work, and every useless formula, the observance of which is required in the transaction of affairs, is a limitation upon the freedom exercised in the performance of the act, and that the requirements of this section of this acknowledgment does not leave the wife to convey as fully and perfectly as if she were unmarried seems to us very clear. In fact, the wife cannot convey perfectly where such an acknowledgment is required. Without the certificate of the officer she cannot convey at all. "No sale or other alienation of any part of such property can be made," etc., without this writing and acknowledgment, is the language of the act of 1865. That of 1871 is that she may convey as fully and perfectly as if unmarried. To illustrate: Jane, a married woman, and Sarah, unmarried, each own a lot in Tucson. They both sell to a purchaser, who waits upon them while they

write the deed. Each writes the deed for the lot she intends to convey. Each signs and seals her deed, and in the same manner, and each delivers her deed to the purchaser and demands the contract price for the property. The purchaser hands the price of the property to Sarah, but says to Jane: "This is not your deed, nor can it become so until you go before a notary or other officer, get him to inform you of the contents of the deed you have just written, make an acknowledgment on an examination separate and apart from your husband, etc.; and then, if the certificate of the officer is in proper form, your conveyance will be complete, and you will be entitled to the purchase money." Each has executed and delivered her deed in the same manner, and the act of 1871 provides that the married woman may by herself, without being joined by her husband, convey as fully and perfectly as if unmarried; and yet, while the deed from Sarah has passed the title to the purchaser, that from Jane is wholly without effect until she and an officer have done something not necessary to be done to give effect to Sarah's deed.

Again, the bad uses to which the cumbersome machinery of this requirement is put, could hardly be more apparent than in the case before us, where the husband seeks to defeat the wife's deed—a deed which it is very clear he would never have moved her to make, and one made wholly against his wishes—by setting up that she has not, by any acknowledgment made upon an examination separate and apart from himself, shown that he himself has not coerced or even persuaded her to execute it. We conclude this branch of the case by adhering to the ruling made in *Miller v. Fisher*, believing the act of 1871 is and was intended by the legislature to be a complete enfranchisement of the wife in the control or conveyance of her separate property from every badge of infirmity or serfdom, and relieving her from all humiliating conditions in regard thereto not imposed upon other persons. This acknowledgment, then, separate and apart, etc., not being regarded in the conveyance of the separate property of the wife, it follows that no acknowledgment of the deed was necessary to entitle it to be received in evidence in this case, (the defendant not being a purchaser,) if it sufficiently appeared that the property intended to be conveyed was the separate property of Anna C. Woffenden.

What constitutes, then, the separate property of the wife, under the act of 1871, taking into consideration the act of 1865? The act of 1865, already quoted, so far as it affects this question, provides that "all property, real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property." The same act provides that the husband shall have the management of the wife's separate property, and that the rents and profits of the separate estate of either husband or wife shall be common property, and that the husband shall have the entire management and control of the common property, with absolute

power to dispose of the same as of his own separate estate. The act of 1871 gives the sole and exclusive control of her separate estate to her if she be of the age of 21 years, with the right of disposing of the same free from any influence of and without the consent of her husband. This sole and exclusive right of control by the wife of her separate property is wholly inconsistent with the rights of the husband to the rents and profits. Of what value to the wife would be the right to control and convey if, upon the lease or conveyance, the rent, on one hand, and the purchase money, upon the other, became at once community funds, under the absolute control of the husband? By the fourteenth section of article 11 of the constitution of California it is provided that "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property." By an act of the legislature of that state regulating the relation of husband and wife it was enacted: "The husband shall have the entire management and control of all the common property, with the like absolute powers of disposition as of his own separate estate, and the rents and profits of the separate estate of either husband or wife shall be deemed common property," etc. Upon a question as to the constitutionality of this enactment, raised in the case of *George v. Ransom*, 15 Cal. 322, the court uses the following language: "We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her and given to the husband or his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist of the right of the property in one, divested of all beneficial use,—the barren right to hold in the wife, and the beneficial right to enjoy in the husband. One object of the provision was to protect the wife against the improvidence of the husband, but this object would wholly fail in many instances if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in contingency of her surviving her husband." The court further says: "The common law recognized no such soleism as a right in the wife to the estate, and a right in some one else to use it as he pleased, and to enjoy all the advantages of its use. It is not perceived that property can be in one, in full and separate ownership, with a right in another to control it and enjoy all of its benefits. The sole value of property is in its use. To dissociate the right of property from the use in this class of cases would be to preserve the name, the mere shadow, and destroy the thing itself, the substance. It would be to make the wife the trustee for the husband, holding the legal title, while he held the fruits of that title. This could no more be done, in consistency with our ideas of property, during the life-time of the wife than for all time."

The act of 1865, as has been seen, which prescribes what property shall be the sep-

arate property of the wife, contains also the antagonistic provision that the husband shall have the management thereof, and of the rents and profits of the same. The act of 1871 repeals these antagonistic provisions by giving to the wife the sole and exclusive control of her separate property, which carries with it the right to use and invest the fruits thereof. Under the law of 1865, whatever of fortune belonged to the wife at her marriage, or came to her in any manner afterwards, either as the fruits of her separate property or otherwise, was taken wholly from her use and control, and given to the sole management of the husband. She might have been possessed, before her marriage, of ample means to supply her wants, and gratify her tastes, free from the control of any one, but on the day of her marriage, and by the act of marriage, she is divested of the right to use one dollar's worth of this property as her own. It makes no difference what the kind and character of the property may be. If she had a carriage, it is no longer her own; she may not even use it except by leave of her husband. If she have money, the husband may demand and take possession of it, doling it out to her, if at all, in such pittance as to make her keenly sensible of her condition of serfdom. This was the law of 1865, and these the conditions to which every woman in Arizona had to submit in contracting marriage under it. We are advised by recent decisions of the United States courts of the effect to the decree of confiscation of the property of those recently in rebellion against the government, and understand the effect of such a decree of confiscation to be wholly to deprive the offender of all right to use and control, or in any manner interfere with, the property confiscated in his lifetime, though at his death it may pass to his heirs. Under the act of 1865, as it stood before the enactment of 1871, the wife possessed of a fortune on the day of her marriage, by entering into this relation, lost as wholly and completely all right to the use and enjoyment of her separate property as if the same had been confiscated for rebellion against the government. The decree of confiscation, in the one case, and bride's marriage certificate, in the other, would operate alike, and take from rebel and matron, with admirable completeness and impartiality, all right to use, appropriate, and enjoy the least even of the treasures owned and held by them when either entered into matrimony, on the one hand, or committed an act of rebellion, on the other. It seems to us the penalty, so to speak, imposed by the law of 1865 upon women for entering into the marriage relation was unnecessarily severe. It was to get rid of these obnoxious provisions that the act of 1871 was passed. The law as it stood before that act was passed, instead of fostering and encouraging marriages, was framed as if for the very purpose of preventing women possessed of property from entering upon this relation. The more enlightened legislation of 1871 says to every woman contracting marriage in our territory: "You shall have the sole



and exclusive use and control of your separate property, and may bestow, convey, and transfer the same when and how you will, as fully and perfectly as if unmarried." We think the act of 1871 adds to the methods by which the wife may obtain separate property that, instead of being confined to several methods of gifts, bequests, devises, and descent, she may add to her separate property by purchase; that she may use the rents and profits of her separate property by investing them in the purchase of other property, lands, or personal property; and that such property, when so purchased, is not "acquired," in the sense in which that word is used in the first section of the act of 1865. We conclude, then, that the wife of the age of 21 years, in addition to the property owned by her at her marriage, and in addition to that afterwards acquired by gift, bequest, devise, or descent, may acquire property, real or personal, by purchase, if the purchase money be of the separate funds of the wife; and that the rents and profits of her separate property are her separate funds. In another case now before us we may consider this matter more fully. Post, 662. The fact, then, that the property intended to be conveyed by the deed offered in evidence was granted to Anna C. Woffenden for a moneyed consideration is not conclusive that the property was common property; for, if the moneyed consideration was of her own separate funds, had and owned by her before marriage, or received by way of rents and profits from her separate property after marriage, the property was her separate property, and under her sole and exclusive control.

We pass the question as to the presumption that all property conveyed to the wife for a moneyed consideration is common property, as necessarily involved in this case, if it appears, as we think it does, from the transcript, that evidence was offered and ruled out which would go strongly to support the theory that the property was the separate property of Anna C. Woffenden at the time of the conveyance by her to the plaintiff and appellant herein; for, admitting the legal presumption to be as above stated, such presumption may be rebutted and overcome by proof that the property was purchased with the separate funds of the wife.

It is, however, insisted by counsel for the respondent that no evidence was offered by the plaintiff showing or tending to show that the property in controversy was the separate property of Anna C. Woffenden. Passing the question as to the order in which this proof should have been offered, was such evidence offered at all? On the examination of the witness Charauleau, the witness was asked: "To whom was the sale of the ranches communicated when the same was being made?" The statement goes on and reads: "The offer upon the question was to prove that, when the sale was made by Anna C. Woffenden to the plaintiff of the ranches in contest, the defendant was informed of it by her in presence of the plaintiff; that he did not then question Mrs. Woffenden's owner-

ship, nor her right to dispose of the property in question, but allowed the contract to proceed, and the consideration of five thousand dollars to be paid, without any question or objection." The court ruled that there was no deed in evidence, and inquired of the plaintiff's counsel what he meant by "sale." Counsel answered "that he meant a contract for the conveyance of the property in controversy, to be consummated, as it afterwards was, by deed." We understand from the transcript, as above quoted, that, upon putting the question to the witness, the plaintiff's counsel offered to prove by the witness the matters set out in substance; that, while negotiations were in progress between Mrs. Woffenden and Charauleau for the sale of the ranches, the defendant was present; that she was treating the ranches as her separate property, and the defendant in no manner questioned her right so to do, but permitted the negotiation to go on, and the plaintiff herein to pay the purchase money, etc. As we understand from the transcript, the court not only sustained the objection made by the defendant's counsel to the question put as leading, but also ruled the evidence offered should be excluded; that is, the court would not permit the plaintiff to prove by the witness the matter he offered to prove, had there been no objection to the form of the question. We have no doubt that in this the court erred. The offer was not by oral testimony to establish and prove a contract for the conveyance of lands; it was to show that the property being negotiated was the wife's separate property, as evidenced by the conduct of her husband while she was negotiating the sale thereof, and treating it as her own. Giving full force to the legal presumption contended for by the counsel for the respondent that the property was common property, it might still be shown to be the wife's separate property; for, though obtained by her by grant for a moneyed consideration, if this moneyed consideration was of her separate funds, the property would be her separate property. Now, when she was so negotiating a sale of this property, bargaining it for a price with the view of conveying it, would not the fact that the husband was present, and made no objection to the negotiation, nor in any manner questioned her right to the property as her separate property, be evidence strongly tending to show that the property was her separate property, and obtained by her separate funds? The title of the property vested in her by virtue of the deeds from her grantors, if the purchase money was of her own funds; if not, then the property became common property. The evidence offered was to show that the defendant himself, being present, assented to her treating the property as her separate property, which, it is assumed, he would not have done had the property been purchased with his separate funds, or with the common fund.

Again, the plaintiff offered to prove by the witness Wise that the defendant, in 1874, "disclaimed in the witness' presence any interest in the ranches in contro-

versy, and expressed his determination never to return to them." The deed from Abram Moreno and Mariana Moreno, his wife, and from Ygnacio Robledo and Romula Robledo, his wife, conveyed the title of the property to Anna C. Woffenden, to vest in her as her separate property if purchased by her separate funds; otherwise, to become common property. If it was common property, the defendant certainly had an interest in it. Was not his disclaimer of any interest in the property evidence tending to show that the property was the separate property of the wife? The husband has control of the common property, and, if these lands had been purchased with means from the common fund, would he not have known it, and would he have disclaimed any interest in them? Had the defendant paid for the property out of his own means, or out of the common funds, would he be likely to make such disclaimer? At any rate, such disclaimer was proper evidence to go to the jury, as tending to show that the property was the separate property of the wife. It would have been more regular for the plaintiff, when offering the deed from Anna C. Woffenden in evidence, to have offered in connection therewith the evidence above referred to. The deed and this evidence should then have gone to the jury, under instruction from the court to the effect that, if the evidence satisfied them that the property was purchased by the separate funds of the wife, it was her separate property, and that the deed was sufficient to convey the same. This evidence was a sufficient predicate for the introduction of the deed, and probably the deed would have been offered after this evidence was offered and ruled out, had not the court excluded the deed on the ground that the certificate of acknowledgment was defective. It is apparent that the court held that the deed, even with this evidence, could not properly be admitted to go to the jury. We think both should have been received under instructions as above indicated.

We have considered this case upon the hypothesis that it is the presumption of law that all property acquired by either spouse after marriage, otherwise than by gift, bequest, devise, or descent, is common property; but, while we have so considered the matter in this case, we would not be understood as adopting the correctness of this presumption, stated as broadly as it is in the authorities cited. The current of the authorities cited, principally from California Reports, is to the effect that all acquisitions by either spouse for a moneyed consideration, during the existence of the marriage, is presumptively common property. It seems to us that there are grave objections to the rule as stated in these authorities. A legal presumption should certainly accord with the probable fact. Common property, under our law, can only accumulate after marriage, and, if either spouse, who married yesterday, to-day purchases and pays for property of the value of \$10,000, could the presumption arise that the property is common property? Would it not, on the other hand, appear certain that

the property so purchased was not common property, that it must have been paid for by the separate funds of one or the other? And, under the authorities referred to, if so paid for by the separate funds of either spouse, it would become the separate property of such spouse. It appears to us that no presumption can arise like that referred to, applicable to all cases, as is assumed by the authorities referred to, but that the legal presumption as to ownership would vary with the different facts and circumstances surrounding each case. It follows from the conclusions at which we have arrived that the judgment of nonsuit herein must be set aside, and the case remanded for a new trial, and it is so ordered.

PORTER, J., concurs.

DUNNE, C. J., (*dissenting*.) I dissent from the judgment. At the close of this term there was a change in the organization of the court,—a newly-appointed member of the court was daily expected to arrive. It was not known how soon he would come, nor how soon the opinions of the court could be prepared and filed. It was deemed advisable by the majority of the court to enter the judgments in the last few cases heard, and allow the opinions to be filed afterwards. As I am the judge who is retired, I am obliged to write my opinion without having before me the opinion of the majority of the court. I cannot, therefore, say how far I dissent from the opinion of the court; and, not knowing on what reason the majority of the court will ground their decision, I must, at the risk of being prolix, review all the grounds of error assigned, and express my opinion on each one separately.

I will first notice the preliminary objection made by respondent as to the lack of authentication of the statement. Rule 12 of this court reads as follows: "Exceptions to the transcript, statement, the bond or undertaking on appeal, or to the notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the rights of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the court before the argument on the merits." This case was set for argument for January—. On that day court opened, but, without calling any case, or in any way considering this or any other case, adjourned of its own motion until January—. On January—, court opened, pursuant to adjournment, and called this case for argument. Respondent, before proceeding to this argument on the merits, produced a preliminary objection to the transcript, noted in writing, filed the day before the argument, and showed proof of service of same on counsel for appellant the day before the argument. Counsel for appellant opposed the hearing of the motion, arguing that it ought to have been noted the day before the day set for the

argument of the case, and not the day before the actual argument; and the majority of the court refused to hear the preliminary objection of respondent, on the ground that it had not been noted in time, to which ruling I dissented. Believing, therefore, that the objection ought to have been heard, I will consider it. The objection was that the statement in the transcript was not properly authenticated, and should therefore not be regarded by the court. The provisions concerning authentication of statements are settled by our statute, (Comp. Laws, p. 437, § 343,) as follows: "The statement, when settled by the judge, shall be signed by him, with the certificate that the same has been allowed and is correct. When the statement is agreed upon by the parties, they or their attorneys shall sign the same, with their certificate that it has been agreed upon by them, and is correct. In either case, when settled and agreed upon, it shall be filed with the clerk." In this it appears that the signature alone of the judge or the attorneys is not sufficient, but there shall also be a certificate that the statement is allowed or "has been agreed upon by them, and is correct." The whole case in the appellate court often turns upon the facts set up in the statement. It is, in such instance, upon those facts that the whole action of the court is based. The statute explicitly provides that there shall be clear and express proof of the truth of the statement. The mere signature of the judge to the statement is not sufficient. He must formally certify that he has allowed the statement, and that it is correct. So the mere signature of the attorneys is not sufficient. There must also be a certificate stating that they have agreed to the statement, and that it is correct. In this case there is no such certificate, nor any attempt at any certificate whatever. At the foot of the statement appear the names of the attorneys, nothing more. They certify to nothing. If the statute said merely that the statement should be attested by the judge, the parties, or their attorneys, a mere signature would doubtless be sufficient; but, where the statute expressly states that there shall be a certificate, and declares what that certificate shall state, I do not think that it is a reasonable compliance with the statute to omit the certificate altogether. I am of opinion, therefore, that a statement so presented is not entitled to the notice of this court, and that this appeal stands upon the judgment roll alone. In that no error appears, and the judgment should therefore be affirmed.

Accepting, however, for the purposes of this opinion, that the unauthenticated statement embodied is true, the following appears: This was an action in ejectment. Plaintiff alleged seisin in fee of the premises in controversy on the 11th of February, 1874; that the defendant entered thereon July 5, 1875, while plaintiff was so seised, and withholds to plaintiff's damage in the sum of \$10,000; and that the value of the rents and profits during such withholding is \$250 per month. Defendant denies that plaintiff was ever seised or entitled to the possession of said premises;

denies damages; and alleges that he is the legal owner of said premises, and in possession thereof, stating his title; that plaintiff claims title from defendant's wife by deed, she having no power to sell; that said deed was made to defraud the defendant; and that plaintiff knew thereof; and prays cancellation of said deed. It was established on the trial by plaintiff's evidence that Anna C. Woffenden, from whom plaintiff claimed to have purchased the lands sued for, was from August, 1872, ever since has been, and now is, the wife of the defendant; that the title of these premises stood in her name; that this title consisted of patents from the United States to her grantors, and deeds of purchase from them to her for a moneyed consideration, made during her coverture; and that the only documentary title plaintiff claimed was a conveyance from her alone to plaintiff, made during such coverture.

The first error assigned is as to action shown at folio 40 of transcript. Plaintiff opened his case by taking the stand himself, as the first witness in his own behalf. The first relevant evidence offered was that plaintiff was asked "to describe the whole property bought by him of Anna C. Woffenden, lands and all." Objected to as inadmissible, because: (1) No foundation laid for oral description of lands purchased, no proof of purchase itself having been made. (2) Evidence offered incompetent to prove purchase; should be in writing; no foundation to prove contents of lost writing. Objection sustained. The ruling on this objection was immaterial, as will appear in the consideration of the fifth assignment of error.

The second assignment of error is as to action taken at folio 42. Plaintiff offered in evidence deed to himself of premises from Anna C. Woffenden. Objected to: (1) Defective acknowledgment; (2) that it has not been shown that the person executing said deed had power to convey the premises described therein. Objection sustained. Here was an objection to the order of proof. Merely proving a conveyance to plaintiff in ejectment is nothing, unless plaintiff shows that the person conveying had power to convey the legal title. Otherwise the court might be delayed for days at any time, and the record uselessly incumbered by the introduction of irrelevant conveyances. The court has the right to protect itself against such a practice. Therefore the order of testimony has been left to the discretion of the court. No abuse of this discretion is shown. It is not shown that plaintiff offered any reason for not introducing the requisite preliminary evidence at that time, nor that he assured the court he would subsequently produce it. There was no error therefore in excluding the deed at that time, the ruling as to the acknowledgment being immaterial, the deed itself being properly excluded on other grounds.

The third assignment of error is for action, commencing at folio 43½. Plaintiff, testifying in his own behalf, being asked on direct examination, "To whom was the sale of the ranches communicated when the same was being made?" offered to show that defendant, the husband,

knew of the sale being made by his wife, and said nothing. Objected to as (1) leading; (2) inadmissible, no proof of negotiations; (3) incompetent, as oral, to prove agreement of sale; (4) immaterial, no power in wife to sell having been shown, and this being incompetent evidence to show such power. Sustained. The evidence was immaterial. Granting it proved all that was claimed,—that it proved that the husband stood by and saw his wife agree to sell real estate of common property,—the most it would show would be equitable title in plaintiff, not sufficient to recover upon in ejectment against the holder of the legal title in possession. If it was separate property of the wife, which she might sell without her husband's consent, as she could do here if it were separate property, then his knowledge or assent was also immaterial. It must have been either common or separate, and therefore the evidence was immaterial in either case, and was properly excluded.

The fourth assignment of error was in action declared at folio 47½. "Plaintiff's counsel again offered in evidence the deed of Anna C. Woffenden to the plaintiff for the property in controversy, with an acknowledgment of that date, November 2, 1875." The action was begun September 6, 1875; and acknowledgment taken after commencement of the action, taken on the trial of the cause, is immaterial to show title in plaintiff at the commencement of the action. None of the other objections sustained to the deed on its first offer had been cured in the mean time. The only additional reason shown for the introduction of the deed was this subsequent acknowledgment, and that was of no benefit to plaintiff in this action. Before any other action was had which is assigned as error, the plaintiff introduced, without objection, patents from the United States for the premises in controversy to the grantors of defendant's wife, and deeds of purchase from them for a moneyed consideration to defendant's wife during her coverture. Plaintiff stated the object of this introduction to be as follows: "These deeds were offered in evidence to show that Mrs. Woffenden, at the date of the deed to plaintiff, was the absolute owner of the premises in controversy, and also to show her power to convey to the plaintiff." The granting clauses in said conveyance to the wife are to her and her heirs and assigns. There is no *habendum* clause in either of them. In neither of them is there anything said at all in any way as to her having or receiving the premises, or any part thereof, as separate property.

The next and fifth assignment of error is as follows: "In excluding evidence that the plaintiff in this case was in the adverse, prior, and notorious possession of the real property in controversy; that the defendant never questioned the plaintiff's right of possession, but disavowed any interest of his own in said property, and declared his intention never to return to it." This evidence was offered after the admission of the documentary title last before described, showing title in the wife of the

defendant from the United States by deeds of purchase during coverture, and which, the transcript says, though received, were not admitted by the court as proving power in the wife to convey to the plaintiff. To this offer, now made, to prove that plaintiff was in adverse, prior, and notorious possession of the premises, defendant objected (1) that the evidence is inadmissible, because title by adverse possession must be specifically pleaded, and must have continued five years in order to give the possessor title against the party holding the legal title, it appearing that the legal title is in the defendant; (2) that the offer does not claim to cover the period of five years, and is therefore incompetent to prove title by adverse possession; (3) that, under the evidence already admitted in this case, title by adverse possession cannot be shown, since plaintiff has already shown, by the documentary evidence of title before alluded to, that the legal title is in the defendant from the United States government, than which no title can be prior. Objection sustained. To that portion of the offer proposing to prove abandonment by acts and declarations of defendant, defendant objected that the testimony offered was incompetent to prove title in the plaintiff, or to prove abandonment by defendant, it having been shown that the legal title was in defendant by patent from the United States. Objection sustained. The answer to all these points in the fifth assignment of error, as also to the first assignment, is that the plaintiff himself proved that the legal title was in the defendant, under patents from the United States issued about 18 months prior to the commencement of the suit. That such was the legal effect of plaintiff's proof, I will now discuss; but that, such being the legal effect of plaintiff's proof, it could be material to permit plaintiff to describe the lands, or to contradict his own testimony by attempting to prove prior or adverse possession to sustain an action in ejectment against such a defendant with such title, I will not discuss. Plaintiff proved patents from the United States, for the premises in controversy, to the grantors of defendant's wife, and conveyances from them to her for a moneyed consideration, during her coverture. What is the legal effect of such a proof? Did the property become the separate property of the wife by such conveyances? Or does the law presume it to be the common property of both husband and wife? Our statute on the subject is as follows: "Sec. 2. All property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property. Comp. Laws, p. 306. Under a similar law in California, the courts have held that all property acquired by either spouse during the marriage by purchase is presumed to be common property, and that this presumption can be overcome only by clear and satisfactory proof that it was acquired by the separate funds of one or the other, and that the burden of proof lies on the party claiming the property as separate. *Smith v. Smith*, 12 Cal. 224, opinion by Judge

FIELD, who cites a great many cases in support of that declaration. This doctrine is confirmed and adhered to in California in *Meyer v. Kinzer*, Id. 247; *Pixley v. Huggins*, 15 Cal. 127; *Mott v. Smith*, 16 Cal. 533; *Burton v. Lies*, 21 Cal. 87; *Adams v. Knowlton*, 22 Cal. 283; *Riley v. Pehl*, 23 Cal. 71; *McDonald v. Badger*, Id. 393. I believe that to be the true rule in the matter. Plaintiff offered no proof whatever to overcome this presumption, although his attention was specially called to this defect of proof by the objection made as to the order of testimony. The conveyances themselves contain no word which shows any intention to pass the property to her as her separate property. There is no proof in the case that she ever owned any separate property, or ever had any rents or profits of any separate property. There was nothing on which to found any inference that it was in any way possible that these premises might be her separate property, beyond the naked fact of her taking the property by a deed of purchase, in which case the presumption stands that it is common property, until overcome by clear and satisfactory proof to the contrary. In this territory, it is not necessary for the wife to join in a deed for common property. She has no control over it whatever. A conveyance from her alone can in no case pass any legal title. Therefore, as against this defendant in ejectment, the deed was properly excluded. If the deed from defendant's wife to plaintiff was properly excluded, on the ground that she had no power to convey the premises, they being common property, then it is immaterial what other and further objections to it were sustained by the court. If one good objection was made and sustained, it does not matter whether the other objections were good or not. If only one insuperable objection to the admission of the deed was made, and remained unremoved, the exclusion of the deed cannot have been error. Admit, for the argument, that all the other objections to the deed were bad, and that all the rulings in those other objections were wrong; the plaintiff was not injured thereby, because the result would have still been the same,—the deed must still have been excluded, for lack of power in the wife to convey common property. It is urged, *arguendo*, that, the objection that the acknowledgment of the deed was defective having been sustained, it was useless for the plaintiff to prove power in the wife to convey, as the deed would still have been excluded. The transcript does not show on which of the two grounds of objections urged—viz.: (1) Defective acknowledgment; (2) defect of power to convey—the deed was excluded. But plaintiff afterwards tried to meet the objections as to defective acknowledgment by getting a new acknowledgment of the deed, but he did not try to cure the other defect, viz., a failure to show power to convey. It is immaterial whether he cured the first defect or not, so long as he left the second fatal defect uncured. It is true that, if the plaintiff had cured the second defect, the court might still have excluded the deed, on account of the acknowledgment; but

had the second been cured, and had the court still excluded the deed because of the acknowledgment, then, if that were error, it would be material; but, with that second defect, of lack of power to convey, left uncured, the ruling of the court, so far as it affected the matter of the acknowledgment, is entirely immaterial.

The sixth and last assignment of error is that the court erred in nonsuiting plaintiff. When plaintiff rested his case, his proof stood as above described, viz., legal title in the defendant. When a plaintiff shows this in ejectment, under a complaint relying solely on seisin in fee, and no offer to amend having been made, all of which is the case here, he must be nonsuited. I am therefore of opinion that the judgment of nonsuit ought to be affirmed.

(1 Ariz. 346)

WOFFENDEN v. CHARAULEAU.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1876.)

APPEAL—EXCEPTIONS TO TRANSCRIPT—RIGHTS OF MARRIED WOMEN.

1. Under rule 12 of supreme court of Arizona, requiring exceptions to the transcript to be noted at least one day before argument, the exceptions must be noted before the day set for hearing though the case is not reached that day.

2. Act Ariz. 1871, § 1, giving a married woman exclusive control of her separate property, repeals the provision of Act 1865, § 9, that rents and profits of separate property shall be common property and under the control of the husband, and she may acquire separate property by purchase with such rents, though Act 1865, § 2, recognizes its acquisition only by "gift, bequest, devise, or descent." Following *Charauleau v. Woffenden*, 1 Ariz. 243, ante, 653.

DUNN, C. J., dissenting.

*Titus & Hughes*, for appellant. *Farley & Pomroy*, for respondent.

TWEED, J. The appeal is from the first district, Pima county. Counsel for the respondent, before submitting his argument upon the merits of the case, asked to be heard upon a preliminary motion to strike out from the transcript certain portions thereof as not being properly certified, citing the twelfth rule of this court as entitling him to be heard upon such motion. The rule invoked reads as follows: "Exceptions to the transcript, the bond, or undertaking, on appeal, or the notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the rights of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such case, the objection must be presented to the court before the argument on the merits." On the 10th of January, the case was set for argument on the 13th. It was not reached until the 24th of that month. On the 21st the counsel for respondent noted in writing and filed his objections to the transcript, and on the 24th, when the case was called for

<sup>1</sup> This case, filed January, 1876, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

argument, asked to be heard upon his motion to strike out. The court declined to hear the motion argued, and counsel for the respondent excepted to this ruling. The object of the rule is obvious. It is intended to enable the court, as early as is practicable, to dispose of all preliminary objections to a hearing upon the merits of the cases to be brought before it for consideration; to hear such objections as early as possible for its own convenience, and for the convenience of the appellant, who might be permitted, in case of error or mistake in copying exhibits, or otherwise, to correct the same in season for a hearing at the term. The rule requires that the exceptions to the transcript be noted at least one day before the argument, or that they be disregarded. When a case is set for argument, and no exceptions are noted and filed before the day so fixed, we think all exceptions to the transcript should be deemed to be waived. It was with this view of the intention and spirit of the rule cited that we declined to hear the motion of respondent's counsel; and we take occasion to say here that, while we do not wish to encourage any laxity in practice in appeals to this court, we shall avoid, as far as possible, allowing technical objections to stand in the way of a hearing upon the merits of such cases as may come before us. There are obvious reasons why the supreme court of a territory like ours should, by liberal rules, liberally construed, aid litigants to obtain a hearing upon the merits of cases brought before it by appeal.

We will now consider the case as presented to us. On the 2d day of July, 1875, a judgment was rendered by the judge of the district court, first district, Pima county, in favor of the plaintiff herein, in an action then pending in said court for forcible entry and detainer, wherein the plaintiff herein was plaintiff, and the defendant herein was defendant. The premises in controversy in that action, and for which judgment of restitution was had in favor of the plaintiff, were three quarter sections of land lying contiguous to each other in Pima county, and known as the "Robledo," "Moreno," and "Duran" ranches. The plaintiff in this action asks to recover the rents and profits of the premises above mentioned from the 10th of April, 1874, up to the 2d of July, 1875, the period, as is alleged, during which the defendant wrongfully withheld the premises from the plaintiff. Also to recover the value of a quantity of corn and a growing crop alleged to have been upon the premises at the time of the unlawful entry of defendant, and by him converted to his own use; and, among other articles of personal property, two horses and three yoke of oxen, of the alleged value of \$250, etc. The defendant in his answer claims ownership of the premises described in the complaint, admits that plaintiff was owner of one-half of the growing crop, denies plaintiff's ownership of the horses and oxen, and alleges that he, the defendant, is the owner thereof. On the trial, the defendant introduced evidence tending to show that certain of the personal property, the oxen and horses, were

purchased by him from Anna C. Woffenden, the wife of the plaintiff, and that this property was purchased by her separate means, and was her separate property. Upon cross-examination, plaintiff, in answer to questions touching the purchase of this property, says: "I got that property at home. My wife bought it. She bought it with money belonging to both of us. What is hers is mine. I did not furnish any money directly to pay for it. I did not furnish any money."

Among other instructions, the court charged the jury as follows: "The title to the ranches is not here in question, nor to be considered by you. Whatever of the other property in controversy was acquired by the plaintiff and his wife subsequent to their marriage is common property, and, as such, subject to the management and disposition of the husband, and the wife had no authority to sell the same, unless you find that she was authorized thereto by her husband as any other agent might be. The presumption of its being common property would be removed if you find that said property was taken in exchange for the separate property of either spouse, or was acquired by gift, bequest, devise, or descent; but such proof must be clear and satisfactory. \* \* \* You must also find that said property was owned by her before marriage with the plaintiff, or acquired afterwards in the manner above described, in order that she might give a complete title thereto as against her husband; or you must find that she was the authorized agent of the husband to sell the same," etc. The court also gave the following instructions: "If you find that any of the property in controversy is rents, issues, and profits of the separate property of either spouse, it is common property by the laws of this territory, and subject to the management of the husband, with like power of disposition as over his own separate estate, and no marriage contract in derogation of these rights is of any force or effect." The jury rendered a verdict for the plaintiff for \$1,000, itemized as follows: For one-half of the crop of 1874, \$750; three yoke of oxen valued at \$150; one horse valued at \$40; and 1,500 pounds of corn valued at \$60. Both these instructions were excepted to by counsel for the defendant, and their being given is assigned as error. In the first of these instructions we understand the learned judge to charge to the effect that to constitute separate property in the wife, when the property is obtained after marriage, it must have come to her by gift, bequest, devise, or descent, or it must have been obtained in exchange for her separate property; that she could not sell any portion of her separate property and invest the means derived from such sale in other property, and hold the same as a part of her separate estate, but that such property so purchased would become common property, and subject to the management and disposal of her husband. Both of these instructions are erroneous. The first section of the act of January 22, 1871, entitled "An act relating to the separate property of married women," reads as follows: "Married wo-

men of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property, and may convey and transfer lands or any estate or interest therein vested in or held by them in their own right, and without being joined by the husband in such conveyance, as fully and perfectly as they might be, if unmarried." The second section repeals all acts and parts of acts so far as they conflict with these provisions. The sole and exclusive control, and the right to convey as if unmarried, given by this statute to the wife, involves the right so to control and convey for her own separate use and benefit; it involves the right in the wife to sell any of her separate property, and to invest the proceeds of such sale in the purchase of other property for her own use; it also involves the right of the wife to the rents and profits of her separate property, and its use by her in the investment of the same as she may choose.

To say that the wife shall have the sole and exclusive control of her separate property, and that she may sell and transfer the same as if unmarried, and then to attach to such right the condition that when in controlling such property she receives the rents and profits thereof, such rents and profits shall become common property and under the exclusive management of the husband, and that when she sells and conveys her separate property, the receipts of such sale, or the property in which she invests such receipts, shall become common property, and pass wholly beyond her right to use the same, or her control thereof, is affixing a condition to the right given to her which utterly destroys the right itself. We have no doubt that under this statute the rents and profits of the wife's separate property are as absolutely hers, and as completely under her control, as the property of which they are the fruits; and that she may use such rents and profits, and the proceeds derived from the sale of any of her separate property, in the purchase of other property, and that such property so purchased will remain a part of her separate estate; and we have no doubt that every provision of our statutes in force when this act of 1871 was passed, limiting the rights or powers of the wife as to her separate property by making the rents and profits thereof or the receipts for the sale thereof or the property purchased therewith, common property, to be managed and controlled by the husband, was in conflict with the provisions of this act, and was repealed by the repealing clause thereof. If the instructions under consideration are correct, from the day of the wife's marriage, however ample her separate means may be, she is wholly deprived of their use and enjoyment. She may not gratify her taste by the purchase of a single article for the adornment of her person, nor bestow upon a needy relative, be the same father, mother, brother, or sister, such aid as their needs may require, and such as she may desire to relieve; she may not even of her own fortune provide for the education of her own children, if she have such when married, but must depend wholly upon the will or whim of her husband in the use

of means which may have been acquired by her own labor, learning, and skill before her marriage. Practically, this ruling places the wife in the same *status* in which she stood under the act of 1865 as to her separate property, the only effect given to the act of 1871 being to give the barren right to convey without being joined with the husband, and places the proceeds of her separate property, as well as the rents and profits thereof, wholly in the hands and under the control of the husband.

The act of 1865, above referred to, in its first section prescribes that "all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property." The second section provides that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." The ninth section of the same act takes from the wife all beneficial interest in her separate property by giving to the husband the management and control of the same, and the rents, issues, and profits thereof, making the rents, issues, and profits, common property. It was doubtless the intention of the legislature, by the act of 1871, to get rid of the obnoxious provision in the act of 1865, by which the wife's separate property became, in effect, common property, and subject to the management and control of the husband. The act of 1871 gives to the wife perfect freedom in the control, use, and enjoyment of her separate property, and makes her wholly independent of her husband in regard thereto.

We hold further that the act of 1871 adds another method to those provided in the second section of the act of 1865, by which the wife may acquire property after marriage; that the right to the sole and exclusive control of her separate property, and the right to sell and convey the same free from the interference of her husband, involves the right in her, and for her own use, to purchase property with the means she may derive from such sale, or by the investment of the rents and profits of her separate estate. These views accord with the decision of this court at this present term in the case of *Charauleau v. Woffenden*, 1 Ariz. 243, ante, 652. The instructions as given must be presumed to have influenced the jury in their verdict as to certain of the personal property in controversy. We do not deem it necessary to pass upon other matters occurring at the trial, and assigned as error. The judgment must be reversed, and the cause remanded for a new trial; and it is so ordered.

PORTER, J., concurs.

DUNNE, C. J. I dissent. 1. The same condition of facts exists in this case as to the objection to the statement as in the case of *Charauleau v. Woffenden*, ante, 652, (decided at this term of the court,) and for the same reasons there stated I consider there is nothing before this court in this transcript but the judgment roll, in which no



error appears, and that the judgment for that reason should be affirmed.

2. Accepting, however, the unauthenticated statement as true, it appears therefrom that plaintiff had obtained judgment against defendant for forcible entry and detainer of certain premises. He then brought his action for damages consequent and attendant upon said entry and detainer, under Comp. Laws, p. 369, § 24. He alleged \$3,600 damages for rents and profits, and \$1,890 damages for personal property on said premises taken by defendant at the time of entry. There are two crops spoken of in the testimony,—the crop of 1874 and the crop of 1875. As to the crop of 1874, defendant admits its value to be as charged in the complaint, but claims he owned one-half of it. The crop of 1875 defendant claims was planted by him during the time he was adjudged to be in unlawful possession of the premises. Defendant undertook to prove the value of the crop of 1875, to show that he had placed articles of value on the premises of which plaintiff got the benefit, and defendant stated that he offered proof on this point as having a bearing on the question of damages. Excluded, wherein appellant assigns error No. 1.

We are governed here by the common law, in the absence of statutory provisions. At common law, a trespasser could not prove value of improvements made by him as a set-off to damages for trespass. By statute here, in ejectment, where defendant enters in good faith, under color of title adverse to plaintiff, he may prove value of improvements made by him as a set-off against damages. But there is no provision for doing it as against damages for forcible entry and unlawful detainer. The exclusion was not error.

Assignment No. 2 is that the court refused to allow defendant to prove ownership of the premises on which it had been adjudged he had forcibly entered, the value of the crop of 1874, and the animals in contest, in mitigation of damages. It was not error to exclude evidence of title in defendant. Title of the land could not be raised in this action; and concerning the allegation that it was error to exclude evidence of the value of the crop of 1874, there is nothing in the transcript to show that any evidence was offered concerning the value of the crop of 1874; besides, the defendant admitted in his answer the value of the crop of 1874 to be as charged in the complaint. The latter portion of the assignment, that the court excluded evidence of the value of the animals in question, is not warranted even by the unauthenticated statement. The unauthenticated statement shows no such exclusion, but, on the contrary, shows that evidence as to the value of the animals, and all about their purchase, and that of other property and its value, was admitted, without objection.

Assignment No. 3 was for refusal to permit defendant to ask a certain question at a certain time. Even if that were error, the unauthenticated statement shows it was cured by allowing the same question to be asked later in the examination of the same witness.

The fourth assignment of error is a duplication of assignment No. 2,—that the court excluded evidence of title to the land,—and is answered in the remarks on that assignment.

The assignments from 5 to 15 inclusive are for error in instructions. The only one of these instructions about which I understand there is serious contest is No. 10, instructing the jury that the rents, issues, and profits of the separate property of either spouse are common property, under the law of this territory. It is argued that the adjudications of the supreme court of California are against the doctrine of this instruction. Section 9, p. 307, of our Compiled Laws, declares, in express terms, that the rents and profits of the separate property of either spouse are common property. Our law on this subject is taken from the California law. Section 9 in the California law is the same as our section 9. In 1860 the supreme court of California construed section 9. We adopted section 9 in 1865, presumptively with notice of the construction given to it in California. The supreme court of California held that section 9 of the California law was inoperative in its declaration that the rents and profits of the wife's separate property should be common property. But why? Because it was, as they say, in conflict with the constitution of California, and that the legislature had not the power to modify the law of the constitution; that the constitution gave to the wife separate property; that at common law a right to separate property gave the right to the rents and profits thereof as separate property also; and that the legislature had no power to say it should be otherwise. But in this territory the matter is not governed by constitutional provision; all the rights the wife has are fixed by the legislature. Our legislature has power to say the wife shall have no separate estate at all. It has power to say just what estate she may have is separate property. They have said that she shall have what the court in California calls a "reversionary interest;" one which, the court continues, can "be of no avail to her, except in the contingency of her surviving her husband." The court speaks of it as "a barren right." But is it such a great anomaly to allow the head of the family to control the usufruct of his wife's property, and dispose of it for the maintenance and care of the family, the support and education of the children, and to have some enjoyment of it also himself, perhaps, while the property itself is put safely beyond his control? He cannot divest the wife of the property owned by her; that is secured for her children, if she so desire. Is there anything against public policy or *contra bonos mores* in such a law? Have not the legislature of Arizona power to make such a law if they like? If they choose to adopt one feature of the law of California recognizing separate property in the wife, have they no power to say that certain conclusions drawn therefrom by the courts of California shall not obtain in Arizona? Five years after that decision was rendered in California, declaring that rents

and profits followed the separate estate, and were separate property in that state, the legislature of Arizona deliberately declared that in Arizona the rents and profits should be common property. What is to hinder their doing so? There is no parity in the legislation on the subject. In Arizona, it is all the act of the legislature. In California, the law is partly statutory and partly constitutional, and of course nothing in the statute may contravene the constitution. But make the cases similar: Suppose that section 14, art. 11, of the California constitution, were followed by a section declaring that, though certain property should be the separate estate of the wife, the rents and profits of that estate should be common property, would not the courts give force to both sections? Necessarily they would, because both sections would then be of equal authority, and would be capable of standing together. So they are in this territory. The statutes are all of equal authority, are all *in pari materia*, must all be taken together, and force given to all.

There is a fourth objection, that the verdict is contrary to the evidence. There was no motion for a new trial. Such an objection is available only on motion for a new trial, so as to give the court an opportunity to submit the case to another jury. The objection cannot properly be considered here. But, nevertheless, what is the objection? The only controverted facts on which the jury gave a verdict were as to the ownership of three oxen and one horse. The only evidence as to the ownership of this property was that of the plaintiff, from whose wife defendant claimed to have bought this property. He said, in substance: "My wife did not own any of this property before marriage. It was all acquired since. My wife bought it with money belonging to both of us. What is hers is mine. I did not furnish any money directly to pay for it. I did not furnish any money." Plaintiff showed he had used these animals in putting in his crop. On this evidence, in substance, the jury by their verdict practically declared that this was common property. Even if it should be conceded that this was against the evidence, what power did the court below have to correct it? The court was bound to receive the verdict. The defendant did not ask for a new trial. The court was, therefore, compelled to enter judgment. The defendant cannot now raise any objection to the verdict on that ground. He had his day in court on that point, and allowed it to go without objection.

The last objection urged is that the verdict is excessive, and ought to be reduced. Plaintiff was entitled to the value of the rents and profits of the premises. He gave evidence that the use of the premises was worth \$1,500 for the time they were withheld. The defendant admitted that plaintiff owned one-half of the crop of 1874, and that that one-half was worth \$750, and owned corn worth \$60, making \$810. That was all the jury gave him except \$190 for three yoke of oxen and one horse. I do not think the verdict was excessive, particularly when in an action

like this the law says the damages may be trebled. The damages were not trebled in this case, nor raised in any amount beyond that awarded by the jury, and no motion was made for a new trial on the ground that the damages given were excessive. I am, therefore, of opinion that the judgment should be affirmed.

(1 Ariz. 328)

WOFFENDEN V. WOFFENDEN.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1876.)

VACATING DECREE.

A decree entered after issue joined, and reciting that the case came on for final hearing on bill, answer, and argument of counsel, and decreeing that the injunction theretofore issued be made perpetual, "or until the further order of this court," is final, and, in the absence of mistake or surprise, cannot be opened after the expiration of the term at which it was rendered.

Appeal from district court, Pima county. *Titus & Hughes*, for appellant. *Farley & L'oumroy*, for respondent.

PORTER, J. This case arose upon a complaint in the nature of a bill of equity by the plaintiff, a married woman, to enjoin the defendant, her husband, from interfering with her separate property, or with the "rents, issues, and profits thereof." The complaint is as follows: "Complaint. Anna C. Woffenden, plaintiff, v. Richard Woffenden, defendant. Anna C. Woffenden, the above-named plaintiff, complains of Richard Woffenden, the above-named defendant, and alleges: (1) That defendant and plaintiff are husband and wife; that they had intermarried at Tucson, in the county of Pima, territory of Arizona, on or about the — day of —, A. D. 1872, and ever since have been, and are now, husband and wife. (2) Plaintiff further alleges that she is of the age of twenty-one years and over. (3) That on the 13th day of August, 1873, for the purpose of preventing difficulties and misunderstandings arising between them, articles of agreement were entered into, made, and signed by said defendant and this plaintiff, a copy of which articles of agreement, marked 'Exhibit A,' is hereunto annexed, and prayed to be made a part of this complaint; that by said articles of agreement said defendant covenanted, promised, and agreed to and with the said plaintiff that he, the said defendant, would not in any manner seek to control or derive any benefit from the separate property of plaintiff, nor from the rents, issues, and profits of said property. (4) Plaintiff further alleges that on the 7th day of October, 1873, the said defendant, in violation of his aforesaid covenant, promises, and agreements, and in violation of the legal rights of said plaintiff over her separate property, served notices upon the tenants of said plaintiff to pay the rents due and owing on the separate property of plaintiff to said defendant. Wherefore the plaintiff demands judgment (1) that the said defendant be enjoined from exercising any control or authority

<sup>1</sup> This case, filed January, 1876, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

over the separate property of said plaintiff, or the rents, issues, and profits thereof; (2) for the costs of this suit."

The contract referred to is as follows: "This indenture made and entered into this 13th day of August, in the year of our Lord one thousand eight hundred and seventy-three, between Richard Woffenden and Anna Charauleau Woffenden, his wife, both of the village of Tucson, in the county of Pima, and territory of Arizona, in consideration of the mutual promise and agreement of the said parties made to each other before marriage, and to prevent difficulties and misunderstandings arising between them in the future, witnesseth: That, in consideration of the premises and of the covenants, promises, and agreements hereinafter contained of the said Anna C. Woffenden, the said Richard Woffenden does hereby covenant, promise, and agree to and with his said wife, Anna C. Woffenden, that, while the said parties shall live together as man and wife, the said Richard Woffenden will, from his own separate property and means, pay and defray all the household expenses, of every class and description, necessary to the comfortable maintenance of himself and his wife, the said Anna C. Woffenden; those hereinafter expressly provided for by the said Anna C. Woffenden. And the said Richard Woffenden further covenants, promises, and agrees to and with the said Anna C. Woffenden, his wife, that he will not in any manner seek to control or to derive any benefit from the separate property of his wife, the said Anna C. Woffenden, nor from the rents, issues, and profits of the said property, and that he will pay and defray all his private and individual expenses, including his own clothing, etc., from his own separate property and means. And, in consideration of the premises and the covenants, promises, and agreements hereinbefore contained of the said Richard Woffenden, the said Anna C. Woffenden, wife of the said Richard Woffenden, does hereby covenant, promise, and agree to and with the said Richard Woffenden that she, the said Anna C. Woffenden, will, from her own separate property and means, pay and defray all expenses incurred by her in keeping and maintaining one or more horses, with the carriage or other vehicle used with the same, and will also pay and defray from her own separate property and means all her own individual and private expenses, including her own clothing, etc., and that she will not in any manner seek to control or to derive any benefit from the separate property of her husband, the said Richard Woffenden, nor from the rents, issues, and profits of the said property. In witness whereof, the parties to these presents have hereunto, and to another of like tenor and date, set their hands and seals the day and year first above written. RICHARD WOFFENDEN. [Seal.] ANNA C. WOFFENDEN. [Seal.] Signed, sealed, and delivered in presence of ———."

Upon which the judge at chambers directed this order: "This complaint will be heard on Monday, the seventeenth in-

stant, at ten A. M. of that day, on not less than four days' notice to the defendant, and in the mean time the property and interest of the plaintiff not to be in any manner or degree prejudiced or interfered with by the defendant. November 10, 1873. JOHN TITUS, Judge, etc. Filed November 10, 1873. O. BUCKALEW, Clerk. By S. W. CARPENTER, Deputy." And, upon hearing, the following order for injunction was entered: "Order for Injunction. Anna C. Woffenden, Plaintiff, v. Richard Woffenden, Defendant. To Richard Woffenden: (1) The above-named plaintiff having commenced an action in the district court of the first judicial district of the territory of Arizona, in and for the county of Pima, against the above-named defendant, and having prayed for an injunction against said defendant, requiring him to refrain from certain acts in said complaint, and hereinafter more particularly mentioned, (2) it is therefore ordered by me, the judge of the said district court of the first judicial district, that, until further order in the premises, you, the said Richard Woffenden, and all your counselors, solicitors, and agents, and all others acting in aid and assistance of you, and each and every one of you, do absolutely desist and refrain from exercising or attempting to exercise any control or authority whatever over the property, both real and personal, or any part thereof, in the possession of and owned by the said Anna C. Woffenden at the time of her marriage, together with all such property, both real and personal, which the said Anna C. Woffenden has acquired since her said marriage, or the rents, issues, and profits thereof. November 18, 1873. JOHN TITUS, Judge, etc. Indorsed: Filed, November 18, 1873. O. BUCKALEW, Clerk. By S. W. CARPENTER, Deputy."

An answer was filed in the case November 28, 1873, as follows: "Answer. Anna C. Woffenden, Plaintiff, v. Richard Woffenden, Defendant. The defendant answers to the complaint. (1) And for a first defense denies—*First*, that he did agree with the plaintiff as alleged, or at all; *second*, that he has in any way interfered or attempted to control the separate property of said plaintiff. (2) And for a further and separate answer and defense alleges—*First*, that the articles of agreement between plaintiff and defendant, referred to in the complaint, were signed by the defendant without the defendant's knowledge of the contents thereof, and with the full and explicit understanding with plaintiff's counsel that the same was void, and did not affect or abridge any of the material rights of the said defendant; *second*, that the plaintiff has not performed the conditions of the said articles of agreement, but, on the contrary, has wholly omitted in defraying the expense of keeping and maintaining one or more horses, with the carriage or vehicle, as set forth in said articles of agreement, and has acted towards him, the said defendant, in such a manner as to foment strife, and encourage difficulties and misunderstandings between plaintiff and defendant as man and wife. Wherefore the defendant

demands that the action be dismissed at the cost of plaintiff; that the injunction granted by this court be discontinued; and that plaintiff be perpetually enjoined from further prosecution of this said action. Filed December 1, 1873. O. BUCKALEW, Clerk. By S. W. CARPENTER, Deputy."

At the regular December term, 1873, the cause having come on regularly for hearing, the court gave the following judgment in the case: "Copy of Judgment. Anna C. Woffenden, Plaintiff, v. Richard Woffenden, Defendant. This cause, having come on regularly for hearing on the tenth day of December, A. D. 1873, and being argued by the parties' respective counsel, O. F. McCarty, Esq., for the plaintiff, and L. C. Hughes, Esq., for the defendant, was by the court taken under advisement and consideration. Now, on this fifteenth day of December, A. D. 1873, the decree of the court therefore is that, this cause having come to a final hearing on bill, answer, and argument of counsel, therefore, and in consideration thereof, it is now hereby ordered and decreed that the injunction heretofore issued, and still existing in the case, ought to be, and the same is, made perpetual, or until the further order of this court. Done in open court this fifteenth day of December, A. D. 1873. Indorsed: Filed December 15, 1873. O. BUCKALEW, Clerk. By S. W. CARPENTER, Deputy."

It does not appear that any other proceedings were had in the case until nearly two years afterwards, during which time three regular terms at least of the court had intervened; but on August 4, 1875, the defendant gave notice of motion, in the same court that entered the foregoing judgment, that he would move that the injunction in this action be dissolved, and the court, on a hearing on the original pleadings and argument of counsel, made the following order: "Order Dissolving Injunction. Anna C. Woffenden, Plaintiff, v. Richard Woffenden, Defendant. At a regular term of the district court of the first judicial district of the territory of Arizona, in and for Pima county, held at the court-house August 16, A. D. 1875. And now comes, as well the said plaintiff by her attorneys, Messrs. Titus & Hughes, as the said defendant by his attorneys, H. Farley and H. B. Summers, and thereupon this action comes on for a hearing before the court, on motion of defendant's attorneys to dissolve the injunction heretofore granted in said cause. On reading the complaint of plaintiff and the answer of defendant herein, and on motion of H. Farley, Esq., counsel for defendant, and after hearing Messrs. Titus & Hughes, Esqs., counsel for plaintiff, in opposition, it is ordered that the injunction granted on the eighteenth day of November, A. D. 1873, against the above-named Richard Woffenden, be vacated and dissolved. E. F. DUNNE, Judge First District Court, A. T. Indorsed: Filed August 16, 1875. Jos. B. AUSTON, Clerk."

We are of the opinion that the court below erred in entertaining the motion to dissolve the injunction in this case, and in dissolving the same, as, by the record of

all the proceedings, it appears conclusive that the same case had already been fully and finally heard and decided. We cannot come to other conclusions, for it is apparent that all the facts of the case were the same before the court on both hearings. The language of the notice of motion to dissolve is that the documents to be used on said motion were the complaint, answer, and order for injunction, and records of the court, and no other cause or reason is assigned for asking the court to set aside a judgment entered by it nearly two years previous. It is urged by defendant that the last clause of the judgment, "or until the further order of this court," is conclusive that the judgment was not intended as a final judgment of the court, and was subject to reversal at any time. While the language is peculiar, it does not have to us such significance. The judgment recites that the cause "came on regularly to be heard." The case had already gone through the stages ordinary in this class of cases,—an order restraining defendant, then a temporary injunction, then at regular term of court issue joined, complaint and answer verified by both parties, arguments of counsel. The judgment recites that, having come to a final hearing on bill, answer, and argument of counsel, it is now hereby ordered and decreed that the injunction heretofore issued, and still existing in this case, ought to be, and the same is, made perpetual. The whole subject-matter of the motion was then *res judicata*. If this was clearly the judgment of the court, if issue had been joined, and the case had been before the court on its merits,—and the record clearly shows that it was as fully so in the hearing when the injunction was made perpetual as when the order from which this appeal was taken was entered,—then we hold the rule to be, and that governs this case, that "a court cannot open a decree, after there has been a regular trial and judgment upon the merits, after the term at which the decree was entered had expired. Its jurisdiction over the decree at the end of the term is exhausted, except, perhaps, in cases where it is shown that a mistake, accident, or surprise, or negligence of counsel occurred by which a decision on the merits was prevented." None of these grounds were alleged, nor do they appear to have existed. *Freem. Judgm.* § 100, and authorities there cited; *Shuford v. Cain*, 1 Abb. (U. S.) 302.

As to just what the court meant by the closing words of the order cited and relied upon by counsel, we are not clear, except that they do not detract from the proposition that the judgment was a final judgment of the court. If the court meant to say that the injunction was final until the court changed it by direction of an appellate court, it effected nothing. If the court meant to keep the judgment under its control after deciding it after a hearing on its merits, it plainly exceeded its power, and the closing clause should not be regarded on appeal. In *Freeman on Judgments*, the learned author, commenting upon the authorities upon this subject, says: "The interests of society demand

that there should be a termination to each controversy." Section 96. Courts have no power, after fully deliberating upon causes and ascertaining and settling the rights of parties, to add clauses in their judgment authorizing the losing party to apply at a subsequent term to have the judgment against him set aside. The law does not permit any judicial tribunal to exercise a revisory power over its own adjudications after they have, in contemplation of law, passed out of the breast of the judge. *Bank v. Moss*, 6 How. 31. "If a vacillating, irresolute judge were allowed to thus keep causes ever within his power to determine and redetermine term after term, . . . litigation might become more intolerable than the wrongs it intends to redress." *Freem. Judgm.* § 96. The rule laid down in *Hill v. City of St. Louis*, 20 Mo. 584, (and we hold it a safe one.) is, "Leave granted in one term to set aside the judgment at the next term is void;" and this appears to be the construction in effect claimed by the respondent: that the injunction was decreed to be, after a final hearing, perpetual, but that the closing clause, "or until the further order of this court," is to be construed as a license to the losing party to ask the court at some future day, under more favorable circumstances, again to pass upon the question.

It will not be denied that the judgment making the injunction perpetual in this case is certainly a final judgment, in the ordinary form, if the concluding clause is omitted, and that it was founded upon proceedings ordinarily had in such cases. If, then, it was proper for the court to have added it in this case, and if it is proper for this court to give to it the effect claimed by respondent, then it would follow that a district court could, if so disposed, keep any and all judgments within its control by adding the words here found at the end of its judgment. If the clause in this case renders the judgment interlocutory, and not subject to appeal, but only to be set aside or modified by the court that entered it, the same formula attached to the judgment from which the appeal is taken, or to any other judgment, would necessarily affect it in a similar manner. The rule was announced in the case of *Baldwin v. Kramer*, 2 Cal. 582, "that, after the expiration of a term of the district court, no power remains in it to set aside a judgment or grant a new trial." And the learned judge adds: "A different doctrine would lead to great uncertainty, and possibly to gross abuse. There must be a time when the rights of the parties are to be considered determined, and for litigation to cease." And for this purpose the law has wisely fixed the rule here indicated. Applying the rules before stated to this case, we are of opinion, as already indicated, that they effectually dispose of the same. It therefore does not appear necessary to examine the record of errors, either of law or of fact, committed on the trial of the cause. The order vacating and dissolving the injunction must be set aside.

TWEED, J., concurs.

# FLEURY v. JACKSON et al.<sup>1</sup>

(*Supreme Court of Arizona*. Jan. Term, 1877.)

## NOTICE OF APPEAL—NEW TRIAL.

1. Appeal from a judgment cannot be entertained where the notice of appeal was not filed for more than a year.

2. Appeal from an order denying a new trial cannot be entertained where the order is not brought up in the record, as provided by Comp. Laws Ariz. §§ 344, 345, 348.

Appeal from district court, Yavapai county.

*Murat Masterson and Farley & Pomroy*, for appellant. *John A. Rush*, for respondents.

FRENCH, C. J. The appeal from the judgment in this case cannot be entertained, for the reason that the notice of appeal, the first step towards perfecting an appeal, was not filed until more than one year had elapsed after the rendition of the judgment appealed from. The appeal from the order denying a new trial cannot be sustained, because the order from which the appeal is taken, is not brought before us in the record. The order appealed from should form the basis of the transcript on appeal. Comp. Laws, p. 437, §§ 344, 345, 348. But, if the order appealed from were in the record, it would be of no avail in this case. It fully appears from the record and the arguments in this case that there was a defect in the testimony; that plaintiff, who appears to have had a good cause of action, continuously failed, both on the trial and on his motion for a new trial, to make his case. On the trial failing for defects of testimony, and on his motion for a new trial utterly failing to make any legal showing why a new trial should be granted, the judgment and order must be affirmed, and it has been so ordered.

(20 Or. 257)

## FOSS v. NEWBURY.

(*Supreme Court of Oregon*. Jan. 6, 1891.)

VENDOR AND VENDEE — STATUTE OF FRAUDS—  
FRAUD OF VENDOR—DAMAGES—SET-OFF.

1. A contract to grant or convey an easement in order to be enforceable must be evidenced by a writing executed according to the statute of frauds.

2. Where the sale of real estate is induced by the fraud of the vendor, although such fraudulent representations may be in reference to a matter within the statute of frauds, the vendor will be liable for damages to his vendee.

3. In a suit to enforce the payment of a note and mortgage given for the purchase price of land, the defendant may recoup the damages resulting to him from plaintiff's fraud.

4. A written agreement can be relieved against on account of fraud.

(*Syllabus by the Court.*)

This is a suit to foreclose a mortgage on certain real estate in Clatsop county, given by defendants to plaintiff. The answer admits the execution of the mortgage, but, as a defense thereto, alleges that

<sup>1</sup>This case, filed January term, 1877, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

it was given to secure a portion of the purchase price of the real estate described therein; that this land was valuable only on account of the growing timber thereon for logging and manufacturing purposes, and situate about one-quarter of a mile back from the John Day river, and the only ingress and egress from the land, and the only way logs and timber cut therefrom can be removed to market, is over and across a tract of land lying between it and the John Day river belonging to one E. C. Ronell; that at the time defendant purchased this land of plaintiff, for the purpose of cheating and defrauding him, the plaintiff falsely and fraudulently represented that he owned in his own right two certain logging roads, and the right of way thereon, leading from the land purchased over and across Ronell's land to the river over which logs and timber could be transported, and agreed for and as part of the consideration for the purchase of the land described in the mortgage that he would grant and give and secure the proper conveyances therefor to defendant; that defendant, relying upon such false and fraudulent representations, and believing the same to be true, purchased the land described in the mortgage for the sum of \$1,700, paying in cash \$1,000, and executing the note and mortgage for the balance; that he has conveyed the land purchased, but has neglected and refused to secure to defendant the rights of way across Ronell's land, or either of them, or any right of way, or to procure for defendant the proper, or any, conveyance for said right of way, though frequently demanded; that defendant, relying upon said representations, entered upon the land purchased of plaintiff, and fitted up and maintained a logging camp and logging outfit, at great expense, and cut a large amount of timber and logs thereon, and was, in September, 1887, proceeding on said rights of way to remove said logs and timber to market, when he was prohibited from so doing by Ronell, this being the first time he was informed that plaintiff was not the owner of said rights of way, and he was compelled to and did pay Ronell \$200 for the privilege of moving and hauling the timber cut over and across the rights of way; that, prior to paying said sum of \$200 to Ronell, he notified plaintiff, and demanded the rights of way, and plaintiff then informed him that he was not the owner thereof, and was unable to execute or secure the proper conveyances therefor, but then and there agreed to repay him the said sum of \$200, but has failed and refused so to do; that, at the time defendant purchased the land, he relied solely upon the false and fraudulent representations of plaintiff, and was not aware of their untruthfulness, and that he informed plaintiff, and plaintiff well knew, that his object in purchasing said land was to operate and maintain a logging camp thereon; that, without said rights of way or logging roads, the premises purchased by him would be of no greater value at the time of his purchase than \$1,000, and, but for said rights of way or logging roads, he would not have given

more than \$1,000 for said land. The answer alleges a tender of the amount due, less the sum of \$200 paid Ronell for the right to cross his land. A trial in the court below resulted in a decree in favor of defendant, from which this appeal is taken.

*W. W. Thayer*, for appellant. *C. W. Fulton*, for respondent.

BEAN, J., (*after stating the facts as above.*) It is contended on behalf of plaintiff that the answer of defendant only alleges a parol agreement to convey to him the logging roads across Ronell's land, made contemporaneous with the agreement for the sale of the premises described in the mortgage, and that such an agreement is within the provisions of the statute of frauds, and void; that an easement, being an interest in land, can only be acquired by a grant, and ordinarily by deed, or what is deemed to be equivalent thereto, is not denied. Washb. Easem. 23. A parol license merely is not sufficient to create an easement. It must therefore follow that, since it is considered an interest in land, a contract to convey or grant an easement in order to be enforceable must be evidenced by a writing. A parol contract to convey an interest in land is not in any sense an illegal contract, but the statute simply provides that, when such a contract is sought to be enforced, oral evidence shall not be received, but it shall be proven by a writing executed according to the provisions of the statute. While the answer is inartificially drawn, and contains much matter that could profitably have been omitted, we think it sufficiently alleges fraud in the inception of the note and mortgage mentioned in the complaint. The defendant is not seeking to enforce a parol contract to convey the logging roads, nor to recover damages for the violation of any such contract. The damages claimed are based upon the fraudulent representations and deceit of plaintiff, in representing, for the purpose of cheating and defrauding defendant, that, if he would purchase the land plaintiff was endeavoring to sell him, he would receive a right to use the road over Ronell's land in marketing his logs; that, by means of such representations, defendant was induced to purchase the land at a much higher figure than he otherwise would have done. The land was chiefly valuable for timber, but it could only be taken to market by crossing Ronell's land, and therefore these logging roads became a material factor to be considered by defendant in making such purchase. This the plaintiff knew, and, to induce him to make the purchase, made the false representations and promises upon which defendant relied, and, having done so, he cannot escape liability for his fraud by invoking the statute of frauds. It is not the kind or character of the property of which the representations are made which gives the purchaser a right of action against the vendor for practicing the fraud upon the vendee in effecting a sale. It is the fraud and deceit of the vendor, and not the subject-matter of his representations, which is the foundation of the action. The statute of frauds was enacted

to prevent frauds, and it cannot be used as a cover for fraud.

If the sale of the land by plaintiff to defendant was induced by fraud and deceit, and the statute could be interposed to prevent its being established by parol, the effect of the statute would be to enable the plaintiff to carry into effect his fraud, instead of preventing him from so doing. The statute was never designed for such a purpose. It is said to be well settled that when a contract is consummated by which an injury is done, whatever fraudulent representations may have been employed by a party to the contract as a means of inducing it to be made, cannot be excluded by invoking the aid of the statute. *Cook v. Churchman*, (Ind.) 3 N. E. Rep. 759; *Day v. Lown*, 51 Iowa, 364, 1 N. W. Rep. 786. The *gravamen* of the charge in the answer is that defendant has been deceived by means of the fraud of plaintiff to his hurt. It is true, if plaintiff had only made a parol agreement to secure or convey these logging roads to defendant, and had refused to comply with it, however great the moral wrong may have been, the law could afford him no relief, because of the statute of frauds; but where, as in this case, the representations are made concerning some collateral matter not ordinarily to be included in the deed, but so materially connected with the subject-matter of the contract as to be one of the controlling influences operating to induce the vendee to make the contract, and without which he would not have made it, although such representations may be in reference to a matter within the statute of frauds, the vendor will be liable for damages to his vendee.

This brings us to the evidence. Plaintiff being the owner of a tract of land, and an interest in a logging outfit, desiring to sell the same to defendant, in company with him, went to examine the property. Defendant carefully examined the land, as well as the logging outfit, plaintiff showing him the boundary lines of the land. In making this examination, defendant noticed that in order to get supplies in for his logging camps, and haul his logs to market, if he made the purchase, it would be necessary to use the roads across Ronell's land, from the land of plaintiff to the John Day river, and he spoke to plaintiff about the matter, saying that, as he desired to use the land, if he bought it for logging purposes, he could not make the purchase until he found out about the crossing, and would have to go and see Ronell. The plaintiff said he need not pay any attention to the crossing, for he had sold the land to Ronell a few years before, and had reserved a right of way across it for all the timber that might come off of the land he was offering to sell, and that he (defendant) need not go to see Ronell, as it was all right, and, if there was any crossing to pay, he would pay it. The plaintiff knew that defendant was purchasing this land for the timber growing thereon, and that he intended immediately to commence logging, and that these logging roads or ways across Ronell's land were almost indispensably necessary to the use of the

land for that purpose. There was no other practicable way by which the logs could be transported to market. Plaintiff did not own these logging roads, nor had he made any reservations in his deed to Ronell for the land sold him, and he well knew he had no right to make any statement or representations to defendant about the matter. There can be no other reasonable inference drawn from these representations by plaintiff, except an intent on his part to overreach the defendant, and induce him to make a contract he otherwise would not have made. Such must have been his intention when he persuaded the defendant not to go and see Ronell about the roads. He knew that if defendant should see Ronell, he would ascertain the true facts, and of course would not purchase his land at the price he was asking, and to prevent this inquiry the representations were made. The statement that he had reserved a right of way across this land when he sold to Ronell was in effect saying that he was the owner of it, and the representation that the matter was all right, when defendant hesitated to close the contract, was sufficient to induce him to believe that whatever conveyances were necessary would be secured or made by plaintiff. Defendant relied on plaintiff's representations, and did not go to see Ronell, but purchased the land and logging outfit, paying \$1,000 in cash, and giving the note and mortgage in suit for the balance. After defendant had expended considerable money in cutting logs and getting them ready for market, he was notified by Ronell that he could not haul them across his land without paying for so doing, and was compelled to pay \$200 for the right. These are briefly the facts in this case, as we gather them from a careful examination of the evidence. It is true plaintiff denies in his testimony that he made the representations as claimed by defendant, and, as we think, has been established by a preponderance of the evidence; but he does admit that he told defendant that he was to have the right of way to take his timber across Ronell's land, and that he sold to defendant with the same understanding. The circumstances surrounding the transaction, the object and purposes for which defendant was buying the land, are strongly corroborative of defendant's theory of this case; and this is also strengthened by the fact that when plaintiff was informed by defendant that Ronell would not allow him to cross his land, without paying for the right, and requested to make his representations good, he went to Ronell and endeavored to persuade him to allow the defendant to cross the land, and, when Ronell refused, said, if there was anything to pay for the right of crossing, he (plaintiff) would have it to pay. The fraud consists in the fact that plaintiff, to induce defendant to purchase his land, represented that he owned these logging roads, and that, if defendant would make the purchase, he should have the use of them in getting his timber to market, when he knew such representations were false, and made them, we think, evidently for the purpose of cheating defendant. If



defendant had supposed he was not going to secure the right to use these logging roads in marketing the timber cut from this land, he would not have made the purchase; and this plaintiff evidently knew. He made the false representations and promises in order to consummate the sale, and defendant having relied upon them and acted to his injury, plaintiff should account to him for any damages he may have sustained. He received the benefit of his fraud in the enhanced price of the land, and it would be unjust to permit him to retain it, under the facts in this case. This being a suit to enforce the payment of the note and mortgage given for the balance due on the land, defendant may recoup the damages resulting to him from plaintiff's fraud. *Whitney v. Allaire*, 4 Denio, 554; *Chandler v. Childs*, 3 N. W. Rep. 297. The court below seems to have adopted, as the measure of damages, the sum which defendant was obliged to pay Ronell for the right to cross his land. There is no suggestion but what this payment was made in good faith, and is the reasonable value of such right. We think the rule adopted by the court below was as favorable to plaintiff as he could ask. *Whitney v. Allaire*, 1 N. Y. 305.

There is yet one question remaining. From the evidence it appears that four or five days before the deed from plaintiff to defendant was executed, the parties entered into a written contract for the sale and purchase of this land, in which no mention is made of the use of the roads across Ronell's land, and it is argued that reducing the agreement to writing precludes recurrence to all representations. It is true, as said by Sugden on Vendors, 129, reducing an agreement to writing is, in most cases, an argument against fraud; but it is only an argument, and very far from a conclusive one. That a written agreement can be relieved against on account of fraud is a doctrine too well settled to be now questioned. *Boyce v. Grundy*, 3 Pet. 210. There is no attempt made here to vary the written agreement. The relief is sought upon the ground that, by the false representations of plaintiff, defendant was entrapped into making a contract he otherwise would not have made. This is not denying that the agreement or deed in the record was entered into, but insisting that defendant is entitled to recoup the damages resulting to him from the misrepresentations of plaintiff. Decree of court below affirmed.

(20 Or. 352)

#### BEEKMAN v. HAMLIN.

(Supreme Court of Oregon. Jan. 21, 1891.)

#### JUDGMENT—PRESUMPTION OF PAYMENT—PLEADING.

1. A judgment upon which no execution has been issued for 20 years, in the absence of explanatory facts or evidence, is presumed to be paid. The burden of proof is on the judgment creditor.

2. To avoid objection by demurrer, the plaintiff must allege in his complaint the facts and circumstances on which he relies to rebut such presumption.

Affirming 24 Pac. Rep. 195.  
(Syllabus by the Court.)

On motion for rehearing. See 24 Pac. Rep. 195.

LORD, J. A re-examination has satisfied us that the case was properly disposed of in the first instance. We are only led to express ourselves further in consequence of a misapprehension that it was intended in the opinion to limit the rebutting evidence to some positive act of unequivocal recognition on the part of the defendant within the period of 20 years. The rule of common law that, after 20 years, payment of a bond or judgment will be presumed in the absence of evidence explaining the delay, although there is no statutory bar, is founded on the "rational ground that a person naturally desires to possess and enjoy his own, and that an unexplained neglect to enforce an alleged right for a long period casts suspicion upon the existence of the right itself." *Bean v. Tonnele*, 94 N. Y. 386. The effect of the presumption of payment, arising from lapse of time, is to change the burden of proof from the debtor to the creditor. Within 20 years, the law presumes that the debt has remained unpaid, and the burden is on the debtor to prove payment, but after 20 years, "the creditor is bound to show by something more than his bond that the debt has not been paid; and this he may do, because the presumption raises only a *prima facie* case against him." *Reed v. Reed*, 46 Pa. St. 242. But the *onus* of proof upon the creditor is not to establish a new contract or promise, as when a debt is barred by the statute of limitations, but to show by competent evidence that the debt or judgment has not been paid. The distinction which the law raises between the presumption of payment after the lapse of 20 years, and the bar interposed by the statute of limitations, is in its nature essentially different. "The bar is removed," said STRONG, J., "by nothing less than a new promise to pay, or an acknowledgment consistent with such promise. The presumption is rebutted, or, to speak more accurately, does not arise, where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor. The statutory bar is not removed without a new promise, or its equivalent, because suit on the old contract is prohibited, and the debtor can only be liable therefor on the contract expressly made by the new promise, or implied from an acknowledgment of continued indebtedness, the old debt being the consideration for the new engagement." *Reed v. Reed*, supra; *Bentley's Appeal*, 99 Pa. St. 504. *Prima facie* the presumption annuls the judgment, but it can have no application, "if it can be made to appear that the plaintiff has used diligence to enforce the judgment, or that the defendant has paid interest or otherwise acknowledged the debt." *Burt v. Casey*, 10 Ga. 179. CLARK, J., said that the presumption may be rebutted by circumstances, by evidence tending to show non-payment of the debt, or sufficiently accounting for the delay of the creditor, or showing a continued course of legal pro-

ceedings conducted *bona fide* to compel payment. *Van Loon v. Smith*, 103 Pa. St. 242. And *KENNEDY, J.*, said: "Being merely a presumption of the defendant's having made payment, it may be rebutted by proof of intervening circumstances, such as a demand of payment, payment of a part by the obligor, his admission that the debt is still due, or his inability to pay it within the twenty years." *Tilghman v. Fisher*, 9 Watts, 442. And, again, in *Gregory v. Com.*, 121 Pa. St. 622, 15 Atl. Rep. 452, it is said: "It is not required that the same precision and particularity of proof shall, in all respects, be observed, as has been required to remove the bar of the statute of limitations, but, as the presumption of payment after twenty years is a strong one, the evidence to rebut it must be satisfactory and convincing; especially is this so when the suit is not brought until after the defendant's death." In *Walker v. Robinson*, 136 Mass. 282, the court say: "We are of the opinion that any legal evidence having a tendency to show that the judgment has been paid or satisfied is competent, and that, if the evidence furnished is such as to produce conviction that the judgment has not in fact been paid or satisfied, it is sufficient to rebut the presumption." *Knapp v. Knapp*, 134 Mass. 356; *Brewer v. Thomey*, 28 Me. 81; *Denny v. Eddy*, 22 Pick. 533. All the cases hold that the presumption is rebuttable, and that the plaintiff may do this by showing what diligence he has used to enforce his judgment, or admissions of the defendant, or other circumstances, such as insolvency, or that the debtor was beyond the sea, or other evidence which satisfactorily accounts for his delay. Or, as Mr. Greenleaf says: "But in all these cases the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstances tending to satisfy the jury that the debt is still due." 1 Greenl. Ev. § 39; *Freem. Judgm.* § 464; 2 Whart. Ev. § 1364; 13 Amer. & Eng. Enc. Law, 673. But a presumption of payment from lapse of time may be raised by demurrer when shown by the facts stated in the complaint, as was done. *Olden v. Hubbard*, 34 N. J. Eq. 85. And, to repel such presumption, any existing circumstances which would have that effect should be alleged. In *Solomon's Heirs v. Solomon's Adm'r*, 81 Ala. 507, 1 South. Rep. 82, it was held that the presumption of payment, arising from the lapse of time, may be taken by demurrer, when shown by the facts stated, but that it is a matter of defense, and must be claimed, the court saying: "While the defense of staleness may be made by demurrer when the facts out of which it springs appear on the face of the bill. (*Story, Eq. Pl.* §§ 494, 503, 751,) still it is defensive, and must be claimed." *Maury v. Mason*, 8 Port. (Ala.) 211; *Solomon v. Solomon*, 83 Ala. 395, 3 South. Rep. 679. Taking the objection by demurrer is in analogy to the rule applied to the statute of limitations, as indicated in *Olden v. Hubbard*, supra; so that, to avoid the presumption and render the complaint invulnerable to a demurrer, the plaintiff is required to allege in his complaint the

facts and circumstances on which he relies to rebut such presumption. We see no reason to change the original direction made in this case.

(1 Wash. St. 475)

TERRY *et al.* v. CLOTHIER *et al.*

(Supreme Court of Washington. Dec. 19, 1890.)

SALE OF DECEDENT'S LAND—SETTING ASIDE—PARTIES.

Where land belonging to the estate of a decedent has been sold under an order of court, persons who are willing and desire to make an advance bid on such land have no such interest in the estate as will entitle them to have the sale set aside on the ground of fraud.

Appeal from superior court, Skagit county; J. R. WINN, Judge.

This suit was brought by the widow and heirs of Jesse B. Ball, joined by John F. Terry and J. B. Alexander, to set aside a sale of the decedent's land as having been fraudulently procured and confirmed. Thereafter the widow procured the suit to be dismissed as to herself and the heirs, whose guardian she was, and Terry and Alexander filed an amended complaint, alleging that they were willing to pay an advance of 10 per cent. on the price for which the land was sold, and that the defendants, the administrators of Ball and the probate judge, had conspired to defraud the infant heirs of said Ball, and they prayed that the sale be set aside, and that they be given an opportunity to bid on the land. The court sustained a demurrer to their complaint, and they appeal.

*Sinclair, Waugh & Payne* and *Strudwick, Peters & Collins*, for appellants. *Ronald & Piles*, for appellees.

DUNBAR, J. It appears from the complaint in this case that the plaintiffs were not parties interested in the estate. No one else has a right to object to a confirmation of sale. This being true, the complaint did not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained. Other questions were raised in the case, but, as the judgment of this court sustaining the demurrer on this point disposes of the case, it is not necessary to enter into their discussion. The judgment of the court below is affirmed, with costs.

ANDERS, C. J., and HOYT, STILES, and SCOTT, J.J., concur.

(87 Cal. 514)

LATHAM v. CITY OF LOS ANGELES *et al.*  
(No. 13,612.)

(Supreme Court of California. Jan. 23, 1891.)

DEDICATION—EVIDENCE—EXCHANGE OF LANDS.

1. Land within the limits of the pueblo of Los Angeles, was granted by the *ayuntamiento* to a private person, who was put in possession by the alcalde. Before the grant, the land was vacant, and was used by adjoining lot-owners in passing to and fro, and sometimes for public celebrations and amusements. *Held*, that this was not sufficient evidence of a dedication to the public to overcome the presumption that the authorities acted within their powers, and conveyed a good title by the grant.

2. That a subsequent owner petitioned the city council for an "exchange or indemnification

for certain lands belonging to her, and now occupied by the public," (being the lot in question,) and that the council passed a resolution directing a concession of other land to be made to her, in pursuance of which a deed was drawn up and signed by the mayor, is not sufficient evidence that the exchange was actually consummated, when there was no proof that the deed was delivered, and it appeared that the city subsequently granted the lot to another.

Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

*Readon & Daly and C. McFarland*, for appellant. *Chapman & Hendrick and Johnston & Borden*, for respondent.

DE HAVEN, J. This is an action by the plaintiff, Latham, against the defendants the city of Los Angeles and one L. M. Bigelow, to quiet title to certain tracts of land in the city of Los Angeles, but by stipulation between the plaintiff and the said city, filed in the court below, the only portion of the property described in the complaint, now in litigation, is the lot known as the "Engine-House Lot." There was also a stipulation entered into between the plaintiff and the defendant Bigelow by which it was agreed, in addition to other matters, that the plaintiff and said Bigelow were "equally interested and held in equal and undivided parts the lot known as the 'Engine-House Lot.'" The judgment of the court below was to the effect that the plaintiff and said defendant Bigelow are the owners, in equal shares, of said engine-house lot, and that the city of Los Angeles has no right in or title to the same. The defendant city moved for a new trial, which was denied, and from the judgment and the order denying its motion for a new trial, appeals. The appeal is from the whole judgment, and the defendant Bigelow has not been served with notice of appeal. The findings support the judgment. The plaintiff derails title through a grant, or order, made by the *ayuntamiento* of the pueblo of Los Angeles to one Leandry, and the possession given him by the alcalde, in pursuance of such order.

That the pueblo had authority to make the grant of the land in question to said Leandry, if it was a house lot, is not questioned; but it is claimed—as we understand the contention of appellant—that the grant is void for uncertainty, and for the further reason that prior to the alleged grant, which was in 1836, the land in question had become a public plaza or street, and for that reason could not be granted for private purposes. We think, however, that the petition and the orders made by the authorities of the pueblo thereon, and the report of the alcalde describing the land, of which he had given Leandry possession by order of the *ayuntamiento*, when read together, as they must be, are sufficiently definite, and that the calls therein embrace the land in controversy was shown upon the trial by uncontradicted extrinsic evidence. Nor is the evidence sufficient to show that at the date of this grant the lot in controversy was a public plaza, and therefore beyond the authority of the pueblo to grant. It does appear that it was vacant, and that

it was used by owners of adjacent lots in going to and from such lots, but it is not shown that such lots were granted, with reference to this lot, as a plaza, or that it ever had been in any manner set apart or recognized by the authorities as a plaza. It is also shown that upon certain days the public would use it as a place for celebrating, and for other public amusements. But all of this only shows that, being vacant and unoccupied, it was used as any other vacant land might have been, and it is not sufficient to overthrow the presumption that the authorities of the pueblo of Los Angeles acted within the limits of official authority in making to Leandry the grant or concession in question. That such presumption attaches to the grant we are considering is the effect of the decisions of this court in *Cohas v. Raisin*, 3 Cal. 453; *Payne v. Treadwell*, 16 Cal. 220.

We cannot say that the evidence in this case is such that the trial court must necessarily have found that since said grant Leandry, or any of those who have succeeded to his title, dedicated the lot in question to the public as a plaza, and such being the state of the proof we do not feel authorized to set aside its finding upon this point. When it is sought to show that an owner has, without a conveyance, divested himself of title to land in favor of the public, by way of gift or abandonment, the proof ought to be such as to clearly show that such was the owner's intent. In *Grube v. Nichols*, 36 Ill. 92, it is said: "The intention to dedicate is a vital controlling element in such a grant. A dedication is not an act of omission to assert a right, but it is the affirmative act of the mind of the donor. It arises upon the action and not upon the passive condition of the mind of the owner. The mere non-assertion of a right does not establish a dedication, unless the circumstances establish the purpose or intention to donate the use to the public." There is no evidence in the record of any express declaration or admission by Leandry, or any successor in interest, showing that such dedication was made.

The petition of Mrs. O'Campo praying for "an exchange or indemnification for certain lands belonging to her and now occupied by the public, being the lot at the entrance of Negro alley, into the public square," supposing it to refer to the land in controversy, is not an admission that the same had been dedicated to the public. It is rather an assertion of her right to it, and willingness to either accept pay for it or an exchange of other lands; and the action of the city council directing a concession to be made to her of other land, in accordance with her petition, is not consistent with the claim now made that the lot in controversy was then the property of the city. It would appear from the evidence that in accordance with this resolution of the city council, a deed was drawn up and signed by the mayor, conveying to Mrs. O'Campo a certain lot in the city of Los Angeles. But whether this was actually delivered to her does not so clearly appear. It was, however, delivered to one Olvera, supposed by the mayor to

be her agent. But the deed itself was not produced, nor any witness who had ever seen it in the possession of Mrs. O'Campo, and it was admitted that subsequent thereto the city had conveyed the same lot to another. We cannot say from this evidence that the exchange contemplated by the petition of Mrs. O'Campo and the city council was ever consummated. And in this connection it may be added that the testimony shows that the first public act by which the city attempted to assert dominion over the lot in controversy was by building the engine-house, which was in 1884. The conclusion which we have thus reached upon the merits makes it unnecessary to determine whether the failure to make the defendant Bigelow a party to this appeal entitles the respondent to a judgment dismissing the appeal, and upon this point we express no opinion. Judgment and order affirmed.

We concur: HARRISON, J.; PATERSON, J.  
(87 Cal. 453)

WILHOIT *et al.* v. CUNNINGHAM *et al.* (No. 13,495.)

(*Supreme Court of California.* Jan. 6, 1891.)

INJUNCTION—PLEADING—COMPLAINT—DEMURRER.

1. The complaint alleged that defendant A. levied attachments on B.'s land; that B. was adjudged an insolvent, and A. proved her claims against him; that thereafter, by consent, the insolvency proceedings were dismissed, and B. executed to plaintiffs an assignment for the benefit of his creditors of all his property, including said land; that plaintiffs accepted the trust; that said levies were dissolved; that A. obtained judgments in said attachment suits, and executions were issued, and the sheriff had levied on the land, and, unless restrained by injunction, would sell it, and prevent plaintiffs executing their trust. *Held*, that the complaint was not demurrable as not stating a cause of action, as, even if the debtor had an attachable interest by reason of his right to any residue, the complaint alleged a threatened sale not of such interest, but of the land; and, under Civil Code Cal. § 3457, where an assignment for benefit of creditors is made, the creditors must avail themselves of the assets without preference, or not at all.

2. Ambiguity and uncertainty being made separate grounds of demurrer by Code Civil Proc. Cal. § 430, subd. 7, a demurrer on the ground that the complaint is ambiguous "and" uncertain cannot be sustained, where the complaint is defective in only one of said respects.

3. Though the assignment to plaintiffs would be void if the affidavit required by Civil Code Cal. § 3462, was not attached to and filed with the inventory, and plaintiffs would be without legal capacity to sue, still the complaint is not demurrable by reason of its failure to allege such attachment and filing, as, under Code Civil Proc. Cal. § 483, the omission of the complaint to show plaintiffs' legal capacity to sue must be taken advantage of by answer.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county.

J. C. Campbell, for appellants. Carter & Smith, for respondents.

GIBSON, C. This is an appeal by the plaintiffs from a final judgment entered against them upon defendants' demurrer to their complaint, praying that defendants be enjoined from selling the realty in controversy under certain writs of execution. It appears by the complaint that Ella Averill, on the 6th day of October,

1885, commenced two separate actions, in the superior court of San Joaquin county, against M. E. Bryant to recover of him the amounts due upon two promissory notes, and, on the same day, caused a writ of attachment to issue in each action, and be levied upon certain real estate then belonging to Bryant; that thereafter, on the 31st day of the same month, Bryant was by and in the same court adjudged an insolvent debtor, against whom the said creditor Averill, on the 27th day of the same month, proved her several claims, including the two promissory notes above mentioned; that on or about the 30th day of January, 1886, by the consent of defendant Averill, as such creditor, and all the other creditors, the insolvency proceedings were by an order of the court duly dismissed; that, on the 16th day of February, 1886, Bryant, being still insolvent, at the request of defendant Averill and his other creditors, executed and delivered to plaintiffs a deed of assignment of all his property not exempt from execution, for the benefit of his creditors, pursuant to division 4, pt. 2, tit. 3, of the Civil Code, which deed embraced the real estate levied upon by the writs of attachment above mentioned; that the plaintiffs, as such assignees, accepted the trust, and in due time qualified, as required by law, and entered upon, and still continue in, the discharge of the duties of the said trust; that the said deed and a proper inventory were duly filed for record; that defendant Averill assented to the execution and delivery of the deed of assignment to the plaintiffs, and also to the acceptance by plaintiffs of the trust thus created; that, since the said trust was created, the plaintiffs have been the owners, and in the possession of the real estate in controversy, in trust for the benefit of all of the creditors of Bryant, including the defendant Averill; that, prior to the execution of said deed, the levies under the writs of attachment above mentioned were dissolved; that on the 21st day of September, 1887, in the superior court aforesaid, the defendant Averill obtained a judgment in her favor in each of the suits upon the promissory notes, and caused a writ of execution, regular in form, to issue in each case, and to be placed in the hands of her co-defendant Cunningham, as sheriff of San Joaquin county, for service; that the said sheriff has, by virtue of said writs of execution, levied upon and threatens to, and, unless restrained by injunction, will, sell the real estate in question, and thereby cast a cloud upon the plaintiffs' title thereto, which will prevent them from executing their trust expeditiously, and with advantage to the creditors of Bryant; that the said execution levies were made for the express purpose of hindering the plaintiffs from executing their trust. The grounds of the demurrer are—*First*, insufficiency of the facts stated to constitute a cause of action; *second*, ambiguity and uncertainty of the facts in certain specified particulars; *third*, incapacity of the plaintiffs to sue, because it does not appear that the inventory was verified, as required by section 3462 of the Civil Code.

1. In support of the first ground of demurrer, the respondents contend that the

assignor still retains an equitable interest in the land in controversy, which was included in the deed of assignment, and that it is subject to sale upon execution. But this argument does not apply to the facts. The allegation is, that the defendant Cunningham, as sheriff, has levied upon and threatens to sell, not only the assignor's equitable interest in the residuum of the property assigned, but the whole of the property itself, thereby including the assignees' legal title thereto, as well as the equitable interest of the assignor in the residuum, if there should be any. The deed of assignment is controlled by the provisions of the Civil Code relative to trusts. Civil Code, § 3449. Those provisions, so far as applicable here, are as follows: "Sec. 863. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. Sec. 864. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust." The trust created by the deed of assignment here relates to real property, and was expressly created for the benefit of the creditors of the assignor. There was no reservation in it of any estate or interest to the assignor, except that authorized by section 864, *supra*, wherein the assignor provides that the residuum left after his creditors are satisfied shall be returned to him, his executors, administrators, or assigns. No other estate or interest could be reserved in a trust of this character. Subdivision 4, § 3457, of the Civil Code. The effect of the deed, then, was to divest the assignor of his entire interest and estate in the property assigned, subject to the right to a reconveyance of any residue remaining undisposed of after the creditors are satisfied, or payment of the overplus of the proceeds of the sales of the property. This is in accordance with the weight of authority in other jurisdictions, as shown in *Burrill on Assignments*, (5th Ed.) § 298. Under our law as declared in the Civil Code, an insolvent may, in good faith, make an assignment for the benefit of his creditors, with or without the consent of the latter, and, when such an assignment is made, the creditors must either avail themselves of the assets without preference, (section 3457,) or not at all. The object of the law is to enable a debtor, through his assignee, to dispose of his property for the benefit of his creditors. This object would be defeated, if one of the creditors could ignore the assignment, and sell the property to satisfy his particular claim. Such a sale would, if it could be made, deprive the assignees of the property, or, if it would not, still the sale would cloud the title of the assignees, because, in any action they might have to prosecute for the removal of the cloud so cast, the evidence of the pur-

chaser's title would show that such latter title was derived from the assignor, to overcome which, the assignees would have to prove that the judgments were obtained in actions commenced before the deed of assignment was made upon debts covered and provided for by the deed of assignment. *Pixley v. Huggins*, 15 Cal. 127; *Porter v. Pico*, 55 Cal. 165; *Roth v. Insley*, (Cal.) 24 Pac. Rep. 838. Such a cloud, it is evident, would prevent them from disposing of the property to the advantage of the creditors in the performance of their trust. The respondents further contend that the threatened sales, if made, would not cast a cloud upon the assignees' title to the property, inasmuch as the judgments, upon which the executions were issued, were obtained subsequent to the assignment, and therefore all that could pass under the sales would be the equitable interest of the assignor in the residuum of the property assigned. But the facts here show that the actions, in which she obtained her several judgments, were begun upon subsisting credits before the assignment was made, and that, as such a creditor, she assented to the assignment. Therefore she is one of the creditors for whose benefit the assignment was made, and as such must take her proportionate share with the other creditors. Besides, as already shown, the execution levies were not restricted to the equitable interest of the assignor in the residuum, but were made upon the whole property. It is further claimed by the respondents that as the complaint shows that defendant Averill acquired a lien by attachment in each of the actions in which she obtained her judgments, above mentioned, before the assignment was made, and as it does not appear that those attachments were dissolved, the liens so acquired became merged in the judgments, and, in consequence, she is entitled to sell the realty in question to satisfy such judgments. But it is distinctly alleged that those attachments were dissolved, but the date is not stated. If, however, the absence of the date renders it insufficient, it appears from the allegations respecting the insolvency proceedings which preceded the assignment, and which are pleaded as matters of inducement, that the attachments were levied within one month prior to Bryant's filing his petition in insolvency. Since this is so, the attachments became dissolved by operation of law, (insolvent act of 1890, § 17,) and that which is implied by law need not be pleaded, (*Kraner v. Halsey*, 82 Cal. 209, 22 Pac. Rep. 1137.)

2. The second ground of demurrer is in the conjunctive; that is, that the complaint is ambiguous and uncertain. These are made separate grounds of demurrer by subdivision 7 of section 430 of the Code of Civil Procedure. And, in the case of *Kraner v. Halsey*, *supra*, it was held that, where such separate grounds of demurrer are conjoined, the complaint must be defective on each, or the demurrer must be overruled. There the complaint was held to be neither ambiguous nor unintelligible, but uncertain in several particulars, and the demurrer upon the ground of ambiguity, unintelligibility, and uncertainty,

not sustainable. In this case, we do not think the complaint is ambiguous. There is but one respect in which it may be said to be so, and that is wherein it is stated that the defendant Averill, as a creditor, proved her claim in the insolvency proceedings several days before Bryant was adjudged an insolvent. But, as those proceedings were dismissed, this allegation is immaterial. The complaint is uncertain with regard to dates, as in *Kraner v. Halsey*, as well as in several other respects, but, as it is not both ambiguous and uncertain, it comes within the rule of that case.

3. As to the capacity of the plaintiffs to maintain this action as assignees, it is urged that, as it does not appear from the complaint, that the affidavit required by section 3462 of the Civil Code was attached to and filed with the inventory, the assignment in consequence was void, and the plaintiffs are therefore without legal capacity to sue. In the case of *District No. 110 v. Feck*, 60 Cal. 405, this court said: "The defendants demurred to the complaint. The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are, in substance, that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. *Bank v. Donnell*, 40 N. Y. 410. A demurrer on the ground that plaintiff has not the legal capacity to sue would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. *Code Civil Proc. § 433; Bank v. Donnell*, supra." See, also, *Miller v. Luco*, 80 Cal. 257, 22 Pac. Rep. 195. In the present case it appears by sufficient allegations, the defect not having been specially pointed out under the first ground of demurrer, that Bryant made a valid assignment for the benefit of his creditors, and that the plaintiffs, as assignees thereunder, accepted the trust, and duly qualified as such assignees. It therefore appears affirmatively that the plaintiffs have the legal capacity to sue. And if it be a fact that the affidavit, which seems to be essential to the validity of the assignment, (*Civil Code, §§ 3461-3463, 3465; Beardsley v. Frame*, (Cal.) 24 Pac. Rep. 721,) was omitted, then, under the rule applied in *District No. 110 v. Feck*, supra, such omission must be set up in the answer, because it does not affirmatively appear upon the face of the complaint that such affidavit was omitted. We therefore advise that the judgment be reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant defendants leave to answer within the usual time.

We concur: VANCLIEF, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant defendants leave to answer within the usual time.

SARGENT *et al.* v. CUNNINGHAM *et al.* (No. 13,496.)  
(*Supreme Court of California*. Jan. 6, 1891.)

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county. J. C. Campbell, for appellants. Carter & Smith, for respondents.

GIBSON, C. This case is in all material respects like that of *Wilhoit v. Cunningham*, ante, 675, (No. 13,495, this day decided,) and, for the reasons given in that case, we advise that the judgment herein be reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant the defendants leave to answer within the usual time.

We concur: VANCLIEF, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant the defendants leave to answer within the usual time.

(87 Cal. 182)

KELLOGG v. COCHRAN *et al.* (No. 13,731.)  
(*Supreme Court of California*. Dec. 19, 1890.)

INSANE PERSONS—COMMITMENT TO ASYLUM—APPEAL—REHEARING.

1. Pol. Code Cal. § 2217, provides that, where it appears to a judge that a person against whom complaint has been made is insane, he must order his confinement in the insane asylum. *Code Civil Proc. § 1784*, provides that if, on petition of a friend, it shall appear that a person is mentally incompetent to manage his property, the court shall appoint a guardian of his person and estate, and section 1766 provides that, on restoration of his mental capacity, it shall be so adjudged by the court, and the guardianship shall cease. *Pol. Code, § 2197*, provides that insane persons received in the asylum must, upon recovery, be discharged therefrom. By Act Cal. March 9, 1885, (*Pol. Code, p. 350*), the resident physician must discharge persons who have been improperly committed. *Held*, that the discharge of an inmate of an insane asylum, over whom no guardian had been appointed, restored him to legal capacity to sue without any further adjudication of his restoration to sanity.

2. The order of commitment of a person to an insane asylum is not conclusive that such person was insane at the time of the commitment.

#### ON REHEARING.

A rehearing will not be granted in order to consider points not made in the argument upon which the case was originally submitted.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

J. M. Damron and Chapman Bros., for appellant. Wells, Guthrie & Lee and Gottschalk & Luckel, for respondents.

VANCLIEF, C. The purpose of this action is to recover from the defendants damages for a malicious prosecution of the plaintiff as an insane person, and causing him to be unlawfully arrested and committed to the insane asylum at Stockton. A demurrer to the complaint was sustained by the court. The plaintiff declined to amend his complaint, and final judgment was thereupon rendered against him, dismissing his complaint, and for

costs, from which he appeals on the judgment roll. The grounds of demurrer are that the complaint does not state facts sufficient to constitute a cause of action, and "that it appears upon the face of the complaint that the plaintiff has not the legal capacity to sue herein." The substance of those parts of the complaint relevant to these grounds of demurrer is as follows: That on January 28, 1889, the defendants willfully, maliciously, unlawfully, and without probable cause, "caused and procured the plaintiff to be arrested and committed to the state insane asylum at Stockton, state of California, on the charge of insanity; that under and by virtue of said commitment plaintiff was unlawfully and against his will detained and imprisoned in said state insane asylum at Stockton, on said charge of insanity, for and during the period from said 28th day of January, 1889, up to and including the 20th day of February, 1889, whereupon said plaintiff was then and there given leave of absence, and afterwards, to-wit, April 13, 1889, was discharged; that plaintiff was not on said 28th of January, 1889, or ever at any other time, before or since said day, dangerously insane, or insane at all, nor was he at any of said times so far disordered in his mind as to injure health, person, or property, all of which was known by said defendants before and at the time of said arrest and commitment."

The learned counsel for respondents contend that the demurrer was properly sustained, on the ground that the plaintiff had not legal capacity to sue, for the reasons: (1) That it appears on the face of the complaint that the plaintiff had been adjudged to be insane on January 28, 1889, by the judge of a court of record, pursuant to section 2217 of the Political Code, relating to commitments to the state insane asylums; and (2) that such adjudication is conclusive upon the plaintiff not only that he was insane at the time he was so adjudged, but that he continued to be insane at the time this action was commenced, unless before that time he had been found to be of sound mind, and capable of taking care of himself and property, as authorized by section 1766 of the Code of Civil Procedure. It is true that where guardians have been appointed for persons who, by reason of their insanity, imbecility, or habitual drunkenness, are mentally incompetent to manage their property, under statutes in other states similar to article 2, tit. 11, pt. 3, of our Code of Civil Procedure, (sections 1763-1766,) it has been held that an adjudication of such incompetency is conclusive against all persons dealing with the ward until he is restored to capacity to manage his own affairs, by an order of court similar to that authorized by section 1766 of the Code of Civil Procedure. The cases of *Wadsworth v. Sharpsteen*, 8 N. Y. 388, and *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 243, are fair samples of the strongest cases to this effect. In the latter case the court said: "The object of the statute was protection and guardianship over persons and estates of parties wanting capacity to take proper care of either, and to pre-

serve the property of such from being squandered or improvidently used to their own injury and that of their families, if they have any. It is not necessary to adduce reasons to prove the self-evident proposition that, to admit the capacity of control to exist in the lunatic or habitual drunkard over his estate, after inquisition settling his condition in this respect, or submit it to be controverted by evidence of lucid intervals or sobriety at the moment of contracting, would leave the estates of these unfortunate classes about as much exposed as before proceedings had in regard to them. The inquisition and decree, standing of record, was intended for notice to all the world of the incapacity of the particular party to contract. It is the judgment of the law to this effect, and, as a consequence, his acts in regard to his property are absolutely void while the condition exists." In the case cited from 8 N. Y. the court said: "The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals, and therefore, during such intervals, the drunkard has no more authority to deal with, or dispose of, the property, than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication, and the committee could not execute his trust with safety to himself, or benefit to the drunkard or his family." These quotations are made merely to show that the reasons assigned in those cases for holding an adjudication of incompetency conclusive until set aside cannot be applied to the order of a judge in this state committing a person to the state insane asylum, under the provisions of the Political Code, although they may be applicable to adjudications of our courts in proceedings had under section 1766 of the Code of Civil Procedure. But, whether the reasons assigned in those cases are to be considered sufficient for holding an adjudication of incompetency, under section 1766 of the Code of Civil Procedure, conclusive against the person adjudged incompetent until set aside, as therein provided, need not be decided in this case, since it seems clear that the proceeding against insane and other mentally incompetent persons, authorized by the Code of Civil Procedure, is entirely distinct from the proceedings authorized by the Political Code for the commitment of insane persons to the state insane asylum. The provision in section 1766 of the Code of Civil Procedure authorizing the court to restore the person adjudged insane or incompetent to capacity is only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same Code. The application of it to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. After a person has been



committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of *habeas corpus*. The power to discharge him otherwise than upon *habeas corpus* is vested exclusively in the officers of the asylum. Section 2197 of the Political Code provides: "Insane persons received in the asylums must, upon recovery, be discharged therefrom." This implies the power to determine whether or not the patient has recovered. By an act of March 9, 1885, the resident physician is authorized, and it is made his duty, to discharge persons who have been improperly committed, (Deer. Pol. Code, p. 350.) By another act of March 9, 1885, (Deer. Pol. Code, p. 342.) it is provided that the kindred or friends of an inmate of the asylum may apply to the judge who committed him for an order to be directed to the trustees of the asylum for his removal to their custody, and, upon their proving that they are capable and suited to take care of him, and to give protection against his insane acts, the judge may issue the order. But the act further provides that "the trustees shall reject all other orders or applications for the release or removal of any insane person, except the order of a court or judge on proceedings in *habeas corpus*." See, also, a like provision in section 19 of "An act to provide for the future management of the Napa State Asylum," approved March 6, 1876, (St. 1875-76, p. 133.) It would seem, therefore, not only that the power to discharge an inmate of the asylum is vested solely in the officers of the asylum, but that such power is to be exercised upon one of two grounds only: (1) That the insane inmate has recovered; and (2) that he had been improperly committed. I think the effect of a discharge on either ground, if no guardian had been appointed under the act of March 9, 1885, (Deer. Pol. Code, p. 342,) would be to restore the person discharged to legal capacity to sue. A discharge on the first ground is an adjudication, by competent authority, that the person had recovered from insanity; and a discharge on the second ground, by like authority, overrules or nullifies the order of commitment, and leaves the person committed in the same status, as to capacity to sue, that he was in before he was committed. Civil Code, § 40. Besides, I think the order of commitment is not conclusive evidence against the plaintiff in this action of his insanity at any time, or of probable cause for the prosecution of which he complains; for, if it is so, it is difficult to conceive how he is to prove a cause of action which depends upon the truth of his averments that he was not insane to the degree required by section 2217 of the Political Code, or at all, at the time the order was made, and that the prosecution was without probable cause. If he is estopped, by the order of commitment, from proving these averments, it would seem to follow that no action for a malicious prosecution on a charge of insanity, resulting in an order

of commitment, can be maintained; yet the authorities sanction such actions. Cooley, Torts, § 176 et seq. That the order of commitment would not thus estop or conclude the plaintiff in a proceeding by writ of *habeas corpus* is obvious, and we have seen that it is not final, or conclusive as to the resident physician of the asylum, whose duty it is to disregard it, if, in his opinion, it was not properly made. Indeed, the final determination, as to whether the person committed is insane or not, is to be made and announced by the resident physician of the asylum. The proceeding before the judge is only preliminary, and is analogous to the preliminary examination of a criminal charge by a magistrate. As the only ground of demurrer argued here is that the plaintiff has not the legal capacity to sue, and no particular in which the complaint fails to state a cause of action has been suggested by counsel, or discovered, I think the judgment should be reversed, and the court below directed to overrule the demurrer.

We concur: BELCHER, C.C., and HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to overrule the demurrer.

#### ON REHEARING.

(Jan. 17, 1891.)

PER CURIAM. In submitting this case for decision, respondents argued but a single point raised by their demurrer to the appellant's complaint. We considered that objection, and decided it correctly. In their petition for a rehearing, other objections to the complaint are called to our attention; but we have decided—and with manifest propriety—that we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted. A respondent whose demurrer has been sustained by the superior court ought to fairly present in this court every objection upon which he relies. We cannot be expected to scrutinize the record for the purpose of discovering points which counsel have not taken the trouble to specify. Rehearing denied.

(87 Cal. 505)

#### BALL v. KEHL. (No. 13,808.)

(Supreme Court of California. Jan. 10, 1891.)

#### INJUNCTION—DIVERSION OF WATER—FINDINGS—SUFFICIENCY.

Plaintiff alleged that by adverse user he had acquired the right to the water in defendant's mill-race for irrigation and domestic purposes, when the mill was not running; that defendant had deprived him of the use of the water at such times, and threatened to continue the deprivation; and he prayed that defendant be restrained therefrom. The court found that on a certain day defendant did so deprive plaintiff of the use of the water. Held sufficient to sustain an injunction, in the absence of any finding as to how long such deprivation lasted, or as to whether defendant threatened to continue it.

Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Curtis & Otis and Henry M. Willis, for appellant. H. C. Rolfe, for respondent.

DE HAVEN, J. The complaint alleges, in substance, that the defendant had, by means of a canal, appropriated the waters of a certain creek for the purpose of operating a mill owned by him, and that, subject to the use and right to use said water by the defendant, the plaintiff has for 12 years last past appropriated and used adversely to defendant for irrigation, agricultural, and domestic purposes the water so flowing in said canal, whenever the said mill was not being run; that upon August 10, 1888, while the said mill was not running, the defendant, without right, deprived plaintiff of the use of said water, and has ever since continued to deprive plaintiff of its use; and that "defendant threatens so to deprive plaintiff of the use of any of said water at all times, even when said mill is not being run or operated, nor said water needed for running or operating the same." The answer of the defendant contained a denial of these allegations. The court below rendered judgment in favor of the plaintiff, and enjoining the defendant from depriving plaintiff of the use or flow of the water of said canal, except at such times as said water may be needed and actually used for running and operating said mill. From this judgment, and an order denying his motion for a new trial, the defendant appeals.

The findings do not support the judgment. The court finds that the defendant did, on the 10th of August, 1888, and while he was not using the water for the operation of his mill, deprive the plaintiff of the use of said water by closing a certain waste-gate, but there is an entire omission to find how long such deprivation continued, or whether defendant ever threatened or threatens to continue so to deprive plaintiff of the use of said water at times when said mill is not being run, or the water is needed for running the same. The allegation that defendant's act was continuing, and that he threatened to continue to deprive plaintiff of all use of the water in controversy, was a material one. Without it, the complaint would not state facts sufficient to entitle plaintiff to the injunction asked for and obtained, and the failure of the court to find upon this issue tendered by the complaint is necessarily fatal to the judgment. This conclusion is sustained by the case of *Coker v. Simpson*, 7 Cal. 340, in which it was said: "The complaint seems insufficient to sustain that part of the judgment granting the injunction. It is simply alleged, in substance, that defendant, between certain specified dates, diverted the waters of the stream, to the plaintiff's damage, in a sum stated. There is no allegation that the injury was continuing, or threatened to be continued, or likely to be continued. The circumstances stated are sufficient for a recovery of damages, but no equitable facts are alleged to sustain the injunction. The writ of injunction, though remedial, must be based upon equitable circumstances. From all that appears in the complaint, the injury was only temporary, and not likely to continue." And so in this case it may be said, from all that appears in the findings of the court, plaintiff's injury was

only temporary and past, and not likely to continue at any time in the future. See, also, *Water Co. v. Chapman*, 8 Cal. 392. This view renders it unnecessary to pass upon the sufficiency of the evidence to sustain the findings of the court, as the reversal of the judgment compels a reversal of the order denying defendant's motion for a new trial. Judgment and order reversed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(37 Cal. 461)

PETTINGER v. FAST. (No. 13,735.)

(*Supreme Court of California*. Jan. 12, 1891.)

VENDOR, AND VENDEE—ACTION FOR PRICE—EVIDENCE.

Plaintiff sold his farm to defendant for \$4,000, and one-half of the excess above that sum for which the farm might be sold within two years. In an action for the balance of purchase money the complaint alleged that defendant had sold the farm for \$8,000, and the court so found. The evidence showed that he sold the farm for \$6,000, reserving the timber thereon. Held, that this would not support the finding, though it was shown that the timber reserved was worth \$2,000.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

*Putnam & Nichols*, for appellant. *B. F. Thomas* and *W. P. Butcher*, for respondent.

DE HAVEN, J. Action to recover the sum of \$1,950, alleged to be due plaintiff for the balance of the purchase price of land conveyed by plaintiff to defendant. The court below gave plaintiff judgment for that sum, and also denied defendant's motion for a new trial, and the defendant appeals from such judgment and order. The facts as found show that on November 17, 1886, plaintiff executed to appellant a deed of his farm, the appellant agreeing, in writing, to pay therefor the sum of \$4,000, and to give one-half of all in excess of that sum which "the farm can be sold for within two years," such additional sum "to be also a part of the purchase price, when so sold for a larger sum." It is also found that on September 1, 1887, "appellant entered into an agreement in writing with one Ed. Culbert, whereby he sold to said Culbert the said parcels of land for the sum of \$8,000."

The principal question to be determined on this appeal is whether the finding of the court in relation to the sale of the land is justified by the evidence. It was shown upon the trial that on September 1, 1887, the appellant and one Culbert entered into an agreement in writing by which the appellant "promises and agrees to sell and convey unto the party of the second part, [Culbert,] and to make and execute and deliver to him a deed" of the land purchased by appellant from the plaintiff in this action, the said Culbert "to have and to hold all and singular said premises, together with all the tenements, hereditaments, and appurtenances thereunto belonging, \* \* \* except that portion of the timber thereon hereinafter mentioned and reserved unto the party of the first part." The agreement further recited that the appellant was to have all the timber

on said land, "except that on the southern line of the *mesa*, adjoining the Rincon rancho, and on the east end of said *mesa*." It is clear that under appellant's agreement with respondent, an actual sale of the farm within the time limited was not indispensably necessary in order to establish as a fact the price for which it could have been sold, and thus fix the liability of appellant thereunder. The appellant would not have been at liberty to reject any *bona fide* offer of purchase for a sum exceeding \$5,000 without the consent of the respondent. But the complaint alleges an actual sale to Culbert for the sum of \$8,000, and the court so finds, and it is therefore necessary to consider whether such fact was established upon the trial. The appellant insists that there was no sale to Culbert at all, but only an agreement to sell; but we are of opinion that such contention cannot be sustained. In the case of *Eaton v. Richerl*, 83 Cal. 185, 23 Pac. Rep. 286, the plaintiff therein was to wait for any balance that might be due him until certain mining property was sold and an executory contract for the sale of the mine was made, and the court held that the plaintiff could recover, saying: "The word 'sold' does not necessarily, and in all connections, mean that a conveyance must be made, or that the title must pass." The fact that no money was received by appellant on the contract is immaterial. The transaction was none the less a sale, and by it the equitable title of the property sold passed to Culbert. But in one respect the evidence does not sustain the finding of the court as to this sale. The written agreement of sale contained a reservation of standing timber, and, we think, notwithstanding some confusion in the evidence, that the real transaction between appellant and Culbert was a sale of the farm for the sum of \$6,000, the appellant reserving the growing timber thereon as specified in the contract of sale. The fact that this timber may have been estimated by both appellant and Culbert as of the value of \$2,000, or that appellant's price for the land with timber standing was \$8,000, and with a reservation of such timber \$6,000, cannot change the terms of the actual sale, as made to appear by the written contract of sale. By that contract, as we have said, the farm was sold for the sum of \$6,000, the appellant reserving as an interest therein the standing timber referred to, and proof of such a contract is at variance with the contract alleged in the complaint and found by the court, and the finding that the farm was sold for the sum of \$8,000 is not sustained by the evidence. Undoubtedly the respondent's right to recover on his contract is not limited to the sum agreed to be paid by Culbert, but if he seeks to recover more it must be upon a complaint which shows the facts as they really exist. It is clear that upon the execution of the contract of sale appellant disabled himself from thereafter accepting any *bona fide* offer for the farm, and the respondent became entitled to recover, not only upon the basis of the price agreed to be paid by Culbert, but in addition thereto one-half of the market

value of the standing timber reserved, or, at his option, one-half of the net sum for which such timber may have been sold by appellant. Judgment and order reversed.

We concur: PATERSON, J.; GAROUTTE, J.

(87 Cal. 49)

HENSON v. SHOTWELL. (No. 12,661.)

(*Supreme Court of California*. Jan. 12, 1891.)

In bank. On rehearing. For former report, see ante, 249.

PER CURIAM. After a careful reconsideration of this case we are satisfied that, although the facts have been stated too strongly against the respondent with respect to the first point discussed in the leading opinion, heretofore filed, the decision is nevertheless correct and fully sustained upon the ground stated and relied upon in the concurring opinion of Mr. Justice WORKS. For this reason respondent's petition for a rehearing is denied.

(87 Cal. 464)

McFADDEN et ux. v. SANTA ANA, O. & T. ST. RY. CO. (No. 13,919.)

(*Supreme Court of California*. Jan. 12, 1891.)

IMPUTED NEGLIGENCE—HUSBAND AND WIFE—CROSS-EXAMINATION.

1. By Civil Code Cal. §§ 162-164, 169, damages recovered for personal injuries to the wife are community property, and by section 172 the husband has the management and power of disposition of such property. *Held*, that the husband is a necessary party to an action for injuries to the wife, and his contributory negligence is imputable to her.

2. In an action for personal injuries, it is competent for defendant to ask plaintiff, on cross-examination, whether she called a doctor on the night of the accident; she having testified in her own behalf as to her injuries, and the pain she suffered.

3. In such action defendant should be allowed to ask plaintiff's physician, on cross-examination, what he considered the serious ailment at the time he was called to see her, and what treatment was advised.

Commissioners' decision. Department

2. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

*Victor Montgomery and O. Caswell*, for appellant. *Charles S. McKelvey*, for respondent.

VANCLIEF, C. Action for damages alleged to have been sustained by a personal injury to the wife alone, through the negligence of defendant. On May 26, 1888, the defendant was a corporation owning and operating a street railroad running east and west through the center of Fourth street, in the city of Santa Ana, in Los Angeles county. On that day it caused an excavation to be made in that street about 6 feet wide, 50 feet long, and 10 inches in depth, on the north side of the railway, parallel with it, and about 6 feet from it, for the purpose of constructing a switch or turn-out, to be connected with the main railway, and for the construction of which it had permission from the city authorities. It is alleged in the complaint that the excavation was dangerous to travelers on the street during the nighttime, unless properly guarded and lighted; and that it was the duty of the defendant

to guard and light it, so as to warn travelers of the danger, etc., which the defendant neglected to do on the night of May 26, 1888. The complaint then proceeds as follows: "That on, to-wit, the 26th day of May, 1888, the plaintiffs herein were lawfully driving along the same, and they, the plaintiffs, had no warning of, or notice of, the existence of the aforesaid excavation and obstructions, and they, the plaintiffs, saw no lights or barriers about the said excavation and obstructions, and, without any fault of either of the plaintiffs, they, the plaintiffs, came in collision with the said obstructions, and were drawn over the same into the excavation aforesaid, whereby Flora McFadden sustained great injuries in her person, and internal injuries by which her womb was displaced, and by reason of said injuries to her person and said internal injuries, she was confined to her bed for many months, and endured great physical and mental suffering. Her health is injured and impaired thereby, and the plaintiffs are informed and believe that the injuries sustained by Flora McFadden, in her person and to her health, are permanent and for life, and that the same were caused by the gross negligence, default, and carelessness of the defendant herein, by reason of all which the plaintiffs are damaged in the sum of \$12,000." The answer of the defendant denies the alleged injuries to the plaintiff Flora; denies the alleged negligence on its part; and alleges contributory negligence on the part of the plaintiffs. The case was tried by a jury. Verdict and judgment for the plaintiffs for \$1,000. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The principal question for decision arises upon instructions to the jury as to the effect of contributory negligence, if any there was, on the part of the husband alone. At the request of the plaintiff, the court instructed the jury that if they found that the plaintiff Flora was injured by the negligence of the defendant, without any negligence on her part, and that the negligence of her husband, if any, only contributed to the injuries, the jury could not attribute the husband's negligence to her, and should assess such damages as will compensate her for injuries proximately caused by the negligence of the defendant. And again: "If you find from the evidence that the negligence of Robert McFadden, if any, only contributed to the injury complained of, if any was sustained, his negligence cannot be imputed to Flora McFadden, and must not be regarded as her negligence." Defendant's counsel excepted to these instructions, and requested the court to instruct the jury that contributory negligence of the husband, if any, was imputable to the wife, and, under the circumstances of this case, would prevent a recovery; which the court refused to give. I think the court erred in giving these instructions, and in refusing to instruct, substantially, as requested by the defendant's counsel. *Peck v. Railroad Co.*, 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440; *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. Rep. 257; *Huntoon v. Trumbull*, 2 McCrary, 314, 12 Fed. Rep. 844; *Beach, Contrib. Neg.* pp. 113, 114, 284.

The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action, (*Railroad Co. v. Dunn*, 52 Ill. 280; *And. Law Dict.*;) and, if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife, (*Civil Code*, §§ 162-164, 169,) of which the husband has the management, control, and absolute power of disposition other than testamentary, (*Id.* § 172.) Consequently the wife cannot sue alone for damages on account of an injury to her person, as she is permitted to do "when the action concerns her separate property." *Code Civil Proc.* § 370; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. Rep. 223. In these respects our Codes differ from the laws of those states in which the cases cited by appellants were decided, wherein the right to recover for a personal injury to the wife, and the money recovered, are deemed her separate property. In the case of *Flori v. City of St. Louis*, 3 Mo. App. 231, the husband and wife sued for a personal injury to the wife alone, and the trial court instructed the jury, in effect, that if the husband was guilty of negligence, directly contributory to the injury, there could be no recovery in the action. Of this instruction the appellate court said: "We do not so understand the law. The contributory negligence of the plaintiff will bar a recovery where the plaintiff is the injured party, and the recovery is for his benefit. But here the husband is merely a formal party, the cause of action belonging to the wife. Under our law, (*Acts 1875*, p. 61.) 'any personal property, including rights in action, \* \* \* which has grown out of any violation of the personal rights' of a *feme covert*, is her separate property, and under her sole control, and is not liable for the debts of her husband." In *Platz v. Cohoes*, 24 Hun, 101, the decision that the negligence of the husband could not be imputed to the wife, in a case like this, was put solely upon the grounds that the wife was a mere passenger in her husband's wagon, and that her husband had no joint interest with her, and was in no way identified with her. On appeal from this decision of the supreme court, the court of appeals held that the question, as to contributory negligence of the husband, did not arise, and declined to decide it. 89 N. Y. 219. In the case of *Railroad Co. v. Dunn*, 52 Ill. 280, it was held that the right of the wife to sue for an injury to her person was her separate property, under a statute of that state providing that all property shall be separate property of the wife "which any married woman, during coverture, acquires in good faith, from any person other than her husband, by descent, devise, or otherwise." In *Shearman and Redfield on Negligence* (4th Ed. § 67) it is said: "But in New York, Missouri, and other states where the change has been radical, and married women have a right to recover, in such cases, damages for their own separate use, it is held that the negligence of the husband, while in company with his wife, is not chargeable

to her, unless she encouraged him in it, or otherwise concurs in it." No other authority is cited for this than the cases above considered.

2. The appellant's counsel complain that the scope of their cross-examination of plaintiffs' witnesses was too much restricted by the court. Of the numerous exceptions taken on this ground, I think the following should be sustained: *First.* After the plaintiff Flora had testified on behalf of plaintiffs as to the injury, and the pain suffered by her immediately thereafter, defendant's attorney, on cross-examination, asked the following questions: "Question. Well, you was conscious, wasn't you? Answer. I was conscious of a very severe pain. Q. Well, you went home that night, and didn't call a doctor? Mr. McKelvey. We object. I don't think it responsive to the direct examination." The court sustained this objection, and the defendant's counsel excepted. *Second.* Dr. Ball, as an expert, testified in chief, on the part of the plaintiffs, that he visited the plaintiff Flora, about two weeks after the injury, in consultation with Mrs. Dr. Howe, the attending physician, and further testified that he examined the patient as to her condition at that time, and as to the probable causes of her ailments. On cross-examination defendant's counsel asked the following questions: "Question. You had a consultation, then, did you? Answer. Yes, sir. Q. What was the determination by you and the attending physician, as to what was the serious thing to attend to? Mr. Brusseau. I object to the evidence, for the reason that the same is immaterial and incompetent." The court sustained this objection, and defendant's counsel excepted. *Third.* Counsel then asked Dr. Ball what was the treatment advised then, (at the consultation.) The objection to this question, on the grounds that it was immaterial, incompetent, and irrelevant, was sustained by the court, and counsel excepted. That all these questions were in the proper line of cross-examination, and that each of them might have elicited testimony which would have been competent, relevant, and material, seems too plain for argument. One of the witnesses, being a party testifying on her own behalf, as to the pain she suffered,—a matter as to which it would have been difficult to contradict her,—and the other testifying as an expert medical witness, their cross-examination should have been allowed a liberal range touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness. Whether or not these errors, in excluding proper cross-examination, may have been prejudicial to the defendant, need not be determined, since the judgment should be reversed on the ground of error in the instructions to the jury. Other points are made by counsel for appellant, but, in my opinion, the record shows no other errors than those above considered. I think that the judgment and order should be reversed, and the case remanded for a new trial.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the case remanded for a new trial.

(87 Cal. 471)

BRUMLEY *et al.* v. FLINT. (No. 13,665.)

(Supreme Court of California. Jan. 14, 1891.)

APPEAL—OBJECTIONS TO EVIDENCE—EXCESSIVE DAMAGES.

1. Where a witness is asked what, in his estimation, was the damage done by cattle trespassing on pasture land, and the question is objected to on the ground that it is "incompetent, irrelevant, and immaterial as asking for a conclusion, \* \* \* and as not the proper way to prove damages," the point that the witness had not been shown to possess the requisite knowledge to express an opinion cannot be raised for the first time on appeal. Distinguishing *Reed v. Drais*, 67 Cal. 491, 8 Pac. Rep. 20.

2. Where, in an action for damage done by trespassing cattle, the evidence as to the number of the cattle, and the amount of damage, is conflicting, it cannot be said that a judgment for \$325 is excessive, though the cattle were on the land only at times during two months, and plaintiff paid only a \$1,000 rent for the land for the whole year, and, after the trespass, subleased it for \$1,500.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

W. H. Spencer, for appellant. W. B. Dillard, for respondents.

BELCHER, C. In December, 1887, one Chester R. Brumley leased from the owner 16,320 acres of grazing land for the year 1888. Between January 1 and February 7, 1888, the defendant's cattle wrongfully entered upon a portion of this land, and ate up, trod down, and destroyed the grass and feed growing thereon. In May, 1888, the said Brumley died, and thereafter the plaintiffs were duly appointed and qualified as executors of his will. The plaintiffs, as such executors, brought this action to recover damages for the alleged trespasses of defendant's cattle in the sum of \$1,000. The case was tried before the court, without a jury, and by the judgment the plaintiffs were awarded the sum of \$325, and costs of suit. From this judgment, and an order denying a new trial, the defendant appeals.

1. At the trial, C. J. Brumley was called as a witness for plaintiffs, and, after stating that he was the son of Chester R. Brumley, and one of the plaintiffs, proceeded to testify as follows: "I know the land described in the complaint, and have known it for the past fifteen years. It is grazing land. I know defendant's cattle. They are branded with a star. I saw defendant's cattle on the land described in the complaint many times during January and February, 1888,—eight, nine, eleven, or twelve hundred of them,—and they were trespassing on the land. There were many fresh rain-water pools on the land, and the cattle ranged there. The ground was wet during these months, there having been a heavy snow-storm and much rain, and the cattle injured and damaged the pasture greatly by treading it down and eating it. For the last five years I have been in the cattle business near this land." The witness was then asked by

plaintiffs' counsel to state what amount of damage, in his estimation, was done by the cattle during the time they were trespassing upon the land. The defendant objected to the question, "upon the ground that the same was incompetent, irrelevant, and immaterial, as asking for a conclusion which the court was to arrive at from the facts given in testimony; and further as not the proper way to prove damages." The court overruled the objection, and the defendant reserved an exception. The witness then answered: "The damage from eating up, treading down, and destroying the grass on the land by defendant's cattle during the time you mention would, in my estimation, amount to \$700 or \$800." It is now urged for appellant that the ruling above mentioned was erroneous, because the witness had not been "shown to possess the requisite knowledge of the value of the property claimed to have been injured by defendant's cattle," and, in support of this position, *Reed v. Drals*, 67 Cal. 491, 8 Pac. Rep. 20, is cited. It is not claimed that the answer to the question, if given by a competent witness, would have been incompetent, irrelevant, or immaterial, and upon that question we are not called upon to express an opinion. It will be observed here that the objection was not that the witness was incompetent, for want of sufficient knowledge, to testify as to the damages, but only that it was not the proper way to prove damages. The general rule is that "a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified." *People v. Manning*, 48 Cal. 338. It is true that a general objection is sufficient, if the evidence objected to is absolutely inadmissible for any purpose. *Nightingale v. Scaunell*, 18 Cal. 315. But otherwise, to entitle the objection to notice, "the party should have laid his finger on the point at the time." *Martin v. Travers*, 12 Cal. 243; *Cochran v. O'Keefe*, 34 Cal. 558. Conceding therefore, without deciding, that the witness was not shown to possess the requisite knowledge to enable him to testify as to the damages, still we do not think the point made can be considered here, for the reason that that objection to the question was not taken. In *Reed v. Drals*, supra, there is nothing in conflict with what has been said. In that case, as shown by the record, a witness was asked to give the value of certain land, and the testimony was objected to, and excluded by the court, "on the ground that the witness had not shown himself competent to testify on that point." In affirming the judgment, the court, among other things, said: "There is no doubt that a witness acquainted with the value of property may give an opinion as to such value, but he must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit, or branch of business, or department of science, he may yet be heard. Where, however, the knowledge is wanting, the opinion should be rejected. We

think, therefore, the court did not err in refusing to admit the testimony."

2. It is claimed that the evidence was insufficient to justify the decision of the court that plaintiffs were damaged in the sum of \$325 by reason of the trespass. But the evidence was conflicting as to the number of cattle that committed the trespasses, and as to the damage done by them. On the part of the plaintiffs, the evidence tended to show that they were entitled to a larger sum than was awarded to them. The fact that the deceased, *Brumley*, paid, as rent for all the leased premises, only \$1,000, and, some time after the trespass, subleased them for \$1,500, is not controlling. We cannot say, therefore, that the judgment should be reversed or modified, because the damages allowed were excessive. We think the judgment and order should be affirmed, and so advise.

We concur: VANCE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(87 Cal. 475)

PEOPLE *ex rel.* LAINE *v.* TYRRELL. (No. 14,076.)

(*Supreme Court of California*. Jan. 17, 1891.)

APPOINTMENT TO OFFICE—VACANCY—HOLDING OVER.

1. Under Pol. Code Cal. § 879, providing that "every officer shall continue to discharge the duties of his office, although his term has expired, until his successor has qualified," an appointee by the governor during a recess of the legislature, to fill a vacancy in the state board of health, holds until the qualification of his successor, notwithstanding section 1000 provides that such appointee shall only hold office until the adjournment of the next session of the legislature.

2. Although the governor issues a commission to such appointee for the entire balance of the unexpired term, its legal effect is to fill the vacancy only until the adjournment of the next session of the legislature.

3. Where the legislature fails to appoint a successor to the appointee, the governor cannot then appoint another, as there is no vacancy.

4. Where such appointee has duly qualified under the commission issued by the governor, and at the next session of the legislature his appointment is confirmed for the unexpired term, but no other commission is issued, the appointee holds under his first commission, and is not required to qualify again.

In bank. Appeal from superior court, Sacramento county; *W. C. VAN FLEET*, Judge.

*Clinton L. White*, for appellant. *Geo. A. Johnson*, Atty. Gen., and *A. L. Hart*, for respondent.

DE HAVEN, J. On November 17, 1884, during a recess of the legislature, a vacancy existed in the membership of the state board of health, and on that day the appellant, *Tyrrell*, was appointed a member of said board, and in the commission issued to him by the governor it was recited that he was thereby appointed a member of the state board of health, vice *F. W. Hatch*, deceased, for the term expiring January 11, 1888. Appellant duly qualified as such officer November 19, 1884, and

since that date has continued to discharge the duties of said office. Upon January 20, 1885, the legislature being in session, the governor transmitted to the senate a message informing that body of appellant's said appointment, on November 17, 1884, "for the term of four years, vice F. W. Hatch, deceased," and the senate was requested to consent thereto. The senate took action upon said message, and the question, "Will the senate advise and consent to the appointment of G. G. Tyrrell of Sacramento as a member of the state board of health for the term of four years, vice F. W. Hatch, deceased?" was decided in the affirmative. The governor did not thereafter issue to appellant any commission for said office, nor has he since such action of the senate taken any oath of office as a member of said board. On March 18, 1889, during a recess of the legislature, the governor appointed the relator, Laine, to the said office of member of the state board of health, and upon that day he duly qualified as such. The judgment of the court below was in favor of the relator, and ousting the appellant from said office. From this judgment, and an order denying his motion for a new trial, the defendant, Tyrrell, appeals.

We think the commission issued by the governor to appellant on November 17, 1884, must be held to have legal effect, simply as an appointment to fill the vacancy then existing, until the adjournment of the next session of the legislature, as the governor was not authorized to make an appointment for any longer time than during the recess of the legislature. Pol. Code, § 1000. Upon the issuance of this commission the appointment to fill such vacancy temporarily was complete, and needed no action of the senate to confirm it. *People v. Cazneau*, 20 Cal. 504. And we think that under this commission the appellant was vested with the right to hold said office until the appointment and qualification of a successor in the mode provided by law. Section 879 of the Political Code declares: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified;" and section 1000 of the Political Code does not create an exception to this rule, in the case of officers temporarily appointed by the governor. The language of that section, "but the person so appointed can only hold the office until the adjournment of the next session of the legislature," simply means, when construed with section 879, as it must be, that the term of such appointed officer shall expire upon the adjournment of the next session of the legislature, and his successor may take his place; but, if no successor has been appointed, then the very condition of affairs intended to be provided for by section 879 has arisen, and that section applies. It is the settled law of this state that the mere expiration of the term of the incumbent of an office does not create a vacancy therein such as the governor alone is authorized to fill by the appointment of a successor. *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407. It would follow from this that the appointment of the relator during a recess

of the legislature was invalid, unless, under section 996 of the Political Code, a vacancy was created by the failure of the appellant to take and file his official oath after the confirmation of the senate. The obligation to take and file such oath did not arise unless the message of the governor announcing the appointment of appellant during the recess, and the action of the senate advising and consenting to the same, constituted an appointment of appellant as his own successor. But, even construing these acts of the governor and senate as a nomination and confirmation of appellant as his own successor, (and whether they can be so construed we do not determine,) such appointment was not completed, no commission having been subsequently issued to the appellant. In the matter of an executive appointment, with the consent of the senate, the issuance of a commission is not a mere ministerial act, but is a part of the act of appointment. It is this act which completes the appointment, as well as perpetuates the evidence of it. *People v. Murray*, 70 N. Y. 526. And this is also the doctrine of the case of *Conger v. Gilmer*, 32 Cal. 76. It follows that the court below erred in rendering judgment for the relator upon the findings. Judgment and order reversed.

WE CONCUR: BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

#### REAY v. BUTLER. (No. 14,051.)

(*Supreme Court of California*. Jan. 17, 1891.)

##### APPEAL—DISMISSAL.

Where no undertaking on appeal is filed within five days after service of the notice of appeal, as required by Code Civil Proc. Cal. § 940, there is no appeal before the court to be considered or dismissed. Following *Bellegrade v. Bridge Co.*, 80 Cal. 61, 22 Pac. Rep. 57, and overruling *Reay v. Butler*, ante, 350.

In bank. On rehearing.

PER CURIAM. The motion to dismiss the appeal in this case upon the showing made at the time the motion was submitted should have been overruled on the authority of *Bellegrade v. Bridge Co.*, 80 Cal. 61, 22 Pac. Rep. 57, and cases therein cited. Since then the record has been filed here, which, it is claimed, shows that the undertaking on appeal was filed in time. The order heretofore made dismissing the appeal is set aside, and the motion overruled, without prejudice to further consideration, at the proper time, whether the appellant is entitled to be heard.

(87 Cal. 480)

#### In re COURTS' ESTATE. (No. 13,995.)

(*Supreme Court of California*. Jan. 19, 1891.)

##### CLAIMS AGAINST EXECUTORS—ALLOWANCE—SALE OF LAND.

1. Under Code Civil Proc. Cal. § 1536, providing that, when a sale of property is necessary to pay the debts of a decedent, or the charges of the administration, the executor may sell real estate for that purpose upon the order of the court, and section 1545, providing that, if the executor neglect to apply for an order of sale, any person may make application, one whose claim against the



executor for services to the estate has been allowed by the court may make application for the sale of land to pay it, and the court has jurisdiction to settle and allow such claim, without waiting for the executor to pay it, and charge it as an expense of the administration.

2. Under Code Civil Proc. Cal. § 1637, providing that the settlement and allowance of an executor's account is conclusive as to all interested, except those under disability, an order settling an executor's account, and allowing a claim included therein of a third person for services rendered the estate, is conclusive on the devisees who do not appeal.

Department 1. Appeal from superior court, San Diego county; C. W. C. ROWELL, Judge.

*Leovy & Humes and Conklin & Hughes*, for appellants. *Trippett & Neale and Hunsaker, Britt & Goodrich*, for respondents.

PATERSON, J. On May 29, 1889, the executrix filed an account of her administration of the estate from January 29, 1887, to February 1, 1889, which set forth, among other items of the same nature, a claim of \$1,240.57 against the executrix by Cave J. Coutts, for services, money paid out, etc., "the validity of which charges against said estate" she asked the court to determine on the settlement of the account. After due notice, a hearing was had, and the account was settled. With respect to the item referred to, the court found that it was a legal charge against the estate, and authorized the executrix to pay Coutts out of any moneys that might thereafter come into her hands as executrix. On March 5, 1890, Coutts filed a petition asking for an order requiring the executrix to sell so much of the real estate as should be necessary to pay his claim. An order to show cause was issued, and at the trial the petitioner introduced evidence tending to support every material allegation of his petition, but, on motion of the devisees, a nonsuit was granted, and the proceeding dismissed. From this order, petitioner has appealed. It is admitted that the court in its decree settling the account made the order referred to, and that the executrix has not paid, and has not funds in her hands sufficient to pay, petitioner the amount allowed, but it is claimed that the nonsuit and dismissal were proper because the order of the court allowing Coutts \$1,240.57 is void; that his claim, if any he had, was against the executrix, and, until she pays it, and presents it in her account as an expense of administration, the court cannot act upon it; that the claim is barred by the statute of limitations, but, if the appellant has any remedy at all, it is by execution against the executrix, under section 1647, Code Civil Proc. We think that the petition states facts sufficient, and that upon the evidence offered by petitioner the motion for nonsuit should have been denied. Section 1536, Code Civil Proc., provides that, "when a sale of property of the estate is necessary to pay \* \* \* the debts outstanding against the decedent, or the debts, expenses, or charges of administration, the executor may also sell any real as well as personal property of the estate for that purpose, upon the order of the court;" and section 1545 provides

that, "If the executor or administrator neglect to apply for an order of sale when it is necessary, any person may make application therefor in the same manner as the executor or administrator, \* \* \* and the decree of sale must fix the period of time within which the executor or administrator must make the sale." These provisions were intended to afford creditors of the executors, as well as creditors of the decedent, the means of securing payment of their claims against the estate, and necessarily contemplate expenses of administration, which the executor neglects or refuses to pay. There is nothing in the statutes which requires payment of claims against the executor for services rendered, or materials furnished, the estate during administration, before they can be allowed in the settlement of his account. It would be a misfortune if there were. Where the representative of the estate has a doubt as to the legality of the claim, or the amount that should be paid for services rendered, or materials furnished, in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and, if so, in what amount. *Dwinelle v. Henriquez*, 1 Cal. 392; *Gurnee v. Maloney*, 38 Cal. 88. The order settling the account was appealable, and the allowance of the claim is conclusive against every one interested, except those laboring under disability. Sections 1637, 1638, Code Civil Proc.; *Deck's Estate*, 6 Cal. 669; *Stott's Estate*, 52 Cal. 406. The order appealed from is reversed, and the proceeding is remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

(87 Cal. 508)

HARLAN *et al.* v. STUFFLEBECK *et al.*  
(No. 14,063.)

(Supreme Court of California. Jan. 21, 1891.)

MECHANICS' LIENS—FORECLOSURE—FINDINGS.

1. In a suit to foreclose a mechanic's lien for painting and graining a house under a contract with defendant, findings that plaintiff substantially performed the contract, and also that some small places were left unfinished which would cost about five dollars to finish properly, are not contradictory.

2. Such findings are sufficient to support a judgment for plaintiff for the contract price, less five dollars.

3. Code Civil Proc. Cal. § 1192, provides that the owner's interest in land shall be subject to mechanics' liens for the erection of a building thereon under contract with the lessee, where the owner knows of the erection of such building and fails to give notice that he will not be responsible for it. *Held*, that the owner's interest may be sold on foreclosure of such mechanic's lien where he knew of the erection of the building, and, after its completion, made a payment to plaintiff on account of his work.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *Brown & Daggett*, for appellants. *Lamberson & Taylor*, for respondents.

HARRISON, J. Action for the foreclosure of a mechanic's lien. The plaintiffs contracted with the defendant Stuffebeck,

who was the lessee of certain lands owned by the defendants Bashore, to do the work of painting, varnishing and graining upon some buildings which Stufflebeem was constructing for himself upon said lands, upon the completion of which they were to receive \$145. The main issue presented in the case was whether the plaintiffs had completed the work according to their contract. The court found that the plaintiffs had substantially complied with all the terms of said contract, and completed said work on or about the 10th day of April, 1890, but that some small places in the house were not properly grained and finished, and that the cost of properly finishing such places would be not more than five dollars; and thereupon gave judgment for the plaintiffs for the amount of the contract price, after deducting said sum of five dollars.

1. It is contended by the appellants that the findings are contradictory, and do not support the judgment. Neither of these propositions can be maintained. The finding that the plaintiffs substantially complied with all the terms of their contract, and completed the work, is entirely consistent with the finding that some places in the houses were not properly grained and finished; and the finding that the cost of properly finishing such places would not be more than five dollars supports, rather than contradicts, the finding of substantial performance. The performance of a contract need not in all cases be literal and exact, in order to entitle a party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done, or the manner of its performance, is the sole matter in dispute, and is to be decided upon conflicting testimony. In contracts for the construction or repair of buildings, a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract. If there has been no willful departure from its provisions, and no omission of any of its essential parts, and the contractor has, in good faith, performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action. *Whart. Cont. § 607; Liggett v. Smith, 3 Watts, 331; Philip v. Gallant, 62 N. Y. 264; Hayward v. Leonard, 7 Pick 185; Sinclair v. Tallmudge, 35 Barb. 604.* This rule is peculiarly applicable in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work. Section 1187 of the Code of Civil Procedure provides that "any trivial imperfection in the said work \* \* \* shall not be deemed such a lack of completion as to prevent the filing of any lien." If the lien can be "filed" notwithstanding such imperfection, it must follow that the claimant can foreclose his lien, and that

the "trivial imperfection in the work" is no defense to the action. Whether the contract has been substantially performed is a question of fact which must be determined by the trial court in each instance from the facts and circumstances in the case, and the finding of the trial court upon that point is as conclusive as is its finding of any other fact. The present case is before us upon the judgment roll alone. In the absence of the testimony upon this point, we are bound to assume that it was sufficient to support the finding that the plaintiffs substantially completed their contract, as also the finding that the defendants would be fully compensated for any imperfection in the work by deducting five dollars from the contract price. If they can be thus compensated in damages, full justice is done to all parties by deducting that amount from the contract price, and allowing the contractor to recover for the work that has been done by him.

2. Appellants urge that it was error to order a sale of the interest of the defendants Bashore in the lands described in the judgment, and cite section 1185 of the Code of Civil Procedure, as declaring that only the interest of the person causing the building to be repaired is subject to the lien. But it is found by the court that the defendants Bashore knew, at the time, of the construction of the said buildings, and of all the terms and conditions of the contract between the defendant Stufflebeem and the plaintiffs at the time it was made; and also that, on the completion of the work, the defendant Rachel Bashore made a payment to the plaintiffs on account thereof. Section 1192 of the Code of Civil Procedure provides that when, with such knowledge, the owner fails to give notice that he will not be responsible for the same, his interest in the land shall be subject to the lien. In *Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. Rep. 231*, these sections were construed by this court on a similar state of facts, and it was held that the interest of the owner in the lands was subject to a lien for materials used in the construction of a building thereon, which was erected under a contract made by the owner of the leasehold estate. It was also held in that case that it was not necessary to aver that the owner of the realty did not give any notice that he would not be responsible for the construction of the building. The judgment of the court below must be affirmed, and that court is directed upon the filing therein of the *remittitur* to allow plaintiffs, as a part of their costs on this appeal, a reasonable fee for the services of their attorney in this court. Code Civil Proc. § 1195.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.

(3 Cal. Unrep. 333)

*In re TILDEN.* (No. 20,776.)

(*Supreme Court of California.* Jan. 19, 1891.)

ATTORNEYS—DISBARMENT—POWER OF SUPREME COURT—ACCUSATION OF LARCENY.

Under Code Civil Proc. Cal. § 287, providing that an attorney may be disbarred for the

reason, among others, that he has been convicted of a crime involving moral turpitude, the supreme court has no authority to proceed against a member of the bar upon a mere verified accusation of larceny, preferred by another attorney.

In bank. Application to disbar an attorney.

*Crittenden Thornton*, for petitioner. *T. C. Coogan*, for respondent.

**BEATTY, C. J.** This is a proceeding against an attorney and counselor of this court, for the purpose of causing his name to be stricken from the roll. It is founded upon a verified accusation, of which the following is a copy: "Now comes Charles F. Hanlon, an attorney and counselor of this court, and brings this accusation against Charles L. Tilden, and for causes of accusation states 'that said Charles L. Tilden was at all the dates and times hereinafter mentioned, and now is, an attorney and counselor of this court; that heretofore, to-wit, the 5th day of December, 1890, at the city and county of San Francisco, state of California, the said Charles L. Tilden did steal, take, and carry away from the office and possession of this accuser, and by force and arms, and without the consent of this accuser, a certain valuable paper and undertaking for the payment of money, that is to say, a certain undertaking of the firm of Tilden & Tilden, of which the said Charles L. Tilden is a member, for the payment unto said Charles F. Hanlon, as attorney for the plaintiffs in the action hereinafter mentioned, for the sum of \$150 to be paid as penalty costs upon the consent of said Charles F. Hanlon, as attorney for plaintiffs, to a continuance of the argument of a certain demurrer in an action then pending in the superior court of the city and county of San Francisco, state of California, in which William H. Carpenter, Harry S. Carpenter, and Thomas Carpenter were plaintiffs, and O. M. Schaff, M. L. Wilbert, William S. Arnold, and M. M. Donovan were defendants; 'that said Charles L. Tilden did so with the felonious intent to steal, take, and carry away from the office and possession of said plaintiffs' attorney the said paper and undertaking. CHARLES F. HANLON.'" Upon the filing of this accusation, Mr. Tilden was cited to answer it, and in response to the citation he files an answer denying the truth of the charge, and at the same time objects to its legal sufficiency. His objection is well taken. The accusation is somewhat ambiguous, charging a larceny in terms, but describing the act in such manner as to leave it doubtful if anything more than a trespass is alleged. Assuming, however, that a larceny is charged, this court has no jurisdiction to try an accusation of that character, and it is not until after an attorney has been tried and convicted of a crime involving moral turpitude, and the record of his conviction produced here, that we are expressly empowered to remove or suspend him for that cause. Code Civil Proc. § 287. But it is contended that in such matters this court must necessarily have an authority more extensive than the mere letter of the statute, and to enforce this view the case is supposed

of an attorney notoriously guilty of an infamous crime, but acquitted of the charge through some scandalous miscarriage of justice. It is sufficient on this point to say that no such case is before us, and that it will be time enough to decide it when it arises. Even conceding that in the case supposed it might be our duty to proceed against an attorney in spite of his acquittal, we are very certain that it is no part of our duty to anticipate the action of the proper trial court where the attorney has not even been accused. Mr. Tilden's demurrer is sustained, and the proceeding dismissed.

We concur: **PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.; SHARPSTEIN, J.; MCFARLAND, J.**

(3 Cal. Unrep. 375)

**MILLER v. WADDINGHAM et al.** (No. 13,899.)<sup>1</sup>

(*Supreme Court of California*. Jan. 19, 1891.)

**FIXTURES—VENDOR AND VENDEE—RIGHT TO REMOVE HOUSES.**

1. Houses built on mud-sills resting upon the soil, which is not disturbed, are affixed to the land within the terms of Civil Code Cal. § 660, declaring that "a thing is deemed to be affixed to the land when it is \* \* \* permanently resting upon it, as in the case of buildings."

2. Such houses built by a contractor for a vendee in possession, who has paid part of the price for the land, and who, being unable to pay for the houses, turns them over to the contractor, cannot be removed from the freehold by the latter. Distinguishing *Hendy v. Dinkernoff*, 57 Cal. 3.

3. A vendee who has not paid the entire purchase price cannot claim the right to remove houses built by him on the land on the principle that, since equity regards that as done which ought to be done, he should be deemed the trustee of the purchase money for the vendor, and the equitable owner of the land, with the right to deal with it as he pleases.

4. A vendee who, while in possession under an executory contract of purchase, has built houses on the land before paying the entire purchase price, may be enjoined by the vendor from removing them.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; **JOHN L. CAMPBELL**, Judge.

*Waters & Gird*, for appellant. *Harris & Gregg*, for respondents.

**HAYNE, C.** This was a suit for an injunction to restrain the defendants from removing six buildings from the plaintiff's land, and for damages for injuries sustained in that regard. The trial court gave judgment for the defendants, and the plaintiff appeals upon the findings. The findings show the following case: The plaintiff, who was the owner of two blocks of land in "Ontario Colony," and of half of the streets in front thereof, made a contract to sell the land to the defendant's assignor, who entered into possession, and paid the sum of \$9,000 "on said contract." While in possession he caused the houses in question to be erected, but, being unable to pay the contractor, he made over the houses to him, and the latter sold them to the defendants, who proceeded to move them. It does not clearly appear whether the houses were erected upon the plaintiff's

<sup>1</sup> Reversed in banc. See 27 Pac. 750, 91 Cal. 377.

blocks of land, or upon the streets in front thereof. But the counsel have assumed (what in all probability was the fact) that the houses were upon the blocks mentioned; and, following the lead of counsel, we have so assumed for the purposes of this opinion. "Said houses were built on red-wood mud-sills of two-inch by six-inch timber; said mud-sills resting upon the soil. The soil was not disturbed in building or removing said houses. Nothing was ever said about the houses being built so they could be removed." It does not appear what was the price to be paid to the plaintiff for the land. The inference is that only a part of the price was paid. Assuming that such was the case, it does not appear whether the unpaid portion was due at the time of the removal of the houses, or at the commencement of the suit. The vendee is still in possession, and the contract "is subsisting, and not disaffirmed."

The first question to be considered is whether the houses were affixed to the land in such a manner as to become a part of the realty. The term "fixture" is used in different senses. Sometimes it is used in its general sense, of a thing which is affixed to land. *Merritt v. Judd*, 14 Cal. 63, 64. Sometimes it is used to designate a thing which can be severed from land after having been affixed to it. In this sense it is a term "denoting the very reverse of the name." 1 Chit. Gen. Pr. p. 161. Less frequently it is used to designate a thing which cannot be removed after having been affixed to the land. *Ewell, Fixt.* p. 4, and note. But, whatever may be the true signification of the term, it is manifest that (with certain exceptions, such as heirlooms and the like) the thing must first be affixed to the land, in a legal sense, before any question as to its removal can arise. If not affixed to the land in any sense, its owner may move it about at pleasure. The rule of the common law was that a thing was not to be deemed affixed to land unless fastened to it in some manner. And in *Pennybecker v. McDougal*, 48 Cal. 160, it was held that a cabin set on wooden blocks not attached to the soil was personal property. But the value of the cabin was only \$25, and it must have been more or less of a temporary structure. In New York and other states the common-law rule was relaxed so as to include things permanently resting upon the soil, though not fastened thereto. Thus, in *Snedeker v. Warring*, 12 N. Y. 175, it was held that a statue resting upon a pedestal in front of a building was a part of the realty; the court saying: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement." And see *Strickland v. Parker*, 54 Me. 266; *Cavis v. Beckford*, 62 N. H. 229. And this principle is embodied in section 660 of the Civil Code, which provides that "a thing is deemed to be affixed to land when it is \* \* \* imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings." In this case the houses seem to have been of a permanent character, (they cost \$4,100;) and we think that, under the Code, they must be considered as having been "affixed" to the land.

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This being so, the question arises whether the successors in interest of the vendee had any right to sever the houses from the land. Upon this question many modern authorities lay great stress upon the intention with which the thing was affixed, (*Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138; *Walker v. Flouring-Mill Co.*, 70 Wis. 96, 35 N. W. Rep. 332; *Schaper v. Bibb*, 71 Md. 149, 17 Atl. Rep. 935; *Docking v. Frazell*, 38 Kan. 423, 17 Pac. Rep. 160;) while others say that the intention is of secondary importance, (*Collamore v. Gillis*, 149 Mass. 581, 22 N. E. Rep. 46.) But, whatever may be the controlling principle, the preponderance of authority is to the effect that a building of a permanent character, erected by a vendee in possession under an executory contract of purchase, is part of the realty, and cannot be removed by him or his successors in interest, in the absence of an agreement to that effect. In *Ogden v. Stock*, 34 Ill. 522, the action was replevin for a house which had been erected by the vendee in possession under a contract of purchase, who, after failing to perform his contract, sold the house to the defendant, who removed it. The court gave judgment for the plaintiff, saying that it could not be presumed that the vendee when he affixed the house to the soil, had any intention of removing it. In *Hemmenway v. Cutler*, 51 Me. 407, a question arose, upon a writ of entry, as to the effect of an omission, from a levy, of a barn erected by a vendee in possession under a bond for a deed. If the barn was real estate, the omission rendered the levy void; otherwise, it was valid. The court held that the levy was void, and *APPLETON, C. J.*, delivering the opinion, said: "It is well settled that erections made by a mortgagor, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property." See, also, *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. Rep. 442. In *Westgate v. Wixon*, 128 Mass. 304, the action was for damages for the removal of a barn erected on the plaintiff's land by one Abbott, who was in possession under a bond for a deed. He failed to perform the conditions of the bond, but remained in possession, and the barn was removed by the defendant under a writ issued in a suit by a creditor. It was held that the plaintiff should recover, and the court, per *MORTON, J.*, said: "As a general rule, buildings are part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of realty, unless there is an agreement by the owner of the land, either express, or implied from the relations of the parties, that they shall remain personal property. \* \* \* The barn in question was a substantial structure. It is clear from the facts agreed upon that Abbott built it, not for any temporary purpose, but for the permanent improvement of the land, which he expected to become his property according to the terms of the bond. When built, it became a part of the realty, and inured to

the benefit of the plaintiff as additional security for the performance of the condition of the bond. Abbott had no right to remove it, and his creditors had no right to attach it as his personal property." The foregoing were cases at law. The same rule is applied in equity. In *English v. Foote*, 8 Smedes & M. 444, the suit was to foreclose a mechanic's lien for work upon a house erected by a vendee in possession under a contract of purchase which he failed to perform. It was held that, under the statute in force in that jurisdiction, the lien extended only to the interest of the person who caused the house to be erected, and that the vendee had no interest in the house after it was affixed to the land. The court, per CLAYTON, J., said: "As a general rule, whatever is annexed to the freehold becomes a part of it, and cannot be severed from it. There are many exceptions to the rule, but it applies with all its strictness between vendor and vendee." In *McLaughlin v. Nash*, 14 Allen, 136, the suit was for an accounting after dissolution of partnership. Before the formation of the partnership the plaintiff was in possession under a bond for a deed, and had affixed certain articles to a building which was upon the land. When the partnership was formed, the defendant purchased an interest in the articles mentioned. The plaintiff failed to perform the condition of the bond, and after the dissolution of the partnership the owner leased the premises to the defendant. It was held that such of the articles as had been permanently affixed to the building were part of the realty, and the court, per GRAY, J., said: "The plaintiff had not the same right to remove fixtures annexed by him to the land so occupied by him without paying rent to the owner, under a contract for its purchase, as an ordinary tenant would have against his landlord. \* \* \* His rights in this respect were no greater than those of a vendor or mortgagor against his vendee or mortgagee." See, also, *Allen v. Mitchell*, 13 Tex. 373. The rule between vendor and vendee to which the court refers in the passage last quoted is that in relation to things affixed by the vendor before the contract of purchase, or before a conveyance, if there is no contract, in which case the construction leans in favor of the vendee. *Fratt v. Whittier*, 58 Cal. 126. The decisions above quoted are in relation to things affixed by the vendee after the contract of purchase.

It is to be observed that the case before us is to be distinguished from that of erections by a person in possession under a revocable license. The rule as to licenses was laid down in *Little v. Willford*, 31 Minn. 178, 17 N. W. Rep. 282. But the court was careful to say: "A distinction is to be noted between a license and a contract for the purchase of land under which buildings are erected. In the latter case the builder's rights are determined by the nature of his contract, and upon his default the fixtures go with the land." The same distinction is stated by Cooley, (Cooley, Torts, § 429;) and, as to the general rule, see 1 Washb. Real Prop. (5th Ed.)

p. 7. In most of the cases above cited, the vendee, after making the erections, failed to perform his contract. But, so far as the question of fixtures is concerned, this circumstance is not material. If a building be once affixed to land so as to become a part of the realty, it does not change its character by subsequent non-action on the part of the person who affixed it. The case of *Hendy v. Dinkerhoff*, 57 Cal. 3, is not in conflict with the above decision. There the thing affixed to the realty did not belong to the person who affixed it. Such person, therefore, had no right, as against the owner of the thing, to make it a part of the realty; and the decision was that the owner of the realty stood in the shoes of the person who did the affixing, and had no greater rights than the latter had. It is true that in the case before us the houses were affixed to the land by a contractor; but he affixed them under a contract with the vendee, and for his benefit, and of course must be taken to have consented to the affixing, and to all its consequences. It results that the houses were part of the realty, and that the vendee had no greater right to them than to any other part of the property.

The defendants, however, advance two arguments, which apply not merely to the fixtures, but to the whole property. In the first place, they invoke the maxim that equity regards that as done which in good conscience ought to be done, and argue that after the contract the vendee was the trustee of the purchase money, and the owner in equity of the land, and could deal with it as he saw fit. As above stated, this argument has no reference to fixtures as distinguished from the land itself, but applies to the whole property. Nor does it depend upon whether the vendor has permitted the vendee to take possession before performance; for, under the rule relied upon, the vendee is as much the equitable owner where he has not taken possession as where he has. Nor does the argument depend upon whether the unpaid purchase money is due or not; for, by the terms of the rule, it applies as soon as the contract is made. If the argument is good at all, it requires that, as soon as a contract of purchase is made, the vendee should in every case be entitled to enter upon the enjoyment of the property, and be allowed to deal with it as he sees fit. But this is certainly not the law. The maxim referred to is not of universal application. 1 Story, Eq. Jur. § 64g. It was established by courts of equity to attain equitable ends, and it will not be applied to accomplish results which are inequitable; as, for example, to enable a vendee to waste or destroy the property before the performance of his contract. Before such performance, whatever interest he has is subject to be divested upon non-performance; for in case of non-performance the vendor is not compelled to foreclose a lien upon the property, but may rescind or retake possession. *Hannan v. McNickle*, 82 Cal. 136, 23 Pac. Rep. 271; *Connolly v. Hingley*, 82 Cal. 643, 23 Pac. Rep. 273; *Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. Rep. 804; *Troy v. Clarke*, 30 Cal. 419.

The interest of the vendee must therefore be conditional. *Non constat* that he will be able to perform the condition when the time for the performance arrives; and a court of equity will not take his performance for granted to such an extent as to allow him to waste or destroy the property. Nor does it make any difference that the vendor has permitted him to take possession. Such permission does not carry with it a right to waste or destroy the property in the case of a vendee any more than it does in the case of a tenant. The question involved was decided in the case of *Crockford v. Alexander*, 15 Ves. 138, in which Lord ELDON enjoined a vendee in possession from cutting timber, although he admitted that the vendee was, in equity, the owner of the estate. The case would be different if the vendee had performed all the conditions of his contract. In such case he would be the absolute owner of the equitable estate, and the vendor would have merely the dry legal title, which he would be compelled to transfer when required, and which he would not in the meantime be allowed to use in opposition to the interests or wishes of the vendee. But this would not be by reason of any presumed or supposititious performance by the vendee, but because he had actually performed. As above stated, the record does not show clearly whether the vendee has paid all the purchase money or not; but the inference from what is stated, and from the argument of counsel, is that he has not. And, as the defense is based upon an equity in opposition to the legal title, it was incumbent upon the defendants to make the fact appear. *Arguello v. Bours*, 67 Cal. 450, 8 Pac. Rep. 49.

In the next place, it is contended that the position of a vendor after an executory contract of purchase is analogous to that of a mortgagee; and that the rule that a mortgagee cannot have an injunction against the removal of a portion of the mortgaged premises, without showing that his security would thereby be impaired, applies here. This is but a variation of the preceding point. It is, in substance, saying that the vendee will be allowed to waste and destroy the property unless it be shown that the vendor's lien will thereby be impaired; and it depends upon the proposition that the position of the vendor is like that of a mortgagee. There are some respects in which the analogy holds; more especially in the case of a common-law mortgage, where the mortgagee has the legal title. But the likeness is by no means perfect. The vendor has not a mere lien for the security of money, which he must foreclose upon non-performance by the vendee. As shown by the cases cited under the preceding head, he may, upon such non-performance, rescind the contract and retake possession. He has therefore, in addition to the legal title, a reversionary interest in the equitable estate, conditional upon non-performance by the vendee, which interest will be protected in equity. The vendee on his side has, before performance, only a conditional equitable interest for equitable purposes; and, as above stated, a court of equity will not take his performance for

granted to such an extent as to enable him to grasp at once at the enjoyment of the property.

It results that the judgment is not sustained by the findings; but, in the somewhat uncertain condition of the record, we do not think that final judgment should be ordered for the plaintiff. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

(87 Cal. 530)

JUSTICE v. OTT. (No. 13,926.)

(*Supreme Court of California*. Jan. 29, 1891.)

GUARDIAN OF INCOMPETENT — ACTION ON WARD'S NOTE.

An action cannot be maintained against the guardian of an incompetent person upon a note made by the latter, when the latter is not joined or served with summons, and judgment entered by default will be set aside.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

*Wells, Guthrie & Lee*, for appellant. *W. T. Williams*, for respondent.

BELCHER, C. This is an action upon a promissory note. A personal judgment for the amount due on the note was entered against the defendant, Ott, by default, and from that judgment he appeals. It is alleged in the complaint that Jesse Justice made and delivered to the plaintiff his promissory note for \$1,000, dated November 18, 1879, and payable five years after date, with interest; that plaintiff is still the owner and holder of the note, and that no part of the principal or interest thereof has been paid; "that on the — day of May, 1888, by an order of the superior court duly made and entered, said defendant, George T. Ott, was appointed the guardian of the estate and person of said Jesse Justice, and that he is now such guardian; that on or about the 18th day of May, 1888, plaintiff demanded of said guardian the payment of said promissory note, and the interest thereon, but said guardian refused to pay said note or any part thereof;" wherefore the plaintiff prayed for judgment against the defendant, George T. Ott, as such guardian, for the principal and interest due on the note, amounting to \$2,400. A summons was issued, addressed to "George T. Ott, guardian," etc., and he was thereby notified that, if he failed to appear and answer the complaint, the plaintiff would cause his default to be entered, and would take judgment against him for \$2,400 and costs of suit. The summons was served on the defendant personally, by delivering to him a copy thereof and a copy of the complaint, but, so far as appears, no service was made on or notice given to Jesse Justice. The affidavit shows service on the defendant, and states the time, but not the place, of service. On the 23d day

after the defendant was served, the clerk of the court, by direction of the plaintiff's attorney, entered his default, and on the next day entered against him a personal judgment for the amount prayed for in the complaint. It is very clear that this judgment cannot be sustained. The facts stated in the complaint do not show any personal obligation on the part of the defendant to pay the note. The obligation, if any, was on the maker, and the action should have been brought against him, though an incompetent, and not against his guardian. *Brown v. Chase*, 4 Mass. 436; *Raymond v. Sawyer*, 37 Me. 406; *Robinson v. Hersey*, 60 Me. 225; *Coombs v. Janvier*, 31 N. J. Law, 240; *Van Horn v. Hann*, 39 N. J. Law, 207; *Steel v. Young*, 4 Watts, 459; *Fox v. Minor*, 32 Cal. 118. If the action had been properly brought, the summons would have been served on both the incompetent and his guardian, (section 411, subd. 4, Code Civil Proc.,) and it would then have been the duty of the guardian to appear and defend the action, (*Gronfier v. Puymiro*, 19 Cal. 632;) and, if deemed expedient, the court might also have appointed a guardian *ad litem* to represent the incompetent, (section 372, Code Civil Proc.) Other grounds for reversal are argued by counsel, but they need not be considered. For the reasons above stated we advise that the judgment be reversed, and the action dismissed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the action dismissed.

(87 Cal. 287)

SAN BERNARDINO COUNTY V. REICHERT.  
(No. 13,756.)

(*Supreme Court of California*. Dec. 22, 1890.)  
COUNTY BOUNDARY LINES.

Act Cal. April 26, 1853, (St. 1853, p. 119,) organizing San Bernardino county, provided that said county should have for its southern boundary the northern boundary of San Diego county. The common boundary line of the two counties, as described in the acts organizing them, makes several express references to points on, and lines of, two ranchos, the N. and the V. At the time of the passage of said act, said ranchos were Mexican grants, and one H. had, under proper authority, made and put on record a survey thereof. In 1880 a patent issued for the V. rancho, and in 1882 one M. made a survey of the N. rancho, on which in 1884 a patent issued for the latter rancho. The H. survey was not finally approved, and was not the basis for either of the said patents. *Held* that, the surveyor general, in running the boundary line of said counties, properly adopted the H. survey, especially as parts of the description expressed in the act could not be applied to the M. survey, but did correspond with the H. survey.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

*Harris & Gregg, Waters & Gird*, and *H. Connor*, Dist. Atty., for appellant. *J. L. Copeland and Brunson, Wilson & Lamme*, for respondent.

McKINLEY, J. In July, 1887, the county of San Bernardino applied to the respondent,

surveyor general of the state, to survey the boundary line between said county and the county of San Diego. While the respondent was proceeding to perform that duty the appellant filed a petition in the superior court alleging, in substance, that he was proceeding to survey and run said boundary in a certain manner that was wrong, and upon a false theory, and praying for a writ of mandate compelling him to run the line in a certain other manner, which is alleged to be the right manner. The court rendered judgment against the appellant, who appeals from the judgment and from an order denying a new trial.

The act organizing the county of San Bernardino was passed April 26, 1853. St. 1853, p. 119. By that act the northern boundary line of San Diego county, which had been previously organized, is made the southern boundary of San Bernardino county. The boundaries of the two counties were afterwards substantially incorporated in sections 3943 and 3944 of the Political Code. The common boundary line between the two counties, as described in the acts organizing them, makes several express references to points on, and lines of, two certain ranchos called "San Jacinto Nuevo" and "San Jacinto Viejo." At the time of the passage of said act of April 26, 1853, these ranchos were known as "Mexican grants;" and one Hancock, a deputy United States surveyor, under directions of the proper authorities, had made and placed on record a survey of said ranchos. Afterwards, in 1880, a United States patent issued for the Viejo rancho, and, in 1882, one Minto, a United States deputy-surveyor, made a survey of the Nuevo rancho, upon which, in 1884, a United States patent issued for said last-named rancho. The Hancock survey does not appear to have been finally approved, and was not adopted as the basis for either of said patents. Appellant contends that the respondent, in running the line between the two counties, should have followed the lines of the ranchos as afterwards established by the Minto survey and the United States patents; while respondent contends that it was the intention of the legislature to determine what the boundary line was at and immediately after the passage of the act of 1853 organizing the county, that he should carry out that intention, and that in doing so he may consider the Hancock survey as tending to show where the legislature at that time intended to fix the line. The court adopted the view of the respondent, and admitted in evidence the said Hancock survey; and we are not able to see that in so doing any error was committed. This proceeding does not involve any question of title to real property, or of the correct boundaries of land as between private claimants. In determining any such question with respect to said ranchos, of course, the lines of the patents would govern. But the legislature, when in 1853 it passed the said act organizing said county, had power to fix the boundary line wherever it pleased, and for that purpose to adopt any description deemed proper to express its intention. It was the duty



—and it certainly may be presumed to have been the intention—of the legislature to adopt a line that could be then definitely fixed. It cannot be presumed that the intention was to describe a line that could not properly be ascertained until the lapse of some indefinite period, when the United States government, over which there was no control, should see fit, for other purposes, to issue patents for said ranchos, thus deliberately providing for the evils which must certainly come from an unknown and unknowable boundary between two municipal corporations. The Minto survey and the patents were not in existence until from 23 to 30 years after the passage of the act organizing the county. It furthermore appears that parts of the description of the line, as expressed in the act, cannot be applied to the Minto survey, while they do correspond with the Hancock survey. Our conclusion is that no error was committed by the court below. We do not, however, wish to be understood as deciding that the courts have jurisdiction to control the surveyor general in the matter here involved. Section 3972 of the Political Code provides that his action in such a case shall be "conclusive;" and in *People v. Boggs*, 56 Cal. 648, this court seems to have held that section not to be unconstitutional. But counsel for respondent do not make the point in their briefs or arguments, and we do not care to pass upon the question without fuller discussion. Judgment and order affirmed.

(87 Cal. 323)

ABBOTT V. SEVENTY-SIX LAND & WATER CO. (No. 13,980.)

(Supreme Court of California. Jan. 3, 1891.)

LEASE—OPTION TO BUY—RIGHT TO EXERCISE—EVIDENCE.

1. Where a tenant takes a lease with an option to extend it from year to year, and also to buy the land at the end of any year, at a price to be fixed by the lessor during the year, the fact that the clause containing the option to buy is by agreement omitted from a lease for the second year, but with a mutual understanding that the option is to continue, does not deprive the tenant of his right to exercise the option under the second lease.

2. Where the business relative to the lease and sale of the lands is left to the secretary of the corporation, the lessor, his statements to a lessee respecting the lease and the option to buy are admissible in an action by the lessee to compel a conveyance according to the terms of the option.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

The business of defendant corporation was the sale of its lands, with the water and water privileges from its canals, to such persons as it could induce to buy them, and also by farm leases or "cropping contracts," to get revenue from the lands while they remained unsold. The plan of defendant was to induce farmers to take the lands upon such leases or cropping contracts for one year, with the privilege of extending the same, from year to year, for a period of not to exceed two additional years; the tenant to have the option to buy the land leased by him, throughout the entire time while his lease

existed, either by the original term of one year, or an extension of the term, at prices to be fixed by the corporation annually; the tenant, if he should elect to buy, to notify defendant before the 1st day of October of the year in which he made such election; and his purchase to be made as of the date October 1st of that year; the corporation to have the right to change and fix the price of the lands leased before October 1st of each year, which price so fixed was to remain the price of the lands for the following year, and, unless such change of price was made, that which had before been put on the land should remain until a change should be made, to take effect on the 1st day of October thereafter. Plaintiff elected to continue his lease and option to buy for the year to come from October 1, 1886, and gave defendant notice of his election. Defendant accepted the notice and demand for the extension. In the second lease the clause mentioning the option to buy was erased, for the reason that it required a good deal of clerical work to fill it out, but it was mutually understood that the option was also extended.

*Jarboe, Harrison & Goodfellow*, for appellant. *Thompson & Thompson*, for respondent.

THORNTON, J. The option in plaintiff to buy the land under the lease or cropping contract entered into by the plaintiff and defendant, bearing date 7th day of December, 1885, continued for two years from the 1st day of October, 1886. It makes no difference that it was not inserted in the second lease. It was left out of the second lease by agreement, as something unnecessary. The defendant had a right to change the purchase price during the execution of the lease, provided it did so prior to the 1st of October of each year. It never did change this price. It therefore remained as in the first contract. The plaintiff exercised and gave notice of his intention to purchase, under the option clause above mentioned, on the 3d of September, 1887, and then offered to pay the installment of the purchase money then due, viz., one-fourth of it, and interest on the portion not then due, and offered to comply in all respects with his contract. The defendant refused to receive the money, and repudiated its contracts with the plaintiff. We think that the judgment is correct, and in accordance with the principles of law, and should be affirmed.

The statements of the secretary of the defendant corporation, made to plaintiff, were properly admitted. It is evident that the conduct of the whole business was left by the company to him; that he was fully authorized to act, and did act, for the company in its dealing with plaintiff, and others in the like situation, in regard to the business connected with the leasing and disposition of its lands. The determination of this action by the court below is in accordance with well-settled legal principles. The record shows no error. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

**TYNER V. SEVENTY-SIX LAND & WATER CO.**  
(No. 13,981.)

(*Supreme Court of California.* Jan. 3, 1891.)

Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

*Jarboe, Harrison & Goodfellow*, for appellant.  
*Thompson & Thompson*, for respondent.

PER CURIAM. This case is similar to, and must be determined on the authority of, *Abbott v. Same Defendant*, ante, 693, (No. 13,980,) and in the same way. Judgment affirmed.

**SHIPE V. SEVENTY-SIX LAND & WATER CO.**  
(No. 13,982.)

(*Supreme Court of California.* Jan. 3, 1891.)

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

*Jarboe, Harrison & Goodfellow*, for appellant.  
*Thompson & Thompson*, for respondent.

PER CURIAM. This case is similar to, and must be determined on the authority of, *Abbott v. Same Defendant*, ante, 693, (No. 13,980,) and in the same way. Judgment affirmed.

**ABBOTT V. SEVENTY-SIX LAND & WATER CO.**  
(No. 13,983.)

(*Supreme Court of California.* Jan. 3, 1891.)

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

*Jarboe, Harrison & Goodfellow*, for appellant.  
*Thompson & Thompson*, for respondent.

PER CURIAM. This case is similar to, and must be determined on the authority of, *Abbott v. Same Defendant*, ante, 693, (No. 13,980,) and in the same way. Judgment affirmed.

(87 Cal. 499)

**CITY OF SAN LUIS OBISPO V. PETTIT.**  
(No. 13,856.)

(*Supreme Court of California.* Jan. 19, 1891.)

**TAXATION—DOUBLE ASSESSMENT—LEVY.**

1. Under Pol. Code Cal. § 3649, providing that any property discovered by the assessor to have "escaped assessment" for the last preceding year, if such property is still owned or controlled by the same person who owned or controlled it the previous year, may be assessed at double its value, money deposited with a county treasurer by order of court in a pending case may be doubly assessed if it "escaped assessment" the year before.

2. Where an assessment is invalid the property has "escaped assessment" within the meaning of section 3649.

3. Under Pol. Code Cal. § 3647, requiring money in litigation in possession of the county treasurer pending the suit to be assessed to him, an assessment of the money to the plaintiffs in the suit is invalid.

4. Under the municipal corporation act, § 871, (Laws Cal. 1883, p. 273,) providing that the city trustees shall provide by ordinance a system for the assessment, levy, and collection of city and town taxes, which shall conform as nearly as possible to the provisions of the state laws, "except as to the times for such assessment, levy, and collection," it is competent for the trustees to fix any time they may see fit for assessing, levying, and collecting the taxes; and the fact that the time fixed coincides with that fixed for the levy of state and county taxes does not affect the validity of the ordinance.

5. Under an ordinance passed in pursuance of the corporation act, providing for "assessing and collecting" city taxes in the manner prescribed by Pol. Code Cal. tit. 9, pt. 3, which contains provisions for levying taxes, authority is given to levy taxes.

6. The fact that one provision of the ordi-

nance provides that delinquent taxes shall be collected by the collector by sale, while section 879 of the corporation act provides that they shall be collected by suit by the city attorney, does not invalidate the entire ordinance, but only the inconsistent provision.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; T. H. REARDON, Judge.

*Graves, Turner & Graves*, for appellant.  
*William Shipsey*, for respondent.

HAYNE, C. This was an action to recover delinquent taxes. The property taxed was a sum of money deposited with the defendant in his official capacity under an order of the superior court in a pending case. During the fiscal year 1887-88 the defendant reported the deposit to the assessor, who, however, did not assess it to him, but (probably acting under a mistaken view of the law) assessed it to the plaintiffs in this suit. The tax was not paid. In the following year the property was assessed to the defendant; but, upon the theory that it had "escaped assessment" the preceding year, the amount of the assessment was doubled. The trial court gave judgment for the plaintiff, and the defendant appeals. The points made relate to the validity of the assessment.

1. In doubling the assessment the assessor acted under a provision of the Political Code, which is as follows: "Sec. 3649. Any property discovered by the assessor to have escaped assessment for the last preceding year, if such property is in the ownership or under the control of the same person who owned or controlled it for such preceding year, may be assessed at double its value." The validity of this provision was affirmed in *Biddle v. Oaks*, 59 Cal. 95, in which case the court said that the legislature had power to impose a penalty for neglect to have an assessment made. In the case before us there was no such neglect, because the defendant reported the property to the assessor. But we do not understand the decision as confining the operation or validity of the provision to cases where there has been neglect on the part of the person to whom the assessment is made. The terms of the provision indicate no such limitation. The language is general, and applies to all cases where property has escaped assessment in the preceding year, whatever may have been the cause of such escape. Nor do we think that upon this construction the provision is invalid. Its evident purpose is to carry out the general intention pervading the revenue system, that all private property shall bear its share of the burden of taxation. This is certainly a legitimate purpose; and the means employed to carry it out are not, in our opinion, in violation of any constitutional provision. The section does not provide that the property shall not be assessed in proportion to its value. It provides, in effect, that in certain cases assessments for two different years may be made in one, and therefore goes in effect merely to the time at which an assessment may be made. We see no constitutional objection to this. It is true that in exceptional cases it might happen that the

property would increase in value since the preceding assessment, and hence that merely doubling the assessment would not be an accurate way of arriving at the value for the preceding year; but in the great majority of cases doubling the assessment would be a fair enough way of arriving at a valuation for the preceding year. And if in exceptional cases the method would result in an overvaluation, and it be assumed (for the purposes of the opinion) that in such cases the overvaluation would render the assessment void, it would have to be shown that the case was of such exceptional character. In this case no such question can arise, because the property assessed was money, and for all practical purposes was of the same value from year to year. The provision, therefore, is valid, and covers the case before us.

It is to be observed that the condition of the double assessment is not that the property should have escaped taxation. It is not enough, therefore, to show that the tax was not paid. The property must have escaped "assessment." But, in our opinion, the word "assessment" in this connection means a "valid assessment." A thing which has the semblance of an assessment, but which is void and of no effect, is for all practical purposes no assessment, and furnishes no reason why a proper assessment should not be made. The question, therefore, must turn upon whether the assessment for the year 1887-88 was valid or invalid. In our opinion, it was invalid. The method of making an assessment in such a case as this is prescribed by the following provision of the Political Code: "Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court." There was a plain violation of the provision of this section, and the well-established rule is that, if an assessment is not made as prescribed by the statute, it is void. *Grotefend v. Ultz*, 53 Cal. 666; *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 367; *Brady v. Dowden*, 59 Cal. 51; *Bosworth v. Webster*, 64 Cal. 1; *Daly v. Ah Goon*, 64 Cal. 512, 2 Pac. Rep. 401; *Klumpke v. Baker*, 68 Cal. 559, 10 Pac. Rep. 197. It is true that the Code provides that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid," (Pol. Code, § 3628;) but, whatever may be the meaning of this provision, it does not apply to personal property, (*Lake Co. v. Mining Co.*, 66 Cal. 17, 4 Pac. Rep. 876.) The assessment for 1887-88 was therefore invalid, and a reassessment in the following year was proper.

2. It is contended that there was no authority of law for making the levy. Section 871 of the municipal corporation act provides that the city trustees "shall have power, and it shall be their duty, to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes, not inconsistent with the provisions of this chapter, which system shall conform, as nearly as the circum-

stances of the case may permit, to the provisions of the laws of this state in reference to the assessment, levy, and collection of state and county taxes, except as to the times for such assessment, levy, and collection." Laws 1883, p. 273. The ordinance passed in pursuance of the above provision contained, among other things, the following: "Sec. 3. The manner, form, and time of assessing and collecting city taxes shall be the same as is prescribed by the Political Code of the state of California for assessing and collecting state and county taxes; and all the provisions of title 9 of part 3 of said Political Code are hereby adopted, and are ordained to be, and are the law for assessing and collecting city taxes, as to manner, mode and time," etc. The objection consists of two branches, which we shall consider separately. (a) It is argued that the statute above quoted forbids the city from assessing, levying, and collecting its taxes at the same time as the state and county. But we do not so construe the provision. It simply leaves those matters to the discretion of the city trustees, who may fix any time they see fit. There is nothing to prevent them from selecting the time fixed for the other taxes. (b) It is said that the ordinance in question provides only for "assessing and collecting" the taxes, and not for levying them, as to which it is contended that no provision is made. But, in the first place, we think that the words "assessing and collecting" are used in the ordinance in a general sense, and include the operation called "levying the tax." The words are so used in the constitution. As is said in the clear and satisfactory argument of the counsel for the respondent: "The foundation of the city taxing power is in the constitution. Article 11, § 12, provides that the legislature \* \* \* may by general laws vest in the corporate authorities power to assess and collect taxes. There is no authority to 'levy,' unless one of the words 'assess and collect' includes levy." In the second place, the ordinance does not confine itself to an adoption of the provisions of the Code by a general reference to them as those in relation to the assessment and collection of taxes. It goes on to designate specifically the provisions adopted by saying: "And all the provisions of title 9, part 3, of said Political Code are hereby adopted." The part of the Code so designated contains provisions for levying the tax, (sections 3713-3719;) and the ordinance makes provision for the difference in officers, etc.

3. It is contended that the provisions of the ordinance quoted conflict with section 879 of the municipal corporation act. The section referred to provides, in substance, that the delinquent taxes shall be collected by the city attorney by suit in the name of the city. (Laws 1883, p. 277.) while the portions of the Political Code adopted by the ordinance provide that such taxes shall be collected by the tax collector by sale of the property, (section 3765 et seq.) But if it be conceded that these portions of the ordinance are in conflict with the statute, (as to which see *City of Placerville v. Wilcox*, 35 Cal. 21,) it does not follow that the whole ordinance is void.

"Nothing is better settled than that, if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected." *Ex parte Christensen*, 85 Cal. 212, 24 Pac. Rep. 747. The provision for the collection of the delinquent taxes seems distinctly separable from the other parts of the ordinance, and may therefore be rejected. The proceedings in this case were in accordance with the statute, the suit having been brought under section 879, above referred to. In the view we have taken it is not necessary to consider the effect of the amended ordinance. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment and in the foregoing opinion. The money which was the subject of the double assessment for the year 1888-89 did not bear its share of taxation for the preceding year. If the owner had waived the invalidity of its assessment for the fiscal year 1887-88, and had paid upon such assessment the tax levied for that year, a different question would have been presented.

(87 Cal. 489)

SMITH v. MOHN. (No. 13,898.)

(*Supreme Court of California*. Jan. 19, 1891.)

VENDOR AND VENDEE—CONTRACT—ACTION FOR PRICE—FINDINGS.

1. In an action on a contract to buy land, which is set out in the complaint, a finding by the court that plaintiff "entered into an agreement in writing with the defendant" \* \* \* whereby plaintiff agreed to sell and defendant agreed to buy said land upon the terms and conditions set forth in plaintiff's complaint, and plaintiff's Exhibit No. 2, "is a sufficient finding that defendant executed the contract, notwithstanding the exhibit is no part of the pleadings or record, as the finding is complete without the reference to the exhibit.

2. Plaintiff and defendant being the only parties to the contract, a finding of the amount "due the plaintiff upon said contract" is sufficient, without a finding that it is due from defendant.

3. Where defendant sets up as affirmative matter that his signature was obtained by fraud, and that another was the real purchaser, and was so regarded by plaintiff, findings that the signature was not obtained by fraud, and the plaintiff did not accept the contract with knowledge that another was the real purchaser, sufficiently cover the issues raised by the affirmative allegations.

4. Where a contract for the sale of land provides that time shall be of the essence, and that in case of the vendee's failure to comply with its terms he shall forfeit all rights, but does not provide that the vendor shall forfeit any right if the purchase money is not paid at the stipulated time, the vendor may enforce the contract and sue for the purchase money in case of the vendee's default. Following *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

*Brunson, Wilson & Lamme*, for appellant. *Dunne & Hunter* and *Jay E. Hunter*, for respondent.

BELCHER, C. This action was commenced on the 19th day of April, 1889, to recover the sum of \$1,000, with interest thereon, alleged to be due from defendant to plaintiff, under a contract for the sale of land. It is alleged in the complaint that on the 6th day of September, 1887, the plaintiff and defendant entered into a written agreement, a copy of which is set out in full, whereby the plaintiff, as party of the first part, agreed to sell and convey to the defendant, as party of the second part, and the latter to buy, a certain described parcel of land, for the sum of \$2,200, to be paid as follows: \$700 cash, the receipt of which was acknowledged; \$500 on January 1, 1888; and the balance of \$1,000 on May 1, 1888,—with interest at 8 per cent. It is further alleged that the first two payments were made, and that the sum of \$1,000, with interest, "became due, according to the terms of said contract, on the 1st day of May, 1888, no part of which has been paid by defendant, although often requested so to do. That plaintiff has duly performed all of the conditions of said contract to be performed by him to this time, and has been constantly and now is ready and willing, and prior to the institution of this suit offered to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance by defendant with the terms of said contract as therein set forth, but defendant said he would not accept a deed, and refused to pay said money." The agreement set out contains this provision: "It is further agreed that time is of the essence of this contract, and, in the event of a failure to comply with the terms thereof by said party of the second part, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys theretofore paid under this contract; and all his interest in or to said moneys, or said property, shall thereupon immediately cease, as fully as if said moneys had never been paid, or this agreement entered into. And the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed, with certificate of title." The defendant, by his answer, denied that "plaintiff and defendant entered into the written agreement, a copy of which is set out in the complaint;" admitted that he signed it; and averred "that his signature thereto was obtained by false and fraudulent representations of the said plaintiff, made by and through his agents employed by him for the sale of said premises in said contract described." He then states that he was solicited by one C. J. Longstreet to purchase the property, and declined to do so; that Longstreet and D. G. White, his partner in the real-estate agency business, informed him that they had contracted to purchase the property in his (defendant's) name, and had paid, on account of the purchase price, a sum of money, which they claimed to have advanced for him; that he then and

there refused to confirm the purchase or to take the property, whereupon they produced the written contract, a copy of which is set out in the complaint, and which had then been signed by the plaintiff, and insisted that he should execute it, and become the purchaser of the property, and that he positively refused to make the purchase or sign the contract; that upon such refusal they informed the agent of plaintiff for the sale of the property that defendant refused to sign the contract, and offered to return the same to the agent, and cancel it, and demanded a return of the money paid by them on account thereof, but the agent refused to receive or cancel the contract, or to repay the money; that thereupon it was agreed between them that White should become the purchaser, procure the signature of defendant to the contract, and take an assignment thereof, and pay the balance of the purchase price; that Longstreet and White informed defendant of this agreement, and requested him to attach his signature to an assignment indorsed on the contract to White, and that he at first refused, but finally did it upon their assurance that it was a mere matter of form, and that he would incur no liability thereunder; that subsequently upon like request and assurance he signed the contract; that the plaintiff thereafter received the contract, and the first and second payments therein provided for, with full knowledge and notice that White was the purchaser of the property, and the real party in interest, as the vendee thereof; and that the plaintiff did not at any time call upon defendant for any money or to comply with any of the terms of the contract until after White had made default in the last payment; and that defendant never did make any payment for or on account of the said purchase, or furnish any money therefor. The case was tried, and the findings of the court were as follows: *First*, That on the 6th day of September, 1887, the plaintiff, being the owner of the parcel of land described, "entered into an agreement in writing with the defendant, G. F. Mohn, Sr., whereby the plaintiff agreed to sell and the defendant agreed to buy said land, upon the terms and conditions set forth in plaintiff's complaint, and the exhibit marked 'Plaintiff's Exhibit No. 2;'" *second*, that Longstreet and White were not the agents of plaintiff, or employed by him for the sale of said premises; *third*, that the signature of the defendant to the said agreement of purchase and sale was not obtained by false and fraudulent representations of the plaintiff, made by and through his agents; *fourth*, that plaintiff did not accept and receive the contract, or the first and second payments thereon, with the knowledge and notice that White was the purchaser of the property, or the real party in interest as the vendee thereof; *fifth*, that the plaintiff, prior to the institution of this suit, offered to execute and deliver to defendant a deed of the premises, together with a certificate of title, and demanded of him the balance due on the contract, but defendant declined to accept the deed and refused to pay the money; *sixth*, that there is now due the plaintiff upon

said contract the sum of \$1,167, principal and interest. The court gave judgment for the plaintiff for the amount found due, with costs, and the defendant appealed. It is contended for appellant that the findings were defective and insufficient in several particulars.

First it is claimed that there was no sufficient finding that defendant ever executed the contract set forth in the complaint, or as to what were the terms and conditions upon which the sale was made. This position is rested upon the last clause of the first finding, that the parties entered into an agreement to sell and buy the land upon the terms and conditions set forth in the complaint, and the exhibit marked "Plaintiff's Exhibit No. 2." It is said that this exhibit is not made a part of the pleadings, findings, or record, and is not referred to except in this manner. But the contract of sale was set out *in hæc verba* in the complaint. The defendant admitted that he signed that contract, and only alleged in substance that he did not execute it, in a legal sense, for the reason that his signature was obtained by fraud. There is no question, therefore, as to what were the terms and conditions of the contract which the defendant signed, and on which the plaintiff relied for a recovery. The only question then is, was the defendant bound by the contract, or not bound by it, because of the alleged frauds? The words "and the exhibit marked 'Plaintiff's Exhibit No. 2,'" may be rejected as surplusage, as the finding is complete without them. It may be remarked in this connection, that the evidence is not brought up in the record, and we are not advised as to what was introduced, but, if need be, we might assume that plaintiff offered his contract, and it was received and marked as his "Exhibit No. 2."

It is next objected that the court found only the amount "due the plaintiff upon said contract," and not that the sum named was due from defendant. But as the plaintiff and defendant were the only parties who signed the contract, it must follow as a necessary inference, in view of the other findings, that if anything was due the plaintiff it was due from the defendant. We think, therefore, that this finding was sufficient.

It is further objected that the findings as to the affirmative matters set up in the answer were not sufficient. The substance of these matters is—*First*, that defendant's signature to the contract was obtained by fraud, consisting of false and fraudulent representations, etc.; *second*, that White was the purchaser and the real party in interest, and was so accepted and regarded by the plaintiff. It is true that findings should respond to and cover all of the material issues raised by the pleadings, but they should be statements only of the ultimate facts, and not of the probative facts. *Mathews v. Kinsell*, 41 Cal. 512. In this case, we think the findings did meet and negative all the ultimate facts affirmatively alleged in the answer, and that they should be held sufficient.

It is also contended that, under the rule that pleadings are to be construed most

strongly against the pleader, the averment in the complaint that plaintiff, "prior to the institution of this suit, offered to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance," etc., must be construed as relating to a time immediately preceding the institution of the suit; that the offer of a deed and demand of payment were therefore not made until nearly 11 months after the money sued for became due and payable; and that plaintiff, by his neglect to tender the deed and demand payment when the money became due, had lost all right to sue for and recover the money under the express provisions of the contract. The provisions of the contract relied upon as effecting this result are those above quoted. It will be observed that it is also averred in the complaint "that plaintiff has duly performed all of the conditions of said contract to be performed by him to this time." This was a sufficient averment of the performance of conditions precedent, (section 457, Code Civil Proc.,) and it is not denied by the answer. This being so, how can it be said that plaintiff was in default and thereby lost his rights? But however this may be, it should be noticed that the substance of the provisions relied upon is that time is of the essence of the contract, and if defendant shall fail to comply with its terms, then the plaintiff shall be released from all obligations to convey the property, and defendant shall forfeit all right thereto, and to the moneys paid, and all his interest in or to the said moneys and property shall immediately cease, as fully as if the moneys had never been paid, or the agreement entered into. In this there is no provision that the plaintiff shall forfeit his rights if the money is not paid on time; and in *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629, where a similar contract was under review, it was held that the failure of the vendee to make the payments provided for did not make the contract void, so far as the vendor was concerned, but that he had the option to avoid or enforce the contract, and might, if he elected to do so, sue for and recover the balance of the purchase money. That case seems to be decisive of this, and, as the above are all the points made for a reversal, we advise that the judgment be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(15 Colo. 359)

GRIMES v. HILL.

(Supreme Court of Colorado. Jan. 10, 1891.)

EXAMINATION OF WITNESS—FRAUDULENT CONVEYANCES—EVIDENCE.

1. A party may interrogate his own witness by direct questions for the purpose of contradicting previous adverse testimony.

2. To invalidate a purchaser's title to property on the ground that the purchase was made in fraud of the rights of creditors, it is necessary to prove that the vendor made the conveyance with intent to hinder, cheat, or defraud his creditors,

and also that the vendee was cognizant of such fraudulent intent in making the purchase.

3. These two matters may be proved conjointly or separately, by one witness or many, by direct or by circumstantial evidence. A wide range of evidence is allowable to show fraudulent intent, as well as notice thereof, in such transactions.

4. Parties committing such frauds usually seek to conceal the direct and positive evidences of their guilt; and hence resort must generally be had to circumstantial evidence. Circumstances, however slight, relating to the transaction, and tending to throw light upon its character, are competent evidence so far as the same are connected with the parties.

5. A party attempting to impeach the validity of a conveyance on the ground of fraud may give in evidence declarations of the vendor or vendee tending to reveal the character of the transaction, when such declarations are shown to have been made either in person or through the authorized intervention of a third party at or prior to the consummation of the sale.

6. A party, having introduced certain testimony tending to sustain his side of the issue, is precluded from denying the materiality of such testimony for the purpose of preventing its contradiction.

(Syllabus by the Court.)

Error to superior court of Denver.

William E. Grimes, plaintiff below, brought suit against Zeph T. Hill, alleging that Hill had wrongfully taken and converted to his own use a large amount of personal property (merchandise) belonging to plaintiff. The defense relied on at the trial was to the effect that defendant, Hill, as United States marshal, seized the property in execution of a valid judgment in the United States court against one Brasher; and that whatever title Grimes had to the property was obtained by a fraudulent conveyance to him by Brasher, and so was void as against creditors whom the marshal represented. To sustain this defense, Frank Grimes was called, and testified, in substance, that the original plan was for him and his brother William to take the property as joint purchasers; that, just previous to the conveyance, Brasher had said to witness: "Joe Williams will call on you. He is coming around there to have a talk with you. \* \* \* Brasher told me \* \* \* that he wanted to have a third party speak to me, because I wouldn't have to swear to no lies on the witness stand." The witness then testified, circumstantially, to a conversation between himself and Williams, in which Williams represented that Brasher was in failing circumstances, and that his business would be closed up the next day; and proposed, in behalf of Brasher, a fictitious and fraudulent sale to the Grimes Bros., to enable Brasher to settle with his creditors, and then that Brasher should have his property and business back again. The witness further testified that, in pursuance of such proposition, he and his brother entered into negotiations with Brasher, but that at the last moment he (Frank) refused to have anything to do with the deal. The transfer, however, was immediately consummated with his brother William. In rebuttal of the testimony given by Frank Grimes, plaintiff called Joseph Williams, whose attention was directed to the time and place of the conversation between

himself and Frank Grimes, and he was asked to give his statement of the conversation. Williams' testimony on that subject was quite brief, and of a very different character from that given by Frank Grimes. When it appeared that Williams could recollect nothing further, counsel for plaintiff proceeded to interrogate him by direct questions as to whether in that conversation he made certain of the damaging statements ascribed to him by the witness Grimes; but the court of its own motion refused to permit such questions to be asked, on the ground stated by the court, as follows: "Mr. Williams has testified to his version of the matter, and that ends it. You cannot ask Mr. Williams, 'Did not such a thing occur?' When you have asked him to state all that did occur, that is as far as you can go." Counsel for plaintiff then offered to prove by the witness Williams that "he did not tell to Frank Grimes that Brasher was in failing circumstances, or that Brasher's establishment would be closed the next day; that he (Williams) did not tell to said Grimes at the place named by said Grimes, or at any time or place, that, if he (Grimes) took or bought the retail business or stock of Brasher, when Brasher had fixed up he could give the stock back to Brasher, and Brasher would go on." This offer was objected to, and the objection was sustained. Plaintiff's counsel duly reserved exceptions to these several rulings of the court, and such rulings are assigned for error.

*Lucius P. Marsh*, for plaintiff in error.  
*Joseph N. Baxter*, for defendant in error.

ELLIOTT, J., (after stating the facts as above.) The plaintiff acquired the property in controversy by a conveyance from one Brasher. Under the issues the burden of showing that the plaintiff's title was fraudulent and void as to the creditors of the vendor rested upon the defendant. To sustain this burden, Frank Grimes was called, and testified to certain statements made to him by one Joseph Williams, as the representative of the vendor, concerning the purposes of the proposed sale. In rebuttal, the plaintiff called said Williams, and by him, as a witness, offered to contradict the testimony of Frank Grimes in certain particulars; but the court refused to allow plaintiff's counsel to propound direct questions to the witness; and finally excluded the offered evidence altogether. The ground upon which the trial court excluded the evidence sought to be elicited from the witness Joseph Williams was clearly erroneous. The rule is well settled that under certain circumstances a party may interrogate his own witness by direct questions for the purpose of contradicting previous adverse testimony. A familiar example of the rule occurs where a witness has been charged by the testimony of another witness, already given at the trial, with having made certain statements in a former conversation between the two witnesses. In such case the latter witness, after giving his recollection of the conversation as fully as he can, may be asked the direct question whether in such

conversation he made the statements, or any of them, imputed to him by the former witness, specifying in the question the substance of such statements. This rule of evidence, and the reasons upon which it is founded, have received thorough consideration by this court. See opinions in *Gilpin v. Gilpin*, 12 Colo. 510, 515, 21 Pac. Rep. 612, and the authorities there cited. An effort has been made in this court to sustain the rulings of the court below upon the ground that the testimony of Frank Grimes stating the conversation between himself and Joseph Williams was not competent evidence; that it was a conversation between parties not finally connected with the actual sale, and hence hearsay; and, further, that, such evidence having been received without objection, the court might in its discretion refuse to allow it to be contradicted. The latter view is not sustained by the record as a matter of fact. Plaintiff's counsel did object, and reserve an exception, to the ruling permitting Frank Grimes to state his conversation with Williams. The objection and exception, however, are not material. The language of the court permitting the testimony to be given, though somewhat suggestive, was not without foundation in the testimony already received. It was as follows: "Mr. Williams, it appears by the testimony, was made the agent of Mr. Brasher to make these declarations." It was certainly within the province of the jury, if they believed the witness Frank Grimes, to find that Brasher expected and had authorized Williams to say something to said witness which, if uttered by Brasher himself, would, in his opinion, militate against him in any controversy which might arise out of the contemplated transaction. The ruling of the court permitting Frank Grimes to state the conversation between himself and Williams was therefore correct, and the evidence thereby admitted was competent and relevant to the issue on trial.

To invalidate the plaintiff's title as a purchaser of the property in controversy, it was necessary to prove that Brasher made the conveyance with intent to hinder, cheat, or defraud his creditors, and also that plaintiff was cognizant of such fraudulent intent in making the purchase. It was competent to prove these two matters conjointly or separately, by one witness or many, by direct or by circumstantial evidence. A wide range of evidence is allowable to show fraudulent intent on the part of the vendor, as well as notice thereof to the vendee, in such transactions. Parties committing such frauds usually seek to conceal the direct and positive evidences of their guilt. Hence resort must generally be had to proof of circumstances somewhat remotely connected with the transaction. Circumstances, however slight, relating to the transaction, and tending to throw light upon its character, are competent evidence so far as the same are connected with the parties thereto, respectively. A party attempting to impeach the validity of a conveyance on the ground of fraud may give in evidence declarations of the vendor or vendee tending



to reveal the character of the transaction, when such declarations are shown to have been made, either in person or through the authorized intervention of a third party, at or prior to the consummation of the sale. We need not, in this case, consider the question of subsequent declarations. *Kerr, Fraud & M. p. 384; Bump, Fraud. Conv. pp. 560-564.*

The evidence disclosed that the proposed purchasers were two brothers, Frank and William Grimes. According to the testimony of Frank Grimes, the vendor, Brasher, expressed a desire, shortly before the sale, that he (Frank) should talk with a third party, (Williams,) so as to avoid the effect of the personal declarations of the parties to the transaction as evidence in a court of justice. Williams talked with Frank Grimes, and proposed, in effect, according to Frank's testimony, that he and his brother William should take charge of the vendor's business and of the property in controversy temporarily under a simulated sale so as to enable the vendor to settle with his creditors. The testimony of Frank Grimes further shows that, immediately after this conversation with Williams, he and his brother William Grimes received from Brasher a substantial confirmation of William's authority. The negotiation proceeded accordingly. It was only at the last moment that Frank Grimes refused to become a party to the transaction, for the reason, among others, as he in effect testified he informed his brother at the time, that the proposed transaction was not politic, and might cause them to lose their business reputation and standing. The negotiation, however, was immediately consummated with William Grimes, plaintiff in this action. The defendant, having introduced the testimony concerning the conversation with Williams in support of his side of the issue, was not privileged to deny the materiality of such testimony for the purpose of preventing its contradiction. An offer to contradict in such a case is unlike an offer to introduce irrelevant matters by one party because other irrelevant or improper testimony has been received in behalf of the other party. *Batdorff v. Bank, 61 Pa. St. 179; Mitchell v. Sellman, 5 Md. 376.* But we need not rest our decision upon this ground; for, as we have seen, the testimony of Frank Grimes concerning the conversation with Williams was both relevant and material. It tended to show fraudulent intent on the part of the vendor in making the sale; and so it was competent evidence, even though the question of the vendee's alleged complicity in the fraud was left to be determined by other evidence. The weight of the evidence, however, was for the jury, as well as the credibility of the witness; and it was the absolute right of plaintiff to contradict his testimony, if it could be done, by competent evidence properly introduced in rebuttal. It was error, therefore, to exclude the offer of plaintiff to contradict any substantial part of Frank Grimes' testimony by the witness Joseph Williams.

We need not discuss the assignments of error relating to the charge of the court.

In the case of *Sutton v. Dana*, ante, 90, (recently decided by this court,) we had occasion to consider and express our views upon instructions to juries in cases of this kind, and we need not repeat them. The judgment of the superior court is reversed, and the cause remanded for a new trial.

(15 Colo. 355)

*CLELLAND et al. v. MCCUMBER.*

(*Supreme Court of Colorado. Jan. 10, 1891.*)

RESIGNATION OF JUDGE—FAILURE TO PAY OVER MONEY—LIABILITY OF BOND.

1. When a county judge resigns his duty, without demand therefor, to turn over to his successor in office all moneys and effects which have come into his hands in the execution of the duties of his office, so far as the same have not been applied to legitimate purposes.

2. The failure of a county judge, upon resigning, to pay over money deposited in a condemnation proceeding, is a breach of his official bond; and thereupon a cause of action accrues to any one specially injured by such breach, as soon as legal damages result therefrom.

3. The petitioner in condemnation proceedings has an immediate and direct interest in the preliminary deposit at all times until the final adjudication, and until the same is applied to its ultimate purposes. The deposit is not payment, nor part payment, until it is actually so applied.

4. If by any means the deposit fails, petitioner becomes liable to replace the same or to lose possession of the premises. Hence, when a county judge resigns without paying over the deposit to his successor, an immediate legal injury results, and a cause of action thereupon accrues to petitioner upon the official bond of the defaulting officer.

(*Syllabus by the Court.*)

Appeal from district court, Fremont county.

This is an appeal from a judgment rendered in an action upon the official bond of the county judge of Fremont county. The cause was submitted in the court below upon an agreed statement of facts, which may be summarized as follows: Copy of official bond of Robert A. Bain, as county judge, in sum of \$5,000, and in form substantially as required by law, with James Clelland, J. L. Prentiss, S. W. Humphrey, and others as sureties. In October, 1880, the Denver & Rio Grande Railway Company commenced proceedings in the county court of Fremont county to condemn right of way for its road through the lands of Philip A. McCumber. By order of said court, the railway company deposited with Robert A. Bain, judge and acting clerk of said court, the sum of \$225, the estimated compensation and damages for the right of way, and thereupon the railway company took possession of the land. In April, 1884, the condemnation proceeding was tried, and the sum of \$1,940 was awarded and adjudged in favor of said McCumber. The railway company appealed the cause to the supreme court. In February, 1887, said appeal was dismissed, and thereupon the railway company duly assigned to said McCumber the deposit of \$225. Shortly after the deposit was made, Judge Bain resigned his office, the resignation taking effect October 1, 1881; and Judge Waldo became his successor on the same day. Judge Bain did not pay over the deposit to his successor, nor has the same ever been paid

to the railway company, or to said McCumber. On March 26, 1888, said McCumber, as assignee of the railway company, commenced this action upon the official bond of Judge Bain to recover damages on account of his failure to pay over said sum of \$225. The appellants herein, being sureties upon his bond, were summoned as defendants. The finding and judgment were in favor of McCumber, appellee herein.

*C. D. Bradley*, for appellants. *A. Macon*, for appellee.

ELLIOTT, J., (after stating the facts as above.) On this appeal no objection is urged that the action was not brought in the name of the proper party. The assignments of error question only the sufficiency of the evidence to support the finding and judgment under the issues; and the particular matter relied on is that the agreed statement of facts fully sustains the defense for the six-years statute of limitations, which was duly pleaded to the action. When Judge Bain resigned as county judge it was his duty, without demand therefor, to turn over to his successor in office all moneys and effects which had come into his hands in the execution of the duties of his office, so far as the same had not been applied to legitimate purposes. His failure to pay over the \$225 deposited in the condemnation proceeding was therefore a breach of his official bond; and thereupon a cause of action accrued to any one specially injured by such breach, as soon as legal damages resulted therefrom. Gen. St. 1883, § 590; *People v. Cramer*, 15 Colo. —, ante, 302; *San Francisco v. Heynemann*, 71 Cal. 153, 11 Pac. Rep. 870; *People v. Van Ness*, 76 Cal. 121, 18 Pac. Rep. 139. The agreed statement of facts is silent as to whether or not McCumber, upon dismissal of the appeal by the supreme court, actually received the \$1,940 awarded him; but, as he sues in this action as assignee of the railway company, and not in his own right, we must presume that his only cause of action is the legal injury resulting to the railway company in consequence of the failure of Judge Bain to pay over the deposit to his successor. The material question to be determined, then, is, when did such injury first result?

Without determining what interest, if any, the owner of the property sought to be taken or damaged has in the preliminary deposit before final judgment in condemnation proceedings, it seems clear that the petitioner making such deposit has an immediate and direct interest therein at all times until the final adjudication, and until the same is finally applied to its ultimate purposes. Such deposit is essential to petitioner's right of entry and possession. If by any means it is withdrawn before the final determination of the controversy, petitioner's right of possession is suspended. The preliminary deposit is not payment, nor part payment, until it is actually so applied. It is in the nature of a continuing tender, and must at all times be kept good by petitioner, though it lacks some of the incidents of tender, in that the owner is not bound to accept it

or incur the risk of being mulcted in costs if it proves sufficient. In receiving the preliminary deposit, the court, or its proper officer, acts as the depository of the petitioner, who thereby, in pursuance of the statute, acquires the privilege of immediate entry and possession of the premises sought to be taken. The owner is an involuntary party to the proceeding. If by any means the deposit fails, petitioner's statutory privilege is at once imperiled, and the possession may be actually terminated unless the deposit be replaced. The deposit, therefore, must be considered as held by the public official at the risk of petitioner, until the same is actually applied to its ultimate purpose, or is otherwise legally disposed of. *Lewis, Em. Dom. § 458 et seq.*; *Blackshire v. Railroad Co.*, 13 Kan. 514; *White v. Railway Co.*, 64 Iowa, 281, 20 N. W. Rep. 436. From the foregoing it will be readily perceived that the failure of Judge Bain to pay over to his successor the deposit of \$225 was not only a breach of his official bond, but such failure resulted in an immediate legal injury to the railway company. The company thereby became liable to replace the deposit or to lose possession of the premises. Hence a cause of action immediately accrued in favor of the company upon the judge's official bond, to recover the damages occasioned by the loss of the deposit. Such cause of action having accrued at the date of the breach of the bond, October 1, 1881, and this action not having been commenced until March, 1888, it was barred by the statute of limitations as against the railway company or any one suing in the right of such company. The judgment must accordingly be reversed, and the cause remanded, with directions to dismiss the action.

(15 Colo. 366)

#### FAIRBANKS *et al.* v. IRWIN.

(*Supreme Court of Colorado.* Jan. 10, 1891.)

#### CHALLENGE OF JURORS—TRIAL—RIGHT TO OPEN AND CLOSE.

1. That a person called as a juror is acquainted with the attorney of one of the parties to the suit, and had employed him at one time to do certain legal business, is not sufficient ground upon which to base a challenge for cause.

2. Where the only defense pleaded consists of affirmative averments of new matter, the burden of the issue rests upon the defendant, and he is entitled to open and close the evidence and argument at the trial.

(*Syllabus by the Court.*)

Appeal from district court, Lake county. This was an action brought by Horace Fairbanks and others, plaintiffs, as payees of certain promissory notes executed by the defendant, Irwin. The defendant pleaded specially and circumstantially to the effect that the notes were given for the price of a certain brick-making machine sold by plaintiffs to defendant, that the machine was warranted to do good work, that it did not do good work, and that the consideration of the notes had failed by reason of a breach of such warranty. The verdict and judgment were for defendant, and the plaintiffs bring this appeal.

*W. J. Weeber*, for appellants. *N. Rollins*, for appellee.

ELLIOTT, J. The first assignment of error relating to the demurrer to plaintiffs' replication was withdrawn upon the oral argument before this court. One C. A. Jones was called as a juror. Being examined upon his *voir dire*, it appeared that he was acquainted with defendant's attorney, whom he had employed at one time to do certain legal business. This was not sufficient ground upon which to base a challenge for cause, and the court did not err in overruling such challenge. Code, § 182. Failure of consideration of the notes sued on was the only defense pleaded in the action. The defense consisted of affirmative averments of new matter, and under it the burden of the issue rested upon the defendant. In such case it was not error to allow defendant to open and close with the evidence and argument at the trial. Code, § 187; Gen. St. 1883, § 110; Patterson v. Gile, 1 Colo. 200; Munro v. King, 3 Colo. 238. That Craycroft was the agent of plaintiffs sent to test the brick-machine sold to defendant with a guaranty was positively proved by a certain deposition read in evidence in behalf of plaintiffs at the trial; so the objection to the competency of certain testimony given by defendant to show such agency becomes immaterial.

The remaining assignments of error relate to the evidence and instructions. Upon examination, we are of opinion that they do not require special discussion in this opinion. The evidence appears to have been properly received and submitted to the jury under appropriate instructions. The verdict cannot properly be disturbed. The judgment of the district court is affirmed.

(15 Colo. 333)

BLYTHE et al. v. DENVER & R. G. RY. CO.  
(Supreme Court of Colorado. Jan. 10, 1891.)

CARRIERS—NEGLIGENCE—PROXIMATE CAUSE—ACT OF GOD—EVIDENCE.

1. In an action against a railroad company to recover the value of an express package, it appeared that the express-car, with three others, was blown from the track by a gale, into such a position that all the goods must have been thrown into one corner at the top; that the car was immediately set on fire by coals from the stove, and burned so rapidly that the messenger escaped with difficulty; and that the wind was so fierce as to make it almost impossible to stand or walk, and the air so full of dust that one could scarcely see. Held sufficient evidence to support a finding that the proximate cause was the "act of God," and not the failure of the company to remove the goods after the car was overturned.

2. Even if not technically correct, no prejudice could have resulted to plaintiff from a charge that, "where one is pursuing a lawful avocation, in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident' or the 'act of God.'"

Commissioners' decision. Error to district court, Arapahoe county.

Plaintiffs in error brought suit against the defendant as a common carrier for the loss of a package of merchandise consisting of gold and silver watches, watch-cases and movements, of the alleged value of \$726.95, delivered to defendant at Alamosa by one J. B. Moomaw, to be carried

as an express package, directed to and to be delivered to plaintiffs at Denver. The package was not valued, and was accepted and receipted for as an ordinary package at a nominal valuation of \$50, upon which charges of 65 cents were paid in advance for its transportation. The defendant, after denying the material allegations of the complaint, admitted the receipt of the package, the payment of the money for its transportation, the execution and delivery of its receipt for the same, and specially alleged as defenses: *First*, that the car in which such package was being transported was blown from the track by a furious wind, and the car and contents destroyed by fire, and that the loss was by inevitable accident and "the act of God;" *second*, that the shipper fraudulently concealed the value of the package, and it was received as being only of the value of \$50; that it was placed in the body of the car, where ordinary packages were usually carried; that defendant had a fire-proof safe in the car, and had the shipper given the true value, and paid transportation for such value, the goods would have been placed in the safe, and would not have been lost; that, by the terms of the receipt given, defendant was exempted from any liability exceeding \$50. A replication was filed putting in issue the special matters pleaded in defense, and averring negligence in not securing the package in the safe, and in not making proper efforts to save the property at the time of the disaster. The case was tried to a jury, resulting in a verdict for the defendant, and judgment upon the verdict.

Lucius P. Marsh, for plaintiffs in error.  
Walcott & Valle, for defendant in error.

REED, C., (after stating the facts as above.) It is conceded that the wrecking of a portion of the train, such portion consisting of one engine and four cars, one being the express-car in which the goods were being carried, was by "the act of God," and inevitable. It is also conceded in argument that having a coal fire burning in a stove, and a lighted lamp in the compartment, as testified to, was not negligence on the part of the carrier. Counsel for plaintiffs in error in reply say: "In the brief of defendant in error, counsel have assumed for us a claim which we have not made, and they then proceed to demolish such assumed claim. They assume for us that we claim there was negligence in carrying in the car a stove with fire in it. \* \* \* There was negligence,—we may call it by that name,—but such negligence was in not making the requisite efforts to save the goods after the peril had been incurred. We make no claim that there was negligence in carrying a stove in the car." By these concessions, two important questions are eliminated, and the issues are narrowed, the only questions remaining being: *First*. Was "the act of God" the proximate and direct cause of the loss sustained, so as to exonerate the carrier from liability, or was it the remote cause, and the fire against which the carrier is supposed to be an insurer the proximate and direct cause?

*Second.* After the wrecking and overturning of the train by "the act of God," was the carrier guilty of negligence in failing to protect and secure the goods in the burning car?

Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms "proximate" and "remote" causes and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing. But, in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration. Webster defines "proximate cause," "that which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause." And, Dict. Law: "The nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation, or dominant cause." But with these definitions in view, when two causes unite to produce the loss, the question still remains, which was the proximate cause? In *Insurance Co. v. Tweed*, 7 Wall. 52, the late lamented Mr. Justice MILLER said: "We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In *Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co.*, 12 Wall. 199, in delivering the opinion of the court, Mr. Justice STRONG said: "And certainly, that cause which set the other in motion, and gave to it its efficiency to do harm at the time of the disaster, must rank as predominant." In *Railroad Co. v. Kellogg*, 94 U. S. 475, it is said: "The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In *Insurance Co. v. Boon*, 95 U. S. 130, it is said: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

Leaving out of consideration, as we must, by concession of counsel, all question of negligence in regard to the burning fire in the stove, a lighted kerosene lamp, and regarding each of them as securely protected against damage as prudence would require, and applying the rules above laid down, it becomes apparent that the overturning and wrecking of the

car by the violence of the wind was the proximate, direct, and efficient cause of the loss, and the fire following, if not instantaneously, immediately after, without negligence or any wrongful act of the carrier intervening to produce it, must be regarded as resulting and incidental. It is ably contended in argument, and many supposed authorities in support of the position are cited, that the negligence of the carrier in failing to use proper exertion to save the contents of the car, after it was overturned, rendered the defendant liable for the loss. If, by proper diligence and attention the goods could have been rescued, a failure to secure them would have fixed the liability of the carrier. There can be no doubt of the correctness of this conclusion. The questions, what was the proximate cause of the loss, and of negligence, were questions of fact to be determined by the jury from the evidence, under proper instructions from the court. There was not much conflict of testimony. In *Railroad Co. v. Kellogg*, supra, it is said: "In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies; and this must be determined in view of the circumstances existing at the time." The jury found as a fact that the "act of God" was the proximate cause, and also found as a fact that there was no negligence. Viewed in the light of all the evidence, and of attendant circumstances, the finding of the jury was fully warranted. The force of the gale was such as to blow the cars from the track over the embankment. It was shown to be almost impossible for men to stand or walk, and they were compelled to prostrate themselves under the lee of the track or bank to escape its fury. The air was so full of dust and flying material that scarcely anything could be seen. The car contained inflammable material, and the fire succeeded the overturning almost instantaneously. The messenger escaped with great difficulty, and not without injury from the flames. The position of the car was such that all movable goods must have been hurled into the corner of the top of the car. From the force of the wind, and combustible material of the car, it is obvious that the destruction of the car and contents was inevitable in a very brief space of time, and that any attempt to rescue the goods would have been unavailing.

Considerable criticism is directed to the instructions of the court. Some of those criticised, and upon which errors are assigned, are in regard to negligence in the use of the stove and lamp. As counsel concedes in his final argument that there was no negligence in that respect, a review of them becomes unnecessary. Considerable attention is given to the eighth instruction, in which the learned judge charged: "Where one is pursuing a lawful avocation, in a lawful manner, and some-

thing occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called 'inevitable accident' or the 'act of God.' The objection is more technical than substantial. While it is, possibly, not technically correct, and while there is a legal distinction between "inevitable accident" and the "act of God," we can see nothing in it to the prejudice of the plaintiff, or that could have misled the jury. The immediate resulting cause producing the loss was the fire, which might properly be termed an "inevitable accident" growing out of the former disaster; while the direct cause of the agency that worked the destruction was the "act of God," putting the resulting agent at work. We think the charge, taken as a whole, was a fair and impartial statement of the law, and should be sustained. We advise that the judgment be affirmed.

**RICHMOND and BISSELL, CC., concurring.**

**PER CURIAM.** For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

**ELLIOTT, J.,** having tried this cause below, did not participate in this decision.

(15 Colo. 339)

**LAHAY V. CITY NAT. BANK OF DENVER.**

(*Supreme Court of Colorado.* Jan. 10, 1891.)

**DECEIT—IDENTIFICATION OF A PAYEE.**

A bank which ignorantly pays money to the holder of an instrument upon the faith of a third person's statement that he knows the holder to be the payee, and is afterwards compelled to pay the amount to the true payee, may recover the sum from the third person in an action of deceit.

Appeal from superior court of Denver.

This cause of action arose in consequence of the payment of money to the wrong person upon the following written instrument: "First National Bank of Chicago. Chicago, 7, 3, 1885. City Nat'l Bank, Denver, Colo.: Your account has credit for six hundred dollars, deposited by J. Phillips, for use of John Phillips. Confirmation of above will be given in our advice of this date. \$600. K. CHAPMAN, Teller." It is alleged in the complaint that this instrument came into the possession of one Paul D'Armenthal, who applied to appellee for the payment of the sum mentioned therein, representing that he was the payee, John Phillips, and indorsed thereon the name of said John Phillips, representing said indorsement to be his own name and signature. That both John Phillips and Paul D'Armenthal were then wholly unknown to appellee, and to its officers and employees, and the signature and handwriting of the said D'Armenthal was likewise unknown. That appellee refused to pay the amount called for by said certificate to the said D'Armenthal until he should be identified as and shown to be John Phillips. That appellant, in whom appellee reposed special trust and confidence, appeared at the banking-house of appellee in said city of Denver, and identified the said D'Armenthal as John Phillips; and appellant, well

knowing the premises, and well knowing appellee's ignorance as aforesaid, and that appellee would not pay over to the said D'Armenthal the sum of money mentioned in said certificate, and for the purpose of enabling the said D'Armenthal to obtain from appellee the said sum of money, and to induce appellee to pay the same, thereupon falsely identified the said D'Armenthal as John Phillips, and then and there stated to appellee that he knew the said D'Armenthal to be John Phillips as of his own knowledge, when in truth and in fact said statement was false, and the said D'Armenthal was not John Phillips, and said appellant had no knowledge that said person was John Phillips; but appellee, being ignorant as aforesaid, and relying solely upon the identification and statement of said appellant, then and there paid over to said D'Armenthal the full sum of \$600 called for by said certificate. That on the 10th day of August, 1885, the said John Phillips, the party for whom such certificate was in fact intended, and who was entitled to said money, instituted in the superior court of Denver his action against appellee to recover said sum of money in said certificate mentioned, and on said date appellee gave notice in writing to appellant of the pendency of said suit. That thereafter judgment in said suit was entered in favor of the plaintiff therein, and against appellee, for the sum of \$620, and for costs, amounting to \$16.35, which appellee paid and satisfied in full. And appellee further avers that it was compelled to have counsel and attorneys to defend said action, whose services were reasonably worth the sum of \$75, and demands judgment against appellant for said sum and costs. The answer of the appellant is a specific denial of each allegation contained in the complaint. Upon these pleadings the cause was tried to the court without a jury; the trial resulting in findings and judgment against appellant for the sum of \$764.30 and costs.

*Rogers & Webber and C. W. McCord, for appellant. Benedict & Phelps, for appellee.*

**HAYT, J.,** (after stating the facts as above.) The allegations of the complaint are established by a large preponderance of the evidence introduced at the trial. In addition to this, we have the findings of the trial court in support thereof. The only question to be considered upon this appeal, therefore, is, are the facts as pleaded sufficient, under the law, to give appellee a right of recovery as against appellant? The action is founded upon the deceit practiced upon appellee by appellant, by means of which appellee was induced to pay the amount of the certificate to D'Armenthal, who had no claim to the money, instead of to John Phillips, who alone was entitled to receive the same. Counsel contended, however, that appellant is not liable on account of his false statement, because he is not shown to have had knowledge of its falsity at the time of making the same. The question thus presented was before the court, and carefully considered, in an early case. See

*Sellar v. Clelland*, 2 Colo. 532. It was then held that the intention of one party to deceive and defraud another was sufficiently made out by showing that a false affirmation had in fact been made by the party, concerning a matter about which he had no actual knowledge, under circumstances showing that the matter spoken about was better known to the party making the representations than to the other party. And to the general rule requiring a party relying upon false representations to show not only that they were false, but that the party making the same knew such to be the case, some exceptions were pointed out; as when one, as in this case, positively assures another that a certain statement is true, professing at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated. In the language of the learned judge writing the opinion in the case of *Sellar v. Clelland*, supra: "In such a case the proof would seem to be complete when it was shown that the defendants made the representations; that they were made to induce plaintiffs to enter into the contract; that, relying upon the same, they did enter into the contract; that the representations were false; that the plaintiffs sustained damage; and that such damage was occasioned by reason of the falsity of such representations."

The statute of frauds and perjuries cannot be invoked in this case to shield appellant. His liability does not grow out of any special promise to answer for the debt, default, or miscarriage of another; nor is he sought to be held upon any agreement required to be in writing. Appellant is shown to have stated as of his own knowledge that Paul D'Armenthal was in fact John Phillipe, and that this representation was made for the express purpose of inducing appellee to pay over the money. It is also shown that the bank, relying upon such representation, did pay the money to D'Armenthal, supposing him to be the John Phillipe entitled to receive the same. The representations were in fact false, and damages were sustained thereby. Every element necessary to a recovery under the decision in *Sellar v. Clelland* was here made out. The correctness of the decision in that case is not questioned. It is well supported by authority, and must control here. The judgment will accordingly be affirmed.

(15 Colo. 343)

#### HALL v. COWLES' ESTATE.

(*Supreme Court of Colorado*. Jan. 10, 1891.)

##### DESCENT AND DISTRIBUTION—RIGHTS OF HEIRS.

1. A granddaughter who, in the right of her deceased mother, sets up a claim against an alleged trustee of personal property belonging to her grandfather's estate, cannot maintain the action when it appears that by reason of a will, whose terms are not shown, no interest in the estate came to her mother until the death of testator's wife. The fact that a will existed negatives any right to claim for the mother under the statute of distributions.

2. The daughter has no legal capacity to sue  
v.25p.no.11-45

merely as a distributee of her mother's estate. The right of action is in the personal representative.

Commissioners' decision. Appeal from district court, Custer county.

This proceeding was started in the county court of Custer county by the filing of a claim against the estate of William Cowles, of which the following is a copy: "The estate of William Cowles, deceased, to Helen S. Durand Hall, daughter of Henry S. and Caroline B. Durand, and granddaughter of Roswell Cowles, formerly of Meriden, Connecticut, now deceased, debtor. For my one-third portion of the trust funds belonging to my mother, the said Caroline B. Durand, now deceased, that the said William Cowles, as administrator of the estate of Roswell Cowles, deceased, the father of my said mother, received into his hands in the year 1863, and has never paid over or accounted for same, or any part thereof, or rendered any account thereof, to the court of probate in and for said town of Meriden, New Haven county, state of Connecticut, my said mother being heir at law of said Roswell Cowles, and entitled to one-fourth part of his said estate, which amounted to exceeding the sum of twelve thousand dollars, after all debts and expenses were paid; the portion belonging to my mother, Caroline B. Durand, being \$3,000, of which I am entitled to one-third, or \$1,000; with 24 years' interest, at 7 per cent., \$1,670, total claim, \$2,670. HELEN S. HALL." The claim was disallowed, and from this order an appeal was taken to the district court, where the case was tried, and judgment again given against the claimant. The evidence in support of the claimant's account was found principally in two depositions,—one of the father of the claimant, Helen S. Hall, and the other of Emily F. Bell. From the evidence it appears that Roswell Cowles, who formerly lived in Meriden, Conn., died in July, 1848, leaving an estate, and a will disposing of it, by which instrument James S. Brooks was appointed executor. The executor Brooks died in 1862, and Mrs. Cowles, the widow of Roswell, died in 1865. The proof as to the disposition of the estate stops with the showing of the existence of an estate, a will, and an executor. No evidence was offered as to the terms of the will, or the disposition of the property, other than general statements that the property was managed by the executor during his life-time. It was shown that Roswell Cowles died, leaving sundry children, and that Caroline B. Durand, the mother of Helen, the claimant, was one of these children. Whether, by the will which Roswell Cowles executed, the widow took the entire estate, or whether the children were the residuary legatees, and, if so, in what proportion they took, nowhere appears. The witnesses whose depositions were taken state that William Cowles "was the last trustee;" and he is characterized by general statement as the "trustee of the estate of Roswell Cowles, deceased." There is no evidence otherwise of his being a trustee responsible to the claimant, or to the heirs of the estate of Roswell Cowles. He is not shown to have

been appointed by the order of any court, by any will, nor by any convention between him and any of the parties in interest. It appears from the testimony that Roswell left five children, one of whom was a daughter, Caroline B., who subsequently intermarried with Henry S. Durand, who testifies that Caroline died, leaving three children. The place of her residence at the date of her death is not shown, nor does it appear whether she died intestate, or left a will. In the course of the testimony, there were produced two notes, dated October 19, 1868, running to the order of Caroline, and signed by William Cowles. Some testimony was introduced which tended to show that these notes were given to represent Caroline's interest in the estate of her father, Roswell; that they were not executed in liquidation of the claim, but were held simply as evidence of the extent of her right. The evidence does not show the amount of Roswell's estate which came into William's hands, nor its value, except as it may be said to be presumptively established by the terms of the notes produced. Judgment was rendered in the district court affirming the order of the county court disallowing the claim, from which the claimant appeals.

*Edwin White Moore, M. M. Kellogg, and D. F. Umy, for appellant. John R. Smith, for appellee.*

BISSELL, C., (after stating the facts as above.) The validity of a claim against the estate of a decedent is not necessarily determined by its antiquity; but, when the ancestor permits a period exceeding thrice the statute of limitations to go by without attempt at legal enforcement, the heir should be held to strict proof of whatever may be necessary to take the case out of the operation of the statute, and of what may be essential to a recovery. According to the record, this claim, if it ever had an existence as against the estate of Roswell Cowles, became enforceable in February, 1865, upon the death of the widow. At that date the heirs at law of Roswell succeeded to the entire inheritance, if it were undisposed of by will. It is shown, however, by such proof as is deemed sufficient to establish the debt, that Roswell disposed of the estate by will, and that by reason of the provisions of that document the estate remained undistributed from 1848 to 1868, three years after the demise of the widow. While not accurately proven, it seems to be conceded that, and because of the will, Caroline B. Durand, the ancestor, succeeded to no right in the estate until after her mother's death. Such being the case, and it being conceded that there was a will disposing of Roswell Cowles' estate, it was important, and even absolutely indispensable, to show what that will was, in order to derive any claim by inheritance through the immediate heir, the mother of the present claimant. When the existence of a will disposing of the estate is once conceded, no heir can establish any rights by inheritance on simple proof of descent. Under such circumstances the statutes of descent and

distribution do not become operative. It is thus evident that Caroline B. Durand might be the daughter of Roswell Cowles, and live and die without ever having acquired any right to share in his estate. No proof was offered on this subject, and the claimant, Helen S. Hall, failed to establish her distributive right to any share in Roswell Cowles' estate through the right of her mother. There was a like failure to establish the liability of William Cowles, or of his estate. He was an heir of Roswell, and the brother of Caroline B. According to the testimony, he came into possession of some money, and of some stocks of undetermined value. But there was a failure of proof as to two important questions: Was this property a part of Roswell Cowles' estate? and did he receive it as trustee, so as to come within any rule depriving him of the benefit of a plea of the statute of limitations? There is a strong presumption arising from the testimony that William, on the death of the original executor, Brooks, succeeded to the control of some part of his father's estate; but it lacks the certainty essential to the enforcement of so ancient a claim. It was indispensable to show with certainty that he got money which was a part of the estate, and to prove the amount of it. Neither was established by sufficient or satisfactory proof. The failure to establish the capacity in which William took what he may have gotten is equally apparent. Without deciding whether a trustee is forbidden to insist on the plea of the statute, it is enough in this case to hold that the claimant failed to prove that William Cowles occupied any such position. If he received any part of his father's estate, it is not shown where, how, or from whom he got it. It may have come into his hands by loan, or from third parties, to whom alone he would be answerable. The absence of evidence establishing the existence of the relation of trustee and *cestui que trust* would forbid the application of the rule contended for.

If the mother of Caroline B., living, had an enforceable claim against William or his estate, the right, or any portion of it, did not descend to the heir at law, Helen S. Hall. Upon the death of the mother, whatever of property right she may have had in it went to her legal representative, whoever that might be; and only in his right of representation could he sue for and collect it. It may be true, according to the evidence, that under the laws of Wisconsin the children inherit from the mother, to the exclusion of the husband and father. It did not appear either that the mother lived and died in Wisconsin, or that the general rule of law which vests the right to all personal property in the representative was varied by statute in that state. The inheritance could only be available through an appeal to the statutes of descent and distribution. The administrator or the executor could alone present or enforce this claim. The present proceeding is an attempt to collect an undistributed share of an undivided portion of an unsettled estate. No authority for such an unusual proceeding was cited or referred to. Unless com-



pelled by well-recognized adjudications, no such rule will be followed or declared. These considerations must control the judgment in this case. The claimant is without the legal capacity essential to the maintenance of the action; and, whatever may have been the rights of Caroline B. Durand in her father's estate, they were not established with sufficient certainty to permit a recovery, even though it were conceded that the daughter had the right to prosecute the claim. The judgment should be affirmed.

RICHMOND and REED, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment below is affirmed.

(15 Colo. 520)

**IN RE SPEAKERSHIP OF THE HOUSE OF REPRESENTATIVES.**

(Supreme Court of Colorado. Jan. 23, 1891.)  
STATE LEGISLATURE—IMPEACHMENT OF SPEAKER—REMOVAL.

1. The speaker of the house of representatives is not a state officer, and is not liable to removal by impeachment.

2. The house of representatives has the power, by a vote of the majority of the whole number of members elected, to remove its speaker from office, and to elect another in his stead.

(Syllabus by the Court.)

Section 3 of article 6 of the constitution of Colorado contains the following provision: "The supreme court shall give its opinion upon important questions, upon solemn occasions, when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court." In pursuance of said provision, the following communication and interrogations were duly submitted to the court: "To the Honorable, the Supreme Court of the State of Colorado—Sirs: The eighth general assembly of the state of Colorado met at 12 o'clock noon on the first Wednesday, the 7th day, of January, 1891. The house of representatives on said day elected one of its members, Hon. James W. Hanna, a speaker, who was at once sworn in as such speaker, and continued thereafter to exercise the duties thereof, and was duly recognized by the members of the general assembly and by the executive of the state as such speaker, and he is now such speaker, unless deposed by the action of members of said house while in session, as hereinafter stated. On the 14th day of January, 1891, certain of the members of said house, constituting a majority thereof, while said house was in session as aforesaid, and said James W. Hanna was occupying the speaker's chair, and engaged in the discharge of his duties as such speaker, sought to depose said Hanna as speaker in manner following, to-wit: A motion was duly made by a member of said house, and duly seconded by a member thereof, that the office of speaker of said house be declared vacant, which motion said Hanna refused to entertain; whereupon a member of said house, not the speaker thereof, propounded said mo-

tion, and called upon the other members to vote thereon; and thereupon a majority of the whole number of members elected to said house announced themselves in favor of said motion, and the member so propounding said motion declared the same adopted, and the office of speaker vacant. Thereupon, and after the office had been declared vacant in manner aforesaid, said Hanna, upon a *viva voce* vote, declared the house adjourned, the majority claiming they had voted against said motion. Immediately thereafter a majority of said members, proceeding in manner as before, assumed to elect Hon. Jesse White, a member thereof, as speaker of said house, who thereupon took oath to perform the duties of speaker. Both said Hanna and said White now claim to be the speaker of said house, and are both assuming to discharge the duties thereof. As governor of this state I am and will be required by the constitution and laws of said state to communicate with the speaker of said house upon official and executive business; and I will be required to approve or disapprove acts passed by the said assembly which bear the signature and authentication of the speaker. I certify, therefore, that the questions submitted are important, and arise upon a solemn occasion, wherein I, as the executive of Colorado, require the opinion of the supreme court, in order to properly discharge my duties. I respectfully request, therefore, the opinion of the honorable supreme court, in answer to the following questions: *First*. Under the constitution and laws of this state, can a speaker of the house of representatives, duly elected, qualified, and acting as such, be removed from office in the manner aforesaid? *Second*. Who is now the speaker of said house? I am, most respectfully, your obedient servant, JOHN L. ROYCE, Governor."

Upon reception of said communication, it was ordered that an oral argument be heard before the court upon the following questions: "(1) Has the court any authority under the constitution and laws to pass upon the matters thus presented for its opinion? (2) What is the state of the law, parliamentary or otherwise, pertaining to the subjects covered by the executive inquiry?" It was further ordered that the attorney general, and other members of the bar interested in the subjects to be considered, be requested to participate, as *amici curiæ*, in said argument. Mr. Joseph H. Maupin, attorney general, appeared at the hearing, and introduced Mr. James B. Belford, Mr. Charles S. Thomas, Mr. Hugh Butler, Mr. Joel T. Valle, and Mr. Harvey Riddell, who addressed the court upon the questions presented.

ELLIOTT, J. The gravity of the subject presented for the consideration of the court by the communication and interrogatories submitted by his excellency, the governor, has caused us to depart from the general custom of returning categorical answers to such inquiries. Inasmuch as the subject incidentally involves nothing less than the legality of the organization of one branch of the general assembly, and as we have invited and heard able

and exhaustive arguments in behalf of the respective claimants to the speakership, we feel that an opinion should be given setting forth the grounds upon which our conclusions are based.

It was urged in argument with great force that this court ought not to express any opinion upon the questions presented by the executive, for the reason that it would be an interference with matters pertaining exclusively to the legislative department of the government, and therefore in conflict with article 3 of the constitution, which divides the governmental powers of the state "into three distinct departments,—the legislative, executive, and judicial,"—and forbids those of one department from exercising "any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." It was further urged that the court could not properly assume to give its opinion upon a question presented by the governor unless the court would have jurisdiction to determine and enforce its views in a direct proceeding involving such question; and it was strongly insisted that the court could not, in any direct proceeding, determine a controversy between contesting claimants for the office of speaker, though it was conceded that, indirectly or incidentally, the court might be required to pass upon such question. *Prince v. Skillin*, 71 Me. 361.

It must be admitted that the promulgation of a judicial opinion in response to an *ex parte* inquiry from the executive department of the government, concerning the affairs of the legislative department, is anomalous and peculiar, and, apparently at least, inconsistent with the prevalent American system of separating the governmental powers into distinct departments. But it must be borne in mind that the same instrument which divides the powers of the government into distinct departments has been so amended by the voice of the people as to require the supreme court to "give its opinion upon important questions, upon solemn occasions, when required by the governor, the senate, or the house of representatives." Article 6, § 3. We have heretofore endeavored to restrict somewhat the class of subjects upon which the opinion of this court might be required under such amendment. In *re Irrigation*, 9 Colo. 620, 21 Pac. Rep. 470; In *re Senate Bill No. 65*, 12 Colo. 466, 21 Pac. Rep. 478; In *re Appropriations*, 13 Colo. 316, 22 Pac. Rep. 464. Certainly, no constitutional question, or question *publici juris*, can be of more importance, nor can any occasion be more solemn, than that arising from the present contention respecting the organization of the house of representatives. The subject involves, not merely the constitutionality of a particular bill or enactment, but it may involve the validity of all further proceedings and enactments of the present general assembly. Therefore, while deploping the occasion which has led the executive to request our opinion in the present exigency, we do not feel at liberty to decline answering; we feel constrained by the imperative command of the constitution to give our opinion upon the subject

thus pressed upon our consideration. We shall examine into and declare what we conceive to be the strict legal powers of the house of representatives relative to the matter referred to us, irrespective of the policy or expediency of exercising those powers.

From the foundation of representative government in this country, the general rule, as announced by standard American authors on parliamentary law, has been that the legislative body of a state, having the power to choose its own speaker from its own members, has also the inherent power to remove such officer at its will or pleasure, unless inhibited from so doing by some constitutional or other controlling provision of law. Such is the doctrine announced in the *Manual of Parliamentary Practice* prepared and published by President Jefferson during the early days of the republic, and republished by the authority of successive congresses of the United States since that period. It is unnecessary to speak of the pre-eminent merit of this work, or of the distinguished character and ability of its author. In *Cushing's Law and Practice of Legislative Assemblies*, a comprehensive work of great merit, the distinguished author, at paragraph 299, says: "The presiding officer, being freely elected by the members, by reason of the confidence which they have in him, is removable by them, at their pleasure, in the same manner, whenever he becomes permanently unable, by reason of sickness or otherwise, to discharge the duties of his place, and does not resign his office; or whenever he has, in any manner, or for any cause, forfeited or lost the confidence upon the strength of which he was elected." In *Hatsell's Precedents of Proceedings in the House of Commons*, a very old and valuable treatise, (volume 2, p. 230,) it is said: "The speaker, though he ought upon all occasions to be treated with the greatest respect and attention by the individual members of the house, is in fact, as was said on the 9th of March, 1620, but a servant to the house, and not their master; and it is therefore his first duty to obey implicitly the orders of the house, without attending to any other commands." It is, however, contended on constitutional grounds that the house of representatives of this state does not have the power, by a vote or resolution of the house, to remove the speaker from office. It is clear that such power does exist according to common parliamentary law; and it is conceded that the constitution nowhere expressly forbids such removal; but it is claimed that, by virtue of certain constitutional provisions, the power of the house to thus remove the speaker from office is prohibited by implication. One ground upon which this claim is based is that the speaker is a state officer, and can be removed from office only by impeachment. Const. art. 13, § 2. It is claimed that the speaker is a state officer because he is charged with the duty of receiving, opening, and publishing the election returns for state officers in the presence of both houses of the general assembly. (Const. art. 4, § 3;) and that, in a certain contin-

gency, the duties of governor may devolve upon him, (Id. § 15.)

These provisions, in our judgment, fall far short of establishing the proposition, that a member of the house of representatives, by virtue of his election to the office of speaker, becomes a state officer, or that he is thereby exempted from the power, discipline, and control of the house as a member and officer thereof. It is true, the speaker of the house may, in a certain contingency, be required to discharge certain duties in connection with the administration of the state government; but he must at all times, so long as he is the speaker, be a member of the house of representatives. The house has no authority to elect a person, not a member, to the speakership. A member, by virtue of his election as speaker, does not lose his character or *status* as a member. On the contrary, he must retain his *status* as a member in order to hold the office of speaker. His rights and privileges as a member are in no way impaired by his election to the speakership, nor are his emoluments increased thereby. His speakership is dependent upon his membership. Something has been claimed on account of the phraseology of section 10 of article 5 of the constitution, which provides: "The house of representatives shall elect one of its members as speaker. Each house shall choose its other officers." The use of the word "elect" in reference to the speaker, and the word "choose" in reference to the other officers, was, in our opinion, a mere matter of rhetoric. The national constitution (article 1, § 2) reads: "The house of representatives shall choose their speaker and other officers." But the words "its other officers," in the section of our state constitution above quoted, are quite significant; they show clearly that the speaker is classed as an officer of the house, rather than as a state officer.

There appears to be no substantial reason for concluding that the duty of receiving, opening, and publishing the election returns for officers of the executive department before both houses of the general assembly was devolved upon the speaker on the ground that he was a state officer; nor do we see how the devolving of such duty upon the speaker in any way tends to make him a state officer, any more than it makes state officers of all the members of the general assembly who are required to participate in the canvass of such returns. It seems far more probable that the lieutenant governor is exempted from such duty because he is a state officer. The duties of governor cannot be devolved upon the speaker of the house of representatives except in the contingency that the governor, the lieutenant governor, and the president of the senate are incapacitated from discharging the same. There is little force in the argument that the speaker becomes a state officer in advance of the happening of such remote contingency. Such contingency can scarcely occur when the general assembly is in session; for though the offices of governor and lieutenant governor may become vacant during a legislative session, nevertheless the senate is specially required to have a presi-

dent *pro tempore* to preside over its deliberations, (Const. art. 5, § 10;) and the president of the senate precedes the speaker in the contingent gubernatorial succession, (Id. art. 4, §§ 14, 15.) No reason appears why any of the special duties devolved upon the speaker by the constitution may not as well be performed by any member holding the office of speaker at the time when the contingency occurs requiring their performance, as by the one chosen to such office at the beginning of the legislative session. Again, the speaker does not derive his office from the suffrages of the electors throughout the state; nor is he chosen for any specified term, as is the case with the officers of the executive department, with whom it is sought to classify him as a state officer. Indeed, the mode of electing the speaker is not in any manner provided for by the constitution. The provision is simply, "The house of representatives shall elect one of its members as speaker;" leaving the manner of his election and the tenure of his office to the will of the body from which he derives his office, according to common parliamentary law. To our minds it is clear that the speaker of the house of representatives, whose duties are mainly legislative, is not to be considered a state officer merely on the ground that in a remote contingency the duties of a state officer may be devolved upon him; nor is he so to be considered upon the ground that his office is designated by the constitution, for so is the office of senator and member of the house of representatives. It may be said that all legislative officers are constitutional officers; but that does not make them state officers and liable to impeachment. Article 13, § 2, of the constitution, declares that "the governor and other state and judicial officers, except county judges and justices of the peace, shall be liable to impeachment." The language of the constitution of the United States is, "the president and vice-president and all civil officers of the United States shall be removed from office on impeachment." Article 2, § 4. Under this provision it was decided in the senate of the United States, in Blount's Case, nearly a hundred years ago, that senators are not civil officers, within the meaning of the constitution, and hence not subject to impeachment. Mechem, Pub. Off. § 471, note 1. In *State v. Gilmore*, 20 Kan. 551, Mr. Justice BREWER, delivering the opinion of the court, referred with approval to the decision in Blount's Case, and declined to say that a member of the house of representatives of Kansas was liable to impeachment even under a constitution which declares that "the governor and all other officers under the constitution shall be subject to impeachment." In that case, also, the court held that an action brought in the district court to remove a member of the house from office could not be maintained under a statute providing for the removal of "any state, district, city, county, or township officer for whose removal from office by impeachment there is no provision." The decision was placed, not upon the ground that the member was subject to removal by im-

peachment only, but upon the ground that the exclusive power of removal is vested in the house itself, under the constitutional provision that "each house shall be a judge of the elections, returns, and qualifications of its own members." Construing this provision, the learned judge said: "This is a grant of power, and constitutes each house the ultimate tribunal of the qualifications of its own members. The two houses, acting conjointly, do not decide. Each house acts for itself, and by itself; and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each house is empowered to pass upon the present qualifications of its own members."

The constitution of Colorado not only provides that "each house shall judge of the election and qualification of its members," (article 5, § 10;) but section 12 of the same article further provides: "Each house shall have power to determine the rules of its proceedings, and punish its members or other persons for contempt or disorderly behavior in its presence; to enforce obedience to its process; to protect its members against violence, or offers of bribes or private solicitation; and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause; and shall have all other powers necessary for the legislature of a free state." This grant of power is plenary, and, except as otherwise provided in the constitution itself, is exclusive, and, when exercised within legitimate limits, is conclusive upon every department of the government. The power is granted to the house, not to the officers of the house, and is to be exercised by a majority of the members. The exclusive nature of this power is in no way affected by the fact that the other departments of the government, the executive and judicial, are equally free and independent within their respective spheres of jurisdiction; nor by the further fact that the contingency may arise which will cast upon the executive or the judicial branch of the government the responsibility of determining which of two conflicting organizations of the legislative body is the legal one; for there can be but one such legitimate body. *Prince v. Skillin*, *supra*. See, also, *Opinion of the Justices*, 56 N. H. 570. In the case of *Hiss v. Bartlett*, 3 Gray, 468, decided in 1855, Chief Justice SHAW, delivering the opinion of the court, declared that the power was inherent in the house of representatives of Massachusetts to expel a member for misconduct, though there was no provision in the constitution relating to expulsion of members. The court based its decision upon the general principles of parliamentary law; that it is necessary that every legislative body shall have the power to protect itself against unworthy members, as well as upon a clause of the constitution providing that "the house of representatives shall be judge of the returns, elections, and qualifications of its

own members." The following extract from the opinion illustrates the reasoning of the court: "The power of expulsion is a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the state. It is a power of protection." Again, the same opinion declares that such power "must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair, rather than strengthen, it." The *Hiss-Bartlett* decision is also authority for the doctrine that the court will not inquire into the motive or cause which influenced the action of the legislative body in such cases, and that the court will not in any way interfere with the procedure or mode of trial by which the legislature reaches its conclusions in expelling a member. The house must judge for itself in such matters, and its jurisdiction to so judge and decide is exclusive. As to those matters confided exclusively to each legislative branch of the government, if a wrong or unwise course be pursued, there is no appeal under our system of government except to the ballot box. Since the house of representatives is thus invested, for its own protection, with inherent power in the matter of disciplining its members, since it may deprive a member of his office as representative, an office to which he has been chosen by the electors of his district for a specified term, and thus deprive him of his emoluments, *a fortiori* may the house remove the speaker from an office given to him by the house itself, not for any definite term, and to which no emoluments are attached,—an office, too, as we have seen, which he is to hold, and the duties of which he is to exercise, at the will and pleasure of the house, according to immemorial usage. It is easy to conceive how the power to remove the speaker by the majority of the house may become necessary in order that legislation may be proceeded with in accordance with the will of such majority.

Another ground upon which it is contended that the speaker cannot be removed by vote or resolution of the house is that if the speaker be not such an officer as is liable to removal from office by impeachment, then he must be included among those officers mentioned in section 3 of article 13 of the constitution, which provides that "all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law;" and it is contended that the words "may be provided by law" should be construed to mean statutory law only. If we adopt this construction, then the speaker, not being liable to impeachment, and no statute having been adopted providing for his removal, cannot be removed at all. It is obvious that the words "may be provided by law" must be held to include something more than statutory law, or else some limit must be placed upon the words "all other officers," as

used in section 3; for, as we have seen, the house is authorized to choose its other officers as well as the speaker; and it certainly cannot be maintained that the subordinate officers of the house, having once been chosen, and not being liable to impeachment, cannot be removed, however unworthy or unfit they may be, simply because no statute has been provided for their removal. Again, clerks of the supreme and district courts are officers designated by the constitution; and it is provided that they shall be appointed by the judges of their respective courts, to hold their offices during the pleasure of such judges. Article 6, §§ 9, 19. They certainly are not state officers, and the manner of their removal is not provided by statutory law. Is there, then, no power to remove them? Unquestionably, the answer must be, that since they derive their offices by appointment from the judges to hold during the pleasure of the judges, they may be removed by the judges. The same principle is applicable to the speaker. He derives his office by election from the house to hold at the pleasure of the house; hence he may be removed by the house. The only difference is that the pleasure of the judges, the tenure by which the clerk holds, is expressed in the constitution; while the pleasure of the house, the tenure by which the speaker holds, exists and has existed from time immemorial as a part of our common parliamentary law, unrepealed and unaffected by the constitution or any statutory enactment. Considering the nature of the office of speaker, the manner of his election, and the plenary powers granted by the constitution to each house of the general assembly, there may be some doubt whether the framers of the constitution intended to provide for the removal of the speaker in any other manner than by common parliamentary law, subject to such rules as the house of representatives, as a co-ordinate branch of "the legislature of a free state," might see fit to adopt for the control of its own organization and proceedings. Section 3 of article 13 may have been intended to include only such officers—county, precinct, and the like—as are elected or appointed for a definite or specified term, and for whose removal some special provision was necessary, rather than to such officers as are chosen by the senate or house of representatives to hold at the will and pleasure of those bodies, and for their convenience in the discharge of their primary duties as legislative bodies. But conceding that the speaker is included in said section 3, nevertheless, the common parliamentary law as it existed in this country at the time of the adoption of our constitution provided that the speaker might be removed at the will and pleasure of the house; and such law, not having been repealed or superseded by any constitutional or statutory enactment, still exists as an adequate provision for the removal of the speaker in conformity to said section.

It is plausibly urged, against the power of the house to remove its speaker by vote or resolution, that, during the hundred years of representative government in this

country under written constitutions, not a single instance has occurred where the speaker of the national house or the speaker of any state legislature has been removed. This may be true as a matter of fact, or it may be that such removals have been made, and that the lack of judicial precedent or of historical account regarding them is to be attributed to the fact that the authority to make them has never before been questioned; certainly, as a matter of law, during all this time, these legislative bodies have possessed the power thus to remove such officers, except in jurisdictions where the common parliamentary law may have been repealed or modified. No precedent to the contrary has been brought to our attention; but the law, as stated in plain, unequivocal language by Jefferson and Cushing, *supra*, seems to have been uniformly accepted as authoritative throughout the United States. If such power of removal has not been exercised, we must conclude that our various legislative assemblies have been singularly fortunate in choosing speakers faithful to voice the will and pleasure of those bodies, or that the members thereof have been remarkably patient and forbearing with the action of their speakers. It is quite probable that our good fortune has been due in some measure to both causes; and this is much to the credit of our people, for patience, forbearance, and fidelity by those in official station are essential to wise and efficient administration in republican government. Upon investigation and reflection, we are satisfied that, as a purely legal proposition, the house of representatives has the power, by the vote of "a majority of the whole number of members elected," to remove its speaker from office, and to elect another in his stead, in the manner stated in the executive communication submitted. Any other conclusion would, in our opinion, be antagonistic to the fundamental principle of representative government, that the majority of each legislative body has the power to control the action of such body within the limits of its jurisdiction, except as otherwise provided by positive law. If a clear majority of the whole house cannot thus change their presiding officer, then it is difficult to see how two-thirds, three-fourths, or even the whole number can take such action against the will of the speaker. We express no opinion as to the wisdom, expediency, or policy of the course pursued by the majority; they must assume and bear the responsibility for the exercise of their powers.

HAYT, J. I concur in the foregoing opinion of Mr. Justice ELLIOTT, except in so far as it maintains that the words "in such manner as provided by law," as used in connection with removals in section 3 of article 13 of the constitution, authorize a removal in any manner sanctioned by parliamentary law. If the speaker of the house is an "officer," within the meaning of this section, then something more than parliamentary precedent should, I think, be held necessary to authorize his removal. In my judgment, however, the

speaker of the house of representatives of this state is not included in the word "officers," as used in that section, and hence the power of removal can in no way be affected thereby. As a general rule, where the term of office is not fixed, the power of removal accompanies the power of appointment as incidental thereto. The term of office of speaker with us is neither designated by the constitution nor fixed by any statute. He, therefore, holds only during the pleasure of the house that elected him; and the power of removal by that body, without restriction as to term or tenure, must, for this reason, be upheld.

(15 Colo. 516)

COLORADO MANUF'G CO. V. McDONALD.

(Supreme Court of Colorado. Jan. 10, 1891.)

EXECUTION SALES—REDEMPTION.

1. Under Gen. St. Colo. 1883, § 1851, which provides that a defendant in an execution sale may redeem by the payment of the purchase money either to the purchaser, or to the officer making the sale, the payment of the money by defendant, with the purpose of redemption, to the sheriff who sold the land on execution, and its receipt by the latter without objection, nullifies and abrogates the sale, as between defendant and the purchaser, though the sheriff has not formally canceled the certificate of purchase, nor directed the execution of a certificate of redemption, as provided by section 1861, and though he has subsequently executed a deed of the land to the purchaser.

2. It is within the discretion of the trial court to order the sheriff who made the sale, and executed the deed to the purchaser, to be made a party to an action by the execution defendant against the purchaser for the cancellation of the deed; and, even if error, it would be no ground for reversing a correct decree canceling the deed.

Commissioners' decision. Appeal from district court, Arapahoe county.

The case appears in the opinion.

F. A. Williams, for appellant. J. H. Croxton and J. P. Brockway, for appellee.

BISSELL, C. In April, 1887, Ronald P. McDonald filed his bill against the Colorado Manufacturing Company to set aside a deed made to the company by the sheriff of Arapahoe county. It appeared that in January, 1885, the company recovered a judgment in the county court of Arapahoe county for \$77.86, and \$25.45 costs. Subsequently an execution issued upon the judgment, the sheriff levied upon certain lands, and on April 11, 1885, the property levied on was sold to the plaintiff in execution. The property was bid in for the sum of \$10, which was paid to the sheriff. In October following, McDonald, through his attorney, attempted to redeem from the sale, and paid the sheriff, within the six months limited by the statute, \$111.25. There is some little controversy in regard to the reason for the payment of that particular sum of money. In computing the amount of money necessary both to redeem and to satisfy the entire judgment and costs, the deputy, in whose hands the writ was, and who had made the sale and issued the certificate of purchase, seems to have made an error in regard to the amount necessary to accomplish both purposes. This, however, is

immaterial to the determination of the rights of the defendant in execution. He paid the sheriff largely more than the purchaser paid upon the sale, and about \$100 more than would have been necessary for him to effect a redemption. That he intended to redeem, and paid the money for that purpose, with the full knowledge of the officer receiving it, who took it with like intent, and in execution of his statutory authority, as an officer, to permit redemption to be made through him, cannot be doubted. Under these circumstances there can be no question but that the legal result of a redemption from the sale was thereby, under our peculiar statute, fully accomplished. It is provided in the sections governing the right of redemption from execution sales that the defendant, within the time limited, may redeem upon payment of the sum paid upon the purchase, and that he may effectuate his redemption by giving the money either to the purchaser or his representatives, or to the officer who made the sale. Unless something further is required to be done than to turn over the amount paid, either to the purchaser or to the officer, the redemption is effected by the simple act of payment, when it is coupled with the expressed intention to exercise the right. That nothing further is required is very evident from even a cursory examination of the statute. It is distinctly enacted that upon the payment of such sum the certificate of sale shall be null and void. Gen. St. 1883, §§ 1851, 1861. While there is a section which contemplates the cancellation of the certificate of purchase, and directs the execution and record of a certificate of redemption, these subsequent statutory provisions were enacted apparently for the protection of the redemptioner, and to provide a way to furnish him with complete and satisfactory evidence of the release of his title from the burden and the cloud of the sale. The payment of the money to the proper person for the purpose of redemption, and with the intention to redeem, and its receipt without objection, serves to accomplish the full purpose of the statute, and to nullify and abrogate the sale. The rights of the redemptioner are unaffected by the failure to furnish him with proof of the act of redemption; and, though the certificate of purchase may remain as a cloud upon his title, his rights are fixed by the act which he has performed. There is no question arising in this case concerning the rights of third parties or innocent purchasers, and the above rules are absolutely true when it is sought to compel the purchaser at the sale to relinquish the apparent title which he holds by virtue of an uncanceled certificate of purchase. That the sheriff may have executed a deed attempting to assure the inchoate title obtained by the purchaser can make no difference. The redemption having been effected, the purchaser's rights were destroyed, and the sheriff could convey nothing by the instrument. The deed then remained a cloud upon the title of the complainant, which he was entitled to have removed upon proper bill filed for the purpose. The court did not err in decreeing its cancella-

tion, and establishing the complainant's rights.

During the progress of the litigation it transpired that the sheriff who executed the deed had gone out of office, and, upon application, the court ordered him to be made a party, and by decree directed him to execute a certificate of redemption as of the date when the complainant was entitled to it by what he had done. This is urged as error, but it is entirely unavailable. That it was within the discretion of the court to direct him to be made a party to the proceedings there can be no question; but, had the court committed error in making the order which it did, the appellant could not be heard to complain, nor would the cause be reversed for any such reason. The only person who could complain in regard to the matter would be the sheriff himself, who was, by the court's order, brought into the litigation. So long as the decree itself is right upon the case as made, the presence of the sheriff as a party furnishes no ground on which the appellant can ask a reversal of the case. This disposes of all the errors upon which the appellant relies for a reversal. No error having been committed by the trial court, the judgment should be affirmed.

RICHMOND and REED, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment below is affirmed.

(15 Colo. 349)

FRYBARGER *et al.* v. McMILLEN.

(*Supreme Court of Colorado.* Jan. 10, 1891.)

SERVICE OF PROCESS—PUBLICATION—AFFIDAVIT.

Service by publication on defendants in a mechanic's lien action, based on an affidavit by plaintiff, sworn to before his attorney, to the effect that defendants are non-residents, but not stating that a cause of action exists against them, or that they are necessary or proper parties to the action, as required by Code Civil Proc. Colo. c. 3, § 44, is insufficient to confer jurisdiction.

Commissioners' decision. Error to Bent county court.

*Nicholas & Kriger* and *J. W. Horner*, for plaintiffs in error. *H. Chadeayne* and *McKinley & Morris*, for defendant in error.

RICHMOND, J. On the 18th day of May, 1887, plaintiff below, and defendant in error herein, filed his complaint in the county court of Bent county to enforce a lien for material of the value of \$240.56 furnished defendants in the construction of a certain building in the town of Carlton, Bent county. On the same day plaintiff filed the following affidavit, which, omitting the title, is in words and figures as follows: "John M. McMillen, being duly sworn, upon oath states that the defendants in the above cause reside out of the state of Colorado, and where plaintiff cannot find them to secure personal service on them in this case. He therefore asks that the court grant an order for the publication of the summons in this case according to sec. 44, chap. 3, of the Code of Colorado. [Signed] JOHN M. McMILLEN. Subscribed and sworn to before me this 17th day of

May, A. D. 1886. H. CHADEAYNE, Notary Public." The above notary public was attorney for plaintiff in the cause. Upon this affidavit order of publication was entered, and proof of publication subsequently made. Thereafter, on the 13th day of July, 1887, default and final judgment was entered against the defendants for the sum of \$218.83 with costs, and a lien decreed for this amount upon the building. On the 8th day of August, 1887, defendants, by their attorney, A. M. Nicholas, appeared generally, and filed a motion to vacate the judgment and for leave to answer. August 13, 1887, motion was overruled. To reverse this judgment this writ of error is prosecuted.

It has been repeatedly decided by this court that, when constructive service by publication is wholly relied upon to give jurisdiction over the person of a non-resident defendant, a compliance with the statute must affirmatively appear of record, even in courts of superior and general jurisdiction. The affidavit above recited does not state that a cause of action existed against defendant, or that he was a necessary or proper party to the action.<sup>1</sup> It was therefore radically defective and insufficient to warrant the court in entering the order of publication. The affidavit, having been made before the attorney of plaintiff, should not have been received by the court. *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. Rep. 621; *Calvert v. Calvert*, 15 Colo. —, 24 Pac. Rep. 1043; *Martin v. Skehan*, 2 Colo. 614. It is needless to cite authorities in support of this position, or to extend the opinion in support of our conclusion. The court had no jurisdiction through the publication of a summons based upon the affidavit; the judgment should have been vacated, and defendants allowed to answer. The judgment should be reversed, and the cause remanded, with directions to vacate the judgment, and permit defendants to answer the complaint.

REED and BISSELL, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is reversed.

(15 Colo. 351)

TRAVELERS' INSURANCE CO. v. McCARTHY.

(*Supreme Court of Colorado.* Jan. 10, 1891.)

ACCIDENT INSURANCE—INTENTIONAL ACT OF ANOTHER.

A clause in an accident insurance policy exempting the company from liability for "intentional injuries inflicted by the insured or any other person" precludes a recovery when the insured has been killed by the intentional act of another, and the company need not show that such injuries were inflicted at the instance of the insured.

Commissioners' decision. Appeal from Lake county court.

*Markham & Dillon*, for appellant. *J. L. Murphy* and *Browne & Putnam*, for appellee.

RICHMOND, C. This is a suit upon what is commonly called an "accident policy of

<sup>1</sup> Code Civil Proc. Colo. c. 3, § 44.



insurance." There was a judgment against the company for the sum of \$1,016.67, besides costs. The case is here upon alleged errors of law committed by the court in sustaining a demurrer to defendant's answer. The policy sued upon by its terms insured the life of John F. McCarthy in the sum of \$1,000, to be paid to his wife, Julia McCarthy, if surviving, within 90 days after sufficient proof that the insured, at any time within the continuing of the policy, shall have sustained bodily injuries, effected through external, violent, or accidental means, within the intent and meaning of the contract. The policy of insurance is set out in the complaint *in hæc verba*, and contains the following clause: "This insurance does not cover disappearances; nor injuries of which there is no visible mark upon the body; nor accident nor death or injury resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Suicide, sane or insane; intentional injuries, (inflicted by the insured or any other person;) intoxication or narcotics; dueling or fighting, war or riot." In addition to the usual allegations in actions upon such policies, the plaintiff sets out in the complaint that on the 3d day of November, A. D. 1886, and while said insurance policy was in full force, and while the said insured was in the peace of the state, he received a personal injury which caused his death within 90 days thereafter, and on the day aforesaid, and that said injury which caused his death was through external, violent, and accidental means, within the meaning of the said policy of insurance, and the conditions and agreements therein contained, to-wit, by being shot by a leaden bullet from a pistol loaded with powder and leaden bullets in the hands of one Daniel Monahan, and while the said insured, John F. McCarthy, was standing on the public highway, near the town limits of the said city of Leadville, in the county of Lake and state of Colorado. To the complaint the defendant answers, and denies that the death of the insured was occasioned by bodily injuries affected through external, violent, and accidental means, within the meaning of the contract of insurance; that death was caused by intentional injuries inflicted by Daniel Monahan while said Daniel Monahan and the said John F. McCarthy were engaged in a personal altercation. Much else is set up in the answer, but for the purposes of this opinion it is unnecessary for us to quote further. The main contention between the parties to this action is raised by the demurrer to the answer, to the effect that the answer does not state facts sufficient to constitute a defense. The contention of the appellant is that the court erred in sustaining the demurrer; that the averment in the answer that the death of the insured was not accidental, but the result of an intentional injury inflicted by the said Daniel Monahan, was a good defense, and the company were not liable. The contention of the appellee is that the terms of the policy do not preclude a recovery; that the words "intentional injury in-

flicted by another person," mentioned in the policy, mean intentional injuries inflicted by the said insured, or injuries inflicted intentionally by another person through the procurement or consent of the insured. The exception in the insurance policy upon which appellants rely, heretofore recited, is as follows: "Intentional injuries inflicted by the insured or any other person." If the fact be that this clause precludes a recovery when the injured individual has been killed or injured by the intentional act of another, or, in other words, if it precludes the idea that death or injury was the result of accident, then certainly the contention of appellant is correct, and plaintiff cannot recover. Happily we have very recent adjudications covering the construction of the identical clause here under consideration. In the case of Insurance Company v. McConkey, 127 U. S. 661, 8 Sup. Ct. Rep. 1360, decided subsequent to the institution of this particular action, Mr. Justice HARLAN, in passing upon this question, said: "The policy expressly provides that no claim shall be made under it where the death of the insured was caused by intentional injuries inflicted by the insured or any other person. If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless, the instructions to the jury were so worded as to convey the idea that, if the insured was murdered, the plaintiff was entitled to recover; in other words, even if death was caused wholly by intentional injuries inflicted upon the insured by another person, the means used were 'accidental' as to him, and the company was liable. This was error. Upon the whole case, the court is of the opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means; also that no valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death, or if his death was caused by intentional injuries inflicted upon him by some other person." In the case of Hutchcraft's Ex'r v. Insurance Co., 87 Ky. 301,<sup>1</sup> the court, in construing a proviso like the one under consideration in the case before us, says: "The remaining clause stipulates for a further exemption of appellant's liability in the event that intentional injuries are inflicted upon the insured by himself or any other person. It is contended by appellant that the meaning of this clause is that, if the insured intentionally inflicted injuries upon himself, or if any other person intentionally inflicted injuries upon him with his consent or at his instance, then the appellee should not be liable. A moment's reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedent, reads as follows: 'No claim shall be made under this ticket when the death may have been caused by

<sup>1</sup> 8 S. W. Rep. 570.

intentional injuries inflicted by the insured or by any other person.' This sentence, though awkwardly expressed, is complete, and fairly expresses the idea that, if the insured intentionally injures himself by the infliction of bodily wounds from which he dies, he thereby breaks the condition of the policy, or that if he is intentionally injured by any other person, by the infliction of bodily wounds from which he dies, the condition of the policy is thereby broken; therefore to add the words 'with his consent' or 'at his instance' would have the effect of torturing the meaning of the language used beyond its legitimate import."

We quote thus extensively from these opinions because they clearly and concisely state, perhaps in better language than we are capable of doing, the exact conclusion of our minds with reference to the clause in the policy mentioned in the complaint and answer. We cannot accept the conclusion reached by the court below, or that forced upon our attention by the appellee in the argument. It requires no extended reasoning to illustrate the purpose of the language of the policy referred to in the answer and relied upon as a defense. There is a vast difference between an intentional injury and an accidental injury. Against accidental and violent injuries the policy provided, but there it stopped, and the company limited its liability by distinctly specifying that, when injury or death resulted from intentional injuries inflicted by another, they were duly excepted from the operation of the policy. It is averred in the answer that the death of the insured resulted from the intentional act of the said Daniel Monahan. This we think was quite sufficient to maintain the contention of the defendant; that is, that the answer was a complete and absolute defense to the cause of action stated in the complaint. The demurrer to the answer should have been overruled. We are of the opinion that the judgment of the court below should be reversed, and the cause remanded for further proceedings.

REED and BISSELL, CC., concurring.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the court below is reversed

(20 Or. 307)

WEIDER v. OSBORN *et al.*

(Supreme Court of Oregon. Jan. 6, 1891.)

EXECUTORS AND ADMINISTRATORS—TITLE TO PERSONAL PROPERTY—POWER TO SELL.

1. At common law the legal title to all personal property of the deceased vested in the executor or administrator with absolute power to dispose of it, and, in the absence of fraud or collusion between him and the person to whom he transferred it, the creditors or next of kin could not follow it into the hands of the alienee.

2. The statute has curtailed the power of the executor or administrator to sell or dispose of the personal property of the decedent, and limited it to such as is visible and tangible, except by an order of the probate court, either at public or private sale, as may be provided therein. With this difference, the power of disposition of the executor or administrator remains as at common law, and the title of all choses in action is vest-

ed in him, with authority to collect and otherwise dispose of them.

3. By force of such power of disposition of choses in action, an executor or administrator may sell or dispose of them by indorsement to another, or to a distributee, without an order of the probate court, and such transfer passes the title, so as to enable the transferee or distributee to maintain an action on them; nor can the makers, in the absence of fraud, abate such action for a want of authority to make the transfer.

(Syllabus by the Court.)

Appeal from circuit court, Benton county; R. S. BEAN, Judge.

This was an action brought by the plaintiff against the defendants on a promissory note dated October 20, 1884, made by them, and payable to the order of Harrison Weider, 12 months after date, with interest thereon at the rate of 10 per cent. until paid. The complaint alleges the execution of the note, the death of Harrison Weider intestate, on the 5th day of September, 1885, the appointment of George W. Weider as administrator of the estate of Harrison Weider, and his qualifying as such administrator; that the plaintiff was the wife of Harrison Weider, and that the administrator duly assigned and transferred said promissory note to the plaintiff as a part of her distributive share of the estate, etc. The answer admits the execution of the note, but denies the assignment alleged and the plaintiff's ownership of said note, etc. On the trial, the defendants objected to all evidence which tended to show that said note was assigned and transferred to the plaintiff as her distributive share of said estate, by the administrator, which, on being overruled and exceptions taken, are now assigned as error. There was no evidence that an order of the probate court had ever been made directing such assignment and transfer, etc. The trial resulted in a verdict and judgment for the plaintiff, from which the present appeal is brought.

J. R. Bryson and W. S. McFadden, for appellants. Seth R. Hammer and Bingham & D'Arcey, for appellee.

LORD, J., (after stating the facts as above.) There is but one question presented by this record, and that is, whether the administrator could make a transfer of the note to the plaintiff as a part of her distributive share of the estate, without an order from the probate court. The defendants admit the execution of the note, and they do not deny their liability to pay it, but they seek to abate the action upon the ground that the transfer did not pass the title to the plaintiff, or out of the estate of her deceased husband, and without an order for the transfer by the probate court, they would still be liable to that estate. At common law, the legal title to all personal property of the deceased vested in the executor or administrator with absolute power to dispose of it, and, unless there was fraud or collusion between him and the person to whom he transferred it, the creditors or next of kin could not follow it into the hands of the alienee. In Williams on Executors, it is said that "it is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole

personal effects of his testator or intestate, and that they cannot be followed by creditors. The principle is that the executor must sell in order to perform his duties in paying debts, etc., and no one would deal with an executor, if liable afterwards to be called to account." Page 932. But, under our statutes, the power is not conferred on the executor or administrator to sell or dispose of visible tangible personal property, except by an order of the probate court, either at public or private sale, as may be provided therein. Hill's Code, §§ 1141-1144. The reasons are many and manifest why the distinction should exist and be applied in the constructions of the statutes authorizing the sale of personal property of the estates of decedents. Choses in action are not properly the subject of sale, and their conversion into money is ordinarily by collection, and not by public auction, which is unusual. To put choses in action on the same footing as other personal property, and likewise require an order from the probate court to authorize their sale, might only result in exchanging one chose in action for another; for, while the statute does not assume, yet it fairly contemplates, that the interests of the estate may require that the order for the sale of personal property may be made on terms of credit, which might involve as to the sale of some of such personal property, if notes be included, the exchange merely of one note for another. But, with this difference, the power of the executor or administrator remains as at common law. The title of all choses in action is vested in him, and the authority to collect or otherwise dispose of them. This is the view taken under a statute of like import in Alabama. In *Waring v. Lewis*, 53 Ala. 630, the court say: "The statutes of this state have deprived an executor or administrator of the power to dispose of visible, tangible personal property, the subject of sale, otherwise than at sale under an order of the court of probate; and with one or two exceptions, the sale must be at public outcry. In other respects his title and power of disposition remains as at common law. He has the full title to the choses in action of the deceased, and is charged with the duty of collecting and reducing them to possession. He may transfer, release, compound, or discharge them as fully as if he was the absolute owner, subject only to his liability to answer to creditors and distributees for improvidence in the exercise of his power." That the executor's or administrator's power of disposition over the choses in action of the deceased remains unaffected by this legislation is likewise clearly stated in *Rhame v. Lewis*, 13 Rich. Eq. 298, in which the court say: "This legislation cannot however be understood as intended to apply to all the assets of an intestate. The terms used—'personal estate,' 'personal property'—are certainly large enough to embrace every class; but choses in action, at least such as are merely securities for money due, are not properly the subject of sale. Their conversion is ordinarily by collection, and such conver-

sion by public auction is an unusual proceeding. Many of the reasons which may be supposed to have induced this legislative restraint upon the administrator's power of sale are wholly inapplicable to them, and the sales contemplated by the acts being, although not positively required, plainly assumed to be on credit, would result in a mere exchange of one chose in action for another. Yet, though the proper method of conversion in such case is by collection, circumstances may exist in which a more speedy conversion by exchange with a third person, for the money, or even by pledge for advances, may be important to the interests of the administration. The administrator's power of disposition over his intestate's choses in action remains unaffected by this legislation, and continues as his power over the assets generally before the acts have been described to have been. Any one may securely take them from him, either absolutely or conditionally, by any of the usual methods of legal or equitable transfer, for value, and in good faith."

These decisions show that it was not the intention of such legislation in requiring an order for the sale of personal property to include choses in action, or to deprive the executor or administrator of the power of disposition over them. This doctrine of the common law that the title to them is invested in him, and that he may sell or dispose of them by indorsement or otherwise, so as to carry the title, and that such purchasers or indorsees may maintain an action on them in their own name, whether an assignee is permitted to sue in his own name, is sustained by numerous adjudications. 7 Amer. & Eng. Enc. Law, 298. So, too, he may transfer such notes to a distributee of the estate in payment of his share of the estate, and such transferee may thereupon maintain an action in his own name. In *Clark v. Moses*, 50 Ala. 327, the note came to the plaintiff by transfer from the executor, to whom it was paid by the payees, as so much of her distributive share of her husband's estate, and without any order of the probate court, and the court held that a promissory note may be transferred by an executor or administrator to a distributee in payment *pro tanto* of his distributive share, and that such transfer passes a title to the distributee, on which he may maintain an action against the maker, or successfully defend an action by an administrator *de bonis non*. In *Hough v. Bailey*, 32 Conn. 288, it was objected that the transfer was void, because the requirements of the statute in respect to distribution of the estate were not complied with, but the court held otherwise, saying that "the title to the note was vested in the administrator, and he had authority to collect or otherwise dispose of it. If he disposed of it improperly, it might render him liable on his bond, but would not affect the title of his *bona fide* assignee." So, too, the same principle was applied in *Marshall Co. v. Hanna*, 57 Iowa, 375, 10 N. W. Rep. 745, where the defendant questioned the plaintiff's right of action, and sought to abate it, although not denying his liability upon the notes,

but the court held that the executor had a general power to dispose of them, and, in the absence of any showing to the contrary, that it must be presumed that this power was rightfully exercised, and said: "Even if the administrator transferred them improperly, still, if the plaintiff took them *bona fide*, it acquired a good title, and the executor is liable upon his bond. The defendant does not show that the plaintiff did not take the evidence of indebtedness *bona fide*; hence the action ought not to abate on account of the lack of authority of the executor to make the transfer." These authorities emphasize the general power with which an executor or administrator is invested in respect to choses in action, and his authority to sell or dispose of them by indorsement to another, or to a distributee, without an order of the probate court, and that such transfer is valid and passes the title, so as to enable the transferee or distributee to maintain an action thereon, and that the payers or makers of them, in the absence of fraud or collusion between the administrator and the person to whom he transferred them, cannot abate the action on the ground of a want of authority to make such transfer. "Such being the general powers of the executor or administrator, he may," said Dixon, C. J., "if he chooses, but at his own risk, make an advance to the heir, or distributee, before a decree for that purpose. His knowledge of the condition of the estate may frequently enable him to do so without any real danger to himself, but if such advances are not afterwards covered by a decree, he and his sureties are responsible. If, therefore, the transfer of the note and mortgage in this case was made to the plaintiff as an advance upon his distributive share as heir at law of the deceased, it does not, in the absence of any evidence of fraud, collusion, or deficiency of assets with which to meet the debts due from the estate, constitute any valid objection to a recovery." Within the principle of these adjudications, upon the facts disclosed by this record, the defendants have no standing ground upon which to avoid the payment of this note. There is no pretense of any fraud or collusion, or of any debts due from the estate, or of any bare possibility of a liability, or of objection to the recovery, except a lack of authority in the administrator to make the transfer without an order of the probate court. Nor is there anything in the case of *Winkle v. Winkle*, 8 Or. 195, inconsistent with this result, as that case involved tangible property and not choses in action. Nor may it be amiss to refer to another aspect of this case, which is entitled to some consideration. So far as this record shows, the plaintiff is the sole heir, but the argument conceded that the plaintiff and the administrator are the only heirs. Why, then, if between themselves they should agree to make this disposition of the note, is not such a distribution valid? More than five years have elapsed since the death of the original payee, and the only defense is one in abatement for lack of authority on the ground that no title passed by the trans-

fer, and therefore there could be no right of recovery in the plaintiff, no matter if the estate was free from debt, and the transfer from fraud. The argument authorizes us to assume that there was no fraud or collusion, or deficiency of assets, and yet there could be no recovery. In such case, it is difficult to see what objection a creditor could make to the distribution. Such an arrangement when fairly made could not injure any one, and there would seem to be no reason that the settlement or distribution which the parties concerned have made should not be accepted by the court as satisfactory, so far as it goes, when the administrator afterwards is summoned to render his accounts. In any view, it seems to us there was no error, and that the judgment must be affirmed.

(20 Or. 265)

## FRINK v. THOMAS.

(Supreme Court of Oregon. Jan. 6, 1891.)

VENDOR AND VENDEE — TIME OF THE ESSENCE — PAYMENT AND TENDER OF DEED — RESCISSION — ESTOPPEL — TITLE TO PUBLIC LANDS — CONTEST.

1. Time is not of the essence of a contract for the sale of real estate, unless made so by the express agreement of the parties, or by the nature of the contract itself, or of the circumstances under which it was made. Courts of equity will ordinarily infer that interest on the deferred payments will be a sufficient compensation for the delay.

2. Although there is no stipulation in the contract that time shall be essential, nor anything in the nature or circumstances of the agreement to make it so, it can nevertheless be made so, by a performance, or tender of performance, by one party, and a demand of the other.

3. Where the payment of the purchase money and the making of the deed are to occur simultaneously, they are regarded as concurrent acts, which disable either party from putting an end to the contract without performance, or a valid offer to perform, on his part.

4. In a suit by a vendor for a rescission of a contract for the sale of real estate, on account of a failure to pay purchase money, the complaint must allege that he has tendered to the vendee a valid deed, conveying to him all the land according to the terms of the agreement, and demanded performance on the part of the vendee.

5. Mere failure to pay the purchase money according to terms of the contract will not entitle vendor to have contract rescinded.

6. Where the vendor is prevented from complying with his contract by the wrongful act of the vendee in obtaining an outstanding title to a portion of the land, so far as that portion of the land is concerned, in a suit by vendor to rescind, the vendee is estopped from claiming that no tender of deed has been made.

7. When the vendee has paid part of the purchase money, and given his notes for the balance, before the vendor can rescind a contract, he must return, or offer to return, money paid, with legal interest, less reasonable rental value of premises, if vendee has been in possession, and also all unpaid notes.

8. Where a controversy concerning the title to government land is still pending in, and undetermined by, the land department of the United States, the courts of this state will not interfere.

9. Where a vendee enters into possession of land under a contract of purchase, he will not be permitted to obtain an outstanding title, and assert it against his vendor, but such title will inure to the benefit of vendor.

(Syllabus by the Court.)

Appeal from circuit court, Polk county; R. P. Boise, Judge.

This is a suit in equity to cancel a contract for the sale of land by plaintiff to defendant. For the purpose of this case it is sufficient to state that the complaint alleges that on the 13th day of February, 1880, the plaintiff and defendant entered into a contract for the sale of certain real estate therein described, and containing 360 acres. By the terms of said agreement, defendant was to pay the plaintiff the sum of \$1,600 for said land, in accordance with the tenor of seven certain promissory notes of that date, therein set out, the last of which to become due and payable on the 13th of February, 1886. That in consideration of said notes, and the payment thereof by said defendant, according to their tenor, the plaintiff agreed to transfer to him, at the time of the last payment, all said lands in fee. That defendant entered into the possession of said lands, and has remained in possession ever since. That at the time of making the contract for the sale plaintiff only had a contract of purchase from the Oregon & California Railroad company for 160 acres of the land, which he agreed to convey to defendant, but defendant knew the condition of his title, and accepted the contract with the understanding that plaintiff might and would perfect his title so that, by the time the last payment became due, he might be in a condition to transfer the legal title thereof to the defendant, according to his agreement. That about March 1, 1883, it was ascertained that there was some question as to whether the 160-acre tract of land was lands of the United States, subject to homestead entry, or whether the same, in fact and law, is within the grant to the Oregon & California Railroad Company. Upon such information coming to defendant, he thereupon filed an application in the proper land-office to enter the same as a homestead, at the same time assuring plaintiff that he made the application for the protection and benefit of plaintiff, and that he had expended for his use and benefit, in making such application, the sum of \$13, which, at his request, plaintiff repaid to him. That afterwards, contriving to cheat, wrong, and defraud plaintiff, he claimed and asserted that said application was made for his own use and benefit. That he has since made final proof of his continued residence and occupation, and a certificate for a patent for said land has been issued to him by the local land-officers. That at the time of defendant's application to make proof of his residence and occupation, plaintiff appeared, and interposed his objections thereto, and set forth the facts and reasons therefor, but, notwithstanding the claim of plaintiff, the certificate for the patent to said lands was issued to defendant. That plaintiff thereupon duly appealed to the land department at Washington, D. C., which appeal is still pending and undetermined. That defendant is threatening to sell and dispose of said 160 acres to innocent purchasers, and will, unless enjoined, make such a disposition thereof as will tend to greatly hinder the plaintiff in maintain-

ing his legal rights concerning the same against the claim of defendant and his intended grantees. That defendant has failed to comply with the terms of said agreement of purchase on his part, or make any of the payments therein provided for, except the sum of \$340, paid soon after the execution of said contract. That on the 1st day of October, 1883, the said defendant abandoned and repudiated his said contract with the plaintiff, and refused to pay the purchase money of the said lands, or any part thereof, and has since failed and refused to pay the same, or any part thereof, and the same is now wholly due and unpaid; and the said defendant further, in consummation of his fraudulent intentions and designs, has forbidden and prevented the said plaintiff from perfecting the title to the said 160 acres of land; and, but for the said wrongful act of the said defendant, the plaintiff would have perfected the same, and complied with the terms of said contract, according to the terms thereof, as hereinbefore stated. The prayer for relief in the complaint is: (1) That defendant be enjoined from disposing of the 160 acres of land during the pendency of the appeal before the interior department. (2) For an accounting of the rents and profits of the lands during the time defendant has been in possession thereof, and, in the event the interior department should determine that said 160 acres of land belong to defendant, then a decree that defendant is the trustee of plaintiff. (3) For a cancellation of the contract under which defendant entered into possession of said lands. (4) For a decree that plaintiff is the owner of all the land described in the complaint, and that he be let into the possession thereof, and for such other and further relief as may be just. A general demurrer to the complaint, being interposed, was sustained, and the complaint dismissed, from which decree this appeal is taken.

W. H. Holmes, for appellant. A. M. Hurley, for respondent.

BEAN, J., (after stating the facts as above.) The grounds upon which it is sought to cancel the contract in this case are (1) the failure of defendant to pay the purchase price at the time provided in the contract, and (2) the conduct of defendant in attempting to secure a title from the United States for the 160 acres of land in his own name and in fraud of the rights of plaintiff. The first ground proceeds upon the theory that time is of the essence of the contract, and that when defendant failed or neglected to make the payments as he agreed to do, plaintiff was entitled to rescind the contract. Time is of course an indispensable ingredient of every contract, but it is not ordinarily of the essence of a contract for the sale of real estate, unless made so by the express agreement of the parties, or by the nature of the contract itself, or of the circumstances under which it was made. When the vendor, by his contract to convey, has not affirmatively provided that time shall be of the essence of the contract, a court of equity will ordinarily in-

fer that interest on the deferred payments would be a sufficient compensation for the delay. "Compensation" and not "forfeiture" is a favorite maxim with a court of equity. *Knott v. Stephens*, 5 Or. 235; *Brook v. Hidy*, 13 Ohio St. 306; *King v. Ruckman*, 20 N. J. Eq. 316. In this case the agreement does not provide that time shall be of the essence of the contract, nor is there anything in the nature of the contract itself, or the surrounding circumstances, from which the court can infer that it was so intended by the parties at the time the contract was made. Although there is no stipulation in the contract that time shall be essential, nor anything in the nature or circumstances of the agreement to make it so, it could nevertheless have been made so by a tender of performance on the part of plaintiff and demand of payments. *Knott v. Stephens*, supra; 2 Warv. Vend. 848. As a general rule, a party who asks for the rescission of a contract for the sale of real estate must be himself without fault, and when, as in this case, the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract, without performance or a valid offer to perform on his part, and so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance, until he has tendered performance on his own side and demanded it on the other. *Powell v. Railroad Co.*, 14 Or. 356, 12 Pac. Rep. 665; *Knott v. Stephens*, 5 Or. 235; *Rummington v. Kelley*, 7 Ohio, pt. 2, p. 97.

When the vendor insists that the vendee is in default, to such an extent as to entitle him to have the contract rescinded, he must allege and prove that he has tendered to the vendee a deed conveying to him all the land according to the terms of the agreement, and demanded performance on the part of the vendee, and must have notified him that the contract would be rescinded unless purchase money was paid within a reasonable time. The mere failure to pay the purchase money according to the terms of the agreement will not be held a repudiation of the contract so as to authorize a suit by the vendor to have it rescinded. *Gregg v. English*, 38 Tex. 139; *Johnson v. Jackson*, 27 Miss. 498; 2 Warv. Vend. 849, 880.

Ordinarily, in a contract of this character, the vendee is entitled to a deed conveying to him the entire land according to agreement, as soon as the purchase money is paid, and he is under no obligation to pay the money except on receipt of the deed. The obligation of the defendant to pay the purchase money is dependent on the duty of the plaintiff to convey the land, so far as to disable him from putting an end to the contract, without performance or a valid offer to perform on his part. *Walker v. Wilson*, 30 Miss. 576. In this case plaintiff does not allege or claim that he ever offered to perform the contract on his part, and without such

an allegation, this complaint fails to state a cause of suit against the defendant for a rescission of the contract, nor is he under such a complaint, entitled to a decree for specific performance. It was insisted on the argument that defendant had, by his conduct in relation to the 160 acres of supposed railroad land, rendered it impossible for plaintiff to obtain a title thereto, so that he could comply with his contract, and therefore was excused from tendering a deed to the land agreed to be conveyed, before bringing suit to rescind the contract. The complaint does perhaps show a sufficient excuse for not tendering a deed for the 160 acres. If plaintiff was prevented from complying with his contract by the wrongful acts of defendant, as far as this portion of the land is concerned, the defendant cannot be heard to say that no tender of deed in fee had been made, but there remains 200 acres to which plaintiff has a title, and he should have tendered a deed for that portion of the land he agreed to convey, and given defendant an opportunity to pay the purchase money, before attempting to rescind the contract. The defendant may have been perfectly willing to have accepted a deed in fee for the 200 acres, and a release as to the remaining 160 acres, and to have paid the purchase money he agreed to pay; at least, he should have been given an opportunity to do so, before bringing this suit. Plaintiff was bound to comply with the contract on his part by performing, or offering to perform, according to his engagements, except in so far as he was excused by reason of defendant's conduct or acts.

There is yet another reason why plaintiff cannot have this contract rescinded. It appears from the complaint that soon after making the contract defendant paid \$340 of the purchase price. Before plaintiff can abandon the contract, and treat it at an end, he must refund or offer to refund the money paid in part performance of it, with legal accrued interest. It is a general rule that in order to disaffirm a contract and entitle a party to the right resulting therefrom, the rescinding party must put the other *in statu quo*. He must account to the other for any money paid in part performance of the contract. *Knott v. Stephens*, 5 Or. 235; *Johnson v. Jackson*, 27 Miss. 498; 2 Warv. Vend. 881; *Thomas v. Beaton*, 25 Tex. Supp. 318. Plaintiff does not offer to account for the money paid him by defendant in part performance of this contract, but seeks not only to rescind the contract and retain this money, but to charge defendant with the rents and profits of the land, during the time he has been in possession thereof, in addition. It would certainly be unjust to permit plaintiff, after having received a part of the purchase money, to put an end to the contract, upon the failure of defendant to pay the remainder, without offering to account to him for the money already paid. He who seeks the aid of a court of equity must himself do equity. If plaintiff had tendered a deed such as the contract required, he should, in addition, have returned the notes given by defendant, for the purchase money, and the amount paid him by defendant, with legal inter-

est, or at least have offered to return them before he could be permitted to rescind. This seems to be the universal rule. The party against whom its rescission is sought must be placed *in statu quo*. *Murphy v. Lockwood*, 21 Ill. 611. In a case of this kind, where the vendee has been allowed to enter into possession of the land, and receive the rents and profits, the vendor would probably be entitled to have the reasonable value thereof deducted from any money paid on the contract by defendant, and would only be required to refund to defendant the balance, if any, remaining after deducting such rental value. What has already been said is sufficient to show that plaintiff does not allege facts sufficient to entitle him to maintain a suit to rescind the contract of sale to the defendant, but it is insisted that under the allegations of the complaint, the defendant should be enjoined from selling the 160 acres, for which he holds a certificate for a patent from the United States.

The controversy between plaintiff and defendant concerning the legal title to this land is still pending before the land department of the United States, and therefore this court cannot now undertake to inquire into the question as to who has the better right to this land under the provisions of the land laws of the government. The land department having acquired jurisdiction, it must first be allowed to proceed to final determination of the case. *Moore v. Fields*, 1 Or. 318. But defendant, having entered into the possession of this land under a contract of purchase, will not be permitted to obtain an outstanding title and assert it against the plaintiff. It was expressly understood at the time the contract for the sale of this land was made that the title was unsettled, and that plaintiff would take such steps as might be necessary, in order to perfect the same, so as to comply with his agreement with defendant. With this understanding, defendant was allowed to go into possession of the land, and having done so, neither equity nor good conscience will permit him, by taking advantage of such possession, to obtain the title from the general government in his own name for his own use and benefit. So that, if it should finally be determined by the land department that the land is not within the grant to the Oregon & California Railroad Company, and a patent issued to defendant, the title will inure to the benefit of plaintiff, and the defendant would only be entitled to deduct from the purchase money the actual cost of obtaining such title from the government. It is an established rule of equity "that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title. Equity treats the purchaser as a trustee for his vendor, because he holds under him, and acts done to perfect the title of the former when in possession of the land inure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a

defect of title was obtained. The vendor and vendee stand in the relation of land lord and tenant. The vendee cannot disavow the vendor's title." *Bush v. Marshall*, 6 How. 284; *Galloway v. Finley*, 12 Pet. 294.

At the time of the contract for the sale of this land by plaintiff to defendant, plaintiff was in the possession thereof under a contract of purchase from the Oregon & California Railroad Company, and acting in good faith, had made valuable and permanent improvements thereon to the amount and value as alleged in the complaint of the sum of \$1,300. Relying on defendant's agreement to purchase the same, he surrendered the possession to him and now he, having so obtained the possession, seeks, contrary to good faith and fair dealing, to obtain the title in his own name, and thereby to overreach his vendor, who was using every endeavor to secure the title for the use and benefit of defendant in fulfillment of his own contract to convey. This a court of equity will not permit him to do, but whatever title he may obtain will inure to the benefit of plaintiff. But, while such is the law applicable to the facts of this case, plaintiff has failed to allege in his complaint, as we have already shown, sufficient to entitle him to a decree for a specific performance of his contract with defendant, or for a cancellation of the same, and, until he does so, the court is powerless to aid him. an the decree of the court below is affirmed.

(20 Or. 274)

**PENNOYER et al. v. WADHAMS et al.**

(Supreme Court of Oregon. Jan. 6, 1891.)

**DEVISE TO CHARITY—EXISTENCE OF BENEFICIARIES.**

A testator devised certain real estate to trustees for the purpose of having erected on a designated portion thereof a Presbyterian Church, to be known as the "First Presbyterian Church of Upper Astoria," for the use of the society of said church, and of a parsonage for the use of the pastor in charge thereof; for the purpose of carrying out this trust, authorized and empowered the trustees to sell any and all of the land devised, except that portion on which the church and parsonage were to be built, and directed that the proceeds of such sale be applied in the erection and furnishing of said church and parsonage, and, after such church and parsonage should be erected and furnished, the trust to wholly cease and determine in trustees as to said church, parsonage, and furniture, as well as to any unsold property, or unexpended proceeds of sales, and to vest in, and be carried on by, the board of trustees of the First Presbyterian Church of Upper Astoria, and their successors in office, in trust "for the purpose of advancing and propagating the Christian religion, through the agency of the Presbyterian Church." *Held* a charitable trust, valid against the testator's heirs, although there was no Presbyterian Church organization or society in Upper Astoria, at time of testator's death.

Appeal from circuit court, Clatsop county; FRANK J. TAYLOR, Judge.

This is a suit in equity to foreclose a mortgage of \$4,000, executed by Truman P. Powers in his life-time, upon a tract of land containing 80 acres adjoining Upper Astoria, and six blocks in Upper Astoria. The complaint is in the usual form. The defendant Wadhams answers separately, alleging that he is the holder in trust of



the legal title to a certain portion of the real estate described in the mortgage for the use and benefit of the First Presbyterian Church of Upper Astoria, in accordance with the last will and testament of said Powers, and asking that defendant Leinenweber's property be first sold. The defendant Mary H. Leinenweber also files an answer in which she denies the allegations of Wadhams' answer, and alleges that she is the sole heir and residuary legatee of Powers. Upon the issues thus made between defendants Wadhams and Leinenweber the cause was tried, which resulted in a decree in favor of defendant Leinenweber, from which decree Wadhams brings this appeal.

*H. B. Nicholas*, for appellant. *Raleigh Stott*, for respondent.

BEAN, J.. (after stating the facts as above.) On March 12, 1883, Truman P. Powers executed his last will and testament, which, among other devises and bequests, contained the following: "*Sixth.* I give, devise, and bequeath to Christian Leinenweber, of the town of Upper Astoria, Clatsop county, Oregon, and William Wadhams, of the city of Portland, Multnomah county, Oregon, and the survivor of them, unless the same shall be conveyed by me prior to my death, blocks Nos. 57, 49, 85, and 99, and lots Nos. 3 and 4 in block No 37, in the town of Upper Astoria, Clatsop county, Oregon, as laid out and recorded by John Adair, and 20 acres of land in a square tract out of the N. E. corner of the S. E. quarter of John Adair's donation land claim, in trust for the sole use, benefit, and behoof of the First Presbyterian Church of the town of Upper Astoria, Clatsop county, Oregon, as laid out and recorded by John Adair, and which said lots, blocks, and tract of land are devised and bequeathed for the sole and express purpose of having erected and built on said lots 3 and 4 in said block 37, in said town of Upper Astoria, a Presbyterian Church, to be known and designated as the 'First Presbyterian Church of the Town of Upper Astoria,' for the use of the society of said First Presbyterian Church, and of a parsonage for the sole use and benefit of the pastor in charge of said First Presbyterian Church; and to the furnishingsaid church and parsonage with suitable, neat, and substantial furniture, and for the purpose of fulfilling and carrying out said trust, I hereby direct, authorize, and empower my said executors, Christian Leinenweber and William Wadhams, and the survivor of them, without any order of the probate court of Clatsop county, Oregon, to sell any and all said lots or tracts of land, except lots 3 and 4 in block 37, for such sums of money as shall to them seem just and right, and to give to the purchaser or purchasers of said lots or tracts of land, or any part or portion thereof, all necessary bonds, deeds, and conveyances therefor, and all sums of money, so realized by my executors, and the survivor of them, shall be loaned by them on good real-estate security until four years from the date of my decease, and at which said date said money shall be applied by my said executors to the

erection of a Presbyterian Church, to be known and designated as the 'First Presbyterian Church of the Town of Upper Astoria,' for the use of the society of the said First Presbyterian Church, and of the parsonage, for the sole use of the pastor in charge of said First Presbyterian Church, to the furnishing said church and parsonage with suitable furniture; and, after the erecting and furnishing of said church and parsonage, said trust shall wholly cease and determine in my said executors, and the survivors of them, and said trust shall thereupon vest in, and be carried on by, the board of trustees of said First Presbyterian Church of the town of Upper Astoria, and by their successors in office; and if, after the said church and parsonage shall be erected and furnished, any money shall be left from the proceeds of the sale of tracts and lots of land, or of any portion thereof, or if any of said lots or tracts of land shall remain unsold, then, and in that event, said trust shall cease and determine as to said money and unsold property, as well as to said church and parsonage, and church and parsonage furniture, and to said lots 3 and 4 in said block 37, on which said church and parsonage shall be built, in my said executors, and the survivor of them, and shall vest and remain in, and be carried on by, the board of trustees of said First Presbyterian Church of Upper Astoria, Clatsop county, Oregon, and their successors in office, in trust to the said board of trustees, and their successors in office, for the purpose of advancing and propagating the Christian religion through the agency of the Presbyterian Church; and I desire and direct that my executor Christian Leinenweber should be elected and added to said board of trustees of said First Presbyterian Church of Upper Astoria for the term of his natural life, or during his pleasure, to enable him the better to assist in the carrying out of my wishes as set out in this bequest. This bequest is for the benefit of my grandchildren, to interest them in working for, and supporting and believing in, the church and gospel of our Lord and Saviour Jesus Christ, to whom with the Father and the Holy Ghost be glory and honor, dominion and power, world without end, amen; and to enable all in the vicinity of Upper Astoria to enjoy the privileges of that glorious gospel, which to hear aright is everlasting life. *Seventh.* All the rest, residue, and remainder of my estate, both real, personal, and mixed, of which I shall die seised and possessed after the payment of all my just debts and all the expenses of my last sickness and burial, I give, devise, and bequeath unto my adopted and beloved daughter Mary Leinenweber, in fee-simple to the said Mary Leinenweber."

At the time of Power's death in July, 1883, there was no First Presbyterian Church, or any Presbyterian Church organization, association, or society in Upper Astoria, nor has any such church been organized or established since his death. The contention of respondent is that the devise to Wadhams and Leinenweber was a private trust, and not a public charity, and, there being no certain specified bene-

ficiaries in existence at the time of the testator's death, is void. The requisites of a valid private trust, and one for a charitable use, are materially different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified *cestui que trust*, clearly identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a *quasi* public character. Indeed, it is said a public charity begins where uncertainty in the recipient begins. 2 Pom. Eq. Jur. § 1018; 2 Perry, Trusts, § 687; *Raley v. Umatilla Co.*, 15 Or. 172, 13 Pac. Rep. 890. When the object and purposes for which a trust is intended to be created is once determined to be charitable, very different rules from those that are applied in administering and establishing private trusts will be applied in order to give effect to the intention of the donor, and establish the charity. In a private trust, if the *cestuis que trustent* are so uncertain, or are so incapable of taking, that they cannot be identified, or cannot, by legal or equitable proceedings, claim the benefit conferred upon them, the gift will fail, and revert to the donor, or his heirs; but, if a gift is made for a public charitable purpose, it is immaterial that the *cestuis que trustent* are indefinite or uncertain, or that the trustee is uncertain or incapable of taking. Courts of equity look with favor upon all such trusts, and endeavor to carry them into effect, if it can be done consistently with the rules of law. With regard to the origin and extent of the equitable jurisdiction over charitable trusts in this country, there is the utmost conflict of judicial utterances in the earlier cases. The opinion seems formerly to have prevailed that the peculiar equitable jurisdiction over charities, except where a trust, valid by the ordinary rules of law and equity, was created, was derived solely from the statute of 43 Eliz. c. 4. It was so held by the supreme court of the United States in the case of *Association v. Hart*, 4 Wheat. 1; but, in the case of *Vidal v. Girard*, 2 How. 127, the court had occasion to re-examine the question, and, after an able and exhaustive argument by eminent counsel, in a learned opinion delivered by Justice STORY, practically overruled the case of *Association v. Hart*, and held that courts of equity have jurisdiction over charitable trusts as part of their ordinary jurisdiction over trusts, and independently of the statute of Elizabeth.

The doctrine of this case has generally been recognized as the law wherever the system of charitable trusts has been accepted at all. 2 Pom. Eq. Jur. § 1028, and note; 2 Perry, Trusts, 694; *Howe v. Wilson*, 91 Mo. 45, 3 S. W. Rep. 390. It may then be stated, as a proposition supported by the great weight of authority in this country, that courts of equity, in the various states, when they are not prohibited by statute, exercise an original inherent jurisdiction over charitable trusts,

and apply to them the rules of equity, together with such other rules as may be applicable under the laws of the several states, and this they do by virtue of their inherent powers, without reference to whether the statute of Elizabeth has been adopted in their state. Many definitions, or attempted definitions of a "legal charity" are to be found in the books, only a few of which will be given here. Mr. Binney, in his great argument in the case of *Vidal v. Girard*, supra, defined a "pious" or "charitable" gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish. The love of God is the basis of all that is bestowed for His honor, the building of His church, the support of His ministers, the religious instructions of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest." This definition was approved by the supreme court of Pennsylvania. *Price v. Maxwell*, 28 Pa. St. 35. In *Ould v. Hospital*, 95 U. S. 311, Mr. Justice SWAYNE said: "A charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing or well-being of social man." A more concise and practical definition is probably: "A gift to a general public use, which extends to the rich as well as the poor." *Coggeshall v. Pelton*, 7 Johns. Ch. 294; *Mitford v. Reynolds*, 1 Phil. Ch. 191; *Perin v. Carey*, 24 How. 506. Mr. Justice GRAY, in the case of *Jackson v. Phillips*, 14 Allen, 556, has given a definition which seems to include all the facts and circumstances, and all varieties of charity, under the law, and leaves nothing to be added. In his words: "A 'charity,' in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, or by relieving their bodies from disease, suffering, or constraint, or by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government. It is immaterial whether the purpose is called 'charitable' in the gift itself, if it is so described as to show that it is charitable in its nature." Trusts for the support of public worship and religious instruction have always been held charitable. In *Perry on Trusts*, § 701, referring to the fact that the English statute (43 Eliz.) makes no reference to religious use, except the "repair of churches," it is said: "But in a Christian community, of whatever variety of faith or form of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spread, and teaching of Christianity, or for the convenience and support of worship, or of the ministry, have been held charitable." Mr. Pomeroy says: "The support and propagation of religion is clearly a 'charitable use.' This includes

gifts for the erection, maintenance, and repair of church edifices, the maintenance of worship, the support of clergymen, the promotion and promulgation of religious doctrines and beliefs, in any manner, by the church or by associations, the aid of missionary, bible, and other religious societies, and all other objects and purposes which are really religious." 2 Pom. Eq. Jur. § 1021. Adopting the language of Lewis, C. J., in the case of Price v. Maxwell, supra: "A charitable use is not always a religious one, but we know of no religious use which could be regarded at all as free from superstition that is not included in the definition of a 'charitable use.'" Gifts for the erection of a house for public worship, or for the use of the ministry, constitute a public charity, when it appears to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. Potter v. Thornton, 7 R. I. 252; Johnson v. Mayne, 4 Iowa, 180; 2 Perry, Trusts, § 701; Beckwith v. Rector, 69 Ga. 564. Tested by all the definitions and descriptions of charities found in the text-books, and the illustrations furnished by the decided cases, it is clear that the devise to Wadhams and Leinenweber was for a public charity. Its object was the advancement of religion, through the erection of a house for the public worship of God, and supplying a dwelling-house for the minister thereof, or, as the donor himself states it, "for the purpose of advancing and propagating the Christian religion through the agency of the Presbyterian Church." It is "to be applied consistently with existing laws for the benefit of an indefinite number of persons, by bringing their hearts and minds under the influence of religion," and therefore has all the requisites of a valid charitable trust.

Section 732, Perry, Trusts, cited by counsel for respondent, does not in any way conflict with this doctrine. In that section Mr. Perry is only discussing the remedy for an abuse of the trust or misemployment of the funds, and not of the validity of a trust for religious purposes, as will readily be seen by an examination of the entire section and authorities referred to by him. The donor in this case was a devout and active member of the Presbyterian Church, and had been since the early settlement of this coast. He for many years resided in Upper Astoria, and had possessed an intense desire for the establishment of a church of his chosen belief in that place. But during his life-time he was doomed to disappointment, but when he came to arrange for the final disposition of his property, after death, still cherishing that desire, and being anxious that those who should reside in his adopted town after him might enjoy the privileges and blessings of which he had been deprived, made this provision in his will. His intention is clear, and definitely expressed. The object to which he desired that particular portion of his property to be applied is clearly stated. It is the duty of a court of equity to carry out his intention, if it can be done consistently with existing laws. It is also claimed that the devise

in this case is invalid because there was no *cestui que trust* in existence capable of taking at the time of the donor's death, nor is there now. In disposing of this question it is well to keep in view the fact that we have a living trustee, in whom the testator vested the property with specific direction as to its disposition. This is not a case where the bequest is for charity generally, or when there is no one *in esse* capable of taking at the time of the testator's death. In Perry, Trusts, § 719, it is said: "There is a wide distinction between a gift to charity and a gift to a trustee to be by him applied to charity. In the first case, the court has only to give the fund to charitable institutions, which is a mere ministerial or prerogative act; in the second case, the court has jurisdiction over the trustee, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable." A gift in trust for a public charity not in existence at the date of the gift, and the beginning of whose existence is uncertain, has repeatedly been held valid by the courts of this country. In Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. Rep. 327, a grant to John S. Horner, and his successors in trust, for the use and benefit of the Russell Institute of St. Louis, Mo., was held to be a charitable gift valid against the donor's heirs, although the institution was neither established nor incorporated in the life-time of the donor, or of Allen. In Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. Rep. 336, a bequest "to the first Christian church erected, or to be erected, in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same," was held valid as a charitable bequest. In Seda v. Huble, 75 Iowa, 429, 39 N. W. Rep. 685, a devise was made to certain persons in trust for the benefit of the Catholic Church on the testator's farm, and directed that they and their successors should invest said money safely for the benefit of the church. It was held that the bequest was for a charitable use clearly defined, and that the title to the money vested in the trustees, and it was immaterial that the beneficiary church was not, and could not be, incorporated, and that the bequest was not invalid on the ground that there was no one to call the trustees to an account for the misuse of the funds. In Schmidt v. Hess, 60 Mo. 591, a grant of land to a church was held valid as a charity, and although the church was at the time of the grant unincorporated so that no grantee was then *in esse* capable of taking it, and although the language used indicating the intent may be obscure, yet equity will effectuate the trust. To the same effect see Ingalls v. Harbor, 3 Pet. 99; McDonogh v. Murdock, 15 How. 367; Ould v. Hospital, 95 U. S. 303; Miller v. Chittenden, 2 Iowa, 315, and 4 Iowa, 252; Attorney General v. Chester, 1 Brown's Ch. 389; 2 Perry, Trusts, §§ 730, 736; Vidal v. Girard, 2 How. 127; Johnson v. Mayne, 4 Iowa, 180; Cumming v. Trustees, 64 Ga. 105. No case was cited in the argument, and our research has failed to furnish one, where a court of equity has refused to

effectuate a trust for public or charitable purposes, when the fund is given to a trustee competent to take, and when the charitable use is so far defined as to be capable of being specifically executed.

The property in this instance is given to a charitable use in every respect consistent with law and public policy. The object is specific and definite, and capable of being carried into effect according to the intention of the donor. The property is given to a trustee capable of taking the estate for the benefit of the beneficiaries named. The trust is so far expressed and defined that it can be enforced by virtue of the inherent powers of a court of equity. The beneficiaries are a well-ascertained society of individuals, whose rights, when organized and established, will ever remain a proper subject of easy and accurate judicial inquiry and determination. The devise is therefore not like an undefined gift to charity, where there is no trustee, nor any designated *cestui que trust*, which many of the courts in this country have refused to uphold. Nor is this a grant to a trustee for charity generally. The trust is fully expressed, and clearly defined. An active duty is imposed upon the trustees in respect to the management, disposition, and use of the property. They are given power to sell and dispose of the property, and invest the proceeds in a specific way. The bequest is accompanied with a designation of the purpose to which it is to be applied, which, as we have already seen, is a charitable object. The beneficiaries are an indefinite number of persons. In fact it presents all the requisites of a valid public charity. The gift was immediate and absolute, and it is clear the testator meant that no part of the property devised to Wadhams and Leinenweber should ever go to his heirs at law, or be applied to any object than that to which he has devoted it by the devise in question. It follows therefore that the decree of the court below must be reversed, and decree entered here foreclosing plaintiff's mortgage, and directing that the real estate described in the mortgage belonging to defendant Mary H. Leinenweber be first sold, and, if the proceeds arising from such sale be insufficient to satisfy the amount due them, and the costs of this suit, then the property devised to defendant Wadhams in trust be sold, or sufficient thereof, in order to satisfy said balance, and that appellant recover his costs in this court and the court below.

(20 Or. 349)

**MCCULLOUGH V. ESTES.**

(Supreme Court of Oregon. Jan. 21, 1891.)

**GUARDIAN'S SALE — COLLATERAL ATTACK — CURATIVE ACTS.**

1. Where the question as to a guardian's sale of lands of his ward arises collaterally, and the pleadings do not attack the proceeding for want of jurisdiction, and where the record discloses jurisdiction, both of the parties and the subject-matter, the sale will be sustained.

2. Mere irregularities of proceedings, though of so grave a character as to render a judicial sale inoperative, may be deprived of their evil consequences by subsequent legislation.

(Syllabus by the Court.)

Appeal from circuit court, Josephine county; L. R. WEBSTER, Judge.

C. A. Sehlbrede, for appellant. W. M. Colvig and P. P. Prim, for respondent.

LORD, J. This is an action in ejectment to recover the possession of certain real property particularly described herein, and situated in Josephine county of this state. The only question raised is as to the validity of the proceedings for the sale by the guardian of the interest of plaintiff in such land. It arose in the progress of the trial out of an objection to the report of the sale, confirmation, and deed of the guardian to the plaintiff's interest in such real property. The sale was made by the guardian in pursuance of an order regularly made of the county court of Lane county, but the place designated in the order for the sale was at the court-house door in Jackson county. The contention is that the sale was void for the reason that the land was situated in what was then Jackson county, and should have been sold there, instead of at the court-house door in Lane county. The Code provides: "In order to obtain a license for such sale the guardian shall present to the county court of the county in which he is appointed guardian a petition therefor, setting forth the condition of the estate of his ward and the facts and circumstances under which it is founded, tending to show the necessity or expediency of such sale, which shall be verified by the oath of the petitioner." Hill's Code, § 3118. The record discloses a compliance with all the requirements of the statute to procure the order, and it is admitted that the court ordering the sale had jurisdiction to make such order, but that it erred in specifying the place at which the property was sold, and thereby vitiated its proceedings. The statute does not designate the place at which the land is to be sold, but provides that such guardian, before fixing the time and place of the sale, shall, etc. Id. § 3123. By some it is thought that either county may be designated as may be deemed best under the circumstances. The claim for the plaintiff is that the sale by the guardian should have been in the county where the real property is situated, and that the sale was rendered void in not so making it. Assuming, without deciding, that the contention for the plaintiff is correct, the case presented is that of a court having jurisdiction in the premises exercising it erroneously. In such case, after jurisdiction has attached, no principle of law is better settled than that mere defects or irregularities which may have resulted from the exercise of jurisdiction cannot be taken advantage of in a collateral way, as is sought to be done in the present action. The defect was not of a jurisdictional character.

Upon the facts presented the court was authorized to make the order for the sale of the property. This is conceded, as well as the jurisdiction of the person; and the defect, if defect it be, crept in after jurisdiction was acquired. In a word, it is admitted that the record contains a recital of all the facts necessary to confer jurisdiction; and, within the principle laid down

in *Heatherly v. Hadley*, 4 Or. 1, it is conclusive when attacked collaterally. In *Walker v. Goldsmith*, 14 Or. 126, 12 Pac. Rep. 537, it was said: "Where the question as to a guardian's sale of the lands of his ward arises collaterally, and the pleadings do not attack the proceedings for want of jurisdiction, and where the record discloses, on its face, jurisdiction, both of the parties and the subject-matter, the sale must be sustained." And in *Wright v. Edwards*, 10 Or. 307, it is said: "Where there is matter of substance upon which jurisdiction can hinge, mere errors or defects, although material in some respects, but which might have been avoided on appeal, cannot avail to condemn a judicial proceeding when by lapse of time an appeal is barred which has become the foundation of title to property." *Morrill v. Morrill*, (Or.) 25 Pac. Rep. 365. This of itself would be sufficient to defeat the contention for the plaintiff, but it is not all. To remedy defects or irregularities which may affect judicial sales, we have a curative act designed to meet such cases. Section 3 provides: "All sales \* \* \* by guardians of their wards' real property in this state to purchasers for a valuable consideration, which has been paid by such purchasers to such guardians or their successors in good faith, and such sales shall not have been set aside by the county or probate court, but shall have been confirmed or acquiesced in by such county or probate court, shall be sufficient to sustain \* \* \* a guardian's deed to such purchaser for such real property; and, in case such deed shall not have been given, shall entitle such purchaser to such deed, and such deed shall be sufficient to convey to such purchaser all title that such ward had in said real property; and all irregularities in obtaining the order of the court for such sale, and all irregularities in making or conducting the same by such \* \* \* guardians, shall be disregarded." *Sess. Laws 1889*, p. 69, § 3. The case before us comes directly within the purview of this statute, which was intended to obviate or cure such defects or irregularities as is sought to be made available in this action. Where the defects are not jurisdictional in their character, it is held that they may be validated by a subsequent curative act of the legislature. Mr. Freeman says: "But mere irregularities or proceedings, though of so grave a character as to render a judicial sale inoperative, may be deprived of their evil consequences by subsequent legislation." *Freem. Jud. Sales*, § 57. So that, however we may regard this case, no error is discovered, and the judgment must be affirmed.

OLLIPHANT v. OLLIPHANT.

(*Supreme Court of Oregon*. Nov. 17, 1890.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

W. R. Willis, for appellant. J. C. Fullerton and C. A. Sehlbrede, for respondent.

PER CURIAM. This is a suit for divorce, and rests wholly upon its facts, which are not complicated, nor is it necessary to recapitulate them. It is not thought any purpose can be served to comment on the

facts, except to say that the result of our examination has confirmed the impression made at the argument that the decree must be affirmed, and it is so ordered.

BEAN, J., having heard this cause in the court below, did not sit at the hearing of said cause on appeal to this court.

(20 Or. 340)

FLINT v. PHIPPS *et al.*

(*Supreme Court of Oregon*. Jan. 21, 1891.)

EXECUTION—MOTION TO QUASH—AMENDMENT.

1. Where an execution is radically defective in failing to follow the judgment, and a sale has been had of certain real property, from which is realized about two-fifths of what the same property brought a few months previously at another execution sale, in the same case, and the cause of the discrepancy in the amount realized does not appear, the court, in the exercise of a superintending power over its processes, will quash the writ.

2. The power to amend an execution is vested in the court, but its exercise must always be in furtherance of justice.

(*Syllabus by the Court*.)

Appeal from circuit court, Douglas county; R. S. BEAN, Judge.

This is an appeal from an order confirming a sheriff's sale made upon a decree of foreclosure; also from an order allowing the execution upon which such sale was made to be amended. On the 2d day of July, 1888, a final decree of foreclosure was entered in this court in said cause, for the sum of \$13,045, and interest, and \$250 attorney's fees, and for costs and disbursements. The mandate was duly filed and entered in the court below on the 10th day of October, 1888. On the 15th day of October, 1888, an execution was issued to enforce said decree, and placed in the hands of the sheriff of Douglas county for service, who advertised the lands described in said writ for sale on the 1st day of December, 1888. On said day, a part of said lands were sold to S. C. Flint and G. A. Taylor for \$3,300, and the residue to W. S. Hamilton for \$10,300, amounting, in the aggregate, to the sum of \$13,600. After the entry of said decree, a payment was made thereon before said sale of \$815.60. The aggregate amount of the costs and attorney's fees, at the time of the sale, was \$643.07. It appears from the sheriff's return that there was from the proceeds of said sale in his hands the sum of \$12,956.93, to apply on said decree, leaving a balance due thereon of \$2,017.77. On the 6th day of May, 1889, the plaintiff moved to confirm said sales, which motion was on the next day duly allowed by the court, and said sales confirmed. One parcel of said land was sold to W. S. Hamilton, as appears from the sheriff's certificate of redemption, for the sum of \$5,000. On the 31st day of August, 1889, the defendant R. Phipps duly redeemed the same by paying said sheriff the sum of \$5,375. The land thus redeemed is described as the donation land claim of R. Phipps in townships 28 and 29 S., range 6 W.;—the donation land claim of Robert McKee in townships 28 and 29 S., range 6 W.; all of the donation land claim of Monroe C. McCloud that lies north and

east of the South Umpqua river, in Douglas county, Or. On the 9th day of October, 1889, the clerk of the circuit court of Douglas county, Or., issued another execution on said decree, in which it was recited that S. C. Flint, at the regular October term, 1888, of the circuit court of Douglas county, Or., to-wit, Wednesday, October 10, 1888, recovered a judgment by foreclosure of a mortgage and against the above-named defendant R. Phipps and against the following described mortgaged premises, to-wit: The donation claim of M. C. McCloud, No. 41 in township 28 S., range 6 W., bounded and described as follows, to-wit: Beginning at a point 12 chains north and 9.25 chains east from the south-west corner of section 33; thence north 40 chains; thence east 40 chains; thence south 40 chains; thence north, 89 deg. 34 min. west, 39.56 chains, to the place of beginning. The donation land claim No. 42, of Robert Phipps, in township 28 S., range 6 W., and donation claim No. 37, of Robert Phipps, in township 29 S., range 6 W. The donation claim of Robert McKee, in townships 28 and 29 S., range 6 W., (notification No. 5,869.) And it is further recited that it has been decreed by the court that the mortgage of the plaintiff be foreclosed, and all rights of the defendants W. R. Willis, Carrie Willis, his wife, S. Hamilton, G. A. Taylor, and H. C. Slocum are decreed to be subsequent to the lien of the plaintiff, and they are thereby barred of all equity of redemption in said lands, except such rights of redemption as the laws of Oregon confer. The sheriff is then commanded to levy upon and sell the above-described premises, and apply the proceeds arising from such sale—*First*. To the costs and expenses of the proceedings in the supreme court of the state of Oregon, and in the court below. *Second*. To the payment of the decree of the plaintiff therein, to-wit: The unsatisfied balance thereof, \$2,305.97, with interest thereon, at the rate of 10 per cent. per annum, from the 9th day of October, 1889. By the sheriff's return on this execution, it appears that he levied on the lands described in it on the 14th day of October, 1889, and, after duly advertising the same for the requisite time, they were sold to T. R. Sheridan on the 16th day of November, 1889, for the sum of \$2,390. This satisfied said decree and costs, the sheriff recites, leaving \$3.04 in his hands. On the 22d day of November, 1889, the defendants W. R. Willis and R. Phipps filed their objections to the confirmation of sale as follows: *First*. For that the said execution does not describe or follow the terms of any judgment or decree in the above-entitled court and cause. *Second*. It does not state the amount of any judgment or decree, or the amount actually due thereon. *Third*. For that the only decree entered in the above-entitled court and cause was a decree dated October 10, 1888, ordering the sale of the lands in this execution, together with a large body of other lands, and said decree and order were duly enforced by virtue of an execution issued on the 15th day of October, 1888, and sale of all of the premises in said decree described

on the 1st day of December, 1888, and the proceeds of said sale paid to the plaintiff above named, as fully appear by the records of the court. *Fourth*. For that the sheriff's return shows a sale of all the right, title, and interest of the defendant R. Phipps, in and to the land described in the execution on the 23d day of September, 1886, when the only judgment or decree on the record of this court in this cause against the defendant R. Phipps was entered on the 10th day of October, 1888. *Fifth*. For that the sale was not authorized by the judgment, decree, or execution issued in said cause. *Sixth*. There is no judgment or decree in the records of this court that will authorize the issuance of the execution issued in this cause. *Seventh*. The only decree and order for sale, authorizing an execution against the real property described in this execution, had been fully executed and satisfied before the issue of this execution. *Eighth*. The execution in this case does not authorize the sale of any interest or title of the defendant R. Phipps, in and to the premises mentioned therein, prior to the 10th day of October, 1888. On the 2d day of December, 1889, the plaintiff filed a motion to amend the execution as well as the return. The defendants also filed a motion to quash the execution. The court sustained the plaintiff's motions, and allowed the execution to be amended, and then confirmed the sale, at the same time overruling the defendants' objections to such confirmation, as well as their motion to quash. From these rulings, this appeal is taken.

W. R. Willis, for appellants. J. C. Fullerton and Hamilton & Hamilton, for respondent.

STRAHAN, C. J., (after stating the facts as above.) The first question presented by the record is the sufficiency of the execution, upon which the sale was made. It appears that there had been a previous sale of all the lands described in the decree, and that the tracts of land described in the writ had been redeemed by the judgment debtor; but the writ fails to follow the decree in every essential particular except the names of the parties. The power of amendment is conceded, and, in most cases, should be exercised to support a title acquired at such sale; but it is still a power which must be exercised cautiously, and in view of the facts of the particular case. A few months previously, this land sold for \$5,000. At the sale in question, it only brought about \$2,300. What caused this discrepancy does not appear. It cannot be claimed that so short a time had produced any effect upon the value of the property. Courts always exercise full control over their processes, so that suitors shall not be prejudiced, either by the form of the writ or the manner of its execution. McKee v. Logan, 82 Mo. 524. The defects in this writ may have been the reason why the property did not sell for as much as at the previous sale, and, if so, then the parties were injured to the amount of the difference between the present and former sale. Under this view of the subject, we

think the better practice would have been for the court below to have quashed the writ on the defendants' motion, rather than to have amended it. This power of amendment is a very salutary one, but it ought always to be exercised in furtherance of justice. In this case, we have concluded to reverse the decree appealed from, and to quash the writ.

The other question presented is not fully presented by this record. It was said at the argument that the defendant Willis had purchased Phipp's interest in this land before the decree of foreclosure, and taken a deed therefor; but the fact does not appear in the record. If it did, what effect the fact would have upon the rights of these parties is not so manifest. *Boyce v. Wight*, 2 Abb. N. C. 167; *Bowers v. Arnoux*, 33 N. Y. Super. Ct. 530; *Teabout v. Jaffray*, 74 Iowa, 28, 36 N. W. Rep. 783; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. Rep. 125; *Clayton v. Ellis*, 50 Iowa, 590. But, whatever the correct rule may be, we do not care to enter upon its consideration until all the facts are before us. Let the decree appealed from be reversed.

(20 Or. 345)

#### LITTLE v. COGSWELL.

(Supreme Court of Oregon. Jan. 21, 1891.)

##### STATUTES—REPEAL BY IMPLICATION.

A new statute, revising the whole subject-matter of an old one, and evidently intended as a substitute for it, although there is no clause to that effect, will operate as a repeal of the old law.

(Syllabus by the Court.)

Appeal from circuit court, Lake county. The respondent recovered a judgment in the circuit court for Lake county against appellant in an action at law, and filed a statement of his costs and disbursements, which included the clerk's and sheriff's fees, to which appellant filed objections. The county clerk found for respondent, from which an appeal was taken to the circuit court, and that court allowed respondent as disbursements paid W. T. Boyd, county clerk, \$16.95, and an additional sum of 33% per cent. to-wit, \$5.65, making a total of \$22.60, and paid William Carl, sheriff, \$6.50, and an additional 33% per cent. to-wit, \$2.17, making a total of \$8.67, from which judgment this appeal is taken.

C. A. Cogswell, for appellant. P. P. Prim and H. K. Hanna, for respondent.

BEAN, J., (after stating the facts as above.) The only question presented by this appeal is whether the clerk and sheriff of Lake county are entitled to receive for their services 33% per cent. in addition to the fees provided in sections 3 and 4 of the act of the legislative assembly approved February 25, 1885. An intelligent understanding of this question requires a brief reference to the various acts of the legislature concerning the fees of these officers. In 1882 (Laws 1882, p. 45) an act was passed regulating the fees of clerks and sheriffs in the various counties of the state, which, for the purposes of this case, may be said to have divided the counties into three classes, and provided a schedule of fees for each class. Sections 2 and 3 of

this act provide the fees for the clerks and sheriffs in the counties of the first class. Section 7 provides that clerks and sheriffs in certain counties, including Lake, shall receive for their services an additional compensation to that provided for those in the first class of 33% per cent.; while sections 8 and 9 provide a schedule of fees for the counties of the third class, which are the counties of Coos, Curry, Clatsop, Columbia, Josephine, and Tillamook, the fees for these counties being largely in excess of those provided for the other counties. In 1885 (Laws 1885, p. 63) an act was passed, approved February 23, 1885, amending section 7 of the act of 1882, by adding to the counties of the second class therein named the counties of Baker, Union, and Grant. At the same session of the legislature an act was passed, approved February 25, 1885, amending sections 7, 8, and 9 of the act of 1882, by omitting the counties of Lake and Klamath from section 7, and adding these counties to sections 8 and 9, thus transferring these counties from the second to the third class. It is contended by counsel for respondent that the attempt to amend section 7 of the act of 1882 by the act of February 25, 1885, is void, because this section had already been amended at the same session of the legislature, two days previously, and therefore the clerk and sheriff of Lake county are entitled to receive for their services the fees provided in sections 3 and 4 of the act of February 25, 1885, and an additional 33% per cent., on account of the provisions of the act of February 23, 1885. Conceding that the attempt to amend section 7 of the act of 1882 is void, as claimed by counsel, the conclusion as contended for does not follow. The only matter under consideration by the legislature at the time the act of February 25, 1885, was passed was the fees to be allowed the clerks and sheriffs of Lake and Klamath counties. This is apparent from the general scope of the act. The only modification it makes in the act of 1882 is in transferring these two counties from the second to the third class, thereby largely increasing the fees of clerks and sheriffs in these counties. It was evidently intended to revise the whole subject of the fees of these officers, and as a substitute for all previous legislation on that subject, by transferring Lake and Klamath counties from the second to the third class. Although the attempt to amend section 7 of the act of 1882 by omitting Lake and Klamath counties from the counties therein named may be void, the amendment of sections 8 and 9 by adding these counties is valid, and clearly expresses the legislative intent. A careful comparison of this act with the act of 1882 can leave no doubt that it was the intention of the legislature, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the fees of these officers as it thought best, and to substitute its will as expressed in sections 3 and 4 of the act of 1885 for the old law. The act of February 25, 1885, being intended to revise the subject of the fees of clerks and sheriffs of these counties, although it had no clause to that effect,



operates as a repeal of all former acts in relation to the same subject-matter. Repeals by implication are not favored, but a new statute revising the whole subject-matter of an old one, and evidently intended as a substitute for it, will operate as a repeal of the old law, although there is no clause to that effect. This has repeatedly been held by this court, (*Grant Co. v. Sels*, 5 Or. 243; *Hurst v. Hawn*, Id. 275; *Fleischner v. Chadwick*, Id. 152,) and is generally recognized by the courts, (*Rogers v. Watrous*, 8 Tex. 62; *Davless v. Fairborn*, 3 How. 636; *U. S. v. Tynen*, 11 Wall. 88; *Pierpont v. Crouch*, 10 Cal. 315; *Towle v. Marrett*, 14 Amer. Dec. 206, and note.) In *Grant Co. v. Sels*, supra, the court held that an act of the legislature fixing the salary of the county judge of that county at \$800 a year operated as a repeal of a former act fixing his salary at \$1,200, although it contained no clause to that effect, and that the county could maintain an action to recover from the defendant money paid him under the former act. To the same effect is the case of *Pierpont v. Crouch*, 10 Cal. 315. So that, conceding that section 2 of the act of February 25, 1885, which attempts to amend section 7 of the act of 1882, is invalid and of no effect, (a question, however, we do not undertake to decide,) there still remains sufficient of the act of 1885 to clearly show the legislative intent. By the act of 1882 no schedule of fees was provided for the counties of Lake and Klamath, but the clerks and sheriffs of these counties were to receive the fees provided for counties of the first class, with 33% per cent. added, which still made their fees much less than prescribed for counties of the third class. By sections 3 and 4 of the act of February 25, 1885, these counties were transferred to the third class, and a schedule of fees prescribed, and it would certainly be doing violence to the clearly expressed legislative intent to so construe this act as to allow these officers the maximum fees provided for any of the counties of the state, and an additional compensation of 33% per cent. In the construction of a statute, the intention of the legislature is to be pursued, if possible. To ascertain this intention, resort may be had to the entire act, and, while section 2 of the act of February 25, 1885, may be invalid on account of some technical defect, we still have a right to examine it, in order to ascertain the purpose and intent of the legislature. It follows, therefore, that the judgment of the court below must be reversed, and this cause remanded to the court below, with directions to enter a judgment in favor of respondent for \$16.95 for clerk's fees, and \$6.50 for sheriff's fees, and that appellant recover his costs and disbursements.

(1 Wash. St. 306)

**VAN HOUTEN v. ROUTHE et al.**  
(*Supreme Court of Washington*. Aug. 8, 1890.)  
CONSTITUTIONAL LAW—TITLE OF LAWS—SINGLE SUBJECT.

Act Wash. March 28, 1890, (Laws 1889-90, p. 51,) entitled "An act allowing school-districts to borrow money and issue bonds for the building and furnishing of school-houses, to permit the

funding of school-district bonds heretofore or hereafter to be issued, legalizing the same, and declaring an emergency," provides for extending the issuing of bonds, by school-districts containing 10,000 population, to 5 per cent. of their taxable property. Held, that the title embraced but one subject, and such provision was within the title, and was valid, though the remainder of the act might violate Const. Wash. art. 2, § 19, providing that an act shall contain but one subject, and that shall be clearly expressed in the title.

Appeal from district court, Spokane county.

*W. C. Jones*, for appellant. *H. E. Houghton*, for appellee.

**SCOTT, J.** Plaintiff brought this action to enjoin the defendants, who were directors of school-district 81, comprising the city of Spokane Falls, from negotiating certain school-district bonds amounting to \$250,000, which had been authorized by a vote of the district. The amount exceeds 2% per cent. of the taxable property therein. The defendants demurred generally to the complaint. The court sustained the demurrer, and the plaintiff appealed to this court. The only question in the case is as to the validity of an act, approved March 28, 1890, purporting to amend section 1 of an act, approved March 19, 1890, relating to the issuance of such bonds, both of said acts having been passed by the last legislative assembly. See Sess. Laws 1889-90, pp. 45, 51. The act first approved limited the issuing of bonds, by school-districts containing a population of 10,000 or more, to an amount not exceeding 2% per cent. of the taxable property therein. The population of this district exceeds 10,000. The later act, if valid, extends the limit to 5 per cent. in all cases. It is urged by appellant that it is void in consequence of its containing more than one subject, and that the matters contained in the act are not sufficiently expressed in the title. See section 19, art. 2, of the state constitution. We are of the opinion that the later act is valid, at least in so far as it extends the limit to 5 per cent. of the taxable property regardless of population, and in incorporated cities making the last preceding assessment for city purposes the basis for determining the maximum amount. The title thereto embraces but one subject, and the act so far being clearly within the title, and relating to but one subject, it should be sustained in any event. See *Cooley*, Const. Lim. (5th Ed.) p. 178, par. 5. As to the validity of the remainder of the act, we are not called upon to decide here. It being admitted that the amount so voted for is within the 5 per cent. limit, the bonds were accordingly authorized. The judgment of the court below is affirmed.

**ANDERS, C. J., and HOYT, DUNBAR, and STILES, J.J., concur.**

(7 Utah, 99)  
**EASTON v. THATCHER et al.**

(*Supreme Court of Utah*. Feb. 4, 1891.)

SPECIFIC PERFORMANCE—CERTAINTY OF DESCRIPTION.

An option on "one-half interest of [the vendor] in horses and ranch" is capable of specific

enforcement, as the ranch may be identified by extrinsic evidence.

Appeal from district court, third district; H. P. HENDERSON, Justice.

C. O. Whittemore and S. P. Armstrong, for appellant. Miller & Maginnis, for respondents.

ZANE, C. J. The plaintiff instituted this action in the district court to enforce the specific performance of an alleged contract in the words and figures following: "Logan, Utah, Feb. 8th, 1890. Received of J. M. Easton the sum of \$10.00, as an option on the one-half interest of Hyrum Thatcher, of Logan City, in horses and ranch, etc., for the space of sixty days; the sum agreed upon being two thousand dollars cash down, and a balance of fifteen hundred dollars in two years; in all, \$3,500. In case of failure of J. M. Easton to finish contract, he to forfeit the option. HYRUM THATCHER. J. M. EASTON. [Seal.]" A more particular description of the property was given in the complaint, and due execution and delivery of the contract was also averred. It was also alleged that the defendant John E. Price, after such delivery and with a knowledge of it, purchased the same property of Thatcher, and that the plaintiff offered to perform the contract on his part, and demanded the execution thereof, and that Thatcher had refused to perform on his part. To the complaint the defendants interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action, which the court sustained. From this decision of the court the plaintiff has appealed to this court, and assigns the same as error. The only question argued by counsel, and submitted for our consideration and decision, is, was the contract void for uncertainty in the description of the land? That description is, "one-half interest of Hyrum Thatcher in horses and ranch." This is equivalent to saying, "a ranch in which Hyrum Thatcher owns a one-half interest." Extrinsic evidence to show that Hyrum Thatcher owned a one-half interest in a ranch would be competent. And it would also be competent for witnesses familiar with the ranch to describe it, giving its boundaries. By such evidence the contract could be applied to its subject-matter; and if the existence of such a ranch was to be so shown, in the absence of any proof of another ranch in which Hyrum Thatcher owned a one-half interest, the subject of the contract would be identified, and it would not be within the statute of frauds. It would also be competent to prove that Hyrum Thatcher owned a one-half interest in no other ranch. The above statement of the law is supported by the following authorities: *Waring v. Ayres*, 40 N. Y. 358; *Devil. Deeds*, § 113; *Notes to Atwood v. Cobb*, 26 Amer. Dec. 667; *King v. Ruckman*, 20 N. J. Eq. 359; *Hurly v. Brown*, 98 Mass. 545; 1 Greenl. Ev. §§ 286, 287; *Atwood v. Cobb*, 16 Pick. 227; *Scanlan v. Geddes*, 112 Mass. 15. We are of the opinion that the court below erred in sustaining the defendants' demurrer to the plaintiff's complaint. That decision is reversed, and the case is remanded, with directions to the court be-

low to overrule the demurrer, and permit defendants to answer.

ANDERSON, BLACKBURN, and MINER, JJ., concur.

(7 Utah, 103)

MEAD v. METCALF, Marshal.

(Supreme Court of Utah. Jan. 20, 1891.)

APPEAL FROM DISCHARGE ON HABEAS CORPUS.

From an order of the district court discharging a person from arrest on *habeas corpus* no appeal lies under Organic Act Utah Territory, § 9, and 2 Comp. Laws Utah 1888, §§ 3635, 5134, providing that appeals shall lie from final judgments in an action or special proceeding, or in criminal actions, from questions of law alone.

Appeal from district court, first district; JAMES A. MINER, Judge.

A. R. Heywood, for appellant. Smith & Smith, for respondent.

ZANE, C. J. The plaintiff was arrested for a violation of an alleged ordinance of Ogden City prohibiting dentists from practicing their profession without a license from a board of examiners appointed by the city council; and the court below discharged him after a hearing upon a writ of *habeas corpus*. From the order of discharge the defendant has prosecuted an appeal to this court, and the plaintiff moves the court to dismiss for the reason that the right of appeal does not exist from such an order.

When an individual is unlawfully deprived of his liberty a writ of *habeas corpus* is his most simple and speedy remedy. Under the statutes of Utah the writ may issue upon application of the prisoner or other person on his behalf, or the judge or court may issue the writ on his or its own motion upon sufficient evidence; and upon the return of the writ the statute requires the court or judge to proceed in a summary manner to hear the testimony and arguments, and to dispose of the prisoner as the case may require. And in all cases where the imprisonment is for a criminal offense, and the commitment may have been informal or without due authority, or the process may have been executed by a person not duly authorized, the court is authorized to make a new commitment, or admit the party to bail, if the case be bailable. The duty of the judge or court upon such a hearing is similar to that of the magistrate upon a preliminary examination; and, though the prisoner may be discharged, he may be again arrested for the same offense upon a sufficient showing. While the decision of the judge or court may liberate the prisoner from arrest, it does not determine his innocence. He may be indicted, tried, and convicted without regard to the discharge upon the writ of *habeas corpus*. Upon such a hearing the guilt or innocence of the prisoner of the crime charged, or of the right to reimprison him in consequence of it, cannot be finally determined. The order of his discharge simply releases him from the particular restraint to which he is subjected. Such a decision cannot convict him or acquit him of the crime, or determine his imprisonment in consequence of it. It is not final. Section 9 of the Organic Act of Utah

Territory, provides that "writs of error, bills of exceptions, and appeal shall be allowed in all cases from the final decision of said district courts to the supreme court under such regulations as may be prescribed by law." And section 3635, vol. 2, Comp. Laws Utah 1888, provides that "an appeal may be taken to the supreme court from the district court from all final judgments in an action or special proceeding," etc. And section 5134 of the same volume provides that "either party in a criminal action may appeal to the supreme court on questions of law alone." The order from which the defendant attempted to appeal was not a final judgment within either of the provisions above quoted; nor did the order of discharge upon the hearing upon the writ of *habeas corpus* involve a question of law only; nor do we think an appeal from such an order within any special provision of the statute. In some of the states the decision of the court upon such a hearing may be reviewed at the instance of the state when the prisoner is discharged, as well as at the instance of the prisoner when he is remanded. In others the appeal is allowed only at the instance of the prisoner when he is remanded, or when the writ is denied. The right of appeal does not exist in either case without statutory authority. To entangle the proceeding by writ of *habeas corpus* with an appeal would deprive it of its efficacy as a simple and speedy remedy for the wrongs for which it was designed. In many cases an appeal would be an idle process unless the prisoner could be held during its pendency; and, if so held, this beneficent and time-honored writ in all such cases would be thereby deprived of its efficacy as a means of swift relief from oppression by unlawful imprisonment. In the case of *In re Clasby*, 3 Utah, 183, 1 Pac. Rep. 852, the court held that neither the defendant named in the writ nor the people have the right to an appeal from an order discharging a person upon a hearing upon a writ of *habeas corpus*. To the same effect are *People v. Schuster*, 40 Cal. 627; *Wyeth v. Richardson*, 10 Gray, 240. We are of the opinion that an appeal does not lie to this court from an order of the district court discharging a person from arrest upon a writ of *habeas corpus*. The motion of the respondent to dismiss the appeal for want of jurisdiction in this court to hear it is allowed. Appeal dismissed.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 107)

SPRECHT *et al.* v. PARSONS, United States Marshal.

(Supreme Court of Utah. Jan. 21, 1891.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—POWER TO SELL ON CREDIT.

An assignment wherein the assignee accepts the trust, and agrees "to execute the same by disposing of the property, \* \* \* and applying the proceeds to the payment of said debts," does not by implication authorize the assignee to sell on credit, which would invalidate it, under 2 Comp. Laws Utah, § 2838, providing that every assignment made with intent to hinder, delay, or defraud creditors shall be void.

Appeal from district court, first district; H. P. HENDERSON, Justice.

*Kimball & Allison*, for appellant. *Smith & Smith*, for respondents.

ZANE, C. J. It appears from the record in this case that one Valentine H. Harding, on the 4th day of October, 1890, assigned to respondents the goods in question, to pay his debts, and that while they were in possession, as such assignees, the appellant, as United States marshal, levied an attachment on them. On the trial of the case in the court below, the defendant objected to the introduction of the assignment in evidence on the ground that it was void under the following provision of the statute of Utah: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods, \* \* \* made with the intent to delay, hinder, or defraud creditors or other persons of their lawful \* \* \* debts or demands, shall be void." 2 Comp. Laws, § 2838. The court overruled the objection, and the defendant excepted. The court also charged the jury that the assignment was valid, to which appellant also excepted. The appellant relies on both exceptions, and assigns the ruling and charge of the court as error. He insists that the assignment conferred the power to sell the property assigned on credit, and that it is for that reason void. The language which it is contended confers such authority to sell on credit is as follows: "Out of the proceeds of the personal property \* \* \* will pay," etc. "The said parties \* \* \* accept this trust, and agree to execute the same by disposing of the property, \* \* \* and applying the proceeds to the payment of said debts." The intention to authorize the assignees to sell on credit is not express. Is it implied? The term "proceeds" of a disposition of property can be construed to mean money or other property, and so the term "dispose," in the connection in which it is found, may mean a sale for cash or on time, or an exchange for other property. To construe the language used as meaning a sale for cash supports the instrument; but to interpret it as authorizing a sale upon time, or exchange of the goods for other property, renders the assignment void. But the first construction mentioned is equally, if not more, reasonable than either of the others. When an assignment may be given a reasonable construction by which it is valid, and another by which it is void, the rule is to adopt the one that supports it. In such case the court will assume that the assignor intended to make a valid instrument; that he did not intend to violate the law. In *Nye v. Van Huse*, 6 Mich. 346, the court said: "It is forthly objected that the assignment was void as allowing the assignees to sell upon credit. The assumption that they were allowed to sell upon credit is based upon the following language: 'And sell and dispose of the same either at public or private sale, as they in their good judgment may deem best, and upon such terms and conditions as they may deem most advisable, and for the best interest of the creditors, con-

verting the same into money,' etc. If it be true that a grant of a power to sell upon credit would render the assignment void, (which is a question not before us,) yet we think a fair and reasonable interpretation of this language will not justify the construction that an illegal act was contemplated. This provision is usually found in the forms of assignments consulted by draughtsmen; and it is as reasonable to presume that the intent in following such form and in using the language was for a lawful as for an unlawful purpose." In the case of *Benedict v. Huntington*, 32 N. Y. 220, the court said: "And also that where an instrument does not, by an express provision, authorize an illegal act, the legal inference is that the assignor did not contemplate or intend to authorize one." The same principle is announced in *Kellogg v. Slauson*, 11 N. Y. 302; *Wilson v. Robertson*, 21 N. Y. 587; *Burrill, Assignm.* 345. The case of *Beus v. Shaugnessy*, 2 Utah, 492, we do not regard as entirely analogous to the one in hand. We have carefully examined other cases referred to by counsel, but do not deem it necessary to make special reference to them. We are of opinion that the assignment which we have considered is valid, and that the judgment appealed from should be affirmed. Judgment affirmed.

ANDERSON, BLACKBURN, and MINER, JJ., concur.

(7 Utah, 110)

LEGG *et al.* v. LARSON.

(*Supreme Court of Utah.* Jan. 20, 1891.)

APPEAL FROM INFERIOR COURTS.

1. 2 Comp. Laws Utah 1888, § 5380, providing that appeals from justices of the peace shall not be effectual unless appellant cause the papers to be filed in the district court within 30 days, and section 3027, giving courts of record power to make rules, and section 5459, authorizing the collection from appellant of a jury fee, in jury cases, before his papers are filed, apply to appeals from United States commissioners, and are valid, and within the legislative power of the territory.

2. Under 2 Comp. Laws Utah 1888, § 3027, authorizing courts of record to make rules not inconsistent with the laws, and not imposing "any tax or charge upon any legal proceeding," the court may by rule require the clerk's fees for filing and docketing the papers in a case appealed from a justice or commissioner to be paid before the case is entered, and, if not paid within 30 days, authorize the opposite party to pay them, docket the case, and have the appeal dismissed.

Following *Salt Lake City v. Redwine*, (Utah,) 23 Pac. Rep. 756.

Appeal from the district court of the third district of Utah territory, and from an order of said court dismissing an appeal from the United States commissioners' court, and from an order refusing to vacate such order of dismissal, and reinstate the appeal.

*Hoge & Burmester*, for appellant. *Stephens & Schroeder*, for respondents.

MINER, J. The record in this case shows that on March 17, 1890, a money judgment was obtained by the plaintiff and respondent against the defendant and appellant before United States Commissioner Norrell, at Salt Lake City, for \$218.75, with costs,

and that on the 19th day of March, 1890, an appeal was duly taken from such judgment by defendant to the third district court, and the court files and transcript of the commissioner lodged in the clerk's office of said district court with the clerk thereof, but were not filed by such clerk, but simply indorsed thereon the words, "Received March 19th, 1890," and put away in the pigeon-hole. That on the 21st day of April, 1890, on an *ex parte* application of plaintiffs, and without the knowledge of the defendant's attorney, an order was obtained in said court dismissing such appeal for the reason that the sum of eight dollars, clerk and jurors' fees, had not been paid to the clerk of said court within 30 days after the appeal papers therein had been lodged with the clerk thereof, as provided by the rules of said court. That on the 15th day of May, 1890, a motion of defendant and appellant, duly noticed, was heard in said court, based on affidavits of defendant and Theodore Burmester, presenting a state of facts tending to show mistake, inadvertence, or negligence on the part of the defendant in failing to pay the docket fee provided by the rules of the third district court, and asking to have the order of dismissal vacated, and the appeal reinstated, which motion was denied by the court, an appeal was taken to this court from each of said orders, and the errors assigned are: "(1) That the court erred in making the order dismissing the appeal, there being no statute authorizing such dismissal, and the organic act expressly gives the right of appeal and a trial *de novo* in the appellate court; (2) that the court erred in refusing to set aside the order of dismissal, and reinstate the case." The record in this case presents substantially the same questions as were presented to this court March 1, 1890, in the case of *Salt Lake City v. Redwine*, (Utah,) 23 Pac. Rep. 756, where the learned chief justice ably reviews the same questions presented here, and we see no reason for disturbing that decision. The reasoning in that case is applicable in this. The ground of the order dismissing the appeal in this case, and the refusal of the court to set aside such order of dismissal, and reinstate the case, were matters resting in the sound discretion of the trial court, and the record in the case presents no good reason for reviewing that discretion. The order and decision of the third district court are affirmed, with costs.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 113)

DUNSHEE v. GEOGHEGAN.

(*Supreme Court of Utah.* Jan. 27, 1891.)

MEASURE OF DAMAGES—BREACH OF CONTRACT.

In an action for breach of contract to convey land against a vendor, who neither had title at the time he made the contract nor acquired it afterwards, the vendee's damage is the difference between the contract price and the value of the property at the time the conveyance should have been made.

Appeal from district court, third district; C. S. ZANE, Chief Justice.

*Stephens & Schroeder*, for appellant.

*C. W. Morse and C. W. Boyd, for respondent.*

**MINER, J.** This is an action brought by the plaintiff, Dunshee, against the appellant, Geoghegan, in the third district court, January 7, 1890, wherein the plaintiff claims that on October 28, 1889, he purchased from the defendant a certain lot of land in Salt Lake City, through defendant's agent, as a real estate dealer; and that a written agreement was entered into, which was duly signed and delivered by the defendant to the plaintiff, wherein defendant promised and agreed to sell and convey to the plaintiff the whole of said lot, for an agreed consideration of \$3,600, \$500 of which sum was then paid to the defendant by the plaintiff, and the balance of the purchase price was to be paid January 1, 1890, at which date a full conveyance of the property was agreed to be made by the defendant to the plaintiff; and that on January 1, 1890, the plaintiff tendered to defendant the balance due on said contract of purchase, and demanded a deed in accordance with the terms of the contract, which deed of conveyance was refused, and plaintiff claims damages in the sum of \$5,000 in consequence thereof. Defendant admits the due execution of the contract to sell and convey the premises as stated, but denies that he was the owner of the said land at the time of the execution and delivery of the contract, except only an undivided one-third part thereof; that his power to convey the whole of the land was conditional upon the joining of his co-tenants in such deed, which he in good faith believed they would do, all of which facts plaintiff well knew when the contract was made. Defendant tendered judgment for \$550 and costs before trial. The case was tried before the court, a jury being waived. On the trial it appeared that the land had appreciated in value, and was worth from \$7,000 to \$8,500 on January 1, 1890; that plaintiff had duly complied with the terms of his contract, tendering the balance of the money then due, with a deed for execution, etc., and placed himself in position to be entitled to a deed of the whole premises under the terms of the contract. It also appears that the defendant knew he only owned an undivided one-third interest in the land at the time he made the contract of sale, and had no right to bind his co-tenants to his contract, or sell their interest therein; that his co-tenants had refused to join in conveying the land; but it does not appear from the testimony that defendant made any effort to secure the title from them. Plaintiff had reason to know, from the abstract furnished by defendant's agent, that there was a defect in defendant's title before the breach, but relied upon the defendant to perfect it under his contracts and supposed he had full control of the property when he purchased. The contract makes no mention of any interest in the lot being owned by any one aside from the defendant. After plaintiff's tender, and the refusal of the defendant to convey the lot, plaintiff offered to accept a warranty deed from defendant of his one-third interest in the land, and

clear up and purchase the title of the other joint owners. The defendant refused to execute any conveyance except a quitclaim deed of his one-third interest. The court below found the value of the property at the time of the conveyance should have been made to be \$5,000, an appreciation after the contract of sale of \$1,400, and gave plaintiff judgment for this sum and \$500, advanced payment, and interest thereon, amounting in all to \$1,950.50.

The only question presented by this appeal is the measure of damages to be allowed plaintiff upon the facts proven. It is a fact, from the proofs in the case, that the land had increased in value nearly 50 per cent. after the contract of sale, and before its maturity. A knowledge of these circumstances may have induced the defendant to use no diligence in procuring and perfecting the title, and in refusing to convey the same as he agreed to do. He knew at the time he entered into this contract, and received the \$500, cash payment, that he did not own the property he was contracting to sell, and he knew at that time he could not convey the full title without first obtaining that of his co-tenants or inducing them to join in the conveyance. He allowed his agent, or the man making the sale for him, to represent that he controlled the title, thus inducing the buyer to invest his money upon the good faith of his contract, in expectation of receiving the benefits therefrom, and, at the same time, assuming the chance of being a loser by means of the purchase. Had the property depreciated in value defendant would have been entitled to his money on the contract, and had the plaintiff refused to pay as agreed, it is possible he might now be tendering a full conveyance, and demanding damages for the plaintiff's refusal to perform his contract. While there is a diversity of opinion upon this subject, yet the weight of authority supports the doctrine that when a vendor has title, and for any reason refuses to convey it as required by his contract, he should respond in damages in which he should make good to the plaintiff what he has lost by his bargain not being performed; but when a party contracts to sell real estate which he knows at the time he has not the power to sell and convey, and does not own, or if he sells what he owns, in whole or in part, and on account of a rise in value he fraudulently refuses to convey, then, in either case, he should be held to make good to the vendee the loss of his bargain, and it does not excuse the vendor that he may have acted in good faith, and believed when he entered into the contract that he should be able to procure a good title for his purchaser. This rule will give the vendee the difference between the contract price and the value at the time of the purchase, as profits or damages which are the result of the contract. *Hopkins v. Lee*, 6 Wheat. 109; *Mack v. Patchin*, 42 N. Y. 175; *Pumpelly v. Phelps*, 40 N. Y. 59; *Sweem v. Steele*, 5 Iowa, 352; *Allen v. Atkinson*, 21 Mich. 351; *Baldwin v. Munn*, 2 Wend. 399; 2 *Suth. Dam.* 217; *Tracy v. Gunn*, 29 Kan. 508. Had this action been brought to recover on a breach of covenant of warranty

of title, the claim of the defendant, as measure of damages, may have been sustained, provided the facts warrant it, as in that case the measure of damages might be the consideration paid, and interest. *Staats v. Ten Eyck*, 3 Caines, 115. There was some conflict of testimony in this case, but the trial court had the opportunity to see the witnesses on the stand, and hear their testimony, and observe their manner of testifying, and was better qualified to judge of the weight to be given the testimony than this court could by reading it. We are satisfied the conclusion reached by the trial court was correct. Judgment of the court below is affirmed, with costs.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 118)

DRUMMOND v. SOUTHERN PAC. CO.

(Supreme Court of Utah. Feb. 3, 1891.)

CARRIERS—SCALPERS' TICKETS—RIGHT TO COLLECT FARE.

1. Full fare may be collected of a passenger attempting to ride on a scalper's ticket conditioned to be void if presented by any other than the original holder, notwithstanding the passenger purchased it on the assurance of an unauthorized agent of the company that it would be honored.

2. The fact that the ticket was not signed by the original purchaser is of no moment, as by accepting it he was bound by its terms.

3. When the ticket was returned to the passenger, he is not damaged by the conductor's having taken it up.

Appeal from district court, first district, H. P. HENDERSON, Justice.

*Marshall & Boyle*, for appellant. *Thos. Maloney, A. Perrin, and John N. Perkins*, for respondent.

BLACKBURN, J. Plaintiff purchased of a ticket broker in Salt Lake City, in May, 1889, two tickets to San Diego, Cal., for himself and wife, over the defendant company's road. They rode on them to Promontory, and the conductor refused to honor the tickets, and took them up, and required the plaintiff to pay full fare for himself and wife to their destination, or be put off the train. The plaintiff paid the fare, and this suit is brought to recover damages for this breach of duty as claimed by the plaintiff. The plaintiff recovered judgment below, and the defendant appeals, asserting that it was the duty of the conductor to refuse to honor the tickets and take them up, and compel the plaintiff to pay full fare or leave the train. The tickets were contract tickets, and among others contained this condition: "(3) If not so used, if more than one date is canceled, or if presented by any other person than the original holder, this ticket is void, and the conductor will take up and collect full fare." This class of tickets are usually signed by the purchasers, but these were not. These tickets were sold at Blue Rapids, Kan., by an agent of the Union Pacific Company, and used to Salt Lake City, and there sold to the ticket broker. Before purchasing the tickets the plaintiff went to the ticket office of the Union Pacific Company at Salt Lake City with the ticket broker, and had the follow-

ing conversation and the following transaction: Saw Mr. Ingalls, who was an employe of the said company, and told him the plaintiff wished to purchase those two tickets. He looked at the tickets, and saw where they were sold and said: "All right. You can sell them, and we will guaranty you will get through all right. We will limit these tickets, and have Mr. Drummond sign them, and will give a letter to Mr. Drummond to the conductors on the Central Pacific Railroad, authorizing them to honor these tickets." Mr. Ingalls gave the letter, and Mr. Drummond signed the tickets and bought them. The letter was signed by Parker per Ingalls, and Parker swears positively he had no authority to sell tickets over the road of defendant company. The letter spoken of was not introduced in evidence, and we cannot tell its contents.

The question is, was it the duty of the defendant to honor these tickets although presented by persons other than the original purchasers? They were through tickets, and were sold for a less price than the local fare; and the purchasers agreed not to sell them, and the tickets stated on their face that they were non-transferable. The purchaser, when he bought these tickets, knew that he had no right to ride part way upon them, and sell them for the rest of the way; and the plaintiff knew, by the terms of the tickets, he had no right to buy them; but, anxious to ride to his destination for less than the regular fare, he considered the matter, and bought on the opinion of a man wholly unauthorized to bind the defendant company. And his suspicions should have been aroused by the conduct of the pretended agent, because, if the tickets were entitled to be honored on their merits, a letter to the conductor was unnecessary, and, if not, the officious letter of the pretended agent would be unavailing, and this ought to have suggested to him that the tickets would be dishonored unless by the influence of this letter the conductors would be induced to neglect their duty. This class of contract tickets is valid, and common carriers are authorized to enforce them. *Post v. Railroad Co.*, 14 Neb. 110, 15 N. W. Rep. 225; *Elmore v. Sands*, 54 N. Y. 512; *Railway Co. v. Chipman*, 146 Mass. 107, 14 N. E. Rep. 940; *Hill v. Railway Co.*, 144 Mass. 284, 10 N. E. Rep. 836; *Cody v. Railway Co.*, 4 Sawy. 114.

But it is contended that the ticket agent at Blue Rapids, Kan., sold without requiring the purchaser to sign the contract. We think this makes no difference. He took them at a less price than the regular fare. The terms of the contract are set out in full, and we think, by accepting the tickets without signing, he accepted the terms of the contract, and was bound by them. *Railroad Co. v. Read*, 37 Ill. 484, 485; *Railroad Co. v. McGowan*, 28 Amer. & Eng. R. Cas. 274; *Mosher v. Railroad Co.*, 127 U. S. 391, 8 Sup. Ct. Rep. 1324. The court instructed the jury in opposition to these views, and in that regard his instructions are erroneous. We also think there is no evidence in the record to support the verdict.

But it is claimed that the conductor

took up the tickets, and therefore the plaintiff should recover. But he had a right to do that under the contract, and the plaintiff was not damaged, as he had the tickets at the trial, and introduced them in evidence. As this error disposes of this case, we deem it unnecessary to pass upon the other alleged errors. The case is reversed, and a *venire de novo* awarded.

ZANE, C. J., and ANDERSON and MINER, JJ., concur.

(7 Utah, 122)

QUIBELL v. UNION PAC. RY. CO.

(Supreme Court of Utah. Jan. 27, 1891.)

CONTRIBUTORY NEGLIGENCE—INJURIES TO SERVANTS.

A laborer employed to load cars at night at defendant's coal chutes, and who has been so employed for several nights, so that he is familiar with the premises, knows the location of the chutes, and is accustomed to operate the cars, cannot recover for injuries occasioned by being caught between a chute and a moving car on which he was standing, on the ground that the company had failed to provide sufficient light, when the lights were sufficient for him to sort the coal by, and at the time of the accident he had his back to the chute, but could have easily seen it if he had looked.

Appeal from district court, first district; H. P. HENDERSON, Justice.

P. L. Williams, for appellant. Kimball & Allison, for respondent.

MINER, J. This is an action by the respondent for damages for personal injuries received while in the employ of the appellant as a laborer at a coal mine, owned and operated by defendant, situated at Almy, in the state of Wyoming; the injury occurring, as alleged, on the 6th day of December, 1887. The respondent was working during the night, and the cause of action is based upon the alleged negligence of the appellant in neglecting to provide sufficient lights where respondent was working to enable him to perform his service safely, and in carelessly erecting and maintaining a screen and chute by which coal was discharged from a high trestle into railway cars, the negligence in that regard, as alleged, existing in the fact that the said screen and chute were so constructed and maintained as to be so near the top of the railway cars that there was not sufficient space for the body of the plaintiff to pass between the top of said cars and said chute. The situation and surroundings of the place were, in brief, that the coal mine was operated by means of an inclined shaft; that cars of coal were drawn up this inclined shaft, and onto the trestle, which was constructed over the railway track of the defendant company; that from this trestle the coal brought up in the cars from the mine was dumped into railroad cars standing on the track below, being poured down over the screen through which the fine coal or slack passed, the larger or lump coal being delivered into the railway cars on one track, and the slack thus screened being caught in the slack chute, and conveyed to other railway cars situated upon another track parallel to the

one in which the lump coal was dumped. These screens were constructed of iron or steel rods, and the chute which caught the screenings of iron or steel sheets. These were permanent structures from three to six feet in depth, and firmly placed in position, and from their nature capable of being seen or observed wherever there was sufficient light for the men to proceed about their work. By the testimony on behalf of the respondent, which consisted of his own evidence and that of his fellow-laborer, Joseph Brown, it appeared the respondent and Brown were employed to work during nights; that they began work about the 1st of December, and had worked only five or six nights at the time of the accident. They were working on the outside, either on top of this trestle or in placing railway cars in proper position, underneath the chutes, to be filled with coal and slack; to pick out the rock from among the coal as it was delivered into the cars from these chutes; and to do whatever work was necessary outside of the mine, and in the vicinity of this dump and these chutes. Respondent and Brown were fellow-laborers, and had worked in coal mines before, as shown by their evidence; and in the actual execution of the work assigned them the respondent was engaged chiefly in picking the rock out of the coal as it was delivered into the railway cars, and Brown in removing these cars, as required, along the track for the purpose of loading them. This division of work, however, was one made by these two parties themselves, and merely as a matter of convenience between them, and not by the directions of the company. In the course of this work Brown usually had a lamp with him, which he carried in his hand in moving about from place to place, while the plaintiff did not use a lamp, as, in picking out the lumps of coal, he could not handle it, but was enabled to do his work by a lamp hanging upon the wall or post of the trestle supporting these chutes or mine tracks over which the coal was dumped from above. There were also some fires on the ground for the purpose of giving light in that locality, and they were kept in open grates or fire baskets, 30 to 40 feet from the track. These fires were to be kept up by the workmen themselves, and if they were not made to burn brightly it was because of their own neglect and forgetfulness. This fire-light in question was obstructed in places by the posts or timbers intervening. No one of the company's managers were present on the night of the accident. The respondent testifies that he could not have taken care of a lamp, and could not have used one very well in his business; that the lights provided were adequate to enable him to select the stone from the coal properly in pursuing his business; that he made no complaint on account of the insufficiency of the lights furnished by the company; that the conditions as to light were the same on the night of the accident as they had been on previous nights. Under these circumstances of employment, to do work on all these railway tracks as occasion might require, and with these means of seeing how to pro-



ceed with it, on the occasion of the accident he was called by Brown to come and help him lift up and hold an end-gate on the railroad car which Brown was placing under the slack chute on the track along-side of the one on which the respondent was working and taking out rock at the time he was called. This chute was so arranged as to permit the railway car to pass underneath it, and it extended some two feet just over and on the inside of the side of the railway car, leaving from two to three feet on the other side of the box of the car not occupied or taken up or covered by this chute. In response to Brown's request, the respondent went to help him lift up the end-gate on this car, and then Brown went to the brake to let the car down, it being on a slight descent, and while holding up this end-gate, which was frosty, and the car was being so moved, the respondent was caught between the slack chute and the top of the car, his position being so that he was facing in an opposite direction from the chute. He could have seen it if he had looked, but he did not look. Brown had his lamp with him in his hand. When Brown went to attend to the brake he faced away from Quibell, and just as he stopped the end-gate dropped down, and his attention was called to Quibell when he found he was hurt. He heard Quibell cry out, and when he looked round he could see him as his body lay there in the car, and he could also see the chute. There was light enough there to see the whole situation. Quibell held up the gate of the car with his back to the chute, and the movement of the car carried him near to it, and at length caught him between the chute and the top of the car. There was no lack of light to proceed about the work. On the track, parallel and next to it, he was, at the time he was called, selecting rock from the coal by means of light furnished in the usual course of his business. On having his attention called to the accident just as he was stopping the car, Brown looked around at the call of Quibell, and saw where and how he lay in the car; could see the chute, and, from the lamp either that he had himself in his hand or sitting down near him at the time he was attending the brake, or from the other light furnished, he could take in the whole situation. Plaintiff was 43 years old at the time of the accident, and was then receiving \$2.25 per day. The result of the accident was the breaking of the left arm above the wrist and below the elbow, which left the arm useless. He had not worked under this particular chute before that day, but had worked above and around them for five days. No one had informed him of the condition of this particular chute. The evidence also discloses that the respondent, when injured, declined to accept the services of a surgeon tendered him by the defendant for the purpose of dressing his wounds, but put himself under the treatment of a man who was a miner, and not in any sense a surgeon or physician. The evidence of Dr. Perkins, who was there and saw him after the injury, is that there was nothing in

the nature of the fracture of the respondent's arm that made it probable, taking into consideration his age and physical condition, that he should not have recovered, if not completely, substantially, from the injury; and that the chief damage resulted from the permanent disability which was caused by respondent's negligence in not obtaining proper surgical treatment, and not as a necessary or probable result of the original injury. At the close of the plaintiff's case defendant moved for a nonsuit, on the ground that there was no evidence upon which the jury could render a verdict in favor of the plaintiff, which was denied by the court, and the defendant introduced evidence. At the close of the case, and after the charge of the court, the jury brought in a verdict in favor of the plaintiff for the sum of \$2,500.

The appellant assigns the following error as grounds for a new trial, among others, to-wit: Insufficiency of the evidence to justify the verdict, and that it is against the law in this case, in this, to-wit: The errors of law occurring at the trial, and excepted to by the defendant, among others is: The court erred in overruling the defendant's motion for a judgment of nonsuit, made at the close of the plaintiff's testimony.

The main question presented in this case is whether there was any evidence of negligence or want of proper care on the part of the defendant in failing to provide materials, machinery, suitable light, and other means by which the plaintiff could perform the work for which he was employed, safe and adequate for his use, and whether the same was kept in order and fit for use, so as not to unnecessarily expose him to danger. Negligence, as I understand it, consists in the want of that reasonable care which would be exercised by a person of ordinary prudence under all the circumstances, in view of the probable danger of injury; and the principles of law involved in the consideration of the questions raised are really those relating to the duty of the defendant towards the plaintiff in the capacity in which he was employed. Those have been so frequently under consideration that a simple statement of them is all that may be required. They require the company to use due care to provide materials, machinery, (and in this case suitable light,) and other means by which the plaintiff was to perform the work for which he was employed, safe and adequate for his use, and to keep them in order and fit for use, so as not to unnecessarily expose him to danger; and, when the company has done this, the plaintiff assumed the risks and danger incident to his employment in the business or work in which he was employed, and the compensation is presumed sufficient to cover the risk. Included in the risks assumed by the plaintiff in this case were those originating from the negligent acts and omissions of his companion, Brown, a fellow-servant in the employ of the company, with whom he was working under the joint directions of both, and without the supervision of a master; and while it was the duty of the company to use reason-

able care in all respects, and to furnish its employees suitable and proper light for them to pursue the work assigned to them without incurring danger or injury in coming in contact with objects to be met with in their usual and necessary avocations, and, without which light, danger would be imminent, still, if such sufficient light was not furnished, and injury in consequence occurred to the plaintiff when he had the same or equal means of knowledge with the defendant of such absence of proper light, and did not protest against the negligence now complained of, but continued in the employ of the company and worked without sufficient light, with knowledge, or with the means of knowledge, easily within his reach, which he could obtain by the reasonable exercise of his senses and sight, of the danger, he ought not to recover. It is generally held, and is, I think, the correct doctrine, that it is incumbent on the plaintiff to show that the injury of which he complains was caused by the negligence of the defendant, and that it did not arise from his own negligence or want of care. He cannot recover if he was negligent, because it cannot be said that defendant's negligence caused an injury which could not have happened but for his own want of care. *Lane v. Crombie*, 12 Pick. 176.

Where, therefore, from the whole evidence on which the case rests, it appears that the plaintiff was wanting in prudence and care, or that he directly or proximately contributed to cause the injury he received, or that by the use of ordinary care and prudence he could have avoided the injury, the court, it is held, may rightfully instruct the jury, as a matter of law, that the plaintiff could not recover, even though the defendant was guilty of negligence. And while the court should not invade the province of the jury, and pass upon the weight of the evidence, yet, where the jury have made a clear and unquestionable mistake of fact, or where the passion or prejudice of the jury have so clearly controlled their mind as to find a verdict where there is no evidence upon which to base it, the appellate court has the right, and it is its duty, to rectify the wrong done, and to set aside the judgment upon which such erroneous judgment is based, and grant a new trial. Where there is no conflict of evidence whatever upon the questions of fact presented, and such evidence falls short of making a *prima facie* case for the plaintiff, it is then the duty of the trial court to take the case from the jury. The case, however, should be a clear one to justify the court in exercising this responsibility; but where the necessity exists the court should not shrink from the responsibility. The question of negligence, diligence, or reasonable care is one of mixed law and fact, and seldom exclusively one of fact. Jurors may act upon a question only when there is some evidence tending to prove it. The relevancy and admissibility of evidence, and the tendency to prove diligence or negligence, or whether there be any such evidence, is a question of law to be determined by the court; and where the facts are found or admitted, or where there is no dispute or

question as to what the facts are, if they be such that all reasonable men would be likely to draw from them the same inference, or in a case where there is no evidence tending to prove a case of negligence, the question is one of law. *Railroad Co. v. Miller*, 25 Mich. 274; *Fernandes v. Railway Co.*, 52 Cal. 45; *Bowers v. Railroad Co.*, 4 Utah, 224, 7 Pac. Rep. 251. While there may be some difficulties in the way of this rule in some cases, yet the courts are held and bound judicially to know that absence of due care is not due care, and that no care is not due or reasonable care; that the absence of proof of negligence does not prove negligence. Jurors should act upon the question of diligence, negligence, and reasonable care when there is evidence in the case to prove it. If there be no evidence, there is nothing before them upon which to find negligence, diligence, or care. The question of the relevancy of evidence, and its tendency to prove negligence, diligence, or want of it, and whether there be any evidence, is not a question for the jury, but a question for the court, and it must be decided by the court, and not by the jury. This being the case, we are bound to determine, in the present case, whether there was any evidence in this case to prove negligence on the part of the defendant.

It has been held that if at the time the plaintiff closed his proofs there was no evidence upon the material point upon which the plaintiff had the burden of proof, or if it affirmatively appeared, by his own showing, that he had no cause of action, upon the undisputed testimony introduced by him, the defendant was entitled at that stage of the case to a direction from the court to the jury to find a verdict for the defendant. Equally so, under the same circumstances, was the defendant entitled to such direction after all the evidence was introduced. It is the duty of the judge, when asked to do so, before sending the case to the jury, as a preliminary question of law, to decide whether there is any evidence upon which the jury could properly find a verdict for the party on whom the *onus* of proof lies; and, if there is not, he ought to withdraw it from the jury. *Railroad Co. v. Miller*, 25 Mich. 274; *Conely v. McDonald*, 40 Mich. 158; *Carver v. Plank-Road Co.*, 61 Mich. 584, 23 N. W. Rep. 721. On looking into the evidence, it will be seen that the chute and screens were properly and permanently constructed and entirely suitable for the use for which they were built; that the chute extended about two feet over the side of the car, and was for the purpose of allowing the coal to drop into the car from above, and could in no way interfere with the safety of the plaintiff had he used reasonable care, and looked to see where he was going. Instead of doing so, he turned his back to the chute and the lamp, and was carried onto and under the chute by the moving car being drawn by his companion, which he knew was moving in the direction of the chute for the very purpose of receiving coal into the car from that chute. The defendant was not negligent in so constructing the chute as to be useful and suitable in the business

in which it was used. It was a large, stable, and substantial structure, easy to be seen, which was located, as he must have known, on the very track over which the car was passing, and from which the coal was to be emptied into the car. Nor can we find from the evidence a negligent absence of proper light. It was the same light the plaintiff had been in the habit of working by and using for several days without objection or complaint. From it he was able to pick out stone from the coal on this and previous nights. His companion, Brown, could and did see all the surroundings at the time of the accident. The lamp was on a post near by, Brown's lamp was near him, and open grate fires were burning 30 or 40 feet away, left on purpose to light the premises; and it was the duty of these men, including the plaintiff, to keep them burning on this occasion, and if they were allowed to go out it was through the plaintiff's and his co-laborer's negligence. The plaintiff's employment was in, around, and about these chutes; he had been there five days, and long enough to see the surroundings. He could have seen the chute if he had looked, but he did not look. He knew, or is chargeable with knowledge, of the situation of the tracks, the condition of the trestle, the existence of the chutes and screens, and the use they were put to, but on this occasion he forgot to look; he did not think of the chute at that time; did not look in that direction, but was facing away from it, and also from his companion. He was simply absent minded, and did not use his eyes, his recollection, or his reason. He was not using that reasonable care which would be exercised by a reasonable person of ordinary prudence, under all the existing circumstances, and in view of the probable danger. It was an accident resulting from the character of the work in which he was employed, and, if it resulted from anybody's fault, it was from the plaintiff's lack of attention to his surroundings, which must have been known to him at the time, and which he could have avoided by the use of ordinary care. Any other rule in this case would render the defendant an insurer of the lives and safety of its employes. Without considering the other questions involved in the case, our conclusions, from the whole testimony bearing upon the question of negligence, are that there was no evidence showing negligence of the defendant in the case to justify the verdict given for the plaintiff, and that the judgment below should be set aside and a new trial granted, with the costs of this court; the costs in the court below to abide the result.

ZANE, C. J., and ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 134)

PEOPLE v. CHADWICK *et al.*

(Supreme Court of Utah. Feb. 4, 1891.)

LARCENY—EVIDENCE OF ACCESSORY AFTER THE FACT—CORROBORATION—INSTRUCTIONS.

1. Comp. Laws Utah, § 5049, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence.

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dence, does not require that the testimony of an accessory after the fact shall be corroborated, in order to sustain a conviction, since sections 4391 and 4949 make a clear distinction between an accomplice and an accessory after the fact.

2. The mere fact that the hide of a stolen cow is found in defendant's possession is not sufficient to warrant a conviction; but when it is connected with the fact that defendant attempts to conceal it, or to put off a person looking for it, or makes a false pretense in reference to it, the question of guilt is for the jury.

3. Where full and accurate instructions are given, it is not error to reject charges asked, even though they are technically correct.

4. Where the jury are told, in substance, that they are the sole judges of the evidence, and of the credibility of the witnesses, it is sufficient, though the words of Comp. Laws Utah, § 5033, subd. 6, requiring such instructions, are not precisely followed.

Appeal from district court, first district; BLACKBURN, Justice.

George Sutherland, for appellants. D. Evans, Asst. U. S. Atty., for the People.

MINER, J. The defendants, Chadwick and Whipple, were jointly indicted on the 4th day of March, 1889, charging them with the felonious larceny of a cow about the 15th day of January, 1888. They were tried together, September 26, 1890, and both found guilty by the verdict of a jury, and a motion for a new trial was made and denied. The errors assigned, upon which a reversal of the judgment is asked, are: (1) Insufficiency of the evidence to justify the verdict; (2) the admission of improper testimony by the court against the defendants' objection; (3) misdirection of the court to the jury as to the possession of the evidences of the crime, as to the testimony of the accomplice, and in failing to charge the jury that they were the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts, as provided by law. We will consider these questions as they were stated in the defendants' brief.

1. As to the insufficiency of the evidence to justify the verdict. On examination of the evidence given in the case, we find there was some evidence of a larceny given before the jury, and facts and circumstances sufficiently shown to justify the court in submitting the case to the jury. Where there is evidence introduced tending to show guilt, this court will not review the weight of the testimony, nor the credit of the witnesses. These are purely questions for the jury. In this connection, however, it is claimed by defendants that without the testimony of one William Green, a witness for the prosecution, there would have been no evidence upon which the jury could convict; and that Green was an accomplice, or at least an accessory after the fact, in the alleged crime, and that therefore his testimony could not be considered testimony, in any respect, except when it was corroborated, as provided by statute. In reviewing this question, it is not necessary to go over the testimony in the case. We are satisfied that if Green had not been used as a witness at all, there was still sufficient testimony to go to the jury upon the question of the defendants' guilt; and, had it been otherwise, the testimony disclosed that

Green was corroborated in most of the important parts of his testimony. But it is not claimed, from any evidence pointed out in the record, that Green was an accomplice, or that he knew of or had any hand or complicity in the alleged larceny at the time or before the offense was committed, or that he aided, abetted, or participated in its commission. He knew of certain facts and circumstances after the time of the alleged larceny that tended to show guilt on the part of the defendants; but it cannot be urged that Green was shown to have had full knowledge of the larceny. This being the case, the most that defendants could claim, and what the defendants claim in their brief, is that Green was an accessory after the fact. If he was an accessory after the fact, under section 4391, Comp. Laws 1888, he could not have been an accomplice, under section 4390. Our statute makes a clear distinction between the two offenses. As an accessory after the fact, he could not be indicted jointly with the principal defendant, nor tried with him, but, if tried at all, he must be tried separately, under sections 4391, 4949, Comp. Laws 1888. *Com. v. Wood*, 11 Gray, 93; *Com. v. Boynton*, 116 Mass. 345; *Com. v. Drake*, 124 Mass. 24; *U. S. v. Kershaw*, 5 Utah, 618, 19 Pac. Rep. 194. If he was an accessory after the fact, he could not become a partaker of the guilt, as there would be no union of criminal intent and act. 1 Bish. Crim. Law, (3d Ed.) § 692. One who is a principal cannot be an accessory after the fact. A person is an accessory after the fact only after he has full knowledge that a felony has been committed, and then conceals that knowledge from a magistrate, or harbors and protects the person charged or connected therewith. *Comp. Laws 1888*, § 4391. If, then, Green was not a principal or accomplice in this crime, under section 4390, it was not necessary that his testimony should have been corroborated, under section 5049, in order to give it such weight as would ordinarily attach to it. Nor do we think it was the intention of the legislature to require the testimony of an accessory after the fact to be corroborated, under the provisions of section 5049, before his testimony could be credited without corroboration. *People v. Barric*, 49 Cal. 342; *People v. Farrell*, 30 Cal. 316; *Com. v. Boynton*, 116 Mass. 345; *Com. v. Blood*, 4 Gray, 31; *State v. McKean*, 36 Iowa, 343; 1 Greenl. Ev. § 382. The court was not required to submit any charge upon that subject to the jury; the question was not in the case. Notwithstanding this, the question as to how far Green was corroborated, and whether he was an accomplice, was left to the jury. The charge was favorable to the defendants, and they cannot complain.

The second assignment of error has reference to the admissibility of evidence introduced by the prosecution. Witness Green had testified that he asked defendant Chadwick for wages one day after the alleged larceny, and Chadwick replied that "he didn't have to pay me;" that he would "turn everything over to his wife." Witness told him, "All right." Chadwick replied, "saying for me to go ahead; that

I didn't have none the best of it." Whereupon the people's attorney asked Green the following question: "Question. Do you know what that had reference to?" Objected to by defendant as calling for an opinion of the witness. The objection was overruled by the court, and an exception was taken. The question, as it appears upon the record, was not subject to the objection made. It simply called for an answer, "yes," or "no." But that and another similar question was answered by the witness, detailing the facts; which were proper, in connection with the other testimony in the case.

Error is also assigned upon the refusal of the court to give the jury the following requests: "*First*. You cannot convict the defendants, or either of them, on this evidence, upon the proofs alone of the possession of the hide by them, however recently after the cow was lost. *Second*. You cannot convict the defendants, or either of them, upon proof alone that the hide was found on the premises of the defendant, however soon after the cow was lost. *Third*. In order to warrant a conviction in this case, it would be necessary for you to find further facts indicative of guilt than the mere fact of the property being found on defendant's premises." The court declined to give these requests, but charged the jury as follows: "I am asked to instruct you that the mere possession of stolen goods does not of itself justify the jury in finding the defendant guilty of taking the property, but it is a circumstance for you to consider. As a proposition of law, that, perhaps, is true: it is true, indeed. From the mere fact that one is in possession of stolen property, that stolen property is found with one man, if there is no other circumstance looking towards his guilt the jury would not be justified in finding him guilty. But where there are other circumstances, such as the property being hidden away or concealed, or any effort made to put the party who was looking for the property off his guard, any false pretense in reference to the property, or anything of that kind, it will be matter for the jury to consider as to whether that is evidence of guilt or not." To which exception was taken. While the above instruction was not given in the language of the learned counsel presenting them, yet it embodies the substance of the request, and leaves the question to the jury as a circumstance for them to consider, and to say whether, under all the facts and circumstances shown, possession of stolen property was evidence of guilt or not; and at the same time the court instructed the jury that possession alone is not sufficient evidence upon which to convict. These instructions were given with reference to the proofs before them at the time, which the jury must have understood and applied with reference to such facts of possession as were shown; and, while the instruction was not as full and explicit as it might have been, yet it sufficiently covered the question presented. We think the proper rule in such case is that recent and exclusive possession of the fruits of crime, after its commission, is usually some evidence

of guilty possession; and if unexplained, either by direct evidence or attending circumstances, or by the character and habits of life of the possessor, or otherwise, may, in some cases, be taken as *prima facie* evidence of guilt. But this presumption weakens as the period of time between the theft and the possession increases, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where the goods were found; for the real criminal may have placed the property where it was found, or sold it so that it came innocently into the possession of the defendant. If, however, the fact of such possession stands alone, and wholly unconnected with any other fact or circumstance, the presumption will be slight; therefore it is not considered safe to convict on this fact of possession alone without other attending circumstances indicative of guilt. But where the recent possession of stolen property is accompanied with the prisoner's denial of possession; his refusal to explain his possession; his giving incredible, false, or contradictory accounts of the manner of acquiring it; his attempting to conceal it, or to destroy marks upon it; his fleeing on being accused, or being near the place where the property was stolen,—such and other like circumstances, when shown, might raise a strong presumption of guilt in the possessor. No rule can be laid down that will apply to all cases alike, but all the circumstances should be shown to, and the weight of the evidence left for, the jury, under the instructions of the court. 2 Bish. Crim. Proc. §§ 746, 747; *Gablick v. People*, 40 Mich. 292; *People v. Walker*, 38 Mich. 156; *People v. Ah Ki*, 20 Cal. 178. Where the charge of the court, as a whole, covered the questions embraced in the request to charge, so as to fairly submit them to the jury, and leave the question for them to pass upon, it is not error to refuse the request to charge, though technically good in law. In such cases the court is not bound to use the language of the counsel, but may use his own. This has uniformly been the practice in this territory, and is sustained by the federal court. *Railroad Co. v. Horst*, 93 U. S. 291; *Cunningham v. Railway Co.*, 4 Utah, 206, 7 Pac. Rep. 795; *U. S. v. Musser*, 4 Utah, 153, 7 Pac. Rep. 889; *People v. Olsen*, 4 Utah, 413, 11 Pac. Rep. 577; *People v. Hampton*, 4 Utah, 258, 9 Pac. Rep. 508; *Clampitt v. Kerr*, 1 Utah, 247; *Laber v. Cooper*, 7 Wall. 565.

Objection is made that the court did not instruct the jury as required by section 5033, Comp. Laws 1888, subd. 6, that they were the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. The court instructed the jury as follows: "You are the judges of the evidence, its force and credibility; that where there is a conflict in testimony, where the witnesses swear against each other, it is your duty to reconcile that testimony, if you can; if not, it is your province to decide which is telling the truth, and which is not. In determining these questions, you must exercise your judgment,—that kind of judgment which influences you in the ordinary

affairs of life; your experience; your observation. Take into consideration the bearing of the witnesses on the stand, their interest in the controversy, their feelings towards the parties, and all that. These things you are to consider," etc. And, while the exact words of the statute were not used, yet the jury must have understood from them that they were the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. All these questions were left to them; and, while it is the better rule to give such instructions in the language of the statute, yet it is not obligatory to do so, where the language used is clearly within the plain intent and meaning of the statute. No specific exception was taken to the charge as given, nor was the court then requested to amplify it in any way. Had the attention of the court been directed to the omission, it would doubtless have supplied it. *Griffiths v. Clift*, 4 Utah, 462, 11 Pac. Rep. 609; *People v. Boggs*, 20 Cal. 432. Upon the whole record we find no error. The judgment and conviction in the court below are affirmed.

ZANE, C. J., and ANDERSON, J., concur.

(7 Utah, 143)

PERRY v. CITY COUNCIL OF SALT LAKE CITY.<sup>1</sup>

(Supreme Court of Utah. Jan. 30, 1891.)

INTOXICATING LIQUORS—LICENSE — DISCRETION IN GRANTING.

Under 1 Comp. Laws Utah 1888, § 1755, subd. 40, providing that the council of Salt Lake City shall have power "to license, regulate, and tax" the sale of intoxicating liquors, it is competent for the council in its discretion to refuse a license notwithstanding the applicant has complied with the ordinance in respect to the petition, bond, etc., and no previous ordinance has specified the persons to whom, nor places where, licenses may be granted. *MINER, J.*, dissenting.

Application for *mandamus*.

*W. H. Dickson and O. W. Powers*, for plaintiff. *Sam'l A. Merritt and C. S. Varian*, for defendant.

ZANE, C. J. This is an application by the plaintiff for a peremptory writ of *mandamus* to compel the council of Salt Lake City to grant him a license to retail intoxicating liquors. In a verified petition, he shows a compliance in all respects with the express requirements of the statutes and the ordinances in making his application for the license. To the alternative writ the defendant makes its return, verified by George M. Scott, its mayor, and signed by Samuel A. Merritt, its attorney, and Charles S. Varian, associate counsel. On the return the defendant states the following facts, and relies upon them as a sufficient reason for not granting the license: That the city had issued a theater license to Charles F. Reynolds & Co., with the express understanding that no intoxicating liquors should be retailed in the building, and that the plaintiff, as is believed, in collusion with that company is endeavoring to obtain the license to sell liquors in a room in its basement; that the building is situated on Franklin avenue, a narrow street; that this street, and the block through which it extends,

<sup>1</sup>For dissenting opinion, see post, 938.

is occupied almost exclusively by residences; that about 20 rods from the theater are a public school and a house for religious worship, and 15 or 20 rods from them is another church; that there is one saloon in the avenue opposite the theater, believed to be sufficient to supply all reasonable demands there; that the performances in the theater are of the variety class, and are attended almost exclusively by males; that the plaintiff, without license and contrary to law, sold liquor in the room on two nights after the first refusal to issue the license; and that on the night of the 14th inst. a ring fight was permitted in the theater. In conclusion the defendant claims that it acted within its discretion in refusing to grant the license, and that the sole purpose of its members in doing so was a desire to preserve public order, and the morals and happiness of the people of the neighborhood. In view of the foregoing facts, ought the court to grant the peremptory mandate? If the refusal to grant the license was not within the discretion of the council, the writ should issue; but, if it was, then it ought not.

The power of the city council with respect to the subject is found in volume 1, Comp. Laws Utah, 1888. Section 1755 is as follows: "The city council shall have the following powers: (40) To license, regulate, and tax the manufacturing, selling, giving away, or disposing of in any manner, any \* \* \* intoxicating liquors." The section also provides that the term of the license shall not extend beyond the municipal year in which it is issued, and it is subject to the restrictions of the general laws of the territory, and a bond is required, and the sale to minors, idiots, habitual drunkards, or persons intoxicated, is prohibited. Section 4518, vol. 2, same compilation, forbids the selling or furnishing of intoxicating liquors to any person in the auditorium or lobbies of any theater, etc. The power to license, regulate, and tax the sale or disposition of intoxicating liquors within its limits is possessed by Salt Lake City except so far as it is regulated by the above provisions. The council of Salt Lake City, under the power to license, regulate, and tax, has by ordinance required a petition by the applicant to be presented, in which the place of business and some other minor facts are required to be stated, and also a bond in the sum of \$1,000, with sureties and conditions as provided. The license is required to be limited to three months, and for a retail business \$300 is charged. The sale without license, and the sale to Indians, insane, or idiotic persons, or to minors, and the sale on Sunday, is forbidden and punished; and it is also provided that the mayor may by proclamation forbid the sale or disposition of such liquors on election days and legal holidays.

The question now comes, has the council any further discretion with respect to granting such licenses? Under its power to regulate, has it any discretion as to the person to whom licenses shall be granted, as to the place of business, or as to the number of licenses to be granted? The legislature could have prohibited the traf-

fic, but it did not do so. However, it did give the city council the power to license, regulate, and tax it. The power is conferred on a deliberative body, and its authority with respect to the subject is not limited to mere ministerial duties. The power of the legislature was unlimited with respect to the business, and all of it except the power to prohibit, subject to a few restrictions named, was conferred by the charter upon the local legislature; and the will of such a body is expressed by a vote, and with the right to vote upon any question is implied the discretion to vote for or against. The business of retailing liquors may be regulated in various ways. To regulate is to control, restrict, and direct. To regulate the liquor traffic according to the purpose for which the power was granted would be to so govern it that it will be attended with good order, and, so far as may be, be consistent with the happiness and welfare of the people in the communities in which it is conducted.

In *Packing, etc., Co. v. City of Chicago*, 88 Ill. 221, the court said: "We are clearly of opinion that the power to require a license is one of the means of regulating the exercise or pursuit of this business. There is, no doubt, a great variety of other means that might be adopted to accomplish the purpose, but these municipalities are not restricted as to the means they shall employ to regulate the business. In the various illustrations of the meaning of the word 'regulate,' we find, among others, 'to direct,' 'to rule,' 'to govern,' 'to conduct.' As the language is used in reference to the power of a city or village government, we must suppose it was intended to mean that such bodies might rule or govern this character of business." The general rule is that public corporations and officers are required to do what they are authorized to, when such performance would be beneficial to an individual or to the public. Upon the subject of imperative and discretionary powers, Judge Dillon says: "It is often material to determine whether a duty imposed by law or charter upon municipal corporations or public officers is imperative or discretionary. This is always a question of legislative intention, and therefore of construction. The general tests to ascertain this intention, propounded in the cases are of doubtful value. \* \* \* Each case, we repeat, must be largely decided on its own circumstances, and the legislative intent gathered from the whole act. No positive, inflexible, or stereotyped rule can be laid down." 1 Dill. Mun. Corp. (4th Ed.) § 98.

It is apparent from the act under consideration that the intention of the legislature in conferring on the council the power to regulate the sale of liquor was to enable that body to protect society from the evils attending it. The benefit of the dealer was not the chief end. Therefore the duty of the council with respect to him must depend largely on the good of the neighborhood. It follows that it is the duty as well as the right of the council to use all reasonable means to give such protection as the public welfare demands. We are of the opinion that the council, in

the regulation of the business, has a wide discretion, but it is not arbitrary discretion. Under the power to regulate, the business may not be prohibited. The authority is delegated to the councilmen as reasonable men, and with the expectation that they will employ reasonable means. To intrust the privilege of selling intoxicating liquors to persons whose antecedents, habits, and characters are such as to inspire confidence in them, and warrant the belief that they would not violate the law by selling to minors, habitual drunkards, or intoxicated persons, and would be likely to conduct their business in other respects with due regard to good morals and the peace and happiness of society, would appear to be within that discretion included in the right to regulate. The exercise of a reasonable discretion as to the localities in which the business shall be carried on would appear to be within the power to regulate. A saloon along-side of a school-house or a church would be very undesirable, and to establish one along-side of a man's home would be regarded as very objectionable. To authorize the retailing of liquors in the midst of the homes of the people would be palpably wrong. Neighborhoods infested with liquor saloons are not suitable communities for boys and girls to grow up in; and so a limitation of the number of places for retailing intoxicating liquors in a city would be a reasonable regulation. Because the council may be authorized to license liquor sellers it does not follow that they must license all who may apply. The powers delegated to the legislative departments of municipal governments are usually exercised by ordinance. The council grants the license by a vote. In that way the power is expressed. When the application is made, it would appear to be a suitable time to inquire and decide as to whether the applicant is a suitable man to be intrusted with the business; and so as to the determination of the place, and as to whether more licenses should be granted. General tests might be established by ordinance, by which to determine the fitness of persons to be intrusted with the business of selling liquor, and ordinances might be adopted designating localities in which the business may be conducted, and limiting the number. But we are not prepared to say that the business may not be regulated in such respects without ordinance. The charter confers the power to regulate the traffic upon the city, without expressly requiring it to be exercised by ordinance. But it is said that the councilmen may act from mere whims, caprice, partiality, or prejudice unless the regulation is by ordinance. The court should assume that public officers will act from proper motives until the contrary appears. It is also claimed that the court must presume that the council acted arbitrarily or without sufficient reason in refusing the license, because no reason appears upon its record. The court will not assume that the council refused the license arbitrarily, and without sufficient reason, without some proof. Being public officers, and acting under the sanction of an oath, the court will

assume that they acted lawfully until the contrary appears.

We have been referred to a decision of the supreme court of the United States involving the validity of an ordinance of the city of San Francisco, in which this language is found: "The sale of such liquors in this way has therefore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom, \* \* \* and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality. \* \* \* There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state, or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue license for that purpose." *Crowley v. Christensen*, 11 Sup. Ct. Rep. 13.

The case of *State v. Holt Co. Court*, 39 Mo. 521, was an application for a writ of mandate to compel the county court to issue a license. The statute provided that, if the court shall be of the opinion that the applicant is a person of good character, the court may grant a license for six months. This fact was admitted. The application was made in conformity with the requirements in all respects of the statute governing licenses, and the county court refused to grant the license. The *mandamus* was refused; the court holding that, although a party applying for a dram-shop license may show himself to possess all the qualifications requisite for the issuing of a license under the statute, the county court may still, in the exercise of its discretion, refuse to grant such license. *Muller v. Commissioners*, 89 N. C. 172, was an application for *mandamus*. The statute involved in the case provided that the applicant might obtain a license from the county commissioners to retail liquor upon proving a good moral character. The court held that such commissioners were not bound to license an applicant though he be qualified by proof of good moral character; that they had a limited legal discretion, and, in passing upon an application, they have a right to take into consideration the question whether the demands of the public require an increase of such accommodations, and whether the place proposed to establish a bar-room at would be a suitable one. To the same effect is *Attorney General v. Justices of Guilford County*, 5 Ired. 315; *Petition of Raudenbusch*, 120 Pa. St. 328, 14 Atl. Rep. 148; *Schlaudecker v. Marshall*, 72 Pa. St. 200;



**Trotter's Appeal**, 90 Pa. St. 376. The statutes providing for licenses construed in these cases differ in some respects from the Utah statute; but the principles laid down in them are similar in effect to the North Carolina cases, *supra*. *Parker v. Portland*, 54 Mich. 308, 20 N. W. Rep. 55, was a petition for *mandamus* to compel the board of trustees of the village of Portland to approve a liquor bond. The power to regulate the business had not been granted by the legislature to the board. Their simple duty was to determine the sufficiency of the bond. The discretion only extended to that duty. The court held that *mandamus* to compel a village board to approve a liquor bond will be denied if there is nothing to show that the refusal to approve it was capricious, or to rebut the presumption that the board had fairly passed upon all the questions which determine the sufficiency of the bond, and the reliability of the sureties. *Potter v. Village of Homer*, 59 Mich. 8, 26 N. W. Rep. 208, and *Amperse v. City of Kalamazoo*, (Mich.) 26 N. W. Rep. 222, are also *mandamus* cases involving a construction of the same law as the last case. In *Potter v. Village of Homer*, the court held that the village council in approving the bond had the same discretion and no more than is possessed by other persons called on to approve sureties. We do not regard the Michigan cases as analogous to the one in hand. The plaintiff also relies upon *Zanone v. Mound City*, 103 Ill. 552. The court held that the village council, under the power to regulate the liquor traffic, might refuse to license persons of such habits and character as rendered them unfit to be licensed, and to limit the number of dram-shop keepers, but held that the discretion should be exercised by ordinance in order to avoid favoritism and monopoly. From this opinion three of the seven judges dissented.

After a careful consideration of the statutes, the ordinances, and the cases cited, we hold that the defendant possesses the power to license, regulate, and tax the liquor business, and that in the use of such authority it may exercise a reasonable discretion in determining who are suitable persons to intrust the business to, the places where it may be conducted, and the number of licenses it will issue, and that the council may exercise that discretion when the application is made, when it has not done so by ordinance before, and that the court will not assume that the council acted arbitrarily, or from any improper motive, without some evidence to that effect. The writ of *mandamus* is denied.

BLACKBURN and ANDERSON, JJ., concur.

MINER, J., dissents.

(7 Utah, 158)

ROCK SPRINGS COAL CO. v. SALT LAKE  
SANITARIUM ASS'N.

(Supreme Court of Utah. Jan. 20, 1891.)

PLEADING—ANSWER—SUFFICIENCY OF DENIAL.

Plaintiff, by verified complaint, alleged that between November 9, 1889, and February 6, 1890, he sold and delivered to defendant coal of the "kinds and amounts specified, to-wit: 88,700 pounds of lump coal; 218,500 pounds of slack coal

in wagon-load lots; 256,600 pounds of slack coal in car-load lots," etc. Defendant averred, on information and belief, "that it is not true that plaintiff, between said dates, sold and delivered to defendant 88,700 pounds of lump coal," etc.; and therefore he denies, in the same words, plaintiff's allegations. Held, that this was a negative pregnant, and not a good denial, under Comp. Laws Utah 1888, § 8226, providing that the answer must contain a general or specific denial of the material allegations of the complaint, and, if the complaint be verified, "the denial of each allegation controverted must be specific and be made positively."

Appeal from district court, third district; C. S. ZANE, Justice.

C. F. LOOFBOUROW, for appellant. E. B. CRITCHLOW, for respondent.

MINER, J. On April 3, 1890, the plaintiff filed in the third district court in Utah its complaint, alleging: "(1) The corporate capacity of both plaintiff and defendant. \* \* \* (3) That between the 9th day of November, 1889, and the 6th day of February, 1890, the plaintiff sold and delivered to the defendant \* \* \* coal of the kinds and in the amounts specified, as follows, to-wit: 88,700 pounds of lump coal; 218,500 pounds of slack coal in wagon-load lots; 256,600 pounds of slack coal in car-load lots. That defendant agreed to pay for the same as follows, to-wit, \* \* \* \$788.05." That payment has been demanded. That no part thereof has been paid, and the whole remains due; and praying judgment for \$788.05, with interest and costs. The defendant filed its answer: (1) Admitting that it is a corporation. (2) Denying that the plaintiff is a corporation. (3) Further answering, the defendant avers, on information and belief, that it is not true that plaintiff, between the 9th day of November, 1889, and the 6th day of February, 1890, sold and delivered to defendant 88,700 pounds of lump coal, or that plaintiff between said dates sold and delivered to defendant 218,500 pounds of slack coal in wagon-load lots; and defendant therefore denies that between the 9th day of November, 1889, and the 6th day of February, 1890, or at any other time, the plaintiff sold and delivered to the defendant 88,700 pounds of lump coal, and denies that between said dates, or at any other time, plaintiff sold and delivered to defendant 218,500 pounds of slack coal in wagon-load lots. Also alleges payment of \$88.20 on account of claim sued upon." The cause was tried before the court, a jury being waived. At the commencement of the trial, and before the production of any evidence, the plaintiff made an oral motion and request for judgment upon the pleadings on account of the alleged insufficiency of the defendant's answer to put in issue any of the allegations of the complaint. Whereupon the court ruled and held, upon said oral motion and request of plaintiff, that the answer of the defendant was not sufficient to put in issue any allegation of the complaint, except that of the corporate capacity of the plaintiff, and gave defendant permission to amend its answer so as to deny each allegation in the complaint, and defendant refused to avail itself of this privilege. And the

court thereupon, and upon said trial, took all the other allegations of the complaint as confessed by the defendant, and made its findings of fact, and gave judgment for the plaintiff for \$802.40, and costs taxed at \$33.35. The defendant alleges error on the above ruling, and appeals to this court from an order denying a motion for a new trial on such alleged error.

It will be observed that in the answer it is averred, on information and belief, "that it is not true that plaintiff, between the dates named, sold and delivered to the defendant 88,700 pounds of lump coal," but it is nowhere denied that some other kind of coal, or some amount of lump or other coal, was sold and delivered to the defendant; and the attempted specific denial, that plaintiff sold and delivered to defendant 218,500 pounds of slack coal in wagon-load lots, is not a denial that 218,500 pounds, or any less number of pounds, of coal was not sold and delivered to defendant, nor that 218,500 pounds of coal was not delivered defendant in cars or carts or by hand, or in some other way than by wagon-load lots; nor is any attempt made to deny it sold and delivered defendant 256,600 pounds of slack coal in car-load lots or otherwise. It does not appear by the answer that defendant did not receive the stated amount of coal from the plaintiff, or that it was not indebted to the plaintiff therefor. What the answer does say is simply this: "I received from the plaintiff within the time stated, the amount of coal he has charged me with, for which I agreed to pay him the price named in the complaint, but it was not delivered to me in wagon-load lots; and I am still indebted to the plaintiff therefor in the sum claimed in the complaint, less \$80.20, which I have paid plaintiff on the claim sued upon prior to the commencement of this suit." In other words, defendant admits the allegations in the complaint to be true, and that he is indebted to the plaintiff for the coal as claimed.

Section 3226 of the Compiled Laws of Utah of 1888 provides that the answer of defendant shall contain a general or specific denial of the material allegations of the complaint controverted by the defendant; and if the complaint be verified, as in this case, "the denial of each allegation controverted must be specific, and be made positively," etc. Counsel for the defendant relies on *Mahana v. Blunt*, 20 Iowa, 142; *Doolittle v. Greene*, 32 Iowa, 123; *Bank v. Hogan*, 47 Mo. 472; *Ellis v. Railroad Co.*, 55 Mo. 278; and *Wall v. Water-Works Co.*, 18 N. Y. 119. I am aware that, under the statutes and decisions of Iowa and Missouri, slight innovations have been made upon this rule, but the general weight of authority sustains it. In 18 N. Y. 119, cited by defendant's counsel, the court holds the pleading open to criticism, and justifies its decision only under the statutes of that state recently amended. Upon the general doctrine, see *Steph. Pl.* 381. *Woodworth v. Knowlton*, 22 Cal. 164; *Bradbury v. Cronise*, 46 Cal. 287; *Bliss*, Code Pl. § 332; *Boone*, Code Pl. § 61. It has been held that an answer in terms merely denying "each and every material allega-

tion in the complaint" is evasive, and not good pleading. And, generally speaking, a denial in the precise language of the complaint is not good, but is a "negative pregnant," with an admission that the alleged facts may have transpired on some other day or under different circumstances. *Robbins v. Lincoln*, 12 Wis. 9; *Miller v. Brumbaugh*, 7 Kan. 343; *Seward v. Miller*, 6 How. Pr. 312. So, in an action of trespass for assault and battery, the defendant justified, alleging that, "as master of a ship, he commanded the plaintiff to do service which he refused to do, whereupon the defendant moderately chastised him." The plaintiff traversed with a denial "that the defendant moderately chastised him," and this traverse was held to be a "negative pregnant," or as being such a form of negative expression as may be implied to carry with it an affirmative. *Steph. Pl.* p. 378. A denial that A. and B. and C. and D. were present on a certain occasion is no denial that B. was present; or that A. and B. were present; and so as to either. A denial that A. went to Washington, and to Boston and to Chicago, and returned from Chicago to New York, is not a denial that A. went to Boston or to Chicago. *Young v. Catlett*, 6 Duer, 437; *Blankman v. Vallejo*, 15 Cal. 639; *Kubland v. Sedgwick*, 17 Cal. 123; *Caulfield v. Sanders*, Id. 569; *Landers v. Bolton*, 26 Cal. 393. And, where there are no conjunctive averments, a denial in the very words of the averment is often held to admit a material part of it. *Woodworth v. Knowlton*, 22 Cal. 164; *Bradbury v. Cronise*, 46 Cal. 287. So, also, a denial that the defendant "wrongfully and unlawfully entered upon the premises, and closed the window," is an admission that he closed the window therein. *Larney v. Mooney*, 50 Cal. 610. A denial of the exact value alleged in the complaint is an admission of any less value. *Scovill v. Barney*, 4 Or. 288. A denial that the defendant wrongfully took and detained the plaintiff's goods is not a denial of the taking or detention. *Moser v. Jenkins*, 5 Or. 448. So a denial in the language of the petition, that the defendant carelessly, negligently, and wantonly ran over the plaintiff's mare is not a denial of the injury complained of. *Harden v. Railroad Co.*, 4 Neb. 521; *Bliss*, Code Pl. § 332. The trial court was more than liberal with the defendant in allowing it to amend its pleading during the trial, and after the question was raised, without terms. The defendant should have accepted the privilege. I think no issue was raised by the answer, and judgment for the plaintiff was properly entered on the pleadings. The judgment below should be affirmed, with costs.

ANDERSON and BLACKBURN, JJ., concur.

(7 Utah, 163)

MARKS *et al.* v. CULMER *et al.*

(Supreme Court of Utah. Feb. 4, 1891.)

COSTS ON APPEAL—TRANSCRIPT.

1. Under 2 Comp. Laws Utah 1888, § 8099, providing that the party ordering a transcript of the testimony or proceedings must pay the reporter's fees, an appellant who gets the judg-

ment reversed cannot collect the costs of such transcript ordered by him, from the appellees.

2. Under the rules of the supreme court allowing reasonable costs for printing the record and briefs, not more than one dollar per page should be allowed.

3. No attorney's fee for trying the case in the supreme court is recoverable as costs.

Appeal from district court, first district; BLACKBURN, Justice.

*Arthur Brown and J. G. Sutherland*, for appellants. *David Evans, Geo. Sutherland, and S. R. Thurman*, for respondents.

ANDERSON, J. This cause was tried in the district court, and plaintiffs recovered a verdict and judgment against the defendants. An appeal was taken to this court, and the cause was reversed and remanded and a new trial ordered. After the case was sent back to the lower court, the defendants filed therein their bill of costs incurred on said appeal, containing, among other items, the following, viz.: Paid stenographer, for making transcript of evidence below, \$226; printing record, 161 pages, \$2.10, \$338.10; printing brief, 14 pages, \$15; attorney fee, \$20. On motion of plaintiffs' counsel the court struck out and disallowed the amount paid the stenographer for transcribing the evidence, and the item for attorney fee, and all in excess of one dollar per page for printing the record and brief, to which ruling and order of the court the defendants excepted, and bring this appeal.

The statute provides that, "in cases where a transcript has been ordered by the court, the fees for transcription must be paid by the respective parties to the action or proceeding, in equal proportions, or by such of them, and in such proportions, as the court, in its discretion, may order." 2 Comp. Laws 1888, § 3099. It is further provided that "the party ordering the reporter to transcribe any portion of the testimony or proceedings must pay the fees of the reporter therefor." *Id.* The transcript having been ordered and paid for by the appellants, they are not entitled, under the provisions of the section of the statute above referred to, to recover the amount from the appellees. This is the construction placed on a similar statute in a recent case by the supreme court of California. *Barkly v. Copeland*, ante, 3. While costs are recoverable for printing abstracts and briefs in accordance with the rules of this court, only usual and reasonable expenses therefor, not exceeding one dollar per page, should be allowed by the court, and there was no error in disallowing so much of this charge as was in excess of one dollar per page. As to the item charged as "attorney fee," we know of no law authorizing its allowance for trials in this court on appeal. Section 824 of the Revised Statutes of the United States authorizes the allowance of an attorney fee of \$20 on a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, except that in cases of admiralty or maritime jurisdiction, where the libellant recovers less than \$50, the docket fee of his proctor shall be but \$10. We think the statute contemplates only the trial in the *nisi prius* courts, and even then it has

been held that it can be allowed but once, although there may be several trials, and must be allowed only in the trial which results in the final disposition of the case. *Strafer v. Carr*, 6 Fed. Rep. 466; *Cleaver v. Insurance Co.*, 40 Fed. Rep. 863. The decision of the court on the appeal was not a final disposition of the case, it being reversed and a new trial ordered. We find no error in the record, and the order of the district court is affirmed.

ZANE, C. J., and MINER, J., concur.

(7 Utah, 196)

ELLISON v. LINDFORD.

(Supreme Court of Utah. Feb. 4, 1891.)

MUNICIPAL CORPORATIONS—TAXATION—AGRICULTURAL LAND.

Farming land situated within the corporate limits of a city, but entirely without the platted and settled portions thereof, cannot be taxed for municipal purposes when the owner will derive no benefit from the expenditure of the taxes either by the extension of the platted limits or of streets or other improvements in that direction.

Appeal from district court, third district; ZANE, Justice.

*J. L. Rawlins*, for appellant. *Arthur Brown and Sutherland & Judd*, for respondent.

ANDERSON, J. The defendant, as tax collector of the city of Kaysville, levied upon and sold a wagon belonging to plaintiff for unpaid municipal taxes levied by said city upon his property. The plaintiff brought this action against the defendant to recover damages for the taking and selling said property, upon the ground that the taxes were illegal, for the reason that the property on which the taxes were levied was not liable to taxation for city purposes, being situated outside the platted and settled portions of the city, and so remote therefrom as to receive no benefit from the expenditure of the taxes for municipal purposes. The defendant by his answer admitted the seizure and sale of the plaintiff's property as alleged, but claimed that the taxes for which it was taken were legal. The cause was tried to the court without a jury upon an agreed statement of facts. The court held the tax invalid, and gave judgment in favor of the plaintiff for \$50, and costs, and the defendant brings this appeal from said judgment. From a plat of the city showing its corporate limits, the platted and settled portion thereof, and the location of plaintiff's premises,—which plat is made a part of the record,—and from the agreed statement of facts, it appears that the property of plaintiff, on which the taxes were levied, and on which he resides, consists of three tracts of land used for farming purposes, and a store, and all within the corporate limits of the city. One tract is situated a little over half a mile from the nearest part of the platted portion of the city. The second tract is situated about one mile, and the third tract about two miles, from the platted portion of the city, while the store is situated about two miles away, at a little place called "Layton," on a county road leading to the city proper,

and also on the line of the Utah Central Railroad. This so-called "city" is only a small village, containing about 600 inhabitants in the platted portion thereof, and yet its corporate limits include more than 23 square miles. It is not shown that the platted and settled portion, or what may be termed the "city proper," is likely to be extended in the direction of plaintiff's premises, nor that any streets, drive-ways, or other improvements in that direction are contemplated or at all probable; nor is it shown that plaintiff will or can derive any benefit from the expenditure of these taxes, except in that general sort of way in which it may be said that all persons residing in the country are benefited by good streets, sidewalks, etc., in the town or city where they usually go to transact their business. But this kind of benefit is too slight to make it equitable or just that their property situated in the country should be taxed for city purposes. The questions involved in this case were fully considered and elaborated by this court in the case of *Territory v. Daniels*, (Utah,) 22 Pac. Rep. 159. That case involved the validity of a tax on agricultural lands for city purposes, and the tax was declared void. In that case ZANE, C. J., in delivering the opinion of the court, said that "taxation for city purposes should be within the bounds indicated by its buildings or streets or alleys or other public improvements, and contiguous or adjacent districts, so situated as to authorize a reasonable expectation that they will be benefited by the improvements of the city or protected by its police; that no outside districts should be included when it is apparent and palpable that the benefits of the city to it will be only such as will be received by other districts not included, such as will be common to all neighboring communities." We see no reason to doubt the correctness of that decision, and, as it is decisive of the point involved in this case, the judgment of the district court is affirmed.

BLACKBURN and MINER, JJ., concur.

(1 Okl. 53)

*Ex parte LARKINS.*

(*Supreme Court of Oklahoma.* Feb. 7, 1891.)

EX POST FACTO LAW—TERRITORIAL LEGISLATURE—POWERS.

1. Under Organic Act Okla. T. § 6, providing that the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the laws and constitution of the United States, it is competent for the legislature to continue in force, after the adjournment of the first legislature, the Criminal Code of Nebraska, extended to the territory by the organic act, § 11, until the adjournment of the first session of the legislature.

2. Act 1st Assem. Okla. T. § 1, continuing in force the Criminal Code of Nebraska, which, by the organic act, was extended to that territory till the adjournment of the first session of the legislature, is valid, and not *ex post facto*, as to offenses already committed, but not prosecuted and punished.

*Habeas corpus.*

Thurston & Merrick, for petitioner.  
Chas. Brown and C. B. Freeman, for the Territory.

GREEN, C. J. This is a petition in this court for a writ of *habeas corpus*. The writ was issued, directed to the sheriff of Logan county, who brought the body of the petitioner into court, together with the cause of his caption and detention. It appears from the petition and return, that the petitioner was indicted by the grand jury of Logan county, at the September term, 1890, of the district court, for the crime of incest and rape upon the person of his daughter, Della Larkins, and that he was taken upon a *capias* issued upon that indictment, and, in default of bail, was committed to the common jail to await his trial. The ground upon which his discharge from imprisonment is asked is that the indictment is for an offense against the Criminal Code of the state of Nebraska, which was extended to, and put in force in, the territory of Oklahoma, by the organic act, until after the adjournment of the first session of the legislative assembly of said territory, which occurred at the close of the 24th day of December, 1890, and, inasmuch as the law creating the offense has expired, there can be no trial, conviction, and judgment upon the indictment; and that the legislative assembly had no power to continue the law in force as to crimes already committed against it and prosecutions pending therefor. Before the adjournment of the first session of the legislative assembly, an act was passed and approved, which provides, *inter alia*, as follows: "Section 1. That as to all offenses committed in this territory, against the laws of Nebraska, while in force in this territory, said laws so offended against shall continue in force until the apprehension and prosecution, and until the punishment and penalty is [are] imposed upon such offenders. Sec. 2. That, as to all offenses mentioned in the preceding section in which prosecutions are now pending, the laws of criminal procedure of the state of Nebraska, now and heretofore in force in this territory, shall continue in force for the purpose of prosecuting such offenses, but for no other purpose. Sec. 3. That as to all offenses mentioned in section 1 of this act, where prosecutions have not yet been commenced, such offenses shall be prosecuted under the procedure in force in this territory after the adjournment of the first session of the legislative assembly." The last section of the act provides that it shall take effect, and be in force, from and after the adjournment of the first session of the legislative assembly. Section 11 of the organic act, which extends to, and puts in force in, the territory of Oklahoma, the Criminal Code of the state of Nebraska, so far as necessary to be stated, has the following provisions: "That the following chapters and provisions of the Compiled Laws of the state of Nebraska, in force November first, eighteen hundred and eighty-nine, in so far as they are locally applicable, and not in conflict with the laws of the United States, or with this act, are hereby extended to, and put in force in, the territory of Oklahoma, until after the adjournment of the first session of said legislative assembly of said territory." But no saving clause or provision is made in the or-

ganic act as to crimes committed and prosecutions pending at and before the adjournment of the first session of the legislative assembly. It is very clear upon principle and authority that if the act of the legislative assembly, continuing in force the Criminal Code of Nebraska, as to all crimes committed and prosecutions pending under it, has no validity to accomplish what was proposed by it, the petitioner cannot be further prosecuted for the crime charged against him in the indictment, and should be discharged from his imprisonment. Sir Matthew Hale, in his history of the Pleas of the Crown, states the rule of the common law that when an offense is made treason or felony by an act of parliament, and then the act is repealed, the offense committed before such repeal, and the proceedings thereupon, are discharged by such repeal, and cannot be proceeded on after such repeal, unless a special clause in the act of repeal is made, enabling such proceedings, after the repeal, for offenses committed before the repeal. 1 P. C. p. 291. The law, as stated by this learned author, has been steadily adhered in England and in this country, and has been held and applied in innumerable cases, a few only of which it is necessary to cite. In the cases of *Yeaton v. U. S.*, 5 Cranch, 281, and *The Rachel v. U. S.*, 6 Cranch, 329, judgment of forfeiture upon proceedings in admiralty had been pronounced in the court of original jurisdiction, before the repeal of the statutes which gave the forfeiture, and both judgments were reversed, on account of such repeal, by the supreme court. In the first case, Chief Justice MARSHALL said: "After the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." The result of all the authorities is briefly and clearly stated by Mr. Bishop: "If the common or statutory law, which authorizes a prosecution and conviction for any offense, is repealed or expired before final judgment, the court can go no further with the case, even after verdict rendered against the prisoner; or, after he has pleaded guilty, sentence cannot be pronounced, and he must be discharged. The same result follows if there is a judgment which has been vacated by an appeal or writ of review, but, after final judgment, a repeal of the law will not arrest the execution of the sentence." St. Crimes, p. 165, c. 20.

It is earnestly contended by counsel for the petitioner that the legislative assembly had no power to continue in force the Criminal Code of Nebraska, and that the act by which it is attempted to be done is an *ex post facto* law, and forbidden by the constitution of the United States. By section 6 of the organic act it is provided "that the legislative power of the territory shall be extended to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." This delegation of power is very ample, and there is no provision of the constitution, and no law of the United States, with which the act of the legislative assembly

is not entirely consistent, unless it is obnoxious to the objection of being an *ex post facto* law. Surely the continuing in force of the criminal law offended against, until the offender is convicted and the penalty of the law enforced, is a "rightful subject" of legislation within the meaning of the organic act. It is urged, however, that inasmuch as the Criminal Code of Nebraska was extended to and put in force in the territory of Oklahoma, until after the adjournment of the first session of the legislative assembly, by act of congress, it cannot be continued in force by an act of the legislative assembly of the territory; in other words, that only the power which created the laws could continue them in force. It was intended by congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relation to the courts, and to the people of the territory, and to the legislative assembly, as a code of laws enacted by the legislative assembly, and no reason is perceived why the legislative assembly might not have continued in force all the laws of Nebraska that were extended to, and put in force in, the territory by the organic act; and, if the legislative assembly had the power to continue these laws as a whole, it had the power to continue them in force as to all crimes committed and criminal prosecutions pending under them.

It is also objected to this act that it is an independent act, and that a saving clause can only be made in the repealing statute itself. That the saving clause is usually found in the repealing act may be admitted, but that it must be found there cannot be conceded. In most of the states of the Union, a saving of rights and prosecutions under a repealed statute is effected by a general law, and no provision is made in the repealing act at all, but the repealing act and general law are construed together. The case at bar does not, however, involve the question of a saving clause in a repealing statute; it is the expiration of a statute by its own limitation; and, if continued in force at all as to crimes committed and prosecutions pending, it could only be done by an independent act, and so we understand the language of Chief Justice MARSHALL quoted from *Yeaton v. U. S.*, *ubi supra*. The act of the legislature took effect *eo instanti* the Criminal Code of Nebraska would have expired, and continued in force as to all crimes committed and prosecutions pending, so that the continuity was not broken, and there has been no moment of time, as to such crimes and prosecutions, when it can be said that it has not been in force.

The only remaining objection to the act of the legislative assembly is that it is an "ex post facto law," within the meaning of the constitution of the United States. This objection to the act is wholly without force. It in no manner changes the punishment to be inflicted upon the petitioner in the event of his conviction, nor does it, in the least, change the mode of trial, but the proceedings are to be conducted to conviction and judgment under

the provisions of the law against which the alleged crime was committed. In *Fletcher v. Peck*, 6 Cranch, 87-138, Chief Justice MARSHALL defined an *ex post facto* law to be one which rendered an act punishable "in a manner in which it was not punishable when it was committed;" and Chancellor Kent expressed his approval of this definition, which he says is distinguished for its comprehensive brevity and precision. 1 Kent, Comm. p. 409. In *Calder v. Bull*, 3 Dall. 386, Judge CHASE stated his apprehension of what is meant by an *ex post facto* law. He said such laws were—"First, any law which makes an act done before the passing of the law, and which was innocent when done, criminal; second, any law which aggravates a crime and makes it greater than it was when committed; third, any law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; fourth, any law which alters the legal rules of evidence." No valid objection is perceived to the act of the legislative assembly continuing in force the Criminal Code of Nebraska as to all crimes committed and prosecutions pending, and the discharge of the petitioner from his imprisonment is denied, and he will be committed to the common jail of the county to await his trial on the indictment. Discharge denied. The other judges concur.

(87 Cal. 589)

RUSS LUMBER & MILL CO. v. GARRETTSON  
et al. (No. 13,954.)

(Supreme Court of California. Feb. 3, 1891.)

MECHANIC'S LIEN—FORECLOSURE—COMPLAINT—  
STATEMENT OF CLAIM.

1. Where, in an action to foreclose a lien for materials furnished the contractors, the complaint fails to state the contract price between the owner and the contractors, or the reasonable value of the work, but only that after the owner had notice that plaintiff was furnishing the materials there became due to the contractors an amount in excess of the sum due plaintiff, an objection to its insufficiency must be taken by demurrer or answer, and cannot be raised for the first time on appeal.

2. Under Code Civil Proc. Cal. §§ 1183, 1184, providing that in certain cases material-men may give notice to the owner of the amount and value of the materials to be furnished, and that the owner must reserve a sufficient amount due or to become due the contractor to answer such claim, a complaint to foreclose a lien for materials furnished is sufficient when it avers that due notice was given the owner of the amount and value of the materials to be furnished the contractors.

3. Where the complaint states the general character of the materials furnished, and their price, and then avers that plaintiff gave the owner written notice of the agreement to furnish the materials "as aforesaid," the notice given is sufficient, under Code Civil Proc. Cal. § 1184, requiring that it state the amount and value of the materials.

4. A claim of lien stating that defendant is the owner of a described lot, that he contracted with named persons to build a house thereon, that plaintiff furnished materials under a contract with the contractors, and gave due notice to the owner, wherefore it claimed the benefit of the Code of Civil Procedure relating to liens on property, is sufficient.

5. It is not necessary in a lien foreclosure suit that there be a personal judgment against

the contractors who are personally liable for the materials.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

L. L. Boone, for appellant. Reinhoehl & Harrison, for respondent.

BELCHER, C. The plaintiff, a corporation, brought this action to foreclose a lien for materials furnished for, and used in, the erection of a building on land owned by defendant Garrettson. It is alleged in the complaint that on the 17th day of February, 1888, defendant Garrettson entered into a contract with defendants Wanberg & Nelson, whereby they agreed to erect and finish for him a building on a certain described piece of land; that on various occasions between the 22d day of February and the 20th day of May, 1888, the plaintiff, at the instance and request of the contractors, furnished materials, viz., lumber, laths, shingles, and windows, to be used, and which were actually used, in the erection and construction of the building specified in the contract; that the market value of the materials so furnished, and the amount agreed to be paid therefor, is the sum of \$1,112.56, of which sum \$300 has been paid, and the balance of \$812.56 is still due, owing, and unpaid to the claimant; that on the 23d day of February, 1888, the plaintiff duly gave to Garrettson a written notice that it had agreed to furnish the materials as aforesaid for the erection of said building, and thereafter there became and was due and owing from him to the contractors, on account of the contract, an amount largely in excess of the balance so due and unpaid to plaintiff, and sufficient to answer its claim, including costs and attorney's fees; that Garrettson is now, and during all the time herein specified was, the owner of the lot of land on which the building was erected, and all thereof is necessary for the convenient use and occupation of the building; that on or about the 20th day of June, 1888, the building was completed, and thereafter, on the 13th day of July following, plaintiff, for the purpose of securing and perfecting a lien for the moneys so due upon the building and land described, under the provisions of chapter 2, tit. 4, pt. 3, Code Civil Proc., filed for record, in the recorder's office of the county in which the property was situated, its claim of lien, which was duly verified, and three days later duly recorded, and a copy of which, marked "Exhibit A," was attached to and made a part of the complaint. Defendant Garrettson demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, "for the reason that the instrument set forth in said complaint as 'Exhibit A,' and purporting to be a notice of claim filed for record in the recorder's office, does not comply with the statute in such cases made and provided, inasmuch as there are no words or clauses contained therein which set out a claim of lien on certain property to be charged therewith, and the statement of demand is entirely wanting;" and also on the ground that the complaint

was ambiguous, uncertain, and unintelligible, "for the reason that it appears upon the complaint that the contract therein was for an amount exceeding one thousand dollars from the sum of money therein set forth, and from the fact that Wanberg & Nelson are made party defendants; but it does not state whether there was a written contract filed in accordance with law, or set out said contract in the complaint as the best evidence." The demurrer was overruled, and he then answered. The case was tried, and judgment rendered foreclosing the lien, as prayed for. From that judgment Garrettson alone appeals, without any statement or bill of exceptions.

It is argued for appellant that the complaint was insufficient, because there was no averment as to what was the contract price between the owner and contractors, or that there was any express agreement to pay anything, or as to what was the reasonable value of the work to be done; and hence, it is said, there was nothing to show that any sum ever became due under the contract from the owner to the contractors. It is true that neither the contract price nor the reasonable value of the work was specifically set forth in the complaint; and the averment that, after the plaintiff gave Garrettson written notice that it had agreed to furnish the materials, there became and was due and owing from him to the contractors, on account of the contract, an amount in excess of the balance due and unpaid to the plaintiff, was a statement of conclusions of law rather than of facts. And, of course, this statement, if tested by demurrer, would have been insufficient. It was, however, not so tested nor was it in any way traversed by the answer. The point seems to be made here for the first time. Under such circumstances, we think the complaint should be held sufficient in this regard.

In this connection it is suggested that if Garrettson agreed to pay a price for the erection of his building, and the amount exceeded \$1,000, the contract was void, unless properly recorded; and if the amount was less than \$1,000, he was not required to reserve 25 per centum thereof for 35 days after the building was completed, but could pay the price at any time and in any way agreed on by the parties. And it is said, for aught that appears in the complaint, the price may have been fully paid before the work commenced, or may have been a prior indebtedness. But the statute, after providing that if the contract price exceeds \$1,000, the contract, or a memorandum thereof, must be recorded or otherwise be wholly void, goes on to say: "And in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to be done and furnished at the special instance of the owner, and they shall have a lien for the value thereof." Section 1183, Code Civil Proc. And the next section (section 1184, *Id.*) has this provision: "Any of the persons mentioned in section 1183, except the contractor, may at any time give to the reputed owner a written no-

tice that they have performed labor and furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount and value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. \* \* \* Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due, to such contractor, or other person, to answer such claim, and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter." Under these provisions, whether the contract was recorded or not, if proper notice was given, and if sufficient money was then due, or afterwards became due, from the owner to the contractors to pay the plaintiff's claim,—and that sufficient did become due is not denied or questioned,—it was the duty of the owner to withhold the same from the contractors, and the plaintiff is now entitled to have his claim of lien therefor enforced.

But it is urged that it does not appear what were the contents of the notice given by the plaintiff to the owner, and that it should therefore be held insufficient to meet the requirements of section 1184 of the Code. The complaint alleges that the plaintiff furnished the materials to be used in the construction of the building, stating in general terms the kind of materials, at the instance and request of the contractors, naming them, and that the amount agreed to be paid for all thereof was \$1,112.56. It is then alleged that the plaintiff gave to the owner of the property a written notice that it had agreed to furnish the materials as aforesaid, etc. The words "as aforesaid" evidently referred to the materials and the persons to whom they were furnished, and the value thereof as before stated, and hence we think the notice must be held sufficient.

It is also objected that the complaint must allege that a claim of lien has been verified and filed, containing certain statements, and that the complaint is insufficient in this respect. It was alleged that a claim of lien was verified and filed, and a copy thereof was attached to and made a part of the complaint, and whether it contained the required statements or not was shown by the lien itself. It is further objected that the claim of lien is defective, in that it does not purport to charge the property, nor state the name of the owner of the building, nor state to whom the materials were furnished, nor the terms of the contract. A substantial compliance with the statute is all that is



required. *Tredinnick v. Mining Co.*, 72 Cal. 78, 13 Pac. Rep. 152. The claim of lien states that Garrettson was the owner of of a lot of land, which is described, and that he entered into a contract with Wanberg & Nelson by which they agreed to erect and finish for him a building on the lot, and that the building was completed at a time named; that the plaintiff furnished the materials under a contract with Wanberg & Nelson, by which they agreed to pay the market value thereof at date of delivery in cash, and the whole value and balance unpaid are stated; and that the plaintiff, on a day named, duly gave a written notice to Garrettson that he had agreed to furnish the materials as aforesaid; wherefore it claimed the benefit of the provisions of the Code of Civil Procedure relating to liens of mechanics on real property. The above seems to be a sufficient statement that Garrettson was the owner of the building which was erected for him on his land, and that the materials were furnished to Wanberg & Nelson, his contractors. To say that the name of the owner of the building, and the names of the persons to whom the materials were furnished, are matters of mere inference, since it does not necessarily follow that the owner of the land is the owner of the building, and the materials might have been furnished to a subcontractor or other persons, seems to us to be not even a plausible argument. So the terms of the contract, we think, were sufficiently stated. See *Hills v. Ohlig*, 63 Cal. 104, and *Jewell v. McKay*, 82 Cal. 144, 23 Pac. Rep. 139. And the demand that the plaintiff have the benefit of the law relating to liens was a sufficient statement that it claimed a lien on the described lot of land, with the building thereon. It is objected that there is a variance between the contract set out in the complaint and that set out in the claim of lien. We see no material variance. The contract, as set out in both papers, seems to be substantially the same.

It is also objected that the findings of the court are insufficient to support the judgment. This is rested upon the tenth finding, which reads as follows: "That on the 13th day of July, 1888, plaintiff, for the purpose of securing and perfecting a lien for the money so due it as aforesaid upon the land and premises and building aforesaid, hereinafter described, pursuant to the provisions of chapter 2, tit. 4, pt. 3, Code Civil Proc. Cal., filed for record in the office of the recorder of San Diego county, Cal., where said premises are situated, its claim therefor, duly verified in its behalf by its manager, S. S. Johnson, and that said claim of lien is in due form, and was filed in due time, and is a valid subsisting claim of lien under the law." We think the finding sufficient.

Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position. The case of *Phelps v. Mining Co.*, 49 Cal. 336, cited in support of it, only holds that the material-man, in an action to enforce a lien, was not entitled to a personal judg-

ment against the owner. We find no material error in the record, and advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, and the court below is directed, upon the filing of the *remittitur* therein, to allow the plaintiff, as a part of the costs upon this appeal, a reasonable fee for the services of its attorneys in this court.

(87 Cal. 443)

DREW v. PEDLAR *et al.* (No. 13,758.)

(*Supreme Court of California.* Jan. 3, 1891.)

CONTRACT TO CONVEY LAND—FORFEITURE—LIQUIDATED DAMAGES—DEMAND.

1. Defendant sold plaintiff land: terms, \$1,000 cash, \$7,500 in 60 days, balance on mortgage; time to be of the essence: defendant to be released from the contract if plaintiff failed to comply with the terms, and all money paid to be liquidated damages for non-fulfillment. Plaintiff failed to make the payment in 60 days, and, defendant having about a year thereafter refused to accept a tender of the amount and to execute a deed, plaintiff brought suit for the \$1,000, and defendant answered, admitting the contract; the payment of the \$1,000; alleging his performance of the contract, and plaintiff's abandonment thereof, and failure to make payments when due; but admitting plaintiff's subsequent tender and demand of a deed. Defendant also alleged that, on plaintiff's failure to perform his covenants, he treated the \$1,000 as forfeited, and the contract as abandoned by plaintiff, and that he converted it to his own use. The answer also alleged that, between the time of plaintiff's failure to make his payment and his subsequent tender, the property increased in value \$2,000. *Held*, that under Civil Code Cal. §§ 1670, 1671, providing that a stipulation fixing damages in case of breach of contract shall be void except where, from the nature of the case, it is impracticable to determine the actual damages; and section 3307, providing that the damages for breach of contract to purchase real estate shall be the excess of the amount due on the contract over the value of the land,—plaintiff was entitled to judgment on the pleadings.

2. Defendant, having elected to rescind the contract, was bound to return the money, and no demand therefor was necessary before suit.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

R. B. Terry and C. W. Thomas, for appellants. J. R. Webb and F. H. Short, for respondent.

VANCLIEF, C. On the 20th day of April, 1888, the parties to this action entered into a written agreement whereby the defendants agreed to sell, and the plaintiff to purchase, three lots of land in the town of Fresno, at the price of \$12,500, to be paid as follows: One thousand dollars upon the execution of the agreement; \$7,500 within 60 days from the date of the agreement; and to assume and pay a mortgage of \$4,000 to Robert B. Thompson; and also to pay the interest on the mortgage, and all taxes thereafter to become due on the land. The agreement also contains the following provision: "In the event of the failure to comply with the terms hereof by the said party of the second part, the parties of the first part shall be

released from all obligation, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto, and all money paid thereon shall be as liquidated damages for the non-fulfillment hereof by the party of the second part. And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying the said land free and clear of all incumbrances made, done, or suffered by the said parties of the first part, except as above specified. And it is understood that the stipulations aforesaid are to apply to, and to bind, the heirs, executors, and administrators and assigns of the respective parties, and that time is of the essence of this contract." The plaintiff paid \$1,000 upon the execution of the agreement, but failed to pay the \$7,500 when the same became due, and never offered to pay the same, or any part thereof, until the 24th day of April, 1889, (about 10 months after maturity,) when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund to plaintiff the \$1,000 paid by him upon the execution of the agreement, and elected to rescind the agreement. Thereupon the plaintiff commenced this action to recover the \$1,000 paid by him upon the execution of the agreement, formally alleging in his complaint the facts above stated. The defendants filed an amended answer, in which they expressly admit the execution of the contract and the payment of \$1,000, as alleged in the complaint; but allege that they have performed their part of the contract, and that plaintiff failed and refused to pay the \$7,500, or any part thereof, when the same became due, and that he abandoned the contract. They admit, however, that plaintiff made the tender of payment and demand for a deed on April 24, 1889, as alleged in the complaint. They further "allege that, on the failure of plaintiff to perform his said covenants, they treated the \$1,000 heretofore paid as forfeited, and said contract as abandoned by the plaintiff, and annulled, and that they converted the said \$1,000 to their own use." They further allege that "the said property had greatly increased in value between June 20, 1888, and April 24, 1889; that said increase was of the value of \$2,000." They "deny that they are indebted to plaintiff in any sum, or that plaintiff has sustained any damage by reason of any act of defendants, or either of them." To this answer the defendants added a cross-complaint, in which they set out the agreement; allege the payment of the \$1,000; the performance thereof on their part; the failure and refusal of the plaintiff to perform on his part, except as to the payment of the \$1,000; "that defendants are the owners and in possession of the land described in said contract; that said contract is a cloud upon defendants' title to said land;" and praying that the contract be declared void and of no effect, and that it be canceled, and for such further relief as they may be entitled to.

Upon due notice, plaintiff's counsel moved for judgment on the pleadings. At the time appointed, counsel for the respective parties appeared, and plaintiff's counsel argued the motion, and it was submitted on briefs to be thereafter filed, but defendants' counsel failed to file any brief. Some time after the expiration of the time agreed upon and allowed for filing briefs, to-wit, on October 12, 1889, the court rendered judgment for the plaintiff for \$1,000, and interest thereon from April 24, 1889, and costs. Thereafter, upon due notice, defendants' counsel moved the court to set aside the judgment on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that no written findings of fact were filed or made; (3) that material allegations of the complaint were denied; (4) that no answer was made to the cross-complaint; (5) that the answer stated new matter constituting a defense to the action. At the same time defendants' counsel made another motion to vacate the judgment on the ground "that said judgment was made and entered against defendants through their mistake, inadvertence, and excusable neglect." This motion was made on affidavits, in connection with which they proffered a draft of a second amended answer which they proposed to file in case the judgment should be set aside. The following are the affidavits upon which the motion was made: "R. B. Terry, being first duly sworn, deposes and says that he is now, and at all times since the defendants have appeared in this action has been, their attorney in said matter; that when the motion heretofore made by plaintiff for judgment upon the pleadings herein was ordered submitted by the court upon brief thereafter to be filed by counsel for plaintiff, and briefs of defendants in reply thereto, affiant, upon receiving the briefs of counsel for plaintiff, was unable to find in the city of Fresno the authorities upon which his answer to said brief would be made and that upon an examination of said authorities at hand affiant determined that, in order that the case should be fully determined upon its merits, that he would ask leave of the court to file a second amended answer; that, so intending, he did not answer such brief. R. B. TERRY." "A. J. Pedlar, being first duly sworn, deposes and says, that he is one of the defendants in the above-entitled action; that the judgment herein entered on the 12th day of October, 1889, was entered through mistake, inadvertence, surprise, and excusable neglect, and was shown in the affidavit of R. B. Terry, filed herewith. Affiant further says that he has fully and fairly stated the case in this action to his said counsel, R. B. Terry, who resides in the county of Fresno, state of California, and after such statement is advised by said R. B. Terry that he has a good and substantial defense on the merits of the action, and thoroughly believes the same to be true. A. J. PEDLAR." The proffered amended answer contained two averments in addition to the first amended answer, to the effect (1) that defendants had tendered to plaintiff a sufficient deed for the

lots on the 20th day of June, 1888, and at the same time demanded payment of the sum of \$7,500, which, by the terms of the agreement, the plaintiff was to pay "on or before sixty days from the date" of the agreement, but that plaintiff then refused to pay said sum, or any part thereof, and thereby released the defendants from all obligations under said agreement, and thereby also released all claim to the \$1,000 theretofore paid by him; and (2) that between April 20, 1888, and April 24, 1889, certain taxes and assessments, amounting to \$114.65, were levied upon said lots, and became due and payable, and that plaintiff never paid nor tendered them, or any part thereof, and that defendants were compelled to pay a street assessment of \$45. The proffered answer also contained the following, which was not in the first amended answer: "Defendants deny that they, or either of them, elected to rescind said contract of sale in complaint mentioned, or that they did rescind the same; but, on the contrary, allege that plaintiff rescinded said contract, and every portion thereof, long prior to the 24th day of April, 1889." The court denied the motions to set aside the judgment; and the defendants appeal from the judgment, and also from the order denying their motion, upon the judgment roll containing their bill of exceptions.

1. I think there was no error in rendering judgment on the pleadings. It clearly appears that the contract was rescinded long before the commencement of the action, and that it was so considered by both parties. Time was of the essence of the contract. Plaintiff failed to pay the \$7,500 on or before June 20, 1888, according to the agreement, and did not tender payment thereof until April 24, 1889, when the defendants refused to accept it and execute a deed, on the ground that plaintiff had abandoned and annulled the contract by failing to tender payment within the stipulated time,—60 days. They say in their answer that, upon the failure of plaintiff to pay according to the terms of the contract, they treated the contract as abandoned and annulled by plaintiff, and the \$1,000 paid as forfeited; and they do not deny the averment in the complaint that they "elected to rescind said contract of sale." From the time defendants refused to accept payment and execute a deed, (April 24, 1889,) the plaintiff has considered the contract rescinded, and bases his action partly upon that ground; his complaint stating facts from which a rescission is a necessary inference. Under these circumstances the plaintiff was entitled to recover the \$1,000 paid by him, less such actual damages as may have been sustained by the defendants by plaintiff's breach of the contract, (*Grey v. Tabbs*, 43 Cal. 364; *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280;) but such damages cannot be recouped in this action, for the reason that none such have been pleaded, (*Id.*) Counsel for appellants contend, however, that his clients are entitled, under the express stipulation of the contract, to retain the \$1,000 paid as liquidated damages, whereas respondent's counsel claim that the stipulation as to liquidated dam-

ages is void. This is the principal issue presented for decision. I think the stipulation is void, under the following sections of the Civil Code: "Sec. 1670. Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section. Sec. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." It appears from the nature of the contract under consideration that it would not be impracticable, or at all difficult, to fix the actual damage in this case, since section 3307 of the Civil Code provides a rule by which the damage in all cases of this kind may be measured and definitely fixed, as follows: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him;" that is, the excess of the agreed price over the value of the property to the party who agreed to sell. In *Field on Damages* (section 508) the rule is stated as follows: "The general rule of damages on failure of the vendee to take the property purchased, and pay for the same, would be the actual loss sustained by the vendor thereby; which would ordinarily be the difference between the actual contract price and the actual value of the land at the time of the breach, if the property shall have declined in value." See, also, *Eva v. McMahon*, 77 Cal. 467, 19 Pac. Rep. 872. The defendants not only failed to plead any damages to them, but alleged in their answer an increase of \$2,000 in the value of the property between the default of the plaintiff and their refusal to accept payment and execute a deed; and it does not appear that plaintiff ever had possession of the property, but does appear that defendants were in possession at the time they answered, and they can claim nothing for use and occupation. No material averment of the complaint was denied. The denial of indebtedness was but a conclusion of law inconsistent with the admitted facts. The defendants were not entitled to any affirmative relief upon their cross-complaint, which they have not obtained by the judgment on the pleadings. Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties; and, as the judgment on the pleadings partly rests upon that fact, it is conclusive evidence of the fact. The agreement was not recorded, and, not being acknowledged, was not entitled to record. Besides, the cross-complaint does not offer to refund the money, or any part thereof, admitted to have been received by the defendants under the contract. *Bohall v. Diller*, 41 Cal. 533. It is alleged that the complaint fails to state a cause of action, in that no demand is alleged. The action is to recover money had and received by defendants to

the use of the plaintiff; and it is alleged the defendants "refused, and still refuse, to pay to plaintiff said sum of one thousand dollars, or any part thereof." The answer admits the receipt of the money, and alleges that defendants "converted the said \$1,000 to their own use." From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary. *Quimby v. Lyon*, 63 Cal. 394.

2. It does not appear that there was any error or abuse of the discretion of the court in overruling the defendants' motions to set aside the judgment, and counsel for appellants has not urged this point here. The averment in the proffered answer that defendants tendered to plaintiff a deed of the 20th day of June, 1888, and demanded payment, etc., only shows that plaintiff was first in default. It does not change or dispute the fact that both parties considered and treated the contract as rescinded, as above stated; and, had it been inserted in the answer on which the judgment was rendered, the plaintiff would still have been entitled to judgment on the pleadings. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(87 Cal. 29)

BIDWELL V. BABCOCK. (No. 13,695.)

(Supreme Court of California. Dec. 13, 1891.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—PLEADING.

1. Const. Cal. art. 12, § 8, provides that a stockholder of a corporation shall be personally liable for such proportion of all its debts contracted while he was a stockholder as the amount of shares owned by him bears to the whole of the subscribed capital stock. In an action to recover thereunder against a stockholder, plaintiff averred that between certain dates he sold to the corporation certain goods; that the total number of shares of stock thereof was 2,500; that 2,170 shares "were subscribed for, issued to, and owned by, various parties who were the owners of said stock" during said time; and that during that time defendant owned 972 shares, "and is indebted to plaintiff herein in the sum of \$384.91," etc. Held, that the complaint was insufficient, since it failed to show that the 2,170 shares were all the shares subscribed at the time the debt was incurred, and consequently for what proportion of the debt defendant was liable.

2. Defects in the second and third causes of action in a complaint cannot be supplied by the statements in the first cause of action, in the absence of references thereto.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

*Hunsaker & Britt*, for appellant. *Alex. G. Watson* and *W. J. Walker*, for respondent.

VANCLIEF, C. The defendant was sued as a stockholder of a corporation—the San Diego Street-Car Company—under section 322 of the Civil Code, to recover his proportionate part of certain alleged in-

debtedness of the corporation. His demurrer to the complaint was overruled, and, upon his failure to answer, judgment was rendered against him by default. This appeal is from the judgment, on the judgment roll, and the overruling of the demurrer is assigned as error. The complaint embraces three causes of action: (1) Indebtedness of the corporation for goods sold and delivered by the plaintiff "during the time" between December 6, 1888, and January 23, 1889; (2) indebtedness of the corporation to H. L. Shaug, for goods sold and delivered by him, during the same time, assigned to the plaintiff; and (3) indebtedness of the corporation to Morris and Breadlove for goods sold and delivered by them, during the same time, assigned to plaintiff. The indebtedness of the corporation, alleged in the three causes of action, amounts to \$858.72. After properly stating the organization of the corporation, its existence during the time within which the indebtedness was incurred, and that its whole capital stock consisted of 2,500 shares of the par value of \$100 per share, the complaint proceeds as follows: "(4) That a large number of shares of said stock, to-wit, twenty-one hundred and seventy, were subscribed for, issued to, and owned by, the various parties who were the owners of said stock, as hereinafter specified, during the time between the 6th day of December, 1888, and the 23d day of January, A. D. 1889, both days inclusive, between which dates the debts hereinafter set forth were incurred." Then, after alleging the indebtedness of the corporation as above indicated, comes the ninth paragraph, as follows: "(9) That during the time mentioned in paragraph 4 of this complaint, to-wit, between December 6, 1888, and January 23, 1889, the defendant, E. S. Babcock, Jr., was the owner of, to-wit, 972 shares of the capital stock of said San Diego Street-Car Company, and is indebted to plaintiff herein in the sum of, to-wit, \$384.91, under section 322 of the Civil Code of California, and other laws of the state of California; that said sum has been demanded of defendant, but he has refused to pay the same, or any part thereof." The allegations as to the organization and existence of the corporation, the amount of its whole capital stock, and in regard to the portion thereof subscribed, and the portion thereof owned by the defendant, are made only in connection with the first cause of action. None of them are repeated or referred to in connection with the second or third cause of action, as alleged in paragraphs 7 and 8 of the complaint.

The grounds of the demurrer are stated as follows. "(1) That the said complaint does not state facts sufficient to constitute a cause of action. (2) That the said complaint is uncertain, ambiguous, and unintelligible, in this: that it does not appear therefrom what number of shares of the capital stock of the San Diego Street-Car Company had been subscribed for at the time of the creation of the alleged indebtedness mentioned in said complaint; nor does it show what proportion the amount of stock and shares of stock alleged to be owned by the defendant bears

to the whole of the subscribed capital stock of the San Diego Street-Car Company; nor does it show what proportion the stock of the defendant bore to the whole subscribed stock of said company at the time of the creation of such alleged indebtedness; nor does the said complaint show what proportionate part of each of the several sums of indebtedness of the San Diego Street-Car Company shown in said complaint is the liability of the defendant. *Second.* Defendant also demurs to that portion of said complaint contained in the paragraph thereof numbered 7, upon the ground that the same attempts to set forth a separate cause of action against this defendant, and that the same does not state facts sufficient for that purpose. *Third.* On the same grounds stated in the above specification of demurrer No. 2, the defendant demurs to that part of the plaintiff's complaint contained in the paragraph thereof numbered 8."

The constitution of 1879 (article 12, § 3) provides: "Each stockholder of a corporation \* \* \* shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation." Section 322 of the Civil Code, as construed by this court, has substantially the same meaning and effect as the above quotation from the constitution.

1. It is essential, to the statement of a cause of action under this provision of the Code and constitution, that the complaint state the proportion which the stock, owned by the defendant at the time the debt sued for was incurred, bears to the whole subscribed stock at the same time, or that it state facts from which such proportion can be deduced. But the complaint in this case states neither the proportion, nor facts from which it may be deduced. In this case, the required proportion cannot be ascertained, by any process, without a knowledge of the whole number of shares of "the subscribed capital stock" existing immediately before and at the time each debt sued for was contracted or incurred. This knowledge, however, is not communicated by the complaint. To affirm, as in the fourth paragraph of the complaint, that 2,170 shares "were subscribed for, issued to, and owned by the various parties who were the owners of said stock during" a specified period of 49 days, within which the debts were contracted, is no limitation upon the number of shares subscribed for and owned during a portion of that period within which the debts, or some of them, may have been incurred; since the debts may have been incurred at different points of time within that period, and all may have been incurred on the last day of the period. Nor, indeed, does the averment limit the number of subscribed shares owned prior to and during the entire period specified. It is perfectly consistent with an averment that all the capital stock of the corporation (2,500 shares) was subscribed and owned by various

persons prior to the specified period; and also consistent with an averment that the remainder of the stock (330 shares) was subscribed and owned on the third day of the period, and thence until the close of the period. Therefore, for aught that is alleged in the complaint, 2,500 shares may have been subscribed for prior to the period specified, and certainly that 330 shares, in addition to the 2,170, may have been subscribed within that period and prior to the creation of the debts sued for. The averment relates only to subscribed stock that existed during the whole period of 49 consecutive days. It neither affirms nor denies, expressly or by implication, that an additional number of shares of subscribed stock existed during the last 40 days of that period; yet, according to paragraphs of the complaint numbered 5, 7, and 8, all the debts sued for may have been incurred within the last 40 days of that period. The complaint should have averred, in substance, if the fact was so, that there were 2,170 shares of subscribed stock, and no more, at the time each debt was incurred.

2. The second and third counts are defective, in that they fail to state the existence of the corporation, the amount of its capital stock, the portion thereof subscribed, or the portion of the subscribed stock owned by defendant, or to refer to the statement of these facts in the first count. The defects in the second and third counts are not supplied by statements in the first count, in the absence of any reference to them in the second and third. *Haskell v. Haskell*, 54 Cal. 262; *Barlow v. Burns*, 40 Cal. 351. I think the judgment should be reversed, and the cause remanded, with instruction to sustain the demurrer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with instructions to sustain the demurrer.

(3 Cal. Unrep. 385)

HEWETT v. DEAN et al. (No. 14,011.)<sup>1</sup>

(Supreme Court of California. Jan. 30, 1891.)

MORTGAGE FORECLOSURE—NOTE DUE ON DEFAULT IN INTEREST—TAXES—COUNSEL FEE—PLEADING.

1. Where a note secured by mortgage declares that, on failure to pay the annual interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder, demand after default is not necessary to support an action for the entire sum. Bringing the suit to foreclose is sufficient demand. Following *Whitaker v. Webb*, 44 Cal. 127.

2. A delay of three months after default in the interest is not a waiver of the right to exercise the option, when the delay is caused by reason of defendant's request to be allowed a few days additional in which to pay the interest.

3. A mortgage, given to secure a contemporaneous note bearing 12½ per cent. interest, provided that "all payments made by the mortgagee for taxes and assessments on said premises, excepting taxes on the interest of the mortgagee therein," might be included in the decree of foreclosure. The mortgagee signed a separate agreement to credit the mortgagor with 2½ per cent. interest on the note if the latter presented receipts showing that he had paid "all taxes against

<sup>1</sup> Rehearing granted.

the property covered by the mortgage." *Held*, that this was not an agreement by the mortgagor to pay taxes on the money loaned, nor could parol evidence be given that such was the intention, for the purpose of avoiding the entire interest, under Const. Cal. art. 13, § 5, declaring any contract by which a debtor agrees to pay taxes on the money loaned shall be void as to any interest specified therein.

4. The note provided that, if suit was commenced to enforce its payment, the maker would pay 5 per cent. on the principal as an attorney's fee, and the mortgage provided for the payment of "a reasonable counsel fee" upon foreclosure. The complaint alleged "that the sum of \$300 is a reasonable attorney's fee or counsel fee for the foreclosure of said mortgage." *Held*, that this was sufficient to support a judgment for an attorney's fee without averring that plaintiff had actually incurred expense for that purpose.

5. But plaintiff was not entitled to recover as counsel fee more than 5 per cent. on the principal, as provided in the note.

Commissioners' decision. Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

*Victor Montgomery*, for appellants. *Ray Billingsley*, for respondent.

**BELCHER, C. C.** This is an action to foreclose a mortgage on real property. The note, to secure which the mortgage was given, was for \$2,500, dated October 29, 1887, and payable three years after date, with interest at the rate of 12½ per cent. per annum, payable annually, and if not so paid to be compounded annually, and bear the same rate of interest as the principal. The note then contained the following provisions: "And should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of 5 per cent. on principal as attorney's fees in such suit." The mortgage also provided: "And the mortgagors promise to pay said note according to the terms and conditions thereof, and in case of default in payment of same, or of any installment of the interest thereon when due, the mortgagee may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court." The action was commenced on the 18th day of January, 1889, and the complaint alleged that no part of the principal or interest mentioned in the note had been paid; and "that because of said interest not having been paid when due, and upon the provision with reference thereto contained in said note, the plaintiff elects to consider and declare the whole sum of principal and interest of said note now due and payable." The prayer was that the plaintiff have judgment for the sum named in the note as principal, and interest thereon as the note specified, compounded annually, "and for 5 per cent. on the said principal sum of \$2,500, for attorney's fees, as provided in said promissory note, and being such reasonable counsel fee, as provided in said mortgage, and for costs of suit," and also that the usual decree of foreclosure be entered. Subsequently the plaintiff filed an amendment to his complaint, alleging that on or

about the 20th of November, 1888, he demanded personally of the defendant G. L. Dean the payment of the whole sum of principal and interest; and on the 4th of December, 1889, he filed a supplemental complaint, alleging that on the 29th of October of that year another installment of interest fell due, and that no payment whatever of interest or principal had been made. The defendants demurred generally and specially to the complaint as amended, and the demurrer was overruled. They then answered, and by their answer denied that plaintiff made any demand for the payment of the principal of the note prior to the commencement of the action, and alleged that no notice of plaintiff's election or option to consider the principal and interest of the note due was ever given by him to them, or either of them; prior to the commencement of the action. They also set up a written memorandum, signed by the plaintiff, agreeing to credit the defendants with 2½ per cent. of the 12½ per cent. stipulated interest, provided the defendants should present receipts showing the payment of all taxes against the property covered by the mortgage on or before the 15th day of December of each year, and alleged that the memorandum was made at the time the note and mortgage were executed, and was a part of the transaction, and that they had paid all state, county, and municipal taxes assessed against the property, and were therefore entitled to a credit of the 2½ per cent. per annum on the interest. The case was tried, and the court found that the plaintiff signed and delivered to the defendant G. L. Dean the memorandum set forth in the answer, at the time the note and mortgage were executed; that an agreement was thereby made between the plaintiff and defendants that the rate of interest on the note should be 10 per cent. per annum only, provided the defendants should pay all taxes levied against the mortgaged property subsequently; that the defendants paid the state, county and municipal taxes on the property for the fiscal year 1888-89, and the municipal taxes for the fiscal year 1889-90, but had not paid the state and county taxes for the last-named year, and were entitled to a reduction of the interest on the principal to 10 per cent. per annum for the first year only; that the plaintiff had paid all state, county, and municipal taxes assessed against the mortgage; that no part of the principal sum nor of the interest thereon mentioned in the note and mortgage had been paid; that no notice that plaintiff had elected, or exercised his option, to consider the principal and interest of the note due was given by plaintiff to defendants, or either of them, prior to the commencement of the action, and that no demand was made by plaintiff upon defendants for the payment of the whole sum of principal and interest other than by bringing the suit; that the sum of \$300 is such reasonable attorney's fee as is provided in the note and mortgage; and that at the time of the trial, December 21, 1889, the amount of principal and interest due and unpaid on the note was \$3,149.60. A decree of foreclosure was accordingly en-

tered, adjudging that there be paid to the plaintiff from the proceeds of the sale of the property the amount found due, and \$300 for attorney's fee, and costs of suit. The defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

1. The appellants contend that it was necessary for respondent, before commencing his action, to give them notice that he had exercised his option to treat the whole sum of principal and interest as due, and to make demand for the payment of the whole sum, and also that, by his delay to commence the action for nearly three months after the first installment of interest became due, he waived the right to exercise such option. The promise to pay the interest annually was absolute, and the first installment became due at the expiration of one year after the date of the note. The stipulation in the note that, if the interest should not be paid when due, then the whole sum of principal and interest should immediately become due and payable at the option of the holder, was without any conditions or limitations requiring notice or demand. The makers knew of this provision, and their failure to pay the interest when it became due left it wholly optional with the holder to insist upon the payment of the whole debt, or not, as he might elect. In *Whitcher v. Webb*, 44 Cal. 127, where the note in suit contained a provision similar to that involved here, it was held that a failure to pay the interest when it became due made the whole amount of the note due absolutely, at the option of the holder, without any notice from the holder to the payor. The court said: "The plaintiff had no duty to perform to the defendant, and the latter no excuse to delay the payments which he had stipulated to make." In *Dean v. Applegarth*, 65 Cal. 391, 4 Pac. Rep. 375, the note in suit bore interest at the rate of 1 per cent. per month, payable monthly, in advance, and it was stipulated that, in case default should be made in the payment of any of the interest when due, such installment or payment thus in default should bear interest from the day of maturity until payment at the rate of 2 per cent., compounding monthly, and at any time during such default the entire unpaid balance of the principal sum should, at the option of the holder of the note, and not otherwise, become due and payable, and the principal sum so due and payable should bear interest thereafter at the rate of 2 per cent. per month, compounding monthly, until paid. When the action was commenced, the note, by its terms, had become due, and the question was as to what interest the plaintiff was entitled to recover. The court said: "This provision as to the compounding of the interest on the principal sum was only intended to have operation when, after default in the payment of an installment of interest, and before the principal sum had matured, the plaintiff elected to have the principal become due, so that he might bring his action at once to foreclose." It did not appear from any averment in the complaint or otherwise that any option was made or manifested in any way by

the plaintiff prior to the commencement of the action; and it was held that this option must have been exercised and manifested in some way before it could have effect. The court then, speaking of the ways in which the option might have been manifested, said: "He [the plaintiff,] might have brought his action to foreclose immediately on default, and this would have been a sufficient election." In *Insurance Co. v. Shepardson*, 77 Cal. 345, 19 Pac. Rep. 583, the court said: "The promise to pay the interest annually was absolute. The only question left to the option of the holder was whether, upon the failure to pay such interest, the whole amount of principal and interest should immediately become due and payable, without any act on the part of the holder showing his election to exercise the option given him. The case as presented does not call for a decision of this question, but we think the case of *Whitcher v. Webb*, 44 Cal. 127, determines it adversely to the appellant." As to demand, the general and well-settled rule is that, in an action to recover money payable on demand, or at a fixed time, or on the happening of an event, it is not necessary to show actual demand before bringing suit. The institution of the suit is a sufficient demand. *Zeil v. Dukes*, 12 Cal. 479; *Halleck v. Moss*, 22 Cal. 266; *Luckhart v. Ogden*, 30 Cal. 556; *Cummings v. Howard*, 63 Cal. 503.

In the light of the foregoing authorities, it is clear, we think, that the plaintiff could maintain his action without showing notice of his election or demand of payment prior to, or otherwise than by, the institution of his suit. In *Crossmore v. Page*, 73 Cal. 213, 14 Pac. Rep. 787, it was held that an option given to the holder of a promissory note to have the same become due immediately upon default in the payment of the interest as therein provided, in order to be available as against an indorser, must be exercised within a reasonable time after default, and that a delay of seven months before attempting to exercise the option was unreasonable.

The delay in commencing this action was, as we have seen, less than three months after the default in paying interest, and the circumstances connected with and accounting for the delay are as follows: The plaintiff testified that on or about October 20, 1888, he met the defendant G. L. Dean, and that "Mr. Dean said to me he wanted I should have this money, but he said, 'I have use for it, and if you can just let me have a few days,'—or something like that,—'I want it to pay for a car-load of material.' I told him, 'Mr. Dean, I am expecting it. I have counted on it, and want the money, but I can get along for a few days.' We was speaking about the interest, and that was a little before the interest became due. I wanted the money, but I didn't propose to press him." The defendant G. L. Dean testified substantially to the same effect, but fixed the time as about October 27th. He stated that plaintiff told him he had use for the money, but under the circumstances he would extend the time to pay the interest, and would not push him. The defendants



also put in evidence a letter, dated October 27, 1888, which was written by plaintiff's attorneys, and addressed to and received by defendants, stating that the interest on their note, due the 29th inst., was payable at the attorneys' office, where the note would be found, and that prompt payment was expected. It thus appears that the delay complained of was at the request of defendants. Under this showing we do not think it can be said that plaintiff's delay to institute his action was for an unreasonable length of time, or that he thereby waived his right to exercise the option given him.

2. The point is made that the words "all taxes against the property covered by the mortgage," as used in the memorandum set up in the answer, included taxes upon the mortgage as well as upon the land; and, if so, it is argued that the memorandum, under the provisions of section 5 of article 13 of the constitution, rendered null and void the promise in the note to pay any interest. At the trial counsel for defendants offered to prove that the words above quoted were intended by the parties, and understood by them, to cover and include the mortgage tax. On objection, the offered evidence was excluded, and this ruling is assigned as error. We see no error in the ruling. The section of the constitution cited reads as follows: "Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." The promise in the note to pay interest at 12½ per cent. was absolute; and the mortgage provided that the mortgagee might include in a decree of foreclosure "all payments made by the mortgagee for taxes and assessments on said premises, excepting taxes on the interest of the mortgagee therein." The memorandum was not signed by the defendants, and they did not thereby obligate themselves to pay any taxes on the land or mortgage. It simply provided that, if they should present receipts showing the payment of all taxes against the property, then the interest on their note was to be 10 per cent. per annum only. They might or might not pay all or any of the taxes at their pleasure, and the evidence showed that the plaintiff in fact paid all taxes assessed against his mortgage at the time they became due. See *Marve v. Hart*, 76 Cal. 291, 18 Pac. Rep. 325.

3. It is contended that the court erred in finding that \$300 was a reasonable attorney's fee, and in allowing the plaintiff that amount. This is rested upon the fact that there was no allegation in the complaint that the plaintiff had paid that sum, or incurred any liability to pay it, and hence it is claimed that the finding was outside of the issues, and not authorized. But the complaint alleged "that the sum of \$300 is a reasonable attorney's fee or counsel fee for the foreclosure of said mortgage;" and, if any averment as to the fee was necessary, this certainly was sufficient. See *Carriere v. Minturn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514; *Rapp v. Gold Co.* 74 Cal. 532, 16 Pac.

Rep. 325; *White v. Allatt*, (Cal.) ante, 421. The cases cited and relied upon by appellants are not in point. In *Patterson v. Donner*, 48 Cal. 369, the action was commenced and prosecuted by the plaintiff personally; and in *Bank v. Treadwell*, 55 Cal. 379, the attorney for plaintiff was employed by it to perform its legal business under a regular monthly salary, and it had neither paid nor become liable to pay to him anything as counsel fees. It was held in each case that, under the circumstances shown, counsel fees could not be allowed; the court, in the latter case, saying: "The object of the law allowing counsel fees is not to afford an opportunity, under cover of the name, for a speculation on the part of the creditor, but to reimburse him in a proper amount for a sum which he pays, or becomes liable to pay, or to relieve him of the burden of paying counsel fees." No such circumstances appear here.

But, even if the plaintiff was entitled to a counsel fee, it is strenuously urged that the amount allowed was too large; that the court could properly allow only \$125. This position, we think, should be sustained. The note provided for an attorney's fee of 5 per cent. on the principal in case an action should be commenced to enforce its payment. The mortgage provided for a reasonable attorney's fee in case of foreclosure. These papers should be read together as constituting one contract in this regard. Civil Code, § 1642. And, besides, the plaintiff asked for only "five per cent. on the said principal sum of \$2,500 for attorney's fees. It has been held that, when the mortgage fixes the amount of the attorney's fee, it is error for the court to allow a larger sum than that so fixed. *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514. We think that rule should be applied here.

We find no other error in the record. The findings seem to be sufficient and without conflict. We therefore advise that the judgment be modified by reducing the amount allowed for attorney's fees to \$125, and that as so modified the judgment and order be affirmed; the appellants to recover costs on appeal.

WE CONCUR: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by reducing the amount allowed for attorney's fees to \$125, and as so modified the judgment and order are affirmed; the appellants to recover costs on appeal.

(87 Cal. 561)

SAN DIEGO FLUME CO. v. CHASE. (No. 13,888.)

(Supreme Court of California. Jan. 30, 1891.)

WATER-RIGHTS—CONSTRUCTION OF CONTRACT.

A water contract provided that defendant could make connections by two 2-inch pipes with plaintiff's flume, and that "all water drawn from said flume shall be taken and drawn from said pipes for the purpose of irrigating, through standard pipes of not more than 1½-inch diameter;" that plaintiff will convey "a water-right of 2¼ inches of water, miner's measure, under a 4-inch pressure," etc.; that the amount of water he is entitled to shall be measured by "the amount of water that he may draw from said pipes through

1½-inch iron pipe standards in his said grounds," etc. Held, that defendant was entitled only to 2¼ inches of water under 4 inches pressure, and not to all he could take by the two 2-inch pipes, and distribute through the two 1½-inch pipes.

Department 2. Appeal from superior court, San Diego county; WALTER VAN DYKE, Judge.

*Shaw & Holland*, for appellant. *Levi Chase and Hunsaker, Britt & Goodrich*, for respondent.

PER CURIAM. This action was brought for the purpose of having a contract for the sale of a water-right for irrigation purposes reformed, and that it be declared that the amount of water "conveyed to and owned by the defendant be limited by said contract to 2¼ inches of water, miner's measure, under a 4-inch pressure, and no more, and that he be entitled and required to take the same in accordance with such reasonable rules and regulations as may be established from time to time by plaintiff," and for such other equitable relief in the premises as should be proper. The contract sought to be reformed is made a part of the complaint, and shows that plaintiff and appellant, who is the party of the first part, "contracts and agrees that the party of the second part [defendant and respondent here] shall have the right to make two connections with the said flume of said party of the first part of a two-inch pipe entering the side thereon near the bottom. \* \* \* The pipe aforesaid shall be extended from the points of connection with said flume to, and be connected with, the pipe system of the party of the second part in said orchard, and thereafter all water drawn from said flume shall be taken and drawn from said pipes for the purpose of irrigating, through standard pipes of not more than 1½-inch diameter, or carried through 1½-inch rubber hose, as hereafter provided. That the party of the first part will convey to the party of the second part a water-right of two and one-quarter (2¼) inches of water, miner's measure, under a four-inch pressure, to be taken and used as hereinafter provided, and subject to the conditions usual with said party of the first part in the sale of water-rights to other parties. That the water to be taken and had by the party of the second part under this agreement, and under and by virtue of his water-rights aforesaid, shall be measured, estimated, and determined by the amount of water that he may draw from said pipes through 1½-inch iron pipe standards in his said grounds, and to be used exclusively thereon, from the 1st day of May to the 1st day of November, both inclusive, during ordinary seasons; but, should an extraordinarily dry spring or fall necessitate a longer use of water for irrigation, he shall have the right to use and take the same through said pipes in the same way as hereinbefore provided, but in that case shall pay the party of the first part an extra amount therefor, proportionate to the sum hereinafter specified to be paid by the party of the second part for the six-months use first aforesaid." A demurrer to this complaint having been overruled, the defendant an-

swered, admitting the contract to be as set out in and attached to the complaint, and denying all other allegations, and also filed an amended cross-complaint, (a demurrer to the original having been sustained,) the *gravamen* of which was that under this contract he was entitled to have a specific performance of it, so that the effect thereof would be that he was to take and receive (through two 2-inch pipes placed in the side of the flume of the plaintiff, from whence water was to be drawn, and connected with the defendant's pipe system, by which he irrigated his fruit farm) all the water he might require for the irrigation of his said property, and for the use of the stock and persons kept or employed thereon, that he might draw from one and one-half inch standard pipes in his irrigation system, and for damages and other relief, consisting, among other things, of the restoration of the 2-inch pipes connected with the flume as they had originally stood, and to remove all natural obstructions to the flow of the water in these pipes; the defendant having been limited as to the flow of water by an obstruction erected by the plaintiff at the flume so that only 1½ inches would flow into each of the 2-inch pipes. An answer to this cross-complaint was filed. When the case came on for trial the plaintiff abandoned its action for a reformation of the contract. Then the defendant moved for judgment on the pleadings in the cross-action for the specific performance of the contract, as he claimed it was to be interpreted, and for nominal damages; he alleging that the plaintiff, by its answer to the cross-complaint, had admitted all the material allegations of that pleading. This motion was sustained, and judgment entered in accordance therewith. The plaintiff appeals.

The real matter to be determined on this appeal is how much water the defendant was entitled to under the contract to take from the plaintiff's flume; the appellant claiming it to be only 2¼ inches under a 4-inch pressure; the respondent claiming it to be all the water he could take through his two 2-inch iron pipes connected with the flume, to be distributed by means of two 1½-inch iron standard pipes. The construction given by the trial court to the contract, as appears by its decree or judgment, is not correct. The quantity of water which the defendant was to get from the plaintiff's flume for a certain specified sum of money was 2¼ inches, miner's measure, under a 4-inch pressure, from "the 1st day of May to the 1st day of November, both inclusive, during ordinary seasons; but, should an extraordinarily dry spring or fall necessitate a longer use of water for irrigation," he is to have the right to use "and take the same through said pipes in the same way" as he took the 2¼ inches for a specified term, as above set forth, but in that case he must pay the plaintiff an extra amount therefor, proportionate to the sum he was ordinarily to pay for the season from the 1st day of May until the 1st day of November, inclusive. But the quantity of water to be taken was to be admeasured to him through his two 2-inch

iron pipes, connected on his land with two 1½-inch standard pipes. The method of taking this quantity of water does not affect the amount which the first clause of the contract relating thereto fixed, unless a construction be given to that clause which will make it entirely inoperative. It reads thus: "That the party of the first part will convey to the party of the second part a water right of two and one-quarter (2¼) inches of water, miner's measure, under a four-inch pressure, to be taken and used as hereinafter provided, and subject to the conditions usual with said party of the first part in the sale of water-rights to other parties." But, giving it the construction we have, it is in entire harmony with the clause following: "That the water to be taken and had by the party of the second part under this agreement, and under and by virtue of his water-rights aforesaid, shall be measured, estimated, and determined by the amount of water that he may draw from said pipes through 1½-inch iron pipe standards in his said grounds." The one clause refers to the amount of water to be taken; the other to the manner of its taking.

Two and one-quarter inches of water, miner's measure, under a 4-inch pressure, it is the privilege of the defendant to take and distributed daily, as he pleases, over his land, through its pipe system attached to the plaintiff's flume; and this daily quantity of water he is entitled to for the season heretofore set forth. But he is not entitled to any more during that season, except, as stated in the contract, when an "extraordinarily dry spring or fall necessitates a longer use of water for irrigation," when he is to get it by paying a sum of money proportionate to the sum he was ordinarily to pay for water during the season as above stated. Judgment reversed.

(87 Cal. 526)

HARRIS v. SAN DIEGO FLUME CO. (No. 13,998.)

(Supreme Court of California. Jan. 30, 1891.)

AGENCY—AUTHORITY OF AGENT—BROKER'S COMMISSIONS.

1. A resolution of the board of directors of a flume company authorizing its superintendent to "enter into negotiations with contractors and others for work on the line of the flume, in his discretion, subject to the approval of the board," does not empower him to employ a broker to find a suitable contractor, in the absence of evidence that such a course is necessary and usual in the ordinary course of business.

2. The fact that the superintendent had been permitted to do many things in San Diego county outside the ordinary duties of his position did not imply authority to bind the company to pay the broker, when the latter had no knowledge of his doings in San Diego county.

3. The company cannot be held on the theory that it accepted the benefit of the broker's services, when it had no knowledge of them at the time it made the contract with the contractor thus found to build the flume.

Commissioner's decision. Department 2. Appeal from superior court, San Diego county, GEORGE PUTERBAUGH, Judge.

Deakin & Story and Thos. J. Capps, for appellant. Shaw & Holland, for respondent.

HAYNE, C. This was an action to recover \$5,000 as brokerage for negotiating a contract. The complaint contained two counts, but the plaintiff elected to go to trial upon a *quantum meruit*. The trial court gave judgment for the defendant, and the plaintiff appeals. The principal question discussed by counsel relates to the authority of the person who employed the plaintiff. The defendant was a corporation "to construct and operate a flume for the transmitting of water." At the period in question its flume had not been constructed. The engineering work was being done, and the business of acquiring rights of way, etc., was being attended to. In the beginning of August, 1886, the company sent its superintendent, one W. E. Robinson, to San Francisco to negotiate a contract for the construction of the flume. He employed the plaintiff as broker to find a contractor, and through the plaintiff's exertions a suitable person was found. The claim is for compensation for services as such broker.

1. The defendant cannot be held on the ground of ostensible or apparent authority. There is evidence to the effect that, in the county of San Diego, Robinson was permitted by the company to do things outside of his ordinary duties as superintendent. And the plaintiff's son, who was an engineer in the employment of the company, testified that, on the eve of Robinson's departure for San Francisco, the president told him that Robinson "had full authority" to enter into contracts. This latter evidence is contradicted; the former is not. But neither is ground for a decision in favor of plaintiff on the theory of an ostensible or apparent authority. For it does not appear either that the alleged statement of the president was communicated to the plaintiff, or that he was aware of the latitude which had been permitted Robinson in San Diego. It may possibly be surmised that he had knowledge of the circumstances; but the fact is not stated, and a mere surmise is not sufficient. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civil Code, § 2317. There are two essential features of an authority of this character, viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient; for a party has no right to take the agent's word for the existence of his authority. In the case before us, as above stated, it does not appear that the acts of the company which are supposed to have been sufficient to justify a belief in Robinson's authority were known to the plaintiff; and, if not, they could not have generated in his mind any belief on the subject of the agency. There may be other reasons why the plaintiff cannot recover on this ground, but the foregoing is sufficient.

2. There was no actual authority, either express or implied. The measure of the agent's authority was the following resolution of the board of directors of the com-

pany: "Resolved, that W. E. Robinson be authorized to proceed to San Francisco and enter into negotiations with contractors and others for work on the line of the flume, in his discretion, subject to the approval of this board; also that he be authorized to enter into negotiations with capitalists for the purchase of not exceeding \$500,000 in the bonds of the company." Nothing appears to have been done by the plaintiff in relation to the disposition of the bonds. His claim is for finding a contractor who was willing to enter into a contract for the building of the flume. In the language of appellant's counsel, "for the peculiarly difficult and rare services rendered by him in introducing and assisting in procuring Mr. Moore to take this contract, the plaintiff claims the moderate commission of \$5,000." In relation to this we concede in favor of the appellant that the words, "subject to the approval of this board," contained in the resolution, refer only to the contract for the construction of the flume, which was to be negotiated by Robinson, and that he had implied authority "to do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of his agency. Civil Code, § 2319. But we are not able to say that the employment of a high-priced broker is necessary or proper and usual, in the ordinary course of business," for finding a contractor to build a flume. At least, we do not think that the court can take judicial notice that such is the case, and we do not find any satisfactory evidence of it in the record. There is evidence that it was a matter of some difficulty to induce contractors to go to so distant a field of action, and some evidence that the plaintiff's services had a value. But the latter evidence seems to be on the general theory that whatever a broker does has a value. Upon the whole evidence, we cannot say that the finding of the trial court should be disturbed.

3. The defendant cannot be made liable upon the theory that it appropriated the benefit of the plaintiff's services. The unauthorized arrangement made by Robinson with the plaintiff was collateral to the flume contract, and the defendant knew nothing of such services at the time the flume contract was entered into. The other matters do not require special attention. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(87 Cal. 543)

CLARKE v. REIS, Treasurer. (No. 13,880.)

(Supreme Court of California. Jan. 30, 1891.)

CITY POLICE DEPARTMENT—LIFE INSURANCE FUND.

Act Cal. April 1, 1878, (St. Cal. 1877-78, p. 879,) fixed the compensation of police officers of the city and county of San Francisco at a certain sum per month, and directed the treasurer of the city and county to "retain from the pay of each police officer the sum of two dollars per

month, to be paid into a fund to be known as the 'Police Life and Health Insurance Fund,' of which \$1,000 was to be paid to the personal representative of any member of the police force on his death. Held that, as the police officer never received the amount so retained, nor had any power of disposition over the same, he had no vested property right in such fund, and on his discharge from the force he was not entitled to a return of the amount contributed by him. Following *Pennie v. Reis*, 80 Cal. 269, 22 Pac. Rep. 176; affirmed, 132 U. S. 471, 10 Sup. Ct. Rep. 149.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; E. R. GARBER, Judge.

Act Cal. April 1, 1878, (St. Cal. 1877-78, p. 879,) fixed the compensation for each member of the police force of San Francisco at a sum not exceeding \$102 a month for each one, and provided that the treasurer of said city and county should "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'Police Life and Health Insurance Fund.'" The act declared that on the death of any member of the police force after January 1, 1878, there should be paid to his representatives, by the treasurer, out of the said life and health insurance fund, the sum of \$1,000; and that in case any officer should resign, from bad health or bodily infirmity, there should be paid to him from that fund the amount of the principal which he may have contributed thereto.

Alfred Clarke, for appellant. George Flournoy, Jr., for respondent.

FOOTE, C. This action was brought for the purpose of forcing, by writ of mandate, the respondent to pay the appellant, who was the assignee of a claim of a dismissed police officer, one Pugh, the amount of \$256, principal, and costs and damages to the amount of \$25. This sum of money was claimed under and by virtue of an act of the legislature approved April 1, 1878, St. Cal. 1878, p. 879. It is asserted that the \$2 per month which the police officer claims to have paid into the fund held by the treasurer was money in which he had a vested right, and that on his discharge he was entitled to have it returned to him or his representative. The petition was demurred to as not stating facts sufficient to constitute a cause of action; the demurrer was sustained, and the writ dismissed. From the judgment rendered in the premises this appeal is taken. The statute, under which this right is set up by the plaintiff, has received construction from the appellate court of this state in *Pennie v. Reis*, 80 Cal. 269, 22 Pac. Rep. 176, and from the supreme court of the United States, in the same case, on writ of error, 132 U. S. 471, 10 Sup. Ct. Rep. 149. These cases hold that a police officer, such as the assignor of the appellant, never had any claim on the fund involved here, except upon the happening of certain contingencies, mentioned in the act of the legislature of California, to which we have just adverted, under which act alone could any right have vested in the plaintiff or his assignor. The voluminous and argumentative petition filed herein does not, in our opinion, state such facts as bring the

appellant within any of the contingencies of the statute which he invokes, and we therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 569)

McLENNAN V. BANK OF CALIFORNIA. (No. 12,944.)

(Supreme Court of California. Jan. 31, 1891.)

TRIAL—BY COURT — FAILURE TO FILE DECISION—FINDINGS.

1. Code Civil Proc. Cal. § 632, which requires a judge, in an action tried before him without a jury, to render and file his decision within 30 days after the cause of action has been submitted to him, is directory merely; and a new trial will not be granted for the judge's failure to comply with the provision.

2. Plaintiff, the owner of a note, placed it for collection in the hands of defendant's cashier, his intimate friend, and in whom he had unbounded confidence. The cashier had the note renewed, placed the renewed note in the bank for collection as deposited for his own account individually, and used the proceeds personally. Though informed by the cashier that the renewed note had been collected, plaintiff never demanded payment from the bank, or any one else except the cashier, and never drew a check against the proceeds, or made any effort to get them. Years afterwards, when the cashier had died, and during a temporary suspension of the bank, plaintiff brought an action against it for the proceeds of the note. Held, that the court was justified in finding that the note had been left with the cashier for collection in his individual capacity, and not as agent for the bank, and that the court was not bound to believe plaintiff's confused and contradictory testimony that he had deposited the note with the bank for collection.

3. The fact that the statute of limitations has apparently run against a counter-claim set up by the bank against plaintiff does not render inadmissible the books of the bank containing the original entries of the transactions, as the bank may be able to show facts which will take the claim out of the operation of the statute.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. G. MAGUIRE, Judge.

George B. Merrill, (T. I. Bergin, of counsel,) for appellant. F. G. Newlands, for respondent.

FOOTE, C. This action was brought by Donald McLennan, now deceased, and was tried, judgment entered, and notice of intention to move for a new trial served and filed during his life-time. After his death his administrator, the present plaintiff, was substituted, and a new trial refused. From the order made in the premises the plaintiff appeals. The action is to recover of the defendant, a banking corporation, the sum of \$10,000, and interest. It is alleged in the complaint that on the 27th day of November, 1869, the Mission & Pacific Woolen Mills, Consolidated, a corporation, made, executed, and duly indorsed and delivered to the plaintiff a certain promissory note for \$10,000. That upon the receipt of that note the plaintiff deposited it with the defendant, to be collected in due course of banking business.

That the note, and certain accrued interest thereon, was paid by the maker of the note to the defendant on the 26th day of April, 1870. That afterwards, on the 26th of August, 1875, the defendant closed the doors of its bank, stopped payment, etc., and refused to pay the plaintiff the money collected by it for him. The defense was that the note was never received by the bank from the plaintiff for collection, but was given by the plaintiff into the hands of W. C. Ralston to be collected, and the proceeds used by him for his own benefit, and that in accordance with this the money was collected by the bank at the request of Ralston, placed to his credit, and paid out to him on his checks drawn against his account as a depositor with the bank. The statute of limitations was set up, and also certain demands against the plaintiff held by the bank, were pleaded by way of set-off, to an amount exceeding the claim of the plaintiff. The court found in favor of the defendant: "That the plaintiff never deposited the said note of November 27, 1869, with the defendant to be collected; that the plaintiff never deposited said note of November 27, 1869, with the defendant." It further held that the plaintiff's cause of action, if it had been otherwise good against the bank, which it was not, was not barred, but that the cause of action by the defendant, on its counter-demands against the plaintiff, was barred by the statute of limitations. So that, upon the findings as made, judgment was rendered against the plaintiff for costs.

The first ground urged for a reversal of the order denying a new trial is that the court did not give its decision and file it with the clerk within 30 days after the cause was submitted for decision under section 632 of the Code of Civil Procedure. The provision of the statute in question is directory merely. *Broad v. Murray*, 44 Cal. 228; *McQuillan v. Donahue*, 49 Cal. 157; *Hayne*, New Trials & App. § 238, note 13.

The main ground, as it seems, urged by the appellant for the reversal of the order is that the trial court misconstrued the evidence given in the cause, and that the findings against the plaintiff are not in accord with such evidence, if properly and legally considered. The only oral evidence in the case introduced by the plaintiff to sustain the contention that the note was placed in the hands of Mr. Ralston, the then cashier of the Bank of California, for collection by the bank, the proceeds to be placed therein to the credit of the plaintiff, was the testimony of Donald McLennan and the witness Tibbey; the latter having been at one time an employe of the bank, but was not at the time he testified. Mr. Ralston, the only other person who might have testified as to the exact nature of the transaction by which he took the note from McLennan for collection, was dead at the time of the trial. So that whether he took it as cashier of the bank, or in his individual capacity, must rest mainly, if not entirely, upon whether the emphatic and positive statements made by McLennan and Tibbey ought to have been given full credit by the trial court. The note

which it is claimed that Ralston collected, and had the proceeds placed to his credit in the bank, and drew it out by check and used it for his own private purposes, was made in renewal of a second note, which last had been in the hands of Tibbey, a friend of McLennan's, to be collected by Tibbey for McLennan. When it became due, Tibbey placed it in another bank for collection, and Col. Fry, the president of the mill corporation, the maker of the note, was not ready to pay it, and told Mr. Ralston, who was largely interested in the corporation, of the fact of the inability of the corporation at that time to meet the note, and that Tibbey had it for collection. Ralston was, as appears abundantly in the record, a man and friend in whom McLennan had the utmost confidence, at whose instance the latter had several times given his name on various notes, and had at Ralston's personal request loaned at one time \$30,000 to the mill corporation. In fact, it would appear as if McLennan, on account of the confidence he had in Ralston, and his intimate personal and business relations with him, as shown by McLennan's evidence, if he had been requested to do it, would at any time have intrusted or loaned to Ralston either his name, credit, or money. Under these existing personal relations between Ralston and McLennan, Mr. Ralston inquired of Tibbey about this second note. He was informed that the note was held in confidence as agent by Tibbey. Then Tibbey saw McLennan, who told him to tell Ralston who the note belonged to. This was done, and an interview occurred between Ralston, Tibbey, and McLennan, by means of which Ralston became possessed of the note, had it renewed, and placed the renewed note in the bank for collection as deposited for his own account individually, and used the proceeds personally. Another circumstance appears in the case in the evidence of McLennan, and that is that although he says that Ralston told him the money had been collected on the note, and placed to McLennan's credit in the Bank of California, he never once made any inquiry of any one else about the bank if such was the fact; never made any demand for it for years afterwards, or during Ralston's life-time, except to Ralston; and never drew a check against it, or made any effort to get it, as is usual in cases when men have money on deposit in banks. After Ralston's death, and during the temporary suspension of the bank, this action is brought, and when a large alleged indebtedness of McLennan to the bank is barred by the statute of limitations, and his claim, being against a bank, cannot be likewise barred. All these facts were before the trial court. In addition to certain suspicious facts and circumstances, which time does not admit of mention, it appears in the testimony of McLennan that he first positively and emphatically declared that he had no interest or claim in the third note, and afterwards declared that he had; the reason which he assigns for not claiming this interest in the first instance being as stated by himself, in answer to questions by his counsel, which

questions and the answers are: "Question. This morning you were asked in regard to the first and second notes, and you said that the third note was not yours. I should like to know if you have any explanation to make about that. Answer. Well, I made a great mistake this morning, because I thought that, not having any physical connection in the third note, that it might not belong to me, or it might prejudice my standing in court. I at once saw my mistake, and beg now to correct it. I claim ownership in that note, the same as the other two notes. I claim ownership in any note having any connection with the transaction. Q. You also said that you never authorized or ratified the taking up of the third note. What do you mean by that? A. Well, I mean to say by that, whatever the bank done in connection or in the shape of an accommodation to the mill, of course it was no doings of mine, any more than the proceeds from any accommodation they might afford the mill. I claim the payment,—claim the money." From this it seems as if the witness thought himself justified in making his recollection conform to his supposed interests, and that he was ready to and did make what he calls a "mistake" in his own favor as to the statement of a fact, or a claim of interest, when to do otherwise, and state the fact or claim correctly, would, as he said, "prejudice my standing in court." Space forbids us to enumerate all the other instances, either, as claimed, resulting from the want of recollection or otherwise, where it would seem that the witness caused "intestinal" conflicts in his testimony, or made statements inherently improbable in their nature. But such appears to us to have been the character of his testimony; and under such circumstances we do not see, in view of the decisions of the appellate court of this state, that the trial court was compelled to regard as true his statement as to how Ralston became possessed of the note. *Crook v. Forsyth*, 30 Cal. 662; *Bernal v. Wade*, 46 Cal. 667; *Blankman v. Vallejo*, 15 Cal. 639-646; *Baker v. Insurance Co.*, 79 Cal. 34-41, 21 Pac. Rep. 357; *Mogk v. Peterson*, 75 Cal. 501, 17 Pac. Rep. 446. Mr. Tibbey's mistakes and corrections also leave it doubtful if his recollection of the facts just as they occurred when Ralston took the note are to be relied on; and, besides, the peculiar relations between Ralston and McLennan, and all the facts and circumstances surrounding the transaction, and the conduct of the plaintiff afterwards, as above adverted to, might well cause the trial judge to doubt the correctness of the memory of the witness.

It is further claimed that the books of the bank showing the alleged indebtedness of the plaintiff, as set up by counterclaim, were inadmissible in evidence. The transactions of a bank, relating, in large measure, to its customers, to the receipt of money from them, and the paying of it out to them, on loan or check, it would seem as if their books showing the original entries of such transactions are admissible and competent evidence for the bank. *Morse*, Banks, (3d Ed.) § 295, note, pp. 510, 511; *Bank v. Kuapp*, 3 Pick. 96,

109; *Watson v. Bank*, 8 Metc. (Mass.) 217, 220, 221. Even if the claim of the defendant was barred by the statute of limitations, this did not render this evidence to show the original indebtedness inadmissible, for it might happen in such a case that the party introducing it would be able to show facts which would take it out of the operation of the statute; and after the date of the claim, and its nature, are shown, it then becomes a question for the court to determine, from all the evidence, whether such claim is or not enforceable under the statute. While a recovery on such claim may be barred, this does not render proof of the claim in the first instance incompetent. Besides, the findings of the court are that the claim was barred; hence the plaintiff is not prejudiced. The same rule applies to the objection to the admission in evidence of the promissory note for \$16,841.75 executed by the plaintiff to the defendant.

There are other objections urged to the admission or exclusion of evidence. We have given to arguments made and authorities cited minute and thorough consideration, and have examined the transcript carefully, but we cannot see wherein any prejudice could have been suffered by the plaintiff. The decision of the court was unquestionably correct; and even if some evidence was admitted, and other evidence excluded, perhaps improperly, it yet appears that even then the evidence unobjectioned to in the record was unaffected, as that admitted against objection and that excluded was not of sufficient importance to change the result. Perceiving no prejudicial error in the record, we advise that the order appealed from be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(91 Cal. 194)

FOSS *et al.* v. HINKELL. (No. 14,014.)<sup>1</sup>

(Supreme Court of California. Feb. 2, 1891.)

#### BOUNDARIES—EVIDENCE.

In ejectment, where defendant claims that the land is within the exterior boundaries of a rancho, and consequently not included in the patent to plaintiff, and supports this claim by the original petition, the *expediente*, the *diseno*, the act of judicial possession, various maps, decrees, and proceedings, and also by oral testimony of witnesses as to the exterior boundaries of the rancho, the evidence may warrant a finding that the land in controversy is within the exterior boundaries of the rancho.

Department 2. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

*Edwin Baxter*, for appellant. *Will D. Gould* and *Jas. H. Blanchard*, for respondent.

McFARLAND, J. This is an action of ejectment. Judgment went for defendant, and plaintiffs appeal. Plaintiffs claim title under a United States patent to the Southern Pacific Railroad Company, dated April 4, 1879, and a deed from said company to plaintiffs, dated June 20, 1887. Defendant claims as a pre-emptor, contend-

ing that at the date of the definite location of the Southern Pacific Railroad, which was on or about April 3, 1871, the land in contest was within the exterior limits of the San Jose Rancho, a valid Mexican grant, and was therefore reserved from the grant to the railroad company. There was a former trial of this case, and a former appeal. At that trial the court made certain findings, and gave judgment for plaintiffs. On appeal, this court determined most of the questions involved favorably to defendant. (*Foss v. Hinkell*, 78 Cal. 158, 20 Pac. Rep. 393.) and the decision of this court then made as to those questions has become the law of the case. But this court reversed the judgment for want of a finding whether or not the land was within the exterior boundaries of said rancho. The court below had found that according to a survey called the "Thompson Survey" the land was within said boundaries, and that according to a survey called the "Hancock Survey" it was not; and this court, in its opinion, said: "The exterior limits of the rancho do not depend on any survey made of it. The land sued for may be within such exterior limits, though excluded from the survey. Though Hancock may have excluded this land from his survey, it still may be within the exterior boundaries of the rancho as granted by the Mexican government. What the exterior limits of such granted rancho were must be determined by the *expediente* of the grant issued by the Mexican government, including petition, *diseno*, and grant, the boundaries designated in which may be identified by parol evidence. See *Doolen v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228." And for this defect in the findings the judgment was reversed, and the cause remanded, "with directions to the court below to find, on the testimony already introduced, and such further testimony as may be introduced by either party, whether or not the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government, and on such findings to enter judgment." And so, when the case went back to the trial court, there was only one issue—the one last above stated—to be determined. When the case was heard again in the trial court, that court, following the said directions of this court, found "that the land in suit was on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose as granted by the Mexican government," and gave judgment accordingly for defendant; and it is evident that the judgment must stand, unless the court committed material errors in ruling upon the admissibility of evidence, or unless the said finding is not supported by the evidence.

Appellants took certain exceptions to the admission of certain evidence; but the point is not pressed in the brief, and—especially when we consider what was decided when the case was here before—we see no error on this point.

The main contention of appellants is that the finding is not supported by the

<sup>1</sup>Rehearing granted.



evidence. Their counsel argue that the court must have found the land in suit to be within the exterior boundaries of the rancho, simply because it was claimed that said boundaries included said land. But there was introduced in evidence the original petition, the *expediente*, the *diseno*, the act of judicial possession, various maps, decrees, and proceedings, and also oral testimony of witnesses as to the exterior boundaries of the rancho. It would be a useless labor here to review all this evidence. It is sufficient to say that after a full consideration of the evidence we are not prepared to say that the court was not warranted in finding that the land in suit was within the exterior limits of the San Jose Rancho "as granted by the Mexican government." The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

(87 Cal. 568)

CAMPODONICO v. OREGON IMP. CO. (No. 13,606.)

(Supreme Court of California. Jan. 31, 1891.)

MORTGAGES ON GROWING CROPS—STORING IN WAREHOUSE—MORTGAGOR'S INSOLVENCY.

1. The lien of a mortgage on growing crops is not lost by the mortgagor's storing the property in a warehouse, under an agreement with the mortgagee that it should be stored in the latter's name; and the action of the warehouseman in issuing the receipt in the name of the mortgagor, instead of the mortgagee, as he had been directed to do, does not entitle the mortgagor's assignee in insolvency to a preference over the mortgagee.

2. Section 55 of the California insolvent act, which provides that any transfer of property by an insolvent shall be void as to his creditors, when the transferee has reasonable cause to believe that it was made to hinder and delay creditors, does not make void the transfer of the warehouse receipt to the mortgagee by the mortgagor on the day he filed his petition in insolvency, as the mortgagee, by virtue of his mortgage, was entitled to the property, which was worth less than the debt for which it was mortgaged.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Venable & Goodchild, for respondent.

PER CURIAM. Action to recover damages for the conversion by defendant of certain personal property, consisting of beans and barley, grown upon land farmed by one Dodge, in the county of San Luis Obispo, in 1888. Judgment was rendered in favor of the plaintiff, and from this, and an order denying its motion for a new trial, defendant appeals. The court below found, in substance, that in May, 1888, the said Dodge duly mortgaged to plaintiff the said beans and barley then growing to secure the sum of \$1,500 and interest, which mortgage was properly recorded. That between May 31, 1888, and October 27, 1888, the said Dodge, at the request of plaintiff, had the said property hauled from the land on which it was grown, and delivered to the defendant at its warehouse, instructing the person hauling it to store the same as the property of

plaintiff, in accordance with plaintiff's request. That upon delivery of the first lot hauled the defendant was notified that said property belonged to plaintiff, and that the delivery was made for him. That from time to time, as delivered, the defendant gave to the teamster of Dodge who hauled it tags of weight, reciting that the same was received from said Dodge, and not naming the plaintiff. On October 27, 1888, Dodge surrendered these tags to defendant, and requested the agent in charge of defendant's warehouse to issue a warehouse receipt to plaintiff for said property, but that the agent issued such receipt in favor of said Dodge, the said Dodge protesting that the same should show that said beans and barley were stored for plaintiff. Plaintiff did not know that the property had been stored in the name of Dodge until October 28, 1888, when he was informed of that fact by Dodge, and of the further fact that the same had been attached on the day before by one Aaron in a suit against Dodge. On the 29th of October, Dodge indorsed and assigned the warehouse receipt to plaintiff, and the defendant was on the same day notified by plaintiff that he was the owner of the property. After this assignment, and upon the same day, Dodge filed his petition in insolvency, and was thereupon adjudged insolvent. Aaron was appointed assignee in the insolvency proceedings, and as such sold the property in controversy to one Sinsheimer, and on December 17, 1888, the defendant, by order of said Sinsheimer, shipped the same, and without the knowledge or consent of plaintiff, to the consignee of said Sinsheimer in San Francisco.

1. These findings support the judgment. The lien of respondent's mortgage was not lost by his permitting the mortgagor, Dodge, to haul the mortgaged property from the land on which it was grown, and its storage in defendant's warehouse, under the circumstances disclosed in the findings. *Byrnes v. Hatch*, 77 Cal. 244, 19 Pac. Rep. 482. The neglect or refusal of defendant's agent to issue a receipt showing that the property was stored in the warehouse for the plaintiff did not change the effect of the agreement, made between plaintiff and his mortgagor, Dodge, as to the way in which it should be stored, so as to destroy the mortgage lien in favor of the assignee of the insolvent Dodge. The attachment proceedings need not be considered, as the attachment was dissolved when Dodge was adjudged insolvent.

2. The assignment of the warehouse receipt, made by Dodge to the plaintiff, on the day of the filing of Dodge's petition in insolvency, was not void as a preference, under section 55 of the insolvent act.<sup>1</sup> As the value of the property was less than the debt for which it was mortgaged, nothing was withdrawn from the reach of the assignee representing the creditors of Dodge, and, if it be conceded that the ef-

<sup>1</sup> This section provides that the transfer of property by an insolvent shall be void if the transferee had reasonable cause to believe that it was made to hinder and delay creditors.

fect of this transaction was in form a transfer of the legal title to the property described in the receipt, it was nevertheless valid as against the assignee. *Catlin v. Hoffman*, 2 Sawy. 486. The other assignments of error do not require special discussion. Judgment and order affirmed

(87 Cal. 576)

*FRICK et al. v. MORFORD*. [(No. 13,659, (Supreme Court of California. Feb. 2, 1891.)

**ASSESSMENTS—VALIDITY—APPEAL—MANDAMUS.**

Under Act Cal. March 18, 1885, § 11, providing that the contractor having any objections to the legality of the assessment shall appeal to the city council, which may alter the same as may be just, and that its decision shall be conclusive upon all persons entitled to appeal, a contractor who does not appeal from the act of the superintendent of streets in making an assessment, which includes the cost of work called for by the specifications, but not authorized by the "resolution of intention," cannot compel him by *mandamus* to make another assessment.

Department 1. Appeal from superior court, Los Angeles county; *LUCIEN SHAW*, Judge.

*Hugh J. & William Crawford*, for appellants. *Charles McFarland* and *Sargent & Harpham*, for respondent.

**HARRISON, J.** The plaintiffs applied to the superior court of Los Angeles county for a writ of mandate to the superintendent of streets of the city of Los Angeles, directing him to make an assessment for certain work done by them in laying a sewer in Seventh street, under a contract with the city authorities. In their application they aver that they entered into a contract with the superintendent of streets by which they agreed to lay the sewer "in accordance with plans and specifications therefor on file in the office of the city surveyor, \* \* \* but said plans and specifications were faulty and erroneous, in this: that about eight feet of sewer more were required by said plans and specifications to be laid, and were laid by affiants, than was authorized by the resolution of intention;" that they had performed their work to the satisfaction of the superintendent of streets, and that he accepted the same and made an assessment therefor, "and in said assessment included the cost and incidental expenses of said unauthorized eight feet;" that they brought an action to recover the amount of a portion of the assessment against one *H. L. Williams*, who had refused to pay the same, "because of said excess of work;" and that they had dismissed the said action. The defendant demurred to the application, and his demurrer having been sustained, the plaintiff declined to amend, and appealed to this court from the order denying the writ. The plaintiffs do not, in their application, aver in terms that the assessment that had been issued was void, nor can we say from the facts averred by them that it was void. Neither do they aver that the court in which they brought an action upon it decided that it was void, but they say that they dismissed their action against *Williams* upon "becoming convinced from the rulings of the honorable court that judgment could not be recovered by them." If the

assessment was a valid one, the superintendent of streets cannot be required to make another, and unless facts showing that it was not valid were clearly set forth in their application, the court was justified in refusing to grant the writ.

1. The plaintiffs do not show very clearly in their application wherein the plans and specifications which were on file in the office of the city surveyor "required about eight feet of sewer more to be laid" than was authorized by the resolution of intention, but we understand therefrom that they required the sewer to be laid to a point 988 feet west of the east line of Pearl street, instead of 980 feet westerly therefrom, as specified in the resolution. If this be the fact, it would result that the plaintiffs laid the westerly eight feet of the sewer without authority, and that they are not entitled to an assessment for that portion of the work done by them. It does not result, however, that the assessment for the work done by them that had been authorized by the resolution of intention was void. Neither does it clearly appear from the application where the lot of *Williams* was situated with reference to this excess of eight feet. If it was wholly or in part within the eight feet, the plaintiffs are not entitled to an assessment against that part of the lot not fronting upon the work authorized by the city council. If his lot was east of the 980-foot limit, the assessment against it would not be rendered void by the fact that the entire assessment purported also to make a charge upon lots that were not within the resolution of intention. Inasmuch as the price at which the plaintiffs were to do the work was estimated by the lineal foot, the cost of that which was done by them outside of the 980-foot limit could be easily segregated from the remainder. *Himmelman v. Hoadley*, 44 Cal. 276.

2. If the assessment embraced only the frontage upon the 980 feet covered by the resolution of intention, but included the expense of laying the sewer in the eight feet outside of that limit, it was an error which could have been corrected by the city council upon appeal, and the failure to take such appeal was conclusive upon the owner as well as upon the contractor. *Himmelman v. Hoadley*, supra; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. Rep. 1143. If the lot of *Williams* as assessed was partly within the 980 feet authorized by the resolution of intention to be "improved" by the sewer, and partly outside thereof, it was the duty of plaintiffs to appeal to the city council within 30 days after the date of the warrant for the purpose of having the assessment corrected. Upon such appeal the city council would have limited the assessment to the 980 feet authorized by their resolution of intention. Section 11 of the act of March 18, 1885, (St. 1885, p. 156,) provides that "the contractor \* \* \* having or making any objections to the correctness or legality of the assessment \* \* \* shall, within thirty days after the date of the warrant, appeal to the city council. \* \* \* Upon such appeal the said city council may \* \* \* set aside, alter, modify, or correct the assessment in such manner as to them shall

seem just; \* \* \* and may instruct and direct the superintendent of streets to correct the assessment in any particular, or to make and issue a new assessment to conform to the decisions of the city council in relation thereto. All the decisions and determinations of said city council \* \* \* shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided." It was the duty of the plaintiffs, and not of Williams, to take this appeal. They were interested in having a legal and correct assessment. If the assessment was illegal and created no lien upon his land, Williams was not a person who would feel "aggrieved," and was not required to appeal for the purpose of giving to the plaintiff a valid assessment. *Smith v. Cofran*, 34 Cal. 310. It follows that inasmuch as the plaintiffs did not appeal from the act of the superintendent of streets in making the original assessment, they are concluded thereby, and are not entitled to have it corrected in any other mode. It is unnecessary to decide whether any part of the work to be done under the resolution of intention "is the improvement of an entire crossing," or whether it was necessary to post notices of the passage of the resolution "in front of each quarter block liable to be assessed." The order appealed from is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.  
(37 Cal. 597)

FINCH v. RIVERSIDE & A. RY. CO. (No. 13,657.)

(*Supreme Court of California*. Feb. 2, 1891.)

STREET RAILWAYS—CONSTRUCTION—RIGHTS OF ABUTTERS—FRANCHISE.

1. A street-railway company may use a street for its track without compensating the owner of the fee. Distinguishing *Weyl v. Railroad Co.*, 69 Cal. 203, 10 Pac. Rep. 510.

2. In Civil Code Cal. § 493, requiring street-railway tracks to be placed as "nearly as possible" in the middle of the street, the words "as nearly as possible" are equivalent to "as nearly as practicable."

3. Where the only evidence that it is impracticable to place the track in the middle of the street is the testimony of two witnesses that to so place it would interfere with traffic somewhat, because, the street being only 40 feet wide, there would not be room for teams to pass on either side of the track, but who do not state that there is an extensive traffic on the street, nor that it would not be practicable to put the track in the middle, it is insufficient to support a finding that it was not "practicable" to locate the track in the middle of the street.

4. Where a member of the board of city trustees is a subscriber to the stock of a corporation obtaining the franchise for a street railway, and is himself one of the committee to whom the application for the franchise is referred, which committee reports favorably, the franchise is void, notwithstanding that no corporation was formed at the time the stock was subscribed for, and that the franchise was granted to individuals, a committee of the subscribers, who conveyed it to the company.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

H. C. Rolfe, for appellant. W. J. McIntyre, for respondent.

HAYNE, C. This was an action of ejectment brought by the owner of the fee of one-half of a street in the city of Riverside called "Cypress Avenue," against a street-car company, which was alleged to be using such half of the street in an unauthorized and unlawful manner. The trial court gave judgment for the defendant, and the plaintiff appeals.

There is no dispute about the plaintiff's ownership of the fee of half of the street, nor about the existence of the street, and the consequent right of the public to use it as a highway. The question litigated is whether the defendant's use of it was unauthorized and unlawful. In this regard several points are made.

1. It is contended that the defendant could not use the street for the purposes of its track without first making compensation to the plaintiff, and the case of *Weyl v. Railroad Co.*, 69 Cal. 203, 10 Pac. Rep. 510, is cited. But that case was not in relation to a street railway, but to an ordinary railroad whose route took it through a street. And we think there is a difference between such a case and the present. The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street in a city or town for the tracks of a street-car company is of this class, and is therefore authorized.

2. It is argued that the track was not located as required by law. The provision of statute in relation to the subject is that "the city or town authorities, in granting the right of way to street-railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with the following conditions: \* \* \* First, to construct their track on those portions of the street designated in the ordinance granting the right, which must be as nearly as possible in the middle of the street." Civil Code, § 498. The order granting the franchise did not prescribe the precise part of the street upon which the track was to be located. It was merely that the franchise be granted to the applicants "according to their application;" and, while the application named the streets through which the road was to run, it did not refer to any particular portion of any street. There was, however, a general ordinance, applicable to all street-car companies, providing that "the track shall be laid as near the center of the street or streets along the route of the railway as practicable." It will be observed that the effect of this was that the board did not exercise its own judgment as to the portion of the street to be occupied by the track, but left it to the company to construct their track as near the middle of the street "as practicable." The company evidently did not consider it practicable to place the track in the middle of the street, and accordingly placed it on the side next the plaintiff's lot. The precise location is not shown by the record; but the court finds that "it was not practicable to locate the track in the middle of Cypress avenue." The court further finds that the franchise provided that the track was to be laid "along the eastern side of Cypress avenue," (which, as

above shown, it did not provide;) and that "the location of the defendant's track was in conformity with the requirements of said franchise." The plaintiff's position is, in the first place, that the words "as nearly as possible" do not mean "as nearly as practicable," as held by the trial court; and that, even if they do, the finding that it was not practicable to locate the track in the middle of the street is not sustained by the evidence. In relation to the first question we think that the statute means "as nearly as practicable." As a matter of course, it is always physically possible to place a track in the middle of a street. It may not be legally possible. For example, there may already be a track there under a franchise which it is beyond the power of the board to revoke. But even if a track were placed in the middle of the street, under a revocable license, we think that the board would have power to authorize the laying of another track so as not to interfere with the first. So if, as is sometimes the case in rural towns, a row of trees were in the middle of the street, the track could be placed on one side. And we are not prepared to say that the conditions of traffic might not be such as to require a similar location. The use of the words "as nearly," in connection with "as possible," shows that it was foreseen that a location in the middle of the street could not always be made; and we think that, from the nature of the case, the meaning must be that the location must be controlled in some degree by the circumstances of the particular case.

But we do not think that the evidence in the case before us shows any reason why the track could not be located in the middle of the street. Only two witnesses testified on the subject. One of them said, in substance, that it was "impractical" to place such a track in the middle of such a narrow street, (it was 40 feet wide,) because it would interfere with traffic. To use his own language: "It is impractical to put it in the center of such a narrow street, because it interferes a little bit with the travel, just about the same as when Mr. Finch goes across to his lot 210. It interferes with the travel in passing teams. If the travel is very great, it interferes materially. It depends on how much travel there is." But the witness did not state how much travel there was. The other witness said that a track in the middle of a street would interfere with traffic "very extensively." But he went on to say: "Putting a street railway in such a street would interfere with the use of the street for other travel wherever you put it. But I should deem it advisable not to put any street railway in the center of such a narrow street, for the reason that it will obstruct the travel to such extent that teams, for instance, cannot pass each other on either side of the track without crossing the track. There would be no room on each side for teams to pass. \* \* \* Of course it is practicable." The effect of this testimony is merely that in the opinion of the witnesses the requirement of the law is wrong, and that it is more convenient to the traveling public to have the track on the side of the street.

But the law certainly means more than this. It is an injustice to the property owners on one side of the street to have the obstruction placed close to their doors. And for this, among other reasons, the law requires that it must be placed as near the middle of the street as practicable, and enjoins a "strict compliance" with the requirement.

3. It is contended that the franchise is void because a subscriber to the stock of the company was a member of the board of city trustees, and took an active part in the proceedings in relation to the franchise; and we think that this position must be sustained. It appears that when the application for the franchise was made a number of protests were put in, and the matter was referred to a committee of two, of which E. W. Holmes was one. This committee made a report in writing, recommending that the application be granted. The report was adopted, and the franchise granted at the next meeting. Several months prior to this an agreement to subscribe to the capital stock of a street-car company to be formed on lines similar to those of the defendant was gotten up, and by it E. W. Holmes subscribed for 200 shares of stock. A committee of subscribers was appointed to apply for a franchise. The *personnel* of this committee was subsequently changed to some extent. The application was made by the committee, and was granted, on the favorable report of the committee of two, of which Holmes was a member, as above stated. Subsequently the committee made a deed of the franchise to the company. It is true that there was no testimony to show that E. W. Holmes, the city trustee, was the same person as E. W. Holmes, the subscriber. But, in the absence of evidence to the contrary, identity of person will be presumed from identity of name. It is also true that no corporation was formed at the time of the subscription, and that the franchise was granted to several individuals, and not to a company. But, as above shown, the individuals constituted a committee of the subscribers appointed for the purpose of applying for the franchise, and after they obtained it they transferred it to the company formed in pursuance of the subscription. We think that it sufficiently appears that the franchise was granted for the benefit of a corporation to be organized by a number of subscribers, of whom the city trustee was one, and was subsequently transferred to the corporation; and, taking this to be the fact, the case falls within the principle of *San Diego v. Railroad Co.*, 44 Cal. 106. The trustee was one of a committee of two to whom the application was referred, and the favorable report of this committee, which was adopted by the board, must have influenced its action. In our opinion this vitiated the franchise. For the above reasons we think that the defendant was a mere intruder upon the street, and under the case of *Weyl v. Railroad Co.*, above cited, the plaintiff can maintain ejectment against it. We therefore advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial.

(87 Cal. 603)

YARNELL v. CITY OF LOS ANGELES *et al.*  
(No. 13,920.)

(Supreme Court of California. Feb. 3, 1891.)

DEPOSITARIES OF PUBLIC MONIES—CONSTITUTIONAL LAW.

1. The charter of Los Angeles, § 44, (Act Cal. Jan. 31, 1889,) directing the city council to appoint as a depositary of the public moneys the bank offering the highest rate of interest therefor, and the treasurer to deposit the city funds there daily, is void, being inconsistent with Const. Cal. art. 11, §§ 13, 16, 17, providing that the legislature shall not delegate to any private corporation, company, or individual the right to interfere with or control any county, city, or municipal money, and that the public moneys shall be deposited with the treasurer, and that making any profit out of such moneys shall be a felony; and also with Pen. Code Cal. §§ 424, 426, punishing by imprisonment the misappropriation of public moneys by the person charged with keeping them.

2. A tax-payer of the city can sue to enjoin the execution of an illegal contract by the city with a bank for the deposit with it of the public moneys.

Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

*Chapman & Hendrick*, for appellant. *C. McFarland, S. M. White, and Graff, Gibbon & Creighton*, for respondents

McFARLAND, J. This is an action brought by a resident, and tax-payer, against the city of Los Angeles, M. D. Johnson, treasurer of said city, and the City Bank, a private corporation. The purpose of the action is to enjoin the said treasurer from depositing the public moneys of the city with said bank, pursuant to a certain contract between the city and the bank. Defendants filed a general demurrer "that said complaint does not state facts sufficient to constitute a cause of action." An answer and supplemental answer were filed, together with some affidavits, and the case was submitted. Subsequently the court rendered judgment, by which it was "ordered, adjudged, and decreed that the demurrer to the complaint be sustained;" that plaintiff was not entitled to the injunction; that the order to show cause be discharged, and the action dismissed; and that defendants recover their costs. Plaintiff appeals from the judgment, and it is clear that the appeal turns upon the sufficiency of the complaint, and the correctness of the decision of the court upon the demurrer. Upon the face of the complaint appear the following facts: The city of Los Angeles is a municipal corporation existing under what is generally called a "freeholders' charter," formed in pursuance of the amendment of section 8 of article 11 of the state constitution, approved March 10, 1887, (St. 1887, p. 88.) The charter was approved by the senate and assembly on January 31, 1889. Section 44 of the charter provides, among other things, (in

brief,) that it shall be the duty of the city clerk, on a certain day of January in each year, to advertise for sealed proposals from banks of deposit as to the terms upon which they will "receive and disburse the public moneys of said city." The proposals are to specify the rate of interest, estimated upon daily balances, which the bank will allow on the public moneys deposited; and "the bank offering the highest rate of interest shall be appointed the depositary of public moneys." After it is ascertained who is the highest bidder, the council is to enter into a contract with the bank, providing that the latter shall pay "all warrants drawn upon the city treasurer" so long as there is city money in the bank to meet the warrants on the various funds. Provision is made for a bond to be given by the bank. "Upon approval of such bond, and the signing of such contract, the council shall direct the city treasurer to deposit each day, when such bank is open for transaction of business, with the bank thus selected, all public moneys of said city by him collected or received. For each such deposit the treasurer shall take the receipt of the bank, and from and after the deposit of such money in said bank the treasurer and his bondsmen shall no longer be liable therefor." Under this section of the charter the city made the kind of contract provided for therein with the defendant the City Bank, and the defendant Johnson, treasurer, was, under such contract, about to deposit the public money in said bank when this action was commenced. The question presented is whether or not the provisions of said section 44 of the charter are constitutional and valid.

Section 6 of article 11 of the constitution provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws;" and the amendment to section 8, of article 11, under which the Los Angeles charter was framed, provides that certain cities may frame charters for their own government, "consistent with and subject to the constitution and laws of this state." If, therefore, the provisions above stated of said section 44 of the charter in question are inconsistent either with the constitution or with any law which is "general" in the sense in which it is used in the clauses above quoted, then they are invalid and void. And we think that they are inconsistent with both. There are several clauses of the constitution which point to the intent that public moneys shall not be used by or for the benefit of private persons and corporations, but one or two of them only need be invoked here. Section 12 of article 11 provides that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." The only method

proposed to avoid this provision is to say that while the legislature may not do the thing prohibited it may authorize its creatures, municipal corporations, to do it. But the thing which the legislature is forbidden to do it cannot delegate to another to do, unless such power of delegation is given by the constitution itself. And in other places there is such power of delegation given; for instance, in section 12 of article 11 the legislature is forbidden to impose taxes on municipalities for municipal purposes, but may, by general laws, vest such power in the municipal authorities; and in section 14 of the same article, the legislature is prohibited from creating any offices in municipalities for the inspection, etc., of merchandise, etc.; but it is provided that the municipality "may, when authorized by general law, appoint such officers." In section 13, however, there is no such power of delegation given. Under the construction contended for by respondent, while the legislature is prohibited by section 26 of article 4 from authorizing lotteries, it could give that power to municipalities. Again, carrying out the same intention, section 16 of article 11, which does not speak of the legislature, but deals directly with municipalities themselves, provides that all moneys of any municipal corporation coming into the hands of any officer thereof shall immediately be deposited "with the treasurer, or other legal depository, to the credit of such city, town, or other corporation, respectively, for the benefit of the funds to which they respectively belong." The word "treasurer" is the one by which the custodian of public money is usually designated, and he is a public officer; and the phrase "other legal depository" is clearly used to designate such public officer, whether he be called in any particular municipality "treasurer" or by some other name. It certainly does not mean a private individual or corporation. And in the case at bar the relation between the city and the City Bank, under the contract, is, we think, simply that of creditor and debtor,—the bank being a borrower of the public money. But if the bank could be held to be a public officer, then the contract would be in the face of section 17 of article 11, which provides that "the making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law." In this section the phrase "making of profit out of county, city, town, or other public money" is an independent clause, and, of itself, constitutes a felony, and is not dependent upon the subsequent words, "not authorized by law," so that these latter words need not be here construed.

We think, also, that the section of the charter under review is inconsistent with both the spirit and the letter of the general laws of the state relating to public moneys. For instance, section 426 of the Penal Code defines "public moneys" as including all moneys belonging to "any city,

county, town, or district;" and section 424 provides that "each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who" commits certain acts with respect to such public moneys as are enumerated in ten subdivisions of the section "is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state." This is certainly a "general law" within any reasonable definition of that term that could be suggested, and the forty-fourth section of the charter is clearly inconsistent with it. Counsel contend that said section 424 (Pen. Code) is qualified, in most part at least, by the words "without authority of law," which occur in the first subdivision. But, waiving here the meaning of the word "law," as applied to a charter adopted by only a part of the law-making power, it is sufficient to say that section 424 enumerates a great many things which one having custody of public moneys may do which are not "authorized by law" in any sense, and which are declared to be crimes punishable by imprisonment in the state prison, and by debarment from office. But if a private corporation should commit any of these crimes, how could it be made to suffer the penalty prescribed? It has neither a body to be imprisoned, nor a right to hold office of which it could be deprived. It seems clear, therefore, that a scheme which places public moneys in the possession and control of a private corporation is entirely inconsistent with the provisions of the section of the Code above quoted. Without referring with further detail to other provisions of the constitution and the laws, our conclusion is that the parts of section 44 of the charter of the city above referred to, and the said contract attempted to be made under it, are inconsistent with both the constitution and the general laws of the state; that the complaint in this action states facts sufficient to constitute a cause of action; and that the court below erred in sustaining the demurrer.

(The point is hinted at, though not pressed in the briefs, that a tax-payer cannot maintain this action. We suppose that counsel wish the case decided on its merits, and not upon an issue in the nature of one raised by a dilatory plea, for their arguments go almost entirely to the point of the constitutionality and validity of the part of the charter assailed. We think, however, that in this case, where it is proposed to take all the public moneys of the municipality out of the hands of their legal custodian, and place them in the possession and control of a private corporation, a tax-payer has sufficient interest in the subject-matter to prevent by suit the consummation of the illegal act.)

The judgment is reversed, with direction to the superior court to overrule the demurrer to the complaint.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

POTTER v. JONES *et al.*

(Supreme Court of Oregon. Jan. 6, 1891.)

## WILLS—TESTAMENTARY CAPACITY—INSANE DELUSIONS.

1. Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. They have no foundation in reality, and spring from a diseased or morbid condition of the mind.

2. Where a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity. But where the belief or aversion to the contestant was formed on an apparent cause, leading on his part to a view unjust and erroneous, this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject. It shows a bad judgment upon an insufficient state of facts, but not that his conclusion was formed without any foundation in fact, apparent or otherwise.

3. It is not enough that a delusion may exist, but its connection with the testator's will must be made manifest and shown to have influenced its provisions before the will can be set aside and declared void.

4. Where it was claimed that the testator was the subject of an insane delusion, but admitted to be of sound mind on all other subjects not connected with such delusion, but which delusion, the evidence disclosed,—assuming such delusion to have ever existed,—was not present influencing him when he executed the will, *held*, that the will was valid.

5. While it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cut them all off and devise it to strangers, from some unworthy motive, yet as long as that motive, whether from pride or aversion, spite or prejudice, is not resolvable into mental perversion, no court can interfere.

6. It is enough that the law recognized the right of the parent to make such testamentary disposition of his property as he chooses to select as the subject of his bounty, and in the exercise of this right he may have reasons satisfactory to himself why some of his children should enjoy his estate while others are excluded. Some may be more deserving than others,—more needful of help, for various reasons; some may have contributed largely to its acquisition. These and other reasons may exert an influence in favor of some and in exclusion of others.

(Syllabus by the Court.)

Appeal from circuit court, Clackamas county; FRANK J. TAYLOR, Judge.

W. W. Thayer and C. D. & D. C. Lauterett, for appellants. Ira Jones and D. Stuart, for respondent.

LORD, J. This was a proceeding instituted in the county court of Clackamas county by the contestant to have the order admitting to probate the will of her father, Cyrus W. Jones, deceased, vacated and annulled, and the will set aside and declared void. The will was executed on the 19th day of January, 1887, and the testator died on the 20th day of August, 1887, leaving several children, to whom he devised his property, with the sole exception of the contestant, who was excluded from its bounty. The proceeding resulted in a decree vacating the order, and setting aside the will as void, which was affirmed on appeal by a de-

creed of the circuit court, and from which this appeal is taken. The theory upon which the will is alleged to be void is that the testator, though conceded to be of sound mind upon all other subjects, was laboring under a delusion in relation to the legitimacy of his daughter, the contestant, causing him to entertain a violent hatred or insane aversion towards her, which rendered him wholly incapable of doing any legal act in which her interest was involved, and which so affected and influenced him at the time of the execution of his will as caused him to deprive her of all benefit in his estate. The record discloses that the testator was married to his wife on the 10th day of May, 1835, in the state of Ohio; that a few years thereafter they emigrated to Missouri, where they continued to reside until 1861, when they emigrated to Oregon, having at this time a family of 10 children, and settled in Marion county, on what is commonly known as "Mission Bottom." Here they continued to reside until 1865, when they started on a return trip to Missouri, taking with them two of their boys and three of their girls, one of whom is the contestant, and going by the way of California, where they stopped for a short time and where the two boys concluded to remain. The parents with these three daughters went on to Missouri, and after their arrival there his wife and the contestant of their own choice left him and went to Ohio, where they remained and never lived afterwards with him. The testator returned to Oregon in 1867 with the other two girls. He bought another farm in Marion county, where he resided for a few years, and then purchased the farm in Clackamas county, to which he moved, and where he was living when the will was executed and until his death. In 1872 he obtained a decree of divorce from his wife on the ground of desertion and cruel treatment. The evidence shows that the testator was a man of sensitive disposition and of a nervous and jealous temperament; that early after his marriage, and especially while he and his wife resided in Missouri, he became suspicious of her chastity, and entertained the belief that she was intimate with a man who met her near a certain spring for adulterous purposes, and that two of the children—the contestant and Calvin Jones—were the offspring of such adulterous embraces. He also expressed the belief that another person in Oregon, while they lived together here, was on intimate terms with her, and at one time sought to chastise him for his supposed conduct. This belief, however, in the infidelity of his wife and the illegitimacy of two of his children was not proclaimed from the housetop, or to every one; but with few exceptions, and those intimate friends, it was only communicated to his brothers. His daughters who lived with him are now married, and never seem to have heard of the matter or knew he entertained such a belief until the commencement of this suit. They knew that there was an estrangement between their parents and that they did not live happily together, but they never supposed the cause of it was due to any morbid delusion involving the chas-



tity of their mother or the illegitimacy of any of the children. To avoid prolixity, we shall say our conviction from the evidences is that his wife was a chaste woman and faithful to her marriage vows, and that the two children named were not the spurious product of her adulterous embraces with another man; but the fact remains, according to the testimony of those to whom he confided his domestic troubles, that he always furnished some grounds for his belief. He identified the party and the place, and described the clandestine manner in which their improper meeting was affected. That such things could occur, or have occurred under less probable circumstances, will not be denied; they are only rendered improbable in the present instance by the absolute confidence expressed in her marital fidelity by her acquaintances. While, therefore, we shall regard this suspicion or belief of her infidelity to her marriage bed with its attendant circumstances as unjust and unworthy of belief, we cannot disregard the fact that there was the opportunity for the parties to have met at the spring, and that it might have occurred in reality for perfectly proper and innocent purposes or without evil design or any concert of action; yet to a man of the testator's sensitive and jealous disposition a trifling circumstance of this kind or a slightly imprudent act would incite his distrust and fill him with jealous suspicions. Whether there were any such visits to the spring near his residence, surreptitious or otherwise, by his wife and the suspected party while they lived in Missouri, there is nothing shown by the evidence, except his declarations, to the persons already referred to, that he had often seen such party go to the spring, when his wife would don her bonnet and go clandestinely to the same place. The evidence of those whose testimony leads to the conviction that his suspicions or accusations were unjust and unfounded rests not upon any knowledge of the facts one way or the other, but on their knowledge of her character and confidence in her chastity as inconsistent with such conduct. Mr. Sampson Jones and his wife, people of excellent character, and whose testimony is entitled to credit, to whom the testator perhaps talked and gave vent to his insinuations and suspicions with more freedom than any others, regarded his accusations of unchastity as unjust and untrue, and the circumstances which gave rise to them as too inconsistent with her character to be worthy of belief, and express the opinion that she was faithful to her marriage vows and the duties of a wife, and that in view of his conduct the testator was laboring under a delusion upon this matter. Stress and importance have been given to this phase of the case and the evidence, as it is the main starting point of his domestic woes and infelicities, of his suspicions of his wife's infidelity and the illegitimacy of his two children,—the contestant and her brother Calvin Jones. It is true that while they lived in Missouri and in Oregon between 1861 and 1865 their married lives were embittered by estrange-

ments. Much of the time they refused to speak with each other or to conduct themselves in any way calculated to resume confidence and affection; and it was doubtless during some such period, when the cup of their domestic unhappiness was overflowing, that the testator was disposed to give vent to his feelings and indulge in unjust accusations against his wife's chastity in the manner described by some of his relatives. It was about this time, when the testator and his wife were estranged and not on speaking terms, although living together as husband and wife, that the conversation with Northcutt took place in which that witness represents him as inveighing with great temper and acrimony against his wife's marital infidelity. There is no doubt that he was extremely jealous of his wife, and entertained a strong suspicion, if not conviction, of her infidelity and his own dishonor. But this was the time when their domestic troubles were hastening to a culmination which finally ended in separation. When they arrived in Missouri after leaving this state in 1865, Mrs. Wright, one of the daughters, gives an account of the separation of the testator and her mother. She heard her mother say to her father: "You have brought me here with the intention of leaving me here;" and father said: "No, I did not; if you want to go to Oregon with us you can;" and that her mother said she was going to Ohio; that as to the children "he gave us the choice to stay or go with him; that mother left us and went to Ohio with Libby Potter, [the contestant,] and shortly after that we started for Oregon."

Mrs. White, the other daughter, testified to the same, substantially. The contestant remembered "that her mother and father had a conversation after they went back to Missouri about separating." She does not know the cause of it, except she thought they were in bad humor; nor had she ever heard of any insane delusion or insanity on the part of her father until after his death, and heard that from her attorneys; nor does she remember that she ever heard her mother say anything about it. She remembers that her father was not given to caressing his children,—never caressed her nor repulsed her. Thinks she disliked her father at the time her mother left him, and remembers that she preferred to go with her mother when she left her father in Missouri and went back to Ohio; that she slept with her mother and father on the trip at the foot of the bed; that he never whipped or abused her; that she saw him whip one of the children; that her father gave her mother some money when they left for Ohio, but does not think it exceeded \$300; that her mother received notice of the divorce proceedings in Oregon while she was living in Ohio; that neither her mother nor the contestant ever lived with their father afterwards; that she is married and has two children, is in good circumstances, and resides in Missouri. The evidence shows that the testator and his other two daughters returned to Oregon, and finally settled in Clackamas county, and lived

there until his death, in 1887. The subscribing witnesses to the execution of the will were old acquaintances living in the neighborhood, who had traded with him, hunted and traveled together, had visited at his house, attended school-meetings together, met at the stores and other places, and they concur in the opinion that his mind was sound and free from all disturbing influences when he executed his will; that he mentioned the portions to be given to each of the children, and betrayed no bad humor, or anything to indicate that he was not rational; that he understood his business and the property he possessed and how he wished to have it distributed. His physicians, who had known him for years and who attended him, also express the opinion that he was rational, knew what he was doing and how he was doing it, and that he was competent at the time to execute a will, and that it was the product of his own free agency. They did not interrogate him in respect to his family matters. They never had had any conversation with him on this subject, and perhaps knew nothing about it, and only think from what they saw and observed that his mind was free from any disturbing influences, and that when he executed his will he knew and understood what he was doing. The evidence also shows that during the last 20 years—from the time he returned to Oregon until his death—he acquired property, was industrious and frugal, was a man of good judgment and business sagacity, attended to his own affairs, dealt extensively with numerous persons, took a proper interest in neighborhood matters, lived to a ripe old age,—past threescore and ten,—and, with the children about him who had chosen to remain with him, made his will giving his property to them. His reasons for disposing of his property in the manner he did and of excluding the contestant from his bounty is, taking the statement of the witnesses together for brevity, that he had given to the contestant and her mother the shares to which they were entitled when they separated; that he understood his daughter (the contestant) was married and had a good home; that he told the children that all of them that wished to remain with him could do so, and that they did so except the contestant, but that he said nothing about her illegitimacy; that he had made up his mind that those who had remained with him and helped to earn it ought to have the benefit of it. Referring to the fact that he wished to will to his wife and the contestant one dollar, as he did when the will was executed, he was asked, "Why do you intend to make your will in that way?" and he said: "The reason is very simple. When I left Missouri the children all went with me except her, and I gave her [his wife] some money; and I came back here, and the children. I have made all that I have got now by my own hands, me and the children here, and that is the reason." That he was in good humor; did not seem to be annoyed, but felt that the children who had remained with and helped him to earn the property which he had acquired were the

rightful objects of his bounty and justly entitled to it under the circumstances. The evidence also shows that at the times mentioned he was as firm in the suspicion or belief that his son Calvin Jones was illegitimate as the contestant, and that he had indicated such belief by much more emphatic language than he had ever indulged in of the contestant; yet he did not exclude him from his share of the estate, but provided for him the same as he had the other children, guided by the principle that those who had remained with him and helped to accumulate the property which he was entitled to dispose of were the proper recipients of his bounty, and its application included his son Calvin, whom he had denounced in the days of his domestic troubles and just before the separation from his wife as a "tow-headed bastard." In this review it will be seen nearly all the important facts in reference to his declarations of his wife's infidelity and the illegitimacy of the two children extend back nearly a quarter of a century, when their lives were embittered by estrangement and their paths rapidly diverging, which was soon to terminate in final separation and divorce. The latest evidence of real importance is Mrs. Jones', of what occurred about the time he procured his divorce in 1872, in which he reiterated his belief in his wife's infidelity and exhibited much temper in its asseveration. As to the circumstances upon which he predicates his belief in the infidelity of his wife and the illegitimacy of the two children, there is no evidence of their existence other than his declarations as stated by the witnesses; but we think the evidence shows that the testator believed that his wife was unfaithful to him, and so expressed himself to those whom he could talk with upon the subject as late as Mrs. Jones' evidence, to which we have just referred.

After this there is little or nothing heard of it, and that of little consequence, and when he did refer to it just before making his will it was without temper or reference to his former suspicions or accusations, and, by his conduct, indicating that his sense of injury was apparently healed over and its effects passed away. The important question for our decision now is, was his belief in the infidelity of his wife and the illegitimacy of the two children an insane delusion, and, if so, was he so affected by such delusion at the time of the execution of his will as caused him to deprive the contestant of all benefit in his estate? This necessarily leads to the inquiry, what is an insane delusion? Sir JOHN NICHOLL in the celebrated case of *Dew v. Clark*, 3 Addams, Ecc. 79, defined "insane delusions" in these words: "Wherever the patient once conceives something extravagant to exist, which still has no existence whatever but in his own heated imagination, and wherever at the same time, having so conceived, he is incapable of being, or at least of being permanently, reasoned out of the conception, such a patient is said to be under a delusion in a peculiar, half-technical sense of the term, and the absence or presence of delusion, so understood, forms in my judgment the

true and only test or criterion of present or absent insanity." In *Boughton v. Knight*, 6 Eng. R. 352, Sir JOHN HANNEN adopted this definition, and expressed the belief that it would solve most if not all of the difficulties which arise in investigations of this kind. In *Banks v. Goodfellow*, L. R. 5 Q. B. 560, COCKBURN, C. J., says: "When delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound." Chief Justice DENIO said: "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity." *Society v. Hopper*, 33 N. Y. 624. See, also, 11 Amer. & Eng. Enc. Law, p. 107, tit. "Insanity." The belief of facts which no rational person would have believed is insane delusion. 1 Williams, Ex'rs, 35; 1 Redf. Wills, 71. And in a later case, (*Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. Rep. 826.) VAN FLEET, Vice-Ordinary, said that "according to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of the mind in which they originate." Tested by these definitions, can it be said upon the facts as disclosed by this record that the testator was beset with an insane delusion in respect to the legitimacy of the contestant and her brother? The circumstances which he relates and upon which his belief is founded fix the place, identify the person and the manner of the improper meeting, nor is there any attempt to deny that there was such a place or person or that such a meeting might not have occurred, only that the adulterous purposes which he ascribed and professed to believe to be the object of such meeting were so absolutely inconsistent with her known character for chastity as to be utterly unworthy of belief, and only to be accounted for in him upon the theory of an unnatural dislike or aversion which amounted to an insane delusion. The evidence in contradiction of his belief proceeds on the assumption that there may have been such a place and man and meeting, and if so, her known character for chastity, her every-day walk and life, render it impossible that it could have occurred for the foul purposes which he imputes, or otherwise

than accidentally and without concert, or evil design in thought or deed. But these facts, however falsely or unjustly he may have reasoned from them, or however absurd his conclusions as applied to the wife and contestant impugned by them, nevertheless furnished the evidence which inspired his suspicions, and the ground upon which his belief was founded. It is conceded that the conclusions he drew from the facts are wholly unwarranted and without any justification, indicating at least an unrelenting, jealous disposition; but unjust and absurd as they may be, they were not the pure creations of a perverted imagination without any foundation in reality. Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist, or imputes the existence of an offense, which no rational person would believe to exist or to have been committed without some kind of evidence to support it. They are as baseless as the fabric of a dream conjured into existence by a disordered or perverted imagination without any sort of foundation in fact. As in *Snee v. Snee*, 5 Prob. Div. 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father in fraud of his rights had distributed to his brothers; or as in *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. In cases like these the belief is the offspring of a disordered mind, and not induced by the existence of any facts or occurrences which could lead any sort of countenance to it. The case at bar is not such. Here there is a claim of facts upon which the belief is founded; and unjust and unfeeling as may be such belief, in view of the known character of his wife for chastity, it is not the spontaneous product of pure fancy, but a grave error showing a lack of judgment or a want of reasoning powers, the outcome of an oversensitive, jealous disposition, prone to exaggerate any trifling circumstance with which his wife may be connected into an unworthy and wicked importance, and to draw from them conclusions untenable, illogical, and unworthy of belief. There is no doubt that the testator was extremely jealous of his wife, and, like all such, disposed to magnify any act or trifling occurrence into undue importance, and to make it the occasion to draw unworthy conclusions of her marital integrity. The experience of mankind has demonstrated that a wife may have a spotless character, she may be justly regarded in the estimation of her friends as without moral blemish and worthy of all confidence and affection, and yet it might happen to her to do some trivial act which would pass unnoticed by them, or any one except the Arguseyes of an ever-watchful and jealous husband, who would stand ready to draw base conclusions from it derogatory to her chastity and character. To minds thus constituted, sometimes even a look of the

wife, or perhaps a facetious or inadvertent remark, or some insignificant circumstance with which she may be associated, although it be wholly innocent, excites their distrust, and fills them with jealous rage; for it is as true now as when first uttered that "trifles light as air are, to the jealous, confirmations strong as proof of holy writ." To support the contention for the contestant, the belief or suspicion the testator entertained of his wife's infidelity and the illegitimacy of the children to be an insane delusion must have been wholly without foundation in reality, and the mere figment of his perverted imagination. But the evidence discloses that it was formed on an apparent cause, leading on his part to a view of his wife's conduct which we have admitted was erroneous, unjust, and unnatural; yet this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect upon the subject. The conclusion which he drew from the facts was untenable and erroneous, and showed that he formed a bad judgment upon an insufficient state of facts, but does not show that his conclusion or belief was formed without any foundation in fact whatever. But even if we assume that his belief was utterly groundless and without any cause, actual or apparent, to justify it, would that authorize us, in view of the circumstances of this cause, to declare the testator was the victim of an insane delusion? In *Re Cole's Will*, 49 Wis. 181, 5 N. W. Rep. 348, Lyon, J., said: "It must be conceded that the belief of the deceased in respect to the unchastity of his wife, persisted in as it was without evidence to support it, and against all reasonable probabilities of its truth, looks very much like insane delusion. Yet it is not necessarily so. Observation teaches us that there is a very large class of people, whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who upon the most trivial, even whimsical, grounds, will wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less extent afflicted with it, to justify us in saying that because the deceased was so afflicted he was insane or the victim of insane delusion. The line between the unfounded and unreasonable suspicions of a sane mind (for doubtless these are such) and insane delusions is sometimes quite indistinct and difficult to be defined." Nor is it enough that a delusion may have existed, but its connection with the will must be made manifest, and shown to have influenced its provisions, before the will can be set aside and declared void.

Nor must it be generally overlooked, in considering this point, that the period of time when the principal witnesses express the opinion that he was the victim of an insane delusion about the chastity of his wife relates to conduct and conversation and circumstances that occurred many years ago; that he was divorced from his

wife in 1872, and that in the year succeeding little or nothing of real importance is ever heard of his suspicions, and when he did speak of her or the contestant in relation to the matter in hand it was with composure, or without insinuations against her marital integrity or the legitimacy of the children. It is necessary, therefore, to show not only that he was the subject of a delusion, an insane hatred or aversion to his daughter, but that it was present when he executed his will, and influenced him in the making of it and in excluding her from its benefits. Upon this point the evidence has already been detailed, and it will be sufficient to briefly advert to it to show that those who were present at the execution of the will, including the subscribing witnesses and his physicians, all concur in the opinion that he was in the possession of all his faculties and free from any mental disturbance impairing his free agency; that he understood the extent of his property, and specified those among whom he wished it to be distributed. Several other witnesses there are with whom he conversed just prior to the making of his will which show his reasons for excluding the contestant, and his appreciation of the claims of those upon whom he thought his property ought to be bestowed. Among these were that the contestant was then in good circumstances; that she had separated from him in early life and chose to remain with her mother; that the property he had acquired was earned by himself and those to whom he intended to will it; that they had helped to lighten his burdens, sympathized with him and cheered him in adversity and disappointment, and were partners in its accumulation,—the justice of whose claims entitle them to it. Among those to whom he distributed his property was Calvin Jones, whom he had considered, as the contestant, to be illegitimate in the years gone by, yet he gave him his share based upon the principle already stated, and which he conceived to be just, and not on account of any belief in his illegitimacy. It would seem if he had been beset by any delusion of this kind it would have operated against him, for its effect is to impair free agency and cause the testator to do what he otherwise would not have done but for the presence of such delusion. His conduct before and at the time of the execution of the will are inconsistent with the existence of such delusion; no feeling of hatred or aversion is evinced; his mind acts from a sense of justice and affection which he feels he owes to those who have been his co-laborers, including Calvin, and influenced by that principle he distributes his estate accordingly. It may be harsh, and under some circumstances cruel, to disinherit one child and to distribute the estate among the others, but if the testator be of sound mind and execute his will as prescribed by law no court can interfere. "It may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust, nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be

the free and unconstrained product of a sound mind, the courts are bound to uphold it." *Middleditch v. Williams*, supra. Sir JOHN HANNEN said: "He may disinherit either wholly or partially his children, and leave his property to strangers, to gratify his spite, or charities to gratify his pride, and we must give effect to his will however much we may condemn the course he has pursued." *Boughton v. Knight*, supra. And among the considerations which turn the scale in favor of the exercise of this testamentary power which may disregard the claim of kindred and disappoint their expectations, COCKBURN, C. J., mentioned these: "Among those who, as a man's nearest relations, would be entitled to share the fortune he leaves behind, some may be better provided for than others; some may be more deserving than others; some, from age, sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment or faithful services may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attention which are its chief consolations." *Banks v. Goodfellow*, supra. The law is settled that if a testator, competent to make a will, executes it according to law, it cannot be disturbed for an inequality or unreasonableness in the distribution of his estate. He is under no obligation to devise it equally to his children or otherwise, but may devise it to a stranger. That fact may be considered as a circumstance in determining testamentary capacity, but, of itself, is not sufficient to set it aside. Where a delusion exists, and it is shown to have had an influence on the testamentary disposition of the property, as in *Dew v. Clark*, supra, consisting of an aversion to kindred, it is usually accompanied "with other signs," says Sir JOHN HANNEN, "which may be relied on to assist us in forming an opinion upon that point." In the case at bar we look in vain for them, but in that case it was the extraordinary importance the testator attached to medical electricity as a means of cure, which he conceived might be applied to almost every purpose. That case well illustrates the existence of a delusion, which consisted in an insane hatred without even the shadow of a cause of his child, persisted in through life, and his will, being shown to be the direct offspring of this delusion, was set aside and declared void. The facts in that case show that the testator entertained an unnatural dislike to his only daughter, whom he imagined vile and profligate, and whom he treated with the utmost severity, stripping her naked and unmercifully flogging her, and then rubbing her back with brine, compelling her to do degrading work, denying her decent clothes, denouncing her whenever she came in his presence, when she was in fact amiable, of superior talents, dutiful and affectionate; indicating that his instincts and affection had become perverted, and his mind a prey to an insane delusion which had affected his will and cut her off with an inadequate provision. But what possible similitude can the case at

bar bear to that case? It is true the father of the contestant did not caress her, nor does it seem that he did the other children; but he did not repulse her, and she owns that she disliked him, and perhaps justly, but he did not whip her although he did some of the other children; nor did he maltreat her, or make any display of any unkind feeling. When his wife decided to leave him and the contestant chose to go with her he gave them money, and the preponderance of evidence is that he gave them their share of what he then possessed. He does not seem to have been a lovable man. He was sensitive and jealous, and, like all such, when brooding over some supposed wrong, indulged in a harsh and cruel judgment against the fidelity of his wife and the legitimacy of two of the children, but this conduct was marked by no course of harsh treatment, no bursts of violence, no display of outrages, or other indignities that we have noticed, and these were only denounced to a few, and generally to those in whom he had a right to confide. The truth is, after their separation, as time passed his sense of injury seems to have gradually healed over and its effects to have passed away, for after this he begins to acquire property, to take an interest in the affairs of his community, and to command the respect and confidence of his friends and acquaintances for his probity and business character, and during all this time so little is said by him to any one of his former grievances or belief, that his daughters are not aware of it until the commencement of this trial. Nor can we find any case upon facts analogous to these, in which it has been held fatal to the validity of the will. In a recent case, (*Barbo v. Rider*, 67 Wis. 600, 31 N. W. Rep. 155,) in which it was held that the appellant was the victim of an insane delusion and mentally incompetent to care for himself or his estate, the evidence showed that his health had been impaired by excessive drinking; that after living happily with his wife for more than 20 years, suddenly and without cause he conceived the idea she had been untrue to him, that she submitted her person to the criminal embraces of a number of men, some of whom she scarcely knew, and that some of these men had begotten children upon her; that he charged her with it and repeated it to all who would listen to him, wrote an incoherent and indecent letter on the subject, became morose and sullen, ceased to take any interest in his family or business, and wandered aimlessly into the fields; that he begged for a division of the property, refused to take medicine, and believed that his friends were trying to poison him. As the court said: "No argument is required to prove that such a change in the nature and conduct of Barbo, such unreasonableness and unfounded hallucinations respecting the chastity of his wife, and his causeless hostility to his family, which yield to no reason or persuasion, are sufficient evidence that he is the unfortunate victim of insane delusion." These cases illustrate delusions, but they are essentially different from the case under consideration. While it seems harsh and cruel, so counter to all the feelings of

our nature, that a parent should disinherit one of his children and devise his property to the others, or to cut them all off and devise it to strangers, from some unworthy motive, yet so long as that motive, whether from pride or aversion, spite or prejudice, is not resolvable into mental perversion, no court can interfere. Reliance can usually be placed on the affections, independent of the law, which parents have for their children, to recognize their claim in the testamentary disposition of their estate. But while this is so, the law recognizes the right of the testator to leave his property to whomsoever he chooses to bestow it, and in the exercise of that right, he may have reason satisfactory to himself why some of his children should enjoy his estate while others are excluded. Some may be more deserving than others,—more needful of help for various causes; some may have contributed largely to its acquisition. These and various other reasons may exert an influence in favor of some and in exclusion of others. The law being so, upon the facts as disclosed by this record, we must give it as our judgment that the will of the testator, sought to be impeached by this proceeding, is valid, and not the product of an insane delusion; and in conclusion it is perhaps due to say that whatever suspicions or belief the testator entertained of his wife's infidelity are refuted by this record; that no wife or mother could be guilty of dishonoring the bed of her husband, and bastardizing her children, whose reputation for chastity and the domestic duties were attested by so many respectable witnesses and contradicted by none. The decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

#### REHART v. REHART.

(*Supreme Court of Oregon.* Feb. 3, 1891.)

**DIVORCE—GROUNDS—DISEASE—EVIDENCE.**

Evidence examined, and held insufficient to entitle plaintiff to a divorce.

(*Syllabus by the Court.*)

Appeal from circuit court, Lake county; L. R. WEBSTER, Judge

Wm. M. Coloig and P. P. Prim, for appellant. C. A. Cogswell and W. D. Fenton, for respondent.

**PER CURIAM.** This is a suit for divorce, on the ground of extreme cruelty. The only ground upon which plaintiff relies in this court for her divorce is the communication to her by defendant of a venereal disease. The evidence is voluminous, and of such a character as renders it highly improper to make any extended extracts therefrom. The question is one of fact, and we deem it only necessary to briefly indicate our conclusions, arrived at after a careful and painstaking examination of the evidence. The parties were married on May 11, 1887, at Lakeview, after an acquaintance of only 15 days, and continued to live together as husband and wife until about the 20th of June, 1888, when plain-

tiff went to San Francisco on a visit, intending to return in a few weeks. After arriving in San Francisco she concluded to separate from defendant, and has from that time continued so to do. The evidence indicates that she married defendant, not on account of any love for him, but with the expectation that "she could leave him afterwards and get some of his money." We think the evidence fails to show a case entitling her to a divorce on the ground indicated. If the disease with which she was affected four or five months after marriage was a venereal disease, and was communicated to her by her husband,—a question, however, by no means free from doubt,—she was informed by him of his probable diseased condition, and the infectious nature of the disease, some 10 or 12 days after marriage, and as soon as he discovered the fact; and, in place of showing that surprise and indignation which would naturally have been exhibited by an innocent, pure-minded woman, she seems only to have been concerned about her own safety. She showed no surprise whatever, but quietly advised him to consult a physician of her acquaintance, and obtain medical treatment, and continued for more than a year, and down to the very last night they were together, willingly and without protest, to submit to his embraces. When she started on her visit to San Francisco, in June, 1888, she did so with the intention of returning in a few weeks to live with him as his wife. It was not until her arrival in San Francisco, her residence before marriage, that she concluded to separate from him. She does not in her testimony claim that she refused to live with him because of the acts charged in the complaint, but because he did not send her the amount of money after her arrival in San Francisco she desired. While she was writing and telegraphing to defendant for money, she was consulting with an attorney in San Francisco about a divorce, and the first indication defendant received that she contemplated leaving him was a letter from her attorney demanding \$10,000, and consent to her obtaining a divorce in San Francisco. The communication by a husband of a venereal disease to his wife knowingly is undoubtedly a good and sufficient cause for a divorce, and cruelty of the most flagrant kind, but when, as in this case, the wife, after being informed of the diseased condition of her husband, and the nature of the disease, consents, willingly and without objection, to continue the marital relations, as did the plaintiff, a court of equity will not aid her in obtaining a divorce, especially when it is apparent that the principal object of the marriage and suit is to obtain a portion of defendant's property. The evidence in this case does not present either of these parties in a favorable light before a court of equity. The conduct of defendant, as disclosed by the testimony, is in many respects to be condemned, and we think he should pay the costs of this suit, both in this court and in the court below. **Affirmed, at defendant's costs.**

(5 N. M. 664)

ALBUQUERQUE NAT. BANK V. PEREA *et al.*  
(*Supreme Court of New Mexico. Jan. 28, 1891.*)

TAXATION OF NATIONAL BANKS—INJUNCTION OF  
COLLECTION.

1. The shares of stock of a national bank are taxable to the owners, and the bank is not liable primarily, or as the agent of the shareholders, under the act of congress, or the revenue laws of this territory, for the payment of a tax levied upon such shares.

2. But if such bank, through its proper officers, voluntarily list such shares as the property of the bank for taxation, and the taxing officers of the territory, in pursuance of such erroneous listing, tax the same in the name of the bank, equity will not relieve the bank from the payment of such tax by enjoining its collection, in the absence of a proper application to all the statutory tribunals authorized to hear such matter and determine and grant the proper relief.

3. Equity will not restrain by injunction the collection of a tax on the ground of excessive valuation, unless the party complaining has exhausted his legal remedies.

(*Syllabus by the Court.*)

Appeal from district court, Bernalillo county.

William B. Childers, for appellant. E. L. Bartlett, Sol. Gen., for appellees.

O'BRIEN, J. The complainant, on the 3d day of November, A. D. 1888, filed his bill of complaint in the district court for the county of Bernalillo against the defendants, Jose L. Perea, sheriff and *ex officio* collector of taxes, and Clifford L. Jackson, district attorney, of said county, for the purpose of obtaining an injunction restraining them from enforcing the collection of certain delinquent taxes assessed to the complainant. The bill, in substance, alleges that complainant made due returns to the county assessor of all its property for taxation. That at such time it protested against the assessment of its property, to-wit, its capital stock and surplus, at any higher rate of valuation than other property taxable in said county, and that it ought not to be assessed at its par value; that is, "that its stock could not be assessed at par, and its surplus at its full money value, because other property in said county and territory is not assessed at its full value." That the assessor, disregarding such protest, assessed said property at its full value. That, upon complainant's appeal from the action of the assessor to the board of county commissioners sitting as a board of equalization, the assessment on its surplus was reduced to 85 per cent. of its par value, while that of its capital stock was left unchanged. That its property valuation then stood as follows: Capital stock, \$100,000; surplus, \$10,000; total, \$110,000. The bill proceeds: "That all other property in said county and territory is not assessed at nearly so high a valuation upon its actual value as said board of equalization assessed your orator's said property. That the average valuation of other property in the hands of individuals and other corporations in said county and territory does not exceed seventy per cent., and that it is so assessed systematically and continuously by the said assessor of said county and said board of equalization, and no valuation

estimated upon its actual value of at least thirty per cent." That bank-stocks in a neighboring county are assessed at less than 85 per cent. of their value. That such discrimination is inequitable, unjust, and unlawful. That the amount of taxes upon said equalized assessment is the sum of \$2,189. That such amount, if lawfully and equitably assessed, would be reduced to \$1,532.30, which sum complainant brings into court, and tenders to defendant Perea. That said defendant refused to accept the same, and threatened to levy upon complainant's property to enforce the payment of the full amount so assessed. The bill continues: "Your orator further alleges that, should it pay the sum so unlawfully demanded of it by virtue of said assessment, and bring suit at law for the recovery thereof as is illegal and unjust, such suit would be unavailing, for the reason that any judgment recovered by your orator against said county of Bernalillo or territory of New Mexico would be paid in warrants of the said county and territory, which said warrants are not worth their face value, but are sold upon the market at a discount, there being no funds in the treasury with which to pay the same, if presented." The bill then informs the court of the legal effect of a forced sale of complainant's property. Then follows the prayer for a writ of injunction, etc. On November 29, 1889, complainant, by leave of the court, filed a supplemental bill, containing additional allegations, in substance as follows: That the shares of its capital stock can only be assessed to the individual owners thereof, and are not subject to assessment and taxation as the property of the bank; that a large portion of such capital stock is owned by non-resident heads of families; that a large portion of complainant's capital stock is invested in government bonds, etc. Defendants demurred to some and answered other portions of the bill. The parties then filed a stipulation, in accordance with which complainant struck from its original and supplemental bills all allegations that the assessor and board of equalization unjustly discriminated in the valuation and assessment of complainant's property. Defendants then withdrew their answer, and stood upon their general demurrer to the bills as amended. The demurrer was sustained, and judgment entered dismissing the bill. The cause is in this court by appeal from such judgment of dismissal. The appellant assigns as error: *First.* The order of the court below sustaining defendants' demurrer to the supplemental bill. *Second.* The demurrer did not answer the allegations that the assessment was upon complainant's capital stock and surplus, and was *in solido*, and against complainant, and not against its shareholders, and was therefore void. *Third.* The demurrer did not apply to the original bill, and the court therefore erred in dismissing the same. *Fourth.* Neither of the assessments for either of the years 1888 or 1889, alleged to have been made on the capital stock, surplus, and personal property of the complainant, against the complainant, and not against the shareholders, is valid, but they are void on their



face, and both the assessor and board of county commissioners sitting as a board of equalization were wholly without jurisdiction to make the same; and the pretended tax-rolls referred to in complainant's bills confer no authority on the defendant collector to enforce the payment of said tax assessment. We shall consider the four assignments together. The statutes of the territory (sections 2822-2825, Comp. Laws 1884) impose the duty upon the assessor to make a proper return of all taxable property in his county, and require all taxable inhabitants to furnish such assessor with a list of all their taxable property, duly verified. The complainant made and delivered to the assessor such list, embracing the property referred to in the bill, including the shares of its capital stock. A certain percentage was extended on all this property at its par value for the purpose of taxation. No complaint was ever made to the assessor or to the county board of equalization that complainant did not own the property so voluntarily listed. Its sole objection was that its property had been assessed higher than a similar property owned by other parties, and that such discrimination was illegal. The public officers had a right to assume that the bank had no other grievance to redress. It never hinted that it had been mistaken in listing the shares of its capital stock as its individual property instead of the property of its shareholders. In such case, when complainant had had ample opportunity to have its error corrected by the proper statutory tribunal, it would be unfair to the public interests to allow it for the first time in its supplemental bill in this suit to set up as the basis of a bill in equity to restrain the collection of a tax its own mistake that misled the revenue officers of the territory, and its subsequent negligence in failing to ask the proper tribunal to relieve it from the consequences thereof. Admitting that the shares of its capital stock should not be assessed *in solido* to it, but to the respective owners, according to interest, we hold that it cannot be heard in this suit to complain of such erroneous assessment. Complainant, and not the public, should be made to suffer the consequences of such mistake. In considering the other points presented by the record, to-wit, that the property taxed was rated at a higher valuation than similar property owned by individuals and other private corporations, it does not appear that such property was valued higher than its market value, but that it was valued too high in comparison with similar property owned by others. We hold that such inequality alone does not afford ground for equitable relief in the present case. It was complainant's duty to apply to all the tribunals established by the laws of the territory to grant the desired relief. See chapter 73, Laws 1887. Failing in this, equity will not restrain the collection of the tax on account of such errors. *Meyer v. Rosenblatt*, 78 Mo. 495. If the county board refused complainant the reduction demanded, an appeal lay to the territorial board, and, having failed to take such appeal in the manner prescribed

by the statute, complainant is not entitled to the relief sought. The foregoing views are, in our opinion, a sufficient answer to all the substantial grounds of error presented by the record. It follows that the judgment appealed from is affirmed.

McFIE, LEE, SEEDS, and FREEMAN, JJ., concur.

(5 N. M. 533)

ARMIGO *et al.* v. ABEYTIA *et al.*

(*Supreme Court of New Mexico. Jan. Term, 1891.*)

APPEAL—REQUISITES—FILING TRANSCRIPT—ACCORD AND SATISFACTION.

1. Under Comp. Laws N. M. 1884, § 2189, providing that if appellant fail to file in the supreme court, at least 10 days before the first day of the term to which the appeal is returnable, a transcript of the record, the appellee may produce in court such transcript, and have the judgment affirmed, unless good cause is shown to the contrary, a motion to affirm will be denied when filed after appellant has filed the transcript less than 10 days before the commencement of the term.

2. Rule 23 of the supreme court provides that appellant shall deliver to the attorney of the adverse party, at least 10 days before the first day of the term, two printed copies of the transcript, and, in case appellant fails to furnish the copies, appellee may, on 24 hours' notice, move on the second day of the term to dismiss or affirm. Comp. Laws N. M. 1884, § 2189, provides that, on appellant's failure to file a transcript 10 days before the first day of the term, the judgment may be affirmed on appellee's motion, "unless good cause is shown to the contrary." *Held*, that where it appears from the affidavit of appellant's counsel that appellant was a poor man, and unable to get the money to pay for printing the transcript until less than 10 days before the first day of the term, the judgment would not be affirmed on appellee's motion, under rule 23.

3. In an action on a sealed contract by which plaintiffs rented to defendants a number of ewes at a certain rent, the ewes to be returned at the termination of the lease, or \$1.25 a head to be paid for all not returned by reason of "accident," and \$1.50 for those disposed of "in any other manner," a plea of accord and satisfaction is bad that sets up that defendants entered into a new contract with plaintiffs, whereby one of defendants agreed to hold the balance of the ewes, after having redelivered a part, and to pay therefor 20 cents per head annual rent, instead of 25 cents as stipulated by the original contract, and that the new contract was executed by that defendant's continuing to hold the sheep thereunder, and that it was agreed that this new contract should be a full and complete satisfaction of the original contract.

4. The fact that the sheep were attached and sold by a creditor of one of defendants, and that plaintiffs replevied them, but afterwards dismissed the suit, constitutes no defense to plaintiffs' suit for the value of those not returned.

5. For the sheep thus attached and sold, defendants must pay \$1.50 apiece, as their loss in this manner is not "accident," within the terms of the contract.

6. Where the contract provides that "the said property [sheep] is to be considered the same as money received," a right of action for its value arises immediately upon the breach, and plaintiffs cannot recover rent also for the time after such breach.

Appeal from district court, Bernalillo county.

William B. Childers, for appellants. Neill B. Field, for appellees.

SEEDS, J. The abstract of the record in this case was filed in the supreme court

upon January —, 1889, being only — days before the first day of the January term of that year. The appellants failed to deliver to the attorney of the appellees two copies of the transcript 10 days before the first day of the term, as required by rule 23 of the rules of the supreme court. The first day of the 1889 term fell upon January 7th. Upon the 5th day of January, 1889, the appellees gave notice to the appellants that they would upon January 8th, being the second day of the term, move the court to strike the case from the docket, and affirm the judgment of the district court. They filed their affidavit and motion, in accordance with that notice, upon January 8, 1889. The motion of the appellees was predicated upon two grounds, viz.: (1) "Because you did not, at least ten days before the first day of the January term, 1889, of said supreme court, file in the office of the clerk of said court a complete transcript of the record and proceedings in said cause." (2) "Because you did not, a least ten days before the first day of the said term of said supreme court, deliver to Neill B. Field, the attorney for the appellees, two printed copies of the transcript of the record in said cause." Counsel for appellees strenuously contends for the rights of his clients under this motion; and as the questions therein raised, if now decided, may definitely settle a matter of procedure, the motion will be considered with some thoroughness.

The two grounds of the motion involve the construction of a section of the Compiled Laws of New Mexico of 1884, (section 2189,) and also of a rule of the supreme court, (No. 23.) Section 2189 provides substantially as follows: The appellant shall file in the supreme court, at least 10 days before the first day of such court to which the appeal is returnable, a perfect transcript of the record and proceedings in the case. If he fail to do so, the appellee may produce in court such transcript; and, if it appears thereby that an appeal has been allowed in the cause, the court shall affirm the judgment, unless good cause shall be shown to the contrary. The facts show that the record was not filed as herein contemplated, but it was filed some — days before the first day of the term, and before the appellee filed his motion to affirm the judgment. Is the motion, upon this ground, well taken?

1. The object of the statute is, undoubtedly, to assure promptness in obtaining the decision of the appellate court, in order that the successful litigant in the *nisi prius* court, if rightfully entitled to his judgment or decree, may not, by negligence or willful dereliction on the part of the appellant, be deprived of his rights. However, it is evident that the enforcement of the appellee's rights under this statute, in the first instance, depends upon his own action. The appellant is *prima facie* negligent, and loses his right to prosecute his appeal, when less than 10 days remain before the first day of the term, and the transcript is not filed. Then is the time for the appellee to move; for immediately, in contemplation of law,

his rights are infringed. He then has a duty to perform,—a duty just as imperative as the previous duty of the appellant,—and that is to produce in court the transcript, and move to affirm the judgment. If he fails to do so, but allows the appellant to file the transcript, the presumption certainly arises that, as he has not moved before, he does not consider his rights interfered with. The appellee contends that it would be a useless and vain thing for him, after the appellant had filed the transcript, to also file a transcript, and then move to affirm the judgment; that the appellant's is sufficient. True, it would be useless and vain; but the error of the learned counsel is in assuming that, immediately upon the closing of the 10 days without appellant's filing the record, he has an absolute right to have the judgment affirmed. If he fails to act with promptness, he may in effect extend the day of grace to his adversary, who may take advantage of it, as in this case. While such statutes should not be so interpreted as to render them easy of evasion, and of no practical value, at the same time they should have some flexibility, so that they may not be oppressive. This holding is not without the support of respectable authorities. Rule 9 of the supreme court of the United States is essentially the same as the statute under consideration; and that court has held that it does not consider the rule as applying where the transcript has been filed by the appellant before the motion to dismiss. *Bingham v. Morris*, 7 Cranch, 99; *Owings v. Tiernan*, 10 Pet. 24; *Sparrow v. Strong*, 3 Wall. 103; *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. Rep. 493.

2. The second ground of the appellee's motion is based upon a portion of rule 23 of the rules of the supreme court, which reads as follows: "And he [the appellant] shall also deliver to the attorney of the adverse party, at least ten days before the first day of the term, two printed copies of said transcript of record." \* \* \* In case the appellant or plaintiff in error neglects to furnish to the adverse party the said number of copies of the transcript of record, the latter shall be entitled to move, on affidavit and twenty-four hours' notice of motion, on the second day of the term, that the cause be stricken from the docket, and the judgment appealed from be affirmed, or the appeal dismissed." It will be noticed that, as to this rule, the day upon which the motion can be filed is fixed,—the second; that it is based upon affidavit and notice of the motion to the appellant 24 hours before its being filed. While the rule contemplates that these copies should be delivered 10 days before the first day, yet it would seem that the delay would not be fatal, if delivered before the filing of the motion; for the rule says, "in case the appellant neglects to furnish," etc., not "neglects to furnish ten days before," etc. But in this case the appellants have neglected to furnish the copies in accordance with the rule, and the appellees have in every particular complied with the requirements as to filing their motion for dismissal. While there is no direct adjudication in the reported

cases of the territory upon this rule, yet there are negative expressions in a number of cases which plainly indicate the opinion of the supreme court upon it. In *Evans v. Baggs*, 4 N. M. 147, 13 Pac. Rep. 207, the court says: "When it is desired to strike out records under this rule, all the requirements of the rule must be complied with. The motion must be filed upon the second day of the term, supported by affidavit; and notice must be served upon appellant or his counsel, twenty-four hours previous to the filing of the motion, that it will be filed, and upon what ground it is based." See, also, *Mora v. Schlick*, 4 N. M. 158, 13 Pac. Rep. 341. The motion under consideration, as to its second ground, fully complied with the rule as interpreted by this court in the above citation. It would seem, therefore, that the motion as to the second ground was well taken, and should be sustained. However, there is another phase of this motion which requires attention. The statute (section 2189) says, among other things, that "the court shall affirm the judgment unless good cause shall be shown to the contrary." The appellant's counsel filed an affidavit in this court alleging that his client was a poor man, and was not able to obtain the money with which to procure a transcript of record of the case until after the time for filing it in the clerk's office had expired. Was this such good cause shown as to take the case out of the statutes? It is not the duty of the attorney to furnish the means for his client. The fact that a man is poor is not, as a general rule, a reason why he should be shown any more leniency than a prosperous person. At the same time, where a man is poor, and makes a laudable effort to protect his rights, and is temporarily embarrassed, he should not be denied the merciful provisions of the law, when by granting it the adversary is in no worse position than he would have been if the unfortunate litigant had been able to do certain acts a few days earlier. It is true that the affiant has not said that his client used due diligence, commensurate with his circumstances, to procure the needed money; but, as the record shows that the transcript was filed five days before the first of the term, the presumption here would certainly be that he had made diligent effort. Of course, as his transcript was in time any way, under the construction heretofore given to the statute, the question is only material upon the second ground. Are we justified in making any exceptions to rule 23? It is conceivable that, if we are not, the righteousness of the statute in its desire to save the rights of those who have failed to file the transcript, but could not do so, in time, though for "a good cause," would be nullified. Suppose a transcript was procured, but before it was filed, through no fault whatever of the appellant, it was burned or stolen; that with all possible celerity it would be impracticable to obtain a new one and file it before the third day of the term. Now, clearly, this would be "a good cause," under the statute, to interfere in behalf of the appellant; but, if the court has no power to relax the rigor of rule 23,

all the appellee would have to do would be to file his notice, affidavit, and motion on the second day, and absolutely deprive the court of its undoubted right under the statute. It does not seem to us that the rule contemplates any such suicidal procedure; but, rather, that while rule 23 is to be sustained in its rigor in all cases where the transcript is in existence in time for a proper filing, yet when the failure to file copies with the adverse attorney in accordance with the rule is because of a failure to file the transcript with the clerk in time, and for that failure there is "a good cause" under the statute, then the same cause will apply to the failure under the rule, and justify this court in refusing to enforce its provisions. It will be borne in mind, however, that we lay down no general rule by which rule 23 can be dispensed with. Each case depends solely upon its own peculiar facts. The affidavit filed in this case, "showing a good cause to the contrary," why the penalties of the statute should not be enforced, and it being evident that the failure in this particular case, under rule 23, is dependent upon the failure under the statute, we believe that the motion of the appellee should be overruled.

This is a case in covenant, upon a contract under seal. The declaration substantially alleges that the plaintiffs' testator rented to the defendants 4,087 ewes for a time determinable at the pleasure of either party; that the defendants were to pay a rental of 25 cents per ewe each year, in advance, upon the 25th of August; that if, by reason of accident, the defendants could not redeliver any of said ewes, then they were to be paid for at the rate of \$1.25 each, but, if they were disposed of by said defendants "in any other manner," then they were to be paid for at the rate of \$1.50 each; that the rental was not paid, and, though often requested, the defendants refused to deliver said ewes. To this declaration the defendants filed sundry pleas, alleging (1) a partial delivery; (2) that there was a new agreement between the plaintiffs and one of these defendants which was a "complete satisfaction of the contract" sued upon; and (3) that the ewes were taken from the defendant Abeytia's possession by the sheriff of Santa Fe county on a writ of attachment upon the suit of one Barela against the said defendant Abeytia; that the plaintiffs herein replevied said property, and returned it to the defendant Abeytia, but afterwards dismissed his suit, whereupon the ewes were returned to the sheriff, who sold them upon the attachment and judgment against the said Abeytia; and that such disposal of the ewes constituted "inevitable accident," whereby it was impossible for the defendants to return said ewes. The plaintiffs demurred to the second and third pleas upon the following grounds: As to the second plea, because (1) it attempts to set up a substituted, unexecuted parol agreement in discharge of the covenant sued on; (2) attempts to set up by way of defense an accord without satisfaction; (3) there was no consideration for the agreement set up in discharge thereof. As to the

third plea, because the institution and commencement of the action of replevin, and the dismissal thereof, was and is, in law, no defense to defendants' breach of covenant set forth in the declaration. The demurrers to these pleas were sustained, to which ruling the defendants excepted. The case was then tried by the court on the issues joined, and judgment given for the plaintiffs. The court found that there had been a partial performance by delivering 1,367 ewes, and the payment of rental up to June 5, 1885, except the sum of \$244.80; that the balance of the contract was unperformed; and the plaintiffs were entitled to recover the value of 2,720 ewes at \$1.50 a head, with rent for 2,720 sheep from June 5, 1885, to the date of the commencement of this action, on August 17, 1886. The defendant filed a motion for a new trial, which was overruled, whereupon he took an appeal, and makes 14 assignments of error. These assignments are interdependent, and in our view of the case a consideration of 3 or 4 disposes of all.

The first, and most material, one is that there was error in sustaining plaintiffs' demurrer to defendants' second plea. It will be necessary to set out the material portions of that plea in order that it may fully appear whether or no there was error. After pleading full payment of rent, a partial delivery of the sheep, and a meeting for the purpose of delivering and receiving the balance of the sheep, the plea continues: "And the defendants further aver that then and there the said defendant Lorenzo A. Abeytia entered into a new contract and agreement with the said plaintiffs, by which he (the said Lorenzo A. Abeytia) agreed to hold the balance of said ewes \* \* \* under a new contract between the said L. A. Abeytia alone and the said plaintiffs, and in accordance with the terms of which he (the said L. A. Abeytia) was to pay twenty cents per head annual rental for the said ewes, and that the said new contract was then and there executed by the said defendant continuing to hold the said ewes thereunder; and that it was then and there agreed by and between the said defendant L. A. Abeytia and the said plaintiffs, in consideration of the said defendant L. A. Abeytia agreeing to hold and continuing to hold the said ewes under said new contract, that the said new contract and agreement should be substituted for the old contract; and the said plaintiffs then and there entered into the said new contract, and agreed that in consideration of the making of said new contract by the said defendant L. A. Abeytia, and the holding of the ewes thereunder as aforesaid, that the same should be a full and complete satisfaction of the contract mentioned in plaintiffs' declaration upon which this suit is brought." It will be noticed that there is no allegation that the balance of the sheep were ever delivered or tendered according to the terms of the original contract. The inference, therefore, is that the defendants failed so to do, and that there was a breach of the contract. This inference is corroborated by the allegations of

the plea, which says that the new contract was "a full and complete satisfaction" of the original contract. If there had been a delivery, there would have been no need of a satisfaction; the delivery would have been a satisfaction. If there was no delivery, then there certainly was a breach. As, then, this new agreement is pleaded as a satisfaction for the original contract, it is certain that it is done so as an accord and satisfaction. Has it set out a good accord and satisfaction?

The appellant argues that the facts alleged in the plea make out a case of performance and satisfaction, or, rather, an abandonment or rescission, not a modification, of the original contract. That it was not a modification seems plain, for the contract pleaded had as one of the parties only one of the defendants, and there is nothing said as to terms except as to holding the sheep, and paying 20 cents per head instead of 25 cents, and there is nothing showing an intention to modify the original contract. Neither is it an abandonment or rescission, as held in the cited case of *Green v. Wells*, 2 Cal. 584. In that case the plaintiffs informed the defendant that they were unable to fulfill their contract, and that they would forfeit the money due them if the defendants would consent to the abandonment of the contract. This the defendants agreed to do. In the case before us a different state of facts exists. The defendants here could have fulfilled their contract. There was nothing due from plaintiffs to these defendants upon which to predicate a consideration for abandoning the original contract. It seems to have been entirely one-sided, and that entirely for this defendant. That the plea makes out a performance and satisfaction is true, if by that is meant an accord and satisfaction. The early cases upon accord and satisfaction held to the doctrine that a contract made under seal could not be satisfied by a parol contract. This has, in a measure, been modified by the later cases where the new agreement was executed. In *Smith's Leading Cases*, in the valuable notes to the case of *Cumber v. Wane*, 1 Strange, 426, upon page 647 of volume 1, (8th Ed.,) it is laid down "that a parol accord and satisfaction cannot discharge the instrument or obligation, but may discharge the money due upon it." If this had been a suit for the rental simply, the plea may have been good; but it would seem that it could not be good in attempting to discharge the instrument itself. There is another serious objection to this plea, and that is that it attempts to discharge a larger obligation by a smaller, without in any way placing the plaintiffs in a better position. The relation would seem to be the same as to the plaintiffs, except that they were to have only 20 cents per head for the sheep instead of 25 cents, and only one bound to pay it instead of three, and with no other terms as to the contract except the agreement to hold the sheep and pay for their use, but when, where, or how is not stated. Upon page 648, vol. 1, *Smith, Lead. Cas.*, we have the result of the cases summarized

in the following language: "It seems to be reasonably well settled by the American cases that the giving and accepting of a smaller sum of money in payment or satisfaction of a larger one due is not a valid discharge, and cannot be pleaded either as payment or as accord and satisfaction." See cases there cited. We think that this new contract was not executed. The defendants plead it as executed by the defendant Abeytia "continuing to hold the said ewes thereunder;" but there is no allegation that the plaintiffs have ever received anything for said sheep under the new contract, nor that the plaintiffs ever had the sheep in their hands, and passed them into the control of the defendants under the new contract. In order to make a good satisfaction for a contract to be set aside, the new contract should have in it an executed consideration of value to the obligee. There is none whatever in this plea shown. There is only a promise to pay 20 cents per head. The obligor has done nothing new; has not changed his position at all; he still holds the sheep. While the manner in which the plea is drawn might at first blush seem to set forth a good defense, yet upon a careful analysis it is apparent that it is fatally defective, and that the ruling sustaining the demurrer was correct.

The second error assigned was that the court erred in sustaining the demurrer to the defendants' plea that the sheep were taken from the defendant Abeytia upon an attachment against him; and that after the plaintiffs had replevied them, and returned them to the defendants, he afterwards dismissed the replevin suit, and allowed them to be sold by the sheriff. We are unable to see any error herein. Possibly, the plaintiffs may have at first thought that he would save his property in the sheep by asserting his prior right to them, and afterwards concluded that, as the defendants held them under a contract, they might protect his right, and that he would look to them for satisfaction, as he had a perfect right to do. It cannot be urged that the contract was at an end by the taking under the replevin, for the plaintiffs immediately passed them into the hands of the defendants, and there was never any agreement that the contract should be terminated by such delivery as contemplated by the contract. Then, too, the evidence conclusively shows that the said replevin suit was instituted for and at the request of the defendants. The sheriff sold said ewes under the attachment and judgment against the defendant Abeytia. The court therefore found that the value of the sheep, under the contract, was \$1.50 per head. To this finding the defendants except, and urge that this is "accident," under the terms of the contract, and their value should be \$1.25 per head. It seems to us that "accident" is any casualty which could not be prevented by ordinary care and diligence. It cannot be presumed that parties will enter into contracts, and place property in another's possession, with a price thereon varying as to contingency, and intend that the lesser sum is to cover the obligor's own fault. The smaller sum was to

protect him against accidents over which he practically had no control; as, for instance, disease. The larger sum was to protect the plaintiffs against the carelessness or fraud of the defendant. He could have saved the sheep by paying his debts. Instead, he saw fit to pay his debts with another person's property. This was clearly disposing of them in "any other manner" than by accident. The court's finding was correct.

The last error which we think material to consider is the eleventh, in which the court refused to declare, as a matter of law, that if a breach of the contract occurred on September 25, 1885, thereafter plaintiffs were not entitled to recover the rent contracted for, but only 6 per cent. interest upon the money due at that time. That the rule here contended for is correct under certain circumstances is undoubtedly true, but whether or no it is applicable here depends upon the terms of the contract, if there are any, governing it. It appears that a value was placed upon the sheep, and the contract specifies that "the said property is to be considered the same as money received." When, then, a breach of the contract occurred, immediately a cause of action arose, and then plaintiffs could have sued thereon, and recovered either the ewes or their value in money. At the time of the breach the plaintiffs could have had the ewes, for they were in the possession of the defendants; or, if they failed to deliver them, then their value, at \$1.50 per head. It rested entirely with the plaintiffs as to when they should begin their suit. Can it be contended that the plaintiffs may speculate upon their right of action? And yet, if the contention of the counsel is correct, they may refuse to institute suit for years, and then recover the value of the sheep, and the rent agreed upon for those years; while, if suit was instituted at once, the damages would be the value of the sheep. The contract was at an end at its breach; the value of the contract then was a moneyed value; the damages for the use of money would be the legal rate of interest. We think, therefore, that the court erred in refusing to declare the law in this respect as asked by the defendant. There was an error of \$502.35 in the judgment. Judgment will therefore be given for \$5,229.42, with interest at 6 per cent. from October 5, 1885.

Judgment affirmed.

O'BRIEN, C. J., and FREEMAN, McFIE, and LEE, JJ., concur.

(5 N. M. 576)

#### CHILDERS v. LEE.

(Supreme Court of New Mexico. Jan. Term, 1891.)

#### LANDLORD AND TENANT—TENANT AT WILL—LEASES.

1. Where one verbally agrees to lease a room for a year provided he himself obtains a renewal of his ground lease, and under this agreement the tenant takes possession, but the lease is never executed nor tendered to him, he is a tenant at will only, not a tenant from year to year, and may abandon the possession without giving six months' notice of his intention to vacate.

2. The statute of frauds, (29 Chas. II. c. 3, § 2,) declaring oral leases to be valid if for a term

not exceeding three years where the rent reserved "shall amount to two-thirds part at least of the thing demised," means that the rent reserved shall be two-thirds of the rental value, not two-thirds of the value of the fee.

Appeal from district court, Bernalillo county.

*William B. Childers*, for appellant. *Neill B. Field*, for appellee.

SEEDS, J. This is the second time that this case has been in this court. It is reported in 4 N. M. 168, 16 Pac. Rep. 275, as *Childers v. Talbott*. The defendant, Talbott, having died since the first hearing, his executor, John A. Lee, was substituted in his place upon the record. There was a retrial before a jury, and, upon motion of the defendant, the court instructed the jury to find for him. It is an action in *assumpsit* against the executor, Lee, for an alleged balance due upon a parol lease. The appellee contends (1) that the lease was void, as being within the statute of frauds, in that it was not to be performed within a year from its agreement; (2) that it did not come under the exception mentioned in section 2 of said statute, which provides, "except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-thirds part at the least of the thing demised," because the amount in value reserved as rent herein means two-thirds of the value of the fee, not the rental value; and (3) that the contract testified to was a mere executory agreement for a lease in writing upon certain conditions, which were never fulfilled, and that, notwithstanding the entry and payment of rent, it was never anything more than an agreement for a future lease, and the occupancy was simply a tenancy at will. The appellant contends, upon the other hand, (1) that the oral lease is good under the second section of the statute of frauds; (2) that, even if it were not, when a party enters under an agreement for a lease for years he becomes, by the payment of rent, a tenant from year to year; (3) an agreement for a lease, under which the lessee goes into possession and pays rent, will be construed to be a present demise; (4) a failure of the lessor to tender a written lease will not justify the lessee in repudiating the contract,—he should demand the lease; (5) though a parol lease, or an agreement for a lease, be void under the statute of frauds, yet if the lessee enters under it the contract will be enforced. He assigns as error therefor (1) the directing of a verdict for the defendant; (2) in overruling the plaintiff's motion for a new trial; (3) in giving judgment for the defendant.

As to the first two contentions of the defendant there is not now room for argument, for while the contract was not to be performed within a year, yet it was a lease for less than three years, upon which the rent reserved was at least two-thirds part of the thing demised; and it is now held in this territory, and is the general holding of the courts of the country, that this means two-thirds part of

the rental value of the demised premises. *Childers v. Talbott*, 4 N. M. 168, 16 Pac. Rep. 275. Whether or no the contention of the appellant is correct depends entirely upon the nature of the holding by Talbott. Was he holding under the oral lease which was to be afterwards simply put into writing? All the testimony was introduced by the plaintiff. The testimony of the defendant, Talbott, taken upon the previous hearing, was introduced by the plaintiff. The evidence was practically unanimous that Mr. Talbott was to have the lease of the room for one year at a monthly rental of \$60 from April 1, 1883, provided that the plaintiff could secure a renewal of the ground lease, which terminated about June 1, 1883; that Talbott went into possession April 1, 1883; that no lease in writing was ever tendered the defendant; that he objected to the closing of a certain door between his room and an adjoining one used as an opera-house; that upon the failure of the plaintiff to open said door he returned the keys to the plaintiff's *cestui que trust*, and tendered the balance of rent up to time of leaving, which was declined, though the keys were retained. Whether or not this oral agreement between Childers and Talbott was a lease, or only an agreement for a lease, depends upon the terms thereof, and the action of the parties under it. If there is a condition attached to the granting of the lease, and it is to be subsequently executed, it operates only as an agreement for a lease. *Tayl. Landl. & Ten.* (8th Ed.) § 39. "Whenever, therefore, the instrument makes the demise dependent on a condition or stipulation yet to be performed, it operates as an agreement only." *Id.* § 40. It is quite certain, then, that the agreement testified to was an agreement for a lease; and until Talbott obtained a written lease, or was entitled to one under this contract, that his holding, whatever its character and consequences, depended entirely upon the oral agreement for a lease. He entered under that. It is contended, therefore, that, as the agreement was for a year, the law contemplates the taking possession and paying the rent as a present demise, and that the tenancy is one from year to year. To this proposition the appellant cites an array of authorities which, if in point, would be absolutely decisive of the question. The cases of *Kerr v. Clark*, 19 Mo. 132; *Laughran v. Smith*, 75 N. Y. 205; and *Koplit v. Gustavus*, 48 Wis. 48, 3 N. W. Rep. 754,—are typical of the doctrine contended for, yet in each case the contract was an oral agreement for a term of years, upon which term the tenant had entered and occupied over one year. It was held in these cases that the terms of the agreement and the acts of the parties conclusively showed that it was an agreement for a lease from year to year. In all these cases where there was an agreement for a lease, and an entry under that agreement, and the courts have held the tenancy to be in accordance with the oral contract, it was possible for the tenant at any time to demand the written lease, and for the landlord to give it. In the

case at bar that rule would not hold. At any time before the renewal of the ground lease by the plaintiff it would have been impossible for the landlord to have given a written lease which would have then and there invested the tenant with a term for a year. Yet the contention is that what the landlord could not do the law by implication will do; for the argument is that, when the tenant entered under the oral agreement, he at once entered upon a tenancy from year to year; not when the ground lease was obtained, but upon April 1st. All the rights of such a tenancy then attached as against the tenant, and, as the rights of the landlord and tenant are reciprocal, against the landlord. Put the position to the test. If, now, the plaintiff had failed to obtain the ground lease, could Talbott have sued Childers for damage for a failure to protect him in his yearly tenancy? Clearly not, under the lease agreed for, for that was a conditional lease; but if, in spite of that condition, he was in for a year under the oral agreement, then the landlord could have been held for damages for a failure to make the term good. This was not contemplated by either the terms of the agreement or acts of the parties. It is quite evident that, under the facts in this case, the tenancy here was not from year to year, but at most at will.

If the tenant had taken the written lease which had been agreed upon, when the plaintiff was in a position to give it, or if it had been tendered him, and without a legal reason he had refused it, there would then have been no question but that the term would have been changed into one from year to year. But there is no evidence whatever that a written lease was ever tendered him; such lease was to be given when the plaintiff obtained a renewal of the ground lease. The presentation of such a lease may reasonably have been considered notice that the plaintiff had received the renewal lease. The fact that the plaintiff did receive the renewal lease did not raise any obligation upon the part of Talbott to demand that the plaintiff should do what he agreed to do. If the plaintiff sought to hold Talbott upon a contract which was to be in writing, and he was to place it in that form, it was his duty to do so, not Talbott's. The cases cited by the plaintiff, being *Fuller v. Hubbard*, 6 Cow. 1, and *Goodfellow v. Noble*, 25 Mo. 60, do not sustain the principle contended for. The fatal error upon which the plaintiff bases his whole case is in assuming that the agreement for a written lease upon conditions, and an entry thereunder, is the creation of a tenancy from year to year absolute in its character, which binds the defendant to pay a year's rent, unless six months' notice of intention to vacate is given. The acts of Talbott in objecting to the closing of the door, and leaving because of the failure upon the part of the plaintiff to remedy it, must be considered in reference to the tenancy which he then had,—that at will. It was that tenancy which he terminated because of the alleged wrong of the plaintiff. If he had been tendered the lease agreed upon, and ac-

cepted it, or without legal reason had refused it, then possibly the reason given for abandoning the tenancy would have been fruitless. The plaintiff declared upon a contract which was only an executory agreement, and, failing to prove himself entitled to rent thereunder, the rulings of the court were proper, and the judgment is affirmed.

O'BRIEN, C. J., and LEE, FREEMAN, and MCFIE, JJ., concur.

(5 N M. 562)

BACHELDER *et al.* v. CHAVES, Sheriff.

(*Supreme Court of New Mexico.* Jan. Term, 1891.)

SHERIFFS—FAILURE TO ENFORCE EXECUTION—INDEMNIFYING BOND.

1. A misrecital in an execution as to the amount of the judgment is an irregularity merely, and does not render the execution void; and, in an action against the sheriff for his failure to enforce the execution, it may be amended so as to conform to the judgment.

2. A mere disclaimer by the judgment debtor of the ownership of personal property in its possession, with an allegation that the title thereto is in a foreign corporation, does not excuse the sheriff's failure to make a levy thereon, as possession of personal property is *prima facie* evidence of title; and it is the sheriff's duty to make the levy unless he knows that the apparent title is different from the real title.

3. A sheriff who has wrongfully levied an execution on the cars, locomotives, road-bed, etc., of a railroad company, greatly exceeding in value the amount of the judgment against it, has no right to demand of plaintiffs an indemnifying bond for the value of the property so wrongfully levied on; and plaintiffs' failure to comply with his demand will not excuse him from selling sufficient of the property to satisfy the judgment, where plaintiffs tendered him an indemnifying bond in double the amount of the judgment.

Error to district court, Santa Fe county.

W. B. Sloan, for plaintiffs in error.  
Thomas Smith, for defendant in error.

FREEMAN, J. This was an action on the case instituted by plaintiffs in error against the defendant in error in the district court of the county of Santa Fe. The plaintiffs in error filed their declaration against the defendant in error at the August term, 1887, alleging that at the July term, 1884, of said court, they obtained a decree against the Texas, Santa Fe & Northern Railroad Company for \$1,346.37, with \$100 attorney's fees, and \$89.75 costs; and that afterwards, to-wit, at the February term, 1887, of said court, "by the consideration of said court, the decree entered at the July term, 1884, was duly docketed, as provided by law, for the sum of sixteen hundred and forty-six dollars and sixty cents, and costs, eighty-nine dollars and seventy-five cents." That afterwards, on the 14th day of March, 1887, an execution was issued on said judgment, directed to the defendant in error as sheriff of Santa Fe county. That defendant in error levied said execution on property of the defendant company, amounting in value to \$3,000. That said defendant in error, disregarding his duty as such sheriff, failed to sell the property so levied upon, and returned said writ, after it had expired, un-



satisfied. That afterwards, to-wit on the 6th of June, 1887, the plaintiffs in error caused the *venditioni exponas* to be issued to the defendant in error, commanding him to sell said property so levied upon; and that said defendant in error refused to execute this writ, to their damage, etc. The defendant filed two pleas to this declaration, the first, a general plea of not guilty; in a second plea, he undertakes to justify his refusal to obey the mandate of the court. It is, in effect, a plea of confession and avoidance, and sets out substantially the following defense: He admits that he was, at the time charged, sheriff of Santa Fe county. That he received in his hands the execution set out in the declaration. That he levied the same upon certain goods and chattels, which he was informed and believed belonged to the defendant company, but was notified by said company that it did not own, claim, or have any interest in said property; and for that reason the property was not sold. That said execution was returned, and thereupon a *venditioni exponas* was issued by the clerk, and the property which had been formerly levied upon advertised to be sold. That upon the day appointed for the sale he was notified by the president of the defendant company that said goods were not the property of the said company, and was also notified by the Southern Trust Company of New York that said goods belonged to the said trust company, which forbade the sale thereof. That thereupon he gave notice to the attorney of the plaintiff that, unless an indemnifying bond "in double the value of the property was executed to this defendant, that such property would not be sold." That the plaintiffs in error refused to execute such bond, and thereupon he adjourned the sale. To this plea plaintiffs filed their replication denying that the property levied upon belonged to the trust company, and averring that the property belonged to the railroad company; and, further, that they, the plaintiffs in error, tendered to the defendant in error a good and sufficient indemnifying bond in double the amount of the judgment. On this state of the pleadings the parties went to trial. On the trial of the cause the plaintiffs in error offered to read as evidence to the jury the execution issued upon the original judgment. To this the defendant in error objected, on the ground that the execution offered in evidence did not agree in amount with the original judgment. This objection being sustained by the court, they moved for leave to correct the execution, so as to make it conform in amount to the judgment. This motion was also denied. They also offered in evidence the original and last or "docketed" decree of the court, the judgment docket, etc., all of which, except the original judgment, was, on the objection of the defendant, excluded. The court thereupon instructed the jury to return a verdict for the defendant, which was accordingly done.

In this we think there was error. It is admitted that the execution differed in amount from the judgment on which it

was issued. It is insisted by the defendant in error that this variance rendered the process void, and some authorities are cited which seem to support this view. We think, however, that the weight of authorities is to the contrary. In *Herman on Executions*, § 65, under the head of "Void Executions," the author mentions, among other defects that render the process void, "a misrecital as to date and amount;" citing *Albee v. Ward*, 8 Mass. 79. The same author, however, in section 66, declares: "Whenever an execution varies from the judgment on which it issued, it may be amended by the judgment so as to conform to it; and, where there is an error as to the amount to be collected, it may be amended at any time, even on the return-day, or after its return." It is claimed, however, by the defendant in error, that while such a writ, as between the judgment creditor and debtor, may be amended, yet it cannot be so amended as to charge the officer refusing to execute it in its defective form. In our opinion, however, the officer's liability depends, not so much upon the regularity, as upon the validity, of the process. The true rule is stated as follows: "When a writ from a court of competent jurisdiction is placed in an officer's hands, he is bound to execute it according to the exigency of the writ, without inquiry into the regularity of the proceedings upon which it was grounded. Nor can he refuse because in his opinion it is irregular, or that the sum varies from the amount for which the judgment was rendered." *Id.* § 146; *Parmelee v. Hitchcock*, 12 Wend. 96. "The cases recognize and affirm a distinction between process which is void, and that which is merely voidable, and it is repeatedly stated that, when a process is void, the sheriff is not bound to execute it, nor liable for any neglect, partial or total. But otherwise, if the process is voidable only; because, if the defendant in the execution does seek to avoid the process, and where the court might, if applied to, allow an amendment, the sheriff cannot avail himself of the defect in the process." *Freem. Ex'ns*, § 103.

Having determined that the process, though irregular, was not void, and that it was the duty of the sheriff to have executed it, we proceed next to inquire if the justification set out in his second plea is sufficient to protect the defendant in error. Omitting the details, the substance of this defense is that the defendant corporation disclaimed the ownership of the property, and that the same was claimed by a foreign corporation. This was not sufficient. The property levied on was in the possession of the defendant corporation; the defendant recites in his return of the original writ that he believed it to belong to the defendant company. "When an officer sees a defendant against whom he holds an execution in possession of property, it is his duty to make a levy, unless he knows that the apparent is different from the real ownership." *Id.* § 252. "Possession of personal property being *prima facie* evidence of ownership, whenever it is shown that the sheriff had knowledge that the defendant in execu-

tion was possessed of personal property, and he fails to levy upon it, the burden of proof is upon him to show that the property was not subject to execution." Taylor v. Wimer, 30 Mo. 129.

The plaintiffs in error, however, tendered the officer a good and sufficient indemnifying bond in a sum equal to double the amount of their judgment. This the officer declined to accept, because it was not in amount sufficient to cover the value of the property levied upon. In this we think the officer was in error. The law authorized him to levy upon only so much property as would be sufficient to satisfy the execution. If he had made an excessive levy, his demand upon the plaintiffs in error was, in effect, that they should not only indemnify him against the consequences of a mistaken ownership of the property, but against his own wrong in having made an excessive levy. A case might occur in which an officer finding but one item of property, and that largely in excess in value of the process to be satisfied, would be entitled to indemnity commensurate with the value of the property levied upon. The extraordinary schedule of property levied on in this case, however, shows that the demand of the defendant in error was unreasonable. The following schedule shows the character and items of property levied upon to satisfy the execution, amounting to \$1,733.97, to-wit: "Two locomotives, one designated as 'No. 5,' the other by name as 'General Melly'; one baggage and express car numbered 15; two passenger coaches, numbered, respectively, 10 and 12; eight freight covered cars, numbered \* \* \*; nine flat-cars, numbered \* \* \*; three coal-cars, numbered \* \* \*; 40,000 feet of manufactured lumber and bridge timber; eighty-five large piles; 7,000 ties; 2,300 splices; one barrel of bolts for splices; forty-seven kegs r/r/spikes; 301 long Trails and 58 common rails; also all the road-bed and right of way from the southern end of the track of said company's road at Santa Fe to the northern line of Santa Fe county; also the ties and rails in place in said road-bed within the county of Santa Fe." The judgment must be reversed and the cause remanded to the lower court, with directions to permit the plaintiffs in error to make such amendments to the execution as will make it conform to the judgment upon which it was issued.

O'BRIEN, C. J., and LEE, SEEDS, and McFIE, JJ., concur.

(5 N. M. 533)

LACEY v. WOODWARD et al.

(Supreme Court of New Mexico. Jan. Term, 1891.)

HARMLESS ERROR—TRIAL—RECALLING WITNESS—MINING LOCATION.

1. In ejectment for a mine, an error by the court in permitting plaintiff to state his opinion as to the damage he suffered in consequence of its detention by defendant is cured by a subsequent ruling that the only damage plaintiff was entitled to was the value of the rents and profits from the commencement of the action to the time of the trial, as provided by the New Mexico statute.

2. It is discretionary with the trial court to permit a witness for plaintiff to be recalled, even after the close of defendant's case, and asked a question which had been overlooked on the direct examination.

3. The fact that a mining locator has failed for one year to perform the annual labor required by Act Cong. May 10, 1872, does not work a forfeiture of the claim, where he in good faith resumes the work before a new location is made by others.

4. Where there is a substantial conflict in evidence, the verdict of the jury will not be disturbed, unless error of law occurred on the trial.

Appeal from district court, Sierra county.

*Elliott & Pickett*, for appellants. *John J. Bell*, for appellee.

LEE, J. This is an action of ejectment, brought originally by plaintiff against the defendants in the district court of Grant county, to recover the possession of the "Star of the West" mine, and damages for the unlawful detention of the same. The venue was afterwards changed to the district court of Sierra county, where, at the November term, 1889, a jury trial was had, which resulted in a verdict of guilty against defendants, and plaintiff's damages were assessed at \$500. A motion for a new trial, made by the defendants, was overruled by the court, and judgment entered in accordance with the verdict, from which judgment the defendants took an appeal to this court.

The first error assigned, and perhaps the principal one in the case, arises upon the following question, asked plaintiff by his counsel, he having been introduced as a witness in his own behalf: "State, Mr. Lacey, to the jury, what you regard as the damages you have suffered in consequence of these defendants taking from you the possession of that mine on the 5th day of November, 1888." The question was objected to for the reason that it called for the opinion of the witness as to the damages he might have sustained. The question was clearly open to the objection made, as well as to others that might be suggested. But whether the ruling of the court in admitting it constitutes error in the case must be taken into consideration with other rulings of the court upon the same question. In answering it the witness said: "Five thousand dollars. I base it on the fact of having a contract of at least two car-loads per day, with the understanding that it could be increased right along to three or four car-loads. In a short time after, I commenced shipping iron, and putting it down at the lowest figure, at fifty cents a ton, for the royalty, you, gentlemen, can figure the thing for yourselves for eleven months, even at two car-loads per day." The counsel for the defendants asked that this testimony be stricken out, as being entirely too remote. The court ruled upon this motion as follows: "I will have to instruct this jury upon the measure of damages. I will not pass finally upon this question now. I will reserve my opinion until a future stage of the case." This witness was recalled later in the case, and was asked practically the same question, as follows: "Mr. Lacey, state to the jury whether or

not you have sustained any damages in consequence of the defendants taking possession of this mining property, and, if so, state the nature of the damages, in what manner you were damaged or injured, and the extent of the injury, commencing from the time of the commencement of this suit, up to the present month." This question was objected to for the reason that the rule, as fixed by statute, reads, "rents and profits of such premises," etc. At this time the court ruled as follows: "I think our statute controls on the subject, and it seems to direct what can be recovered. The question of what is embraced in the name of 'rents and profits' is a matter upon which you may give testimony, but I think we have to be governed by the statute in regard to assessing damages." The question was finally asked by the counsel for plaintiff in the following form: "Mr. Lacey, state to the jury what would be the reasonable value of the rents and profits, if any, of the 'Star of the West' mine now in controversy, from the time you commenced this action to the present time." To this question there was no objection, and, the ruling having finally been in favor of the appellants, and correct in point of law, it leaves the defendant nothing to complain of in this assignment of error.

The fourth error assigned is as follows: "John F. Lacey, the plaintiff, called in rebuttal after the defendants had introduced all their testimony, and closed their case in chief, was asked: 'Mr. Lacey, are you a citizen of the United States, and, if so, how long have you been a citizen?'"—to the admission of which defendants excepted. The record shows that the plaintiff, on motion and by leave of the court, asked the question as a question that had been overlooked on direct examination. The permission was a matter resting in the sound discretion of the court, and, as such, cannot be assigned as error. The rule is thus laid down by the supreme court of the United States in *Railroad Co. v. Stimpson*, 14 Pet. 448: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are matters properly belonging to the practice of circuit courts, with which the supreme court ought not to interfere." The district courts possess this discretion as fully as other judicial tribunals.

Exception was taken to the ruling of the court in refusing an instruction asked by the defendants on the trial, which was as follows: "If you find from the evidence that the plaintiff did not perform one hundred dollars' worth of work on the 'Star of the West' mining claim, located by him in the year 1883, in the year 1887, and that, if he resumed work on the said claim in 1888, and did not perform work thereon to the value of one hundred dollars before the defendants made their location in November of that year, you will find for the defendants, and return your verdict accordingly." If the law was correctly presented to the jury by the court in an instruction which was given on his motion, and which was also excepted to by the defendants, then the above instruction

was erroneous, and properly refused. The instruction given was as follows: "If you believe from the evidence that the plaintiff made a valid location of the 'Star of the West' mining claim on the 1st day of January, 1883, and that he had performed the necessary labor upon said claim, or that if the assessment work was not done for one year, but work upon said claim was resumed in good faith by the plaintiff prior to the making of a valid location of part or all of said claim by the defendants or other parties up to and including the 5th day of November, 1888; and if you further believe that the defendants, or some of them, unlawfully took possession of said mining claim, or a part thereof, and unlawfully withheld from the plaintiff all or a part of said mining claim,—you should find for the plaintiff." We think the law correctly stated in this instruction. It is fully sustained by the supreme court of the United States. In *Belk v. Meagher*, 104 U. S. 282, in an opinion rendered by Chief Justice WAITE, that court says: "For all purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure on claims then in existence might be made at any time before January 1, 1875, and annually thereafter until a patent issued. If it was not made by that time, the claim would be open for relocation, provided work was not resumed upon it by the original locator, or those claiming under him, before a new location was made. Such being the law, it seems to us clear that, if work is resumed upon a claim after it has once been open to relocation, but before a relocation has been made, the rights of the original owners stand as they would if there had been no failure to comply with the conditions of the act. The argument on the part of the plaintiff in error is that if no work is done before January 1, 1875, all rights under the original claim are gone, but that is not, in our opinion, the fair meaning of the language that congress has employed to express its will as we think the exclusive possessory rights of the original locator and his assigns were continued without any work at all until January 1, 1875, and afterwards, if before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred." In this case the evidence tends to show that the plaintiff located this mine January 1, 1883. He performed his annual labor for the years 1884 and 1885. In 1886 he did not perform the labor required. In 1887 he resumed work on the mine, and did the assessment work for that year, continuing in possession, and working from November, 1887, to and through February, 1888, performing his annual work for that year. He was ousted by the defendants in the fall of that year. This statement of the facts clearly brings the plaintiff within the provision as laid down by the supreme court of the United States, which is in full accord with the instruction given by the court.

It is argued by the appellants that this

court ought to review the evidence, and find that a preponderance was other than as found by the jury. This would be contrary to the whole policy of our government. The law-making power regards juries as better able to determine questions of fact correctly than judges, or it would do away with the system altogether, and submit all questions of fact, as well as of law, to the courts. Under the law as it exists this court has decided time and again that where there is a substantial conflict in evidence the verdict of a jury will not be disturbed, unless errors of law occurred upon the trial. *Corkins v. Prichard*, 3 N. M. 184, 3 Pac. Rep. 746. The judgment of the lower court will be affirmed, and it is so ordered.

O'BRIEN, C. J., and MCFIE, SEEDS, and FREEMAN, JJ., concur.

(5 N. M. 518)

TOWN OF ALBUQUERQUE v. ZEIGER.

(Supreme Court of New Mexico. Jan. Term, 1891.)

WRIT OF ERROR—PARTIES—FILING RECORD.

1. The failure of a sheriff to join in a writ of error sued out by a city from a decree in favor of a tax-payer, enjoining both the city and the sheriff from collecting a tax, is no ground for dismissing the writ, as the sheriff is not a party to any substantial interest involved, but is simply a part of the machinery invoked by the city to enforce the collection of the tax.

2. Under the New Mexico statute requiring the record on a writ of error to be filed in the supreme court at least 10 days before the first day of the term, either the day of filing or the first day of the term may be included in the computation of the 10 days.

Error to district court, Bernalillo county.

*H. C. Collier*, for plaintiff in error. *Neill B. Field*, for defendant in error.

FREEMAN, J. The defendant in error filed his bill in the court below against the plaintiff in error and one Jose L. Perea, sheriff of Bernalillo county, to enjoin the collection of certain taxes assessed against him for the improvement of a street in said town of Albuquerque. The defendants below demurred, and the demurrer was overruled. Electing to stand on their demurrer, the injunction was made perpetual, to which ruling of the court they prayed and obtained an appeal. The appeal, however, was not prosecuted, and the case was afterwards brought to this court by writ of error sued out by the town of Albuquerque only; its co-defendant, the sheriff, declining to prosecute the writ. The defendant in error now moves to dismiss the writ of error for the reason, among others, that both of the defendants in the lower court do not join in the writ.

It is apparent that there are but two parties who have any substantial interest in the present litigation, viz., the town of Albuquerque, the plaintiff in error, and Zeiger, the defendant in error. To the sheriff, the other defendant below, it is a matter of trifling concern. Beyond the matter of commission on the tax enjoined, he has no interest whatever in the result. He was a necessary party defendant, because, as sheriff, he was proceeding, or

was about to proceed, to enforce the collection of the supposed illegal assessment. It is insisted by the defendant in error that he is also a necessary party to this proceeding, for the reason that as he stands enjoined by a decree of the court, which he does not seek to disturb, a dissolution of the injunction as to his co-defendant below will not have the effect of dissolving the injunction as to him, and that therefore the town would take nothing by such judgment here; that a judgment dissolving the injunction as to the town, and leaving it in force as to the officer, would be barren of any practical result. We do not so regard the law. If it should appear to this court that the injunction was improvidently granted, and that the plaintiff in error is entitled to collect the tax, it would seem to be a hardship to deprive it of the power to enforce the collection on account of the indifference of the officer. "Where the officers of a corporation are joined with it as co-defendants in a bill for discovery, and for an injunction against an action brought by the corporation, the injunction may be dissolved upon the coming in of the answer of the corporation, although its officers have not answered. So, when an injunction is obtained against several defendants, restraining them from prosecuting a joint action at law, some of whom answer and obtain a dissolution as to themselves, and the others afterwards file their answer, but neglect to move to dissolve, those who have already procured the dissolution as to themselves may have the injunction dissolved as to their co-defendants." High, *Inj.* § 1534. A similar doctrine is laid down in the case of *Basket v. Hassell*, 107 U. S. 608, 2 Sup. Ct. Rep. 415, where it is said "that the omitted parties have no legal interest either in maintaining or reversing the decree, and consequently are not necessary parties to the appeal." The case of *Germain v. Mason*, 12 Wall. 259, was an action brought by Mason against Germain to enforce a mechanic's lien. Twenty other parties were made defendants to the petition on the ground that they had or pretended to have liens against the same building. A decree was had affirming the right of the petitioner to priority of satisfaction of his lien, and a judgment *in personam* rendered against Germain. From this judgment, Germain alone sued out a writ of error. A motion to dismiss for non-joinder of the other defendants was overruled. The supreme court, speaking by Justice MILLER, said: "The lien creditors, co-defendants with Germain, have not sought to reverse the judgment; but Germain, who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right, we think, to prosecute a writ of error in his own name without joining them." A motion similar to that we are considering was made in the case of *Cox v. U. S.*, 6 Pet. 172. The argument made in the case which was sustained by the court is as follows: "It must be obvious that in many cases all the parties will join in the appeal. Sometimes they are satisfied with the judgment. Often they have no interest in reversing it. \* \* \* The party in-

interested in reversing the judgment only will sue out a writ of error. The court cannot compel the other party to join, and justice could not be done if either party could defeat the other of their legal rights. The aggrieved party must be allowed to bring up the case, and, if necessary to comply with obsolete forms, the court must decree a severance." The motion to dismiss was therefore overruled by the court. The sheriff is not a party to any substantial interest involved. He is merely a part of the official machinery invoked by the corporation to enforce the collection of the tax. His functions are suspended by the writ; and if, upon the hearing, the court should be of the opinion that the injunction ought to be dissolved, it will remand the cause to the court below, with directions to that court to dissolve it as to all the parties to the suit; and this view of the case, we think, disposes of the question as to whether the sheriff is a necessary party to the appeal or writ of error.

Another reason assigned in support of the motion to dismiss is that the record was not filed "at least ten days before the 1st day of the January term, A. D. 1889, of said supreme court." The record was filed on the 27th day of December, 1889, and the court convened on the 6th day of January, 1890. We think this is a substantial compliance with the rule. If we include either the day of filing or the day on which the court convened, we have the period of 10 days, which meets the requirement of the statute. Let the motion be denied.

O'BRIEN, C. J., and MCFIE, LEE, and SEEDS, JJ., concur.

(5 N. M. 522)

ALARID, Auditor, v. ROMERO.

(Supreme Court of New Mexico. Jan. Term, 1891.)

MANDAMUS—APPEAL—SUPERSEDEAS.

An appeal by the territorial auditor from a peremptory writ of *mandamus* erroneously issued against him commanding him to audit and allow the claims of a sheriff against the territory does not operate as a *supersedeas*; and where the auditor, in obedience to the mandate of the court, has audited and allowed the claims, his appeal will be dismissed, at the costs of the sheriff, without ascertaining and pointing out the particular items which were improperly allowed as charges against the territory.

Error to district court, San Miguel county.

E. L. Bartlett, for plaintiff in error. G. W. Prichard, for defendant in error.

FREEMAN, J. This was an action of *mandamus* instituted by the defendant in error against the plaintiff in error. The alternative writ of *mandamus* allowed by the lower court was as follows:

"The Territory of New Mexico, to Trinidad Alarid, auditor of public accounts of the territory of New Mexico: Whereas, Eugenio Romero, sheriff of San Miguel county, in said territory, has this day presented to the judge of the fourth judicial district court of said territory, at chambers, his petition, in which it is recited that, as such sheriff, he holds certain certificates of

allowance made by this court against the territory, and by the court of the first judicial district of said territory, for fees and money laid out and expended in and about his office as such sheriff in said county as required by law, said certificates bearing upon their face the following numbers and amounts, to-wit: No. —, Santa Fe county, \$76.25; No. 25, San Miguel county, \$12; No. 22, San Miguel county, \$81; No. 20, San Miguel county, \$576; No. 8, Lincoln county, \$83; No. 2, Lincoln county, \$400.75,—and that you, as the auditor of public accounts for said territory, have refused at divers times, and still refuse, to audit said allowances, as shown by said certificates and issue warrants therefor, in the name of the territory and against the treasurer thereof, as required by law, and for further information as to the recitals of said petition, reference is had to a copy of the same, attached thereto, and made a part hereof: Now, therefore, we, being willing that speedy justice be done in this behalf to him, the said Eugenio Romero, sheriff as aforesaid, do command and enjoin you that, immediately after the receipt of this writ, to receive each and every of said certificates bearing the numbers and amounts as aforesaid, held by the said Eugenio Romero, sheriff as aforesaid, and that you do take up said certificates of allowance, and that you do issue therefor the territory's warrant as auditor of public accounts against the treasurer of said territory for the full amount thereof of each and every of the same, or to show cause to the contrary before the court on the 14th day of May, A. D. 1888, at the court-house in the said county of San Miguel, and how you shall have executed this, our writ, make known at the time and place aforesaid, and have you also then and there this writ. Witness the Hon. ELISHA V. LONG, Chief Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Fourth Judicial District Court thereof. [Seal.] R. M. JOHNSON, Clerk."

To which said writ was attached the following petition:

"Territory of New Mexico, county of San Miguel. In the district court for the fourth judicial district of the territory of New Mexico, sitting in and for the county of San Miguel, for the trial of causes arising under the laws of said territory. To the Honorable Elisha V. Long, chief justice of the supreme court of the territory of New Mexico, and judge of the fourth judicial district thereof: Your petitioner, Eugenio Romero, the duly commissioned and acting sheriff, and a resident of the county of San Miguel, in said territory, complaining of Trinidad Alarid, the auditor of public account of said territory, and a resident of the county of Santa Fe, therein, humbly shows unto your honor that your petitioner, as such sheriff for said county, in and about the business of the district court in and for the same, has been compelled by virtue of his office to lay out and expend large sums of money, and has performed the hereinafter mentioned services, for which your petitioner at divers times made the following charges against the said territory, to-wit:

For fees and expenses in taking one William Green, a prisoner, from Las Vegas to Santa Fe, New Mexico, and return, by order of the court in the month of August, A. D. 1887, the amount allowed by law, and duly approved by the court, being seventy-six dollars and twenty-five cents; for fees and allowances for opening jury-lists at the September, October, and November terms of the Colfax, Mora, and San Miguel district courts for the year 1887, the amount allowed by law, and approved by the court, being twelve dollars; for amount paid to janitor at Las Vegas as a necessary court expense for services in and about the court in the year of 1887, the amount allowed by law, and approved by the court, eighty-one dollars; for horse hire and pay of extra deputy during the November term, 1887, of the San Miguel county district court as extra and necessary court expenses, the amount allowed by law, and approved by the court, being five hundred and seventy-six dollars; for furniture and painting furnished by your petitioner for the fourth judicial district court for said last-named county, the same being necessary and by order of the court, the amount allowed and approved by the court in the year 1887, being four hundred and eighty dollars and twenty-five cents. Your petitioner hereto attaches a true copy of the foregoing orders of allowances by the court of the said charges. Your petitioner shows that each and every of the above charges were for money laid out and expended for services rendered by your petitioner and his deputies, as required by law; and that thereafter each and every of said charges were duly presented in open court for allowance, and approved; and that, after the same were carefully inquired into and investigated by the court, the same were duly approved and ordered to be paid; and that the clerk of the said district court in and for the county of San Miguel and territory aforesaid was ordered to make a certificate or certificates to your petitioner bearing the following numbers and amounts: Certificate No. 25, \$12; certificate No. 22, \$81; certificate No. 20, \$576; certificate Nos. 8, 9, \$83.50 and \$400.07; certificate No. —, from Santa Fe county, \$76.25, showing upon the face thereof that each of said charges had been allowed as aforesaid. And your petitioner further shows that the defendant herein named is the auditor of public accounts in and for said territory, and as such the law of said territory enjoins upon him the duty of auditing the charges allowed as aforesaid, and, in the name of the territory, to issue his warrants therein against the treasurer of said territory. That your petitioner, after the allowances of his said claims by the court aforesaid, to-wit, on the — day of January, A. D. 1888, and on divers days thereafter, presented, and caused to be presented, to the said auditor at his office said certificates of allowance, and demanded, and caused to be demanded, of said auditor the issuance of the proper warrants for the same. That it has now been something over four (4) months since he first made said demand. That he has frequently appeared in person before said auditor with

said certificates; has sent his agent; and has also written and otherwise requested the issuance of the warrants due him as aforesaid as the law requires; yet the said Trinidad Alarid then and there wholly refused, and still refuses, to receive said certificates of allowances, or any of them, or to issue to your petitioner warrants therefor, or to otherwise perform the official duty enjoined upon him as the auditor of public accounts, by means whereof your petitioner has been prevented, and is still prevented, from receiving the warrants due him, and from receiving the money due for money laid out and expended for services rendered as aforesaid, to all of which he is justly and lawfully entitled. Wherefore your petitioner prays a writ of *mandamus* directed to the said Trinidad Alarid, as auditor of public accounts for said territory, commanding him to forthwith receive each and every of said certificates so held by your petitioner, and to audit the same, and to issue thereon the territory's warrants against the treasurer of said territory for the full amounts thereof as required by law, and that said defendant be required to make due return to the writ of *mandamus* that may issue out of this court at such time and place as the court may order, and that, upon the final hearing hereof, said writ be made peremptory, and that your petitioner be granted such other and further relief as he is entitled to, and as justice may require. G. W. PRICHARD, L. C. FORT, Attorneys for Plaintiff.

"Eugenio Romero, Sheriff of the County of San Miguel, vs. Trinidad Alarid, Auditor of Public Accounts of the Territory of New Mexico. Now comes the said defendant by the attorney general of the territory of New Mexico, and for answer to the said writ, and to the petition and exhibits thereto attached, says that he admits that said plaintiff holds certain certificates of allowances made by the court of the first judicial district against said territory, and that such certificates bear upon their faces the number and amounts stated in said writ, but he denies that he has ever refused to audit said allowances, and states the fact to be that he has audited the claims of said plaintiff, and, with one exception, has disallowed the claims referred to in said writ, and has refused, and still refuses, to issue warrants therefor against the treasurer of said territory. He further says that the exception referred to above is as to the item of \$12.00, which in said petition is stated to be for fee allowances for opening jury-lists, while in the copy of the certificate of allowance attached to said petition it appears to be for summoning extra talesmen for petit jury and commissioners for selecting juries. Defendant is therefore unable to know which of these allowances is brought in question, but states that he has allowed both of them, and has issued, or is ready to issue, warrants therefor. Defendant further says that he has disallowed the claim of said plaintiff for fees and expenses in taking one William Green, a prisoner, from Las Vegas to Santa Fe, New Mexico, and return, by order of the court, in the month of August, 1887, because it is not a

proper charge against said territory, but, by express statutory provision, is a charge to be paid by the county whence said prisoner was sent. Defendant further states that he has disallowed the claim of the plaintiff for the amount allowed by the court to one Cristobal Beltran for janitor, because it appears from the certificate of allowance that said person was employed in and about offices situate in the court-house (being a county building) for the county of San Miguel, the expense of caring for which is properly chargeable to said county of San Miguel only, and not to the territory of New Mexico. Defendant further says that he has disallowed the claim of plaintiff for the sum of five hundred and seventy-six dollars for bailiffs and horse hire at the November term of 1887 of this court, because he has already audited and allowed the claims of four bailiffs for services at said term of court, and drawn warrants therefor on the territorial treasurer, the statute of the territory prohibiting the appointment of more than four such officers, and also because the horses whose hiring and use are implied were used only for the purpose of enabling the sheriff, by himself or by his deputies, to serve process of this court in different parts of the county, for which service said sheriff is allowed and authorized by law to charge the usual amounts for fees and mileage, and to pay him for his horse hire would allow him to receive double for such services. Defendant further says that he has disallowed the claim of said plaintiff for four hundred and eighty-four dollars and twenty-five cents for furniture and painting, because it appeared from the itemized bill presented to the defendant for four hundred dollars and seventy-five cents of said amount, and from the certificate for the remainder thereof, that said claim was for expenses which should have been made, if proper at all, either by the clerk of this court and by the statute of the territory, paid by the counties of this judicial district, or should have been made and paid by the county of San Miguel, and because said claim, if proper at all, should have been made by the court for the county of San Miguel, whereas said amount is claimed to have been originated, and not by the court for Lincoln county; and defendant further says that said claim is extraordinarily extravagant. Defendant denies that the said charges so by him disallowed, or any thereof, were for money laid out or expended, or for services rendered, as required by law; and he denies that the same, or any thereof, were carefully inquired into and investigated by the court; and he avers that said claims and all of them were passed without investigation by the court, and as a matter of course, and that the attention of the court was in no manner called or directed to the impropriety and illegality of the same. Wherefore defendant prays for judgment of the court that the said claims of the said plaintiff set out in said writ, petition, and exhibits, with the exception of the said item of \$12.00, are not proper legal charges against the said territory of New Mexico, and ought not to be allowed by the defendant as au-

ditor of public accounts, and that he may be hence dismissed, with his costs. M. A. BREEDEN, A. A. G. for Auditor."

Upon the issues thus presented, the court caused to be entered the following judgment:

"Eugenio Romero vs. Trinidad Alarid, Auditor. *Mandamus*. No. 3,116. On reading and filing the answer of the defendant in this cause to the alternative writ of *mandamus* heretofore issued in this cause, and also the motion of the plaintiff herein to quash and strike out said answer, and for the issue of a peremptory writ of *mandamus* in this cause, for the purposes and in the manner as prayed in the petition of the said plaintiff, and the counsel for the said plaintiff, as well as for the said defendant, having been heard, and the court, being now sufficiently advised in the premises, doth grant said motion as to the quashing of the said answer, and the issuing of the said peremptory writ of *mandamus* concerning the following items, to-wit: No. 4, county of Santa Fe, \$76.25; No. 25, San Miguel county, \$12.00; No. 22, San Miguel county, \$81.00; No. 20, San Miguel county, \$288.00; No. 8, Lincoln county, \$83.50; No. 2, Lincoln county, \$400.75,—and as to the issuing of said *mandamus* concerning the said item of horse hire embraced in No. 20, San Miguel county, amounting to \$288.00, is disallowed, and doth deny said motion. It is therefore ordered and adjudged that the said answer be, and the same hereby is, declared quashed and stricken out, and that a peremptory writ of *mandamus* be allowed in this cause, and that the same issue forthwith against the said defendant, commanding him forthwith, as auditor of public accounts of the territory of New Mexico, to receive each and every certificate of allowance in said alternative writ of *mandamus* mentioned and held by said plaintiff, except the sum of \$288.00 out of certificate No. 20, San Miguel county, being the allowance for horse hire to said plaintiff, and to take up said certificates of allowance, and issue therefor, as said auditor of public accounts of said territory, the said territory's warrants against the treasurer of said territory for the full amount of each and every one of said certificates of allowance except the sum of \$288.00 out of certificate No. 20, San Miguel county, as aforesaid. It is further ordered and adjudged that service of said peremptory writ of *mandamus* be made forthwith by A. D. Clarke, of the county of San Miguel, by delivering a true copy thereof to said defendant in person, or, if said defendant shall not be found in said county of Santa Fe, then by delivering a true copy of said writ to some person over the age of fifteen years at the usual place of business or abode of said defendant in the county of Santa Fe, territory of New Mexico. It is further ordered and adjudged that the said defendant make return of this writ, and due obedience to its commands, before this court on the 30th day of July, 1888, at 10 o'clock A. M. of said day at the court-house at Las Vegas, New Mexico, for the district court of the county of San Miguel, territory aforesaid. ELISHA V. LONG, Chief Justice."

In this, we think, there was error. In



view of the fact, however, that the appeal did not operate as a *supersedeas*, and that therefore the mandate of the court was obeyed, and the several certificates audited and allowed. It is immaterial now to inquire minutely into the several matters of controversy, in order to ascertain and point out the particular items which were improperly allowed as charges against the territory. The judgment must be reversed, and the writ dismissed at the cost of the defendant in error, and it is so ordered.

O'BRIEN, C. J., and MCFIE, LEE, and SEEDS, J.J., CONCUR.

(5 N. M. 569)

UNITED STATES v. SAUCIER *et al.*

(Supreme Court of New Mexico. Jan. Term, 1891.)

PUBLIC LAND—CUTTING TIMBER—WHO MAY MAINTAIN ACTION—EVIDENCE.

1. In trover for timber alleged to have been cut on the public land, where the receiver of the United States land-office testifies that a pre-emptor has paid for the land as required by law, the presumption is that final proof has been made by the pre-emptor, and that the final certificate has been issued to him, vesting him with the equitable title to the land, and leaving only the naked legal title in the United States; and hence the latter cannot maintain the action, as Comp. Laws N. M. § 1882, requires every action to be prosecuted in the name of the real party in interest.

2. The fact that a contest for the land was heard in the land-office in the year preceding the cutting of the timber does not enable the United States to maintain the action, in the absence of any showing as to how or when the contest was instituted, as, under rule 5 of practice in contest cases in the local land-offices, a contest may be instituted after the final certificate issues, as well as before.

3. The action of a pre-emptor in entering land at the land-office as agricultural does not preclude an inquiry into its character in an action against third persons for unlawfully cutting timber thereon; and it is error to exclude defendant's evidence as to the mineral character of the land, since Act Cong. June 8, 1878, permits the cutting of timber on mineral lands.

Appeal from district court, third district.

*Elliott & Pickett*, for appellants. *Eugene A. Fiske*, for the United States.

MCFIE, J. In this action the United States sued Frank and John Saucier in the district court of the third judicial district, in an action of trover. The declaration was filed March 7, 1888, and contains two counts, the first charging that on the — day of — A. D. 1887, the defendants cut and appropriated to their own use 500 trees of the value of \$500; the second charging the appropriation of 10,000 feet of lumber of the value of \$250 from the public lands of the United States. October 1, 1888, defendants filed a demurrer to the declaration, assigning the following causes of demurrer: (1) That the first count joins two separate causes of action, —trespass and trover,—and does not allege the date when committed; (2) the second count does not allege the date of the wrong or injury complained of; (3) that the declaration does not allege that the lands were non-mineral from which timber was taken. The cause was continued by consent until March term, 1889,

and on the 11th day of March, 1889, the court overruled the demurrer. The defendants filed two pleas: (1) not guilty; and (2) that if any timber was converted by defendants it was taken from mineral lands; that they were *bona fide* residents of the territory of New Mexico; that no trees were cut more than eight inches in diameter, and that the lumber was sold to *bona fide* residents, for building, agricultural, mining, and other domestic purposes. Plaintiff joined issue on first plea, and filed two replications to second plea denying that the land was mineral in character. Trial was had upon issues thus formed, by jury, and resulted in a verdict for plaintiff for \$375. Motions for new trial and in arrest of judgment were overruled, and judgment was entered on the verdict. The defendants, to review this judgment, brought the case to this court by appeal.

The declaration alleges, and the proof shows, that the land from which the timber is alleged to have been taken, was sections 21 and 22, in township 11 S., of range 9 W., and situated in Sierra county, and in the third judicial district of New Mexico. All of this land, with the exception of one forty-acre tract, (the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of sec. 21,) is included in two pre-emption claims made at the Las Cruces land-office by Mr. Austin Crawford and Mr. W. H. James. In fact the only attempt to locate the land from which the timber was alleged to have been taken was by witnesses testifying that the timber cut was upon their claims. There is no proof that there was any timber cut on the 40-acre tract in section 21, not embraced in these pre-emption claims. A large number of errors are assigned, chiefly as to the admissibility of evidence, but there are two important questions presented by this record: (1) Did the court err in giving to the jury its seventh instruction? (2) Did the court err in excluding evidence offered by defendants as to the mineral character of the land? During the progress of the trial Mr. E. G. Shields, at that time register of the United States land-office for the Las Cruces, N. M., district, and custodian of the records of said office, was called as a witness for the plaintiff. The records of the office were identified by him, and were competent evidence in the case. *Bly v. U. S.*, 4 Dill. 465. Mr. Shields was recalled by the plaintiff, and testified as follows, as to whether the pre-emptors Crawford and James had paid the United States for the lands embraced in their pre-emption claims: Question. "State whether Mr. James and Crawford have paid for this land in pursuance of the requirements of law. Answer. Yes, sir." The record is silent as to final proof or the issuance of final receipt. In 1884 the commissioner of the general land-office, in his instructions to registers and receivers, said: "There is no authority for receiving proofs in advance of action in allowing or rejecting an entry, and you have no authority to act upon entry applications until the party is prepared to consummate entry by making proof and payment. In other words, proof and payment must be made at the same time." 3 Dec. Dep. Int. p. 188. We must presume, therefore,

in the absence of proof to the contrary, that the officers of the government did their duty, and that final proof, showing full compliance with the law by the settlers, was made when payment was made. In fact, the register was asked, and answered "that payment was made in pursuance of the requirements of law." If that be true, then the settlers had done all that the law required of them, and the further presumption must then be indulged that final receipt was issued to these settlers for the land from which the timber, if any, was taken. Mr. Shields was asked, on page 56 of the record, when payment was made, and answered: "I have forgotten the date now. I think it was in June, 1886, I said yesterday." The declaration alleges that the timber was appropriated "on the \_\_\_\_\_ day of \_\_\_\_\_, 1887." No date being fixed, it is limited to the year 1887. The pre-emptors had purchased and paid for the land prior to the alleged injury. The settlers having done all they could, and paid the government for the land, they, and not the United States, were the real parties in interest, and had a right to the damage if the injury complained of had been done. If they had paid the government for the land, and received their final certificate, they had a right to sell the land, or mortgage the land; and it follows that they have the right to punish a trespasser upon their possessions. If the law has been fully complied with by the pre-emptor, and he has paid for the land, and received his final certificate, the certificate is as good as a patent; and until the patent issues, while the government had the naked legal title, it holds in trust for the settler, who is the real owner for all beneficial purposes. After compliance with the law, payment, and the issue of final certificate of entry, the land becomes segregated from the public domain. The secretary of the interior, on the 19th day of February, A. D. 1885, in case of timber trespass upon a homestead entry, which also segregates the land from the public domain, says: "But if it be conceded that Landrum has entered, and is holding the land in good faith, the tract covered by the entry is to be considered as being to all intents and purposes Landrum's land; and, if the McCombs have removed the timber therefrom without warrant, the question is one between them and Landrum. The local courts have jurisdiction in such cases, and Landrum can apply to them for protection, or for reparation of any injury that may have been done him." 3 Dec. Dep. Int. p. 421; 4 Dec. Dep. Int. p. 467. Same as to pre-emption. While these decisions may not bind this court, they are very persuasive, coming as they do from the head of the land department of the government. In *Carroll v. Safford* 3 How. 460, Mr. Justice McLEAN said: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate might be

recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee." *Myers v. Croft*, 13 Wall. 291; *Smith v. Ewing*, 23 Fed. Rep. 745. The court below erred, therefore, in giving to the jury the following instruction: "(7) I charge you that the title to these lands, for the purposes of this suit, is in the United States." The fact that contests have been heard in the land-office in August, 1886, does not alter the situation, for the reason that it is not shown when and how the contests were instituted; and, under rule 5 of practice in contest cases in the local land-office, a contest may be instituted after the final certificate issues, as well as before; the only difference being that in that case the affidavit in contest must be forwarded to the commissioner of the general land-office, who directs a hearing. From what has been said it follows that the lands from which the timber is alleged to have been taken were not public lands, and the plaintiff was not the real party in interest, as required by section 1882, Comp. Laws, which is as follows: "Every action must be prosecuted in the name of the real party in interest."

If it was conceded that the lands belonged to the United States, there is still a reversible error disclosed by this record, in that the court refused to permit the defendants to prove that the lands were mineral lands, and compliance with the act of congress of June 3, 1878, under defendants' second plea. While it may be objected that the plea did not state all of the facts necessary to a complete defense, there was no demurrer to the plea, but issue was joined as to whether or not the lands in question were mineral lands. The court, in excluding the testimony as to the mineral character of the lands, practically excluded all of the defense, for, if the plea had been technically correct, it would have been unavailing for the defendants to have proven compliance with every other requirement of the law of June 3, 1878. The court permitted evidence to go to the jury as to the mineral character of lands outside the entries of Crawford and James, but not of the lands within the entries, holding, as the court is informed, that the fact of their being entered at the land-office as agricultural lands precluded inquiry as to their mineral character. The entries at the land-office were *ex parte*, and could not affect the defendants in this case. Whether the lands were mineral in character or not was a material issue, and a question for the jury. The court erred, therefore, in excluding the testimony. In view of the fact that we have indulged some presumptions that plaintiff may be able to rebut with testimony on another hearing in the lower court, the judgment of the lower court will be reversed, and cause remanded, with instruction to the lower court to sustain the motion for a new trial, and such further proceedings as may be deemed proper.

O'BRIEN, C. J., and SEEDS, LEE, and FREEMAN, JJ., concur.

(1 Ariz. 404)

FIELD *et al.* v. GREY *et al.*<sup>1</sup>

(Supreme Court of Arizona. April, 1881.)

NOTICE FOR NEW TRIAL—LOCATION OF MINING CLAIM.

1. Under St. Ariz. 1879, p. 71, requiring the statement, on notice for new trial, to specify the errors on which the party will rely, and providing that, if no specifications are made, the statement shall be disregarded, a statement the correctness of which has been agreed to cannot be disregarded.

2. Under Rev. St. U. S. § 2320, providing that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," one so locating a claim prior to the discovery of the lode can hold possession of the surface as against one possessing or claiming no better right.

Appeal from district court, Cochise county.

Morgan & Price, for appellants. Stanford, Earl & Smith, for respondents.

FRENCH, C. J. This action is ejectment to recover possession of certain mining ground. The complaint is in the usual form for ejectment. The denials of the averments of the complaint contained in defendant's answer, except the denial as to damages, are defective. But plaintiffs having proceeded to trial on the answer without objection in these respects, we shall consider the answer as a denial of the plaintiff's allegations. But the defendants show no right, and do not even claim any right, to the premises in controversy or to the possession of the same in their answer, but simply traverse plaintiffs' right to the same. The plaintiffs had judgment, and defendants moved for a new trial, which was denied, and the appeal is from the judgment and from the order denying a new trial.

The statutory provision as to new trials in this territory provides: "When the notice designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no specifications be made, the statement shall be disregarded." St. 1879, p. 71. Plaintiffs object to the assignments under the statute. But their objection cannot be justly sustained to all the assignments of error. Besides, plaintiffs have expressly agreed to the correctness of the statement on motion for new trial. The statement therefore cannot be entirely disregarded, under the provision of the statute: "If no specifications be made, the statement shall be disregarded."

The premises were located by plaintiffs' grantors as a mining claim on the 19th day of December, 1879. At that time the premises were entirely vacant, open, unclaimed public land, without any adverse

claim, occupancy, possession, or right whatever adverse to plaintiffs' grantors, and so continued till after said grantors, on the 1st day of July, 1879, conveyed the same by deed to plaintiffs herein, who then entered under said deed. The evidence is clear, complete, and entirely unquestioned on the foregoing points. There is clear prior possession decisively established, if the location by plaintiff's grantors had any validity. The act of May 10, 1872, (Rev. St. U. S. § 2320,) among other provisions, contains the following: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." This broad and sweeping provision is earnestly invoked by the appellants in this case as fatal to plaintiffs' claim in this action on the statement and record therein. It would be sufficient answer to this to say that, for the purpose of this appeal, there is a substantial conflict of testimony on this point,—testimony of Field and others on croppings, etc. Another and more decisive answer to defendants' position is that defendants are not in a position to invoke this provision of the statute against the plaintiffs in this action, for the reason that defendants claim no right to the premises whatever. But as the above provision of the statute is so decisive in its terms, a brief and summary discussion of the same may not be out of place here, though not demanded in the decision of the present case. It is well known that in many portions of the mineral regions of the United States blind veins or lodes exist, that is, veins or lodes entirely below the surface of the ground, and often a great distance below the surface, and that in many instances these blind veins or lodes are the only kind found. Where such a state of things exists, the miner must seek the vein or ledge without attempting a location of claim till the vein or ledge is discovered, or he must attempt a location of the surface at least before such discovery; and this brings us to the consideration of the question, what right, if any, does the miner acquire as to the surface, not ledge, by such location, before the discovery of the vein or ledge? If this exact question has been authoritatively passed upon or settled by judicial decision, my attention has not been called to such decision by counsel or otherwise, except as mentioned and discussed in this opinion. The doctrine of prior possession or actual occupancy, without legal claim, except so far as such possession *per se* confers it, has been of late fully recognized by the supreme court of the United States as to public lands not mineral.

The question whether public lands inclosed and occupied by parties not claiming them under the laws of the United States are subject to pre-emption or homestead entry under such laws of the United States has been settled in the negative. In the case of *Atherton v. Fowler*, 96 U. S. 513, and later in the cases of *Hosmer v. Wallace*, 97 U. S. 575, and *Trenouth v. San Francisco*, 100 U. S. 251, the supreme court of the United States held that no pre-emption right can be established by a settle-

<sup>1</sup> This case, filed April, 1881, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

ment and improvements on a tract of public land which was already in the possession of another. The state and territorial courts have necessarily followed these decisions,—those of California in the cases of *Hosmer v. Duggan*, 56 Cal. 257; *Davis v. Scott*, Id. 165; and in the still later case of *McBrown v. Morris*, 59 Cal. 64. In the case of *Railroad Co. v. Gould*, 21 Cal. 254, the same court sustained naked prior occupancy against a congressional grant of right of way, as to claim of damages. This is the settled doctrine as to public lands not mineral, and, by analogy, should be recognized where applicable to rights upon the mineral lands. A person making a location of a mining claim fully in accordance with law and usage acquires a right of possession to the same equivalent to an actual or *possessio pedis* possession. But what right does he acquire by making such location before the discovery of the vein or ledge? Mr. Justice MILLER in his circuit has encountered this question more or less directly, and especially in the state of Colorado, where these blind ledges are understood to be of frequent occurrence. But his conclusions have not reached us in an authoritative form. In the case of *Crossman v. Pendery*, 2 McCrary, 139, 8 Fed. Rep. 693, the Orion had been first located. The Pendery was located subsequently, on the same ground, and discovered mineral in place, before the prior locators had made such discovery. In this case, which was heard in the circuit court of the district of Colorado, the defendants had judgment in their favor. Mr. Justice MILLER, of the supreme court of the United States, in his (the eighth) circuit, rendered the decision, in which he is reported as saying: "This cause is submitted on an agreed state of facts, to the effect that the ground in controversy is covered by the surface lines of the Orion claim, located by the plaintiff, and also of the Pendery claim, located by defendant; that both locations are regular as to form; that the Orion was first located and surveyed; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place; that the discoverers of the Pendery, located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work, and discovered mineral in place before the discoverers of the Orion. The question submitted to the court is this: Can prospectors on public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? If so, can the plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy? It is the opinion of the court that, inasmuch as the plaintiff allowed the defendant to enter upon their claim, and within their boundaries, and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and make location thereof without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceedings prior to the discovery of min-

eral by the defendants or either party. A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral." The instructions to juries on this statute in the local federal courts have been various, generally giving the substance of the statute that no location could be made prior to the discovery of the vein or lode therein. In the case of *Mining Co. v. Evans*, 2 McCrary, 39, 5 Fed. Rep. 172, (October term, 1880,) Mr. Justice HALLETT, in the same district of Colorado, is reported as instructing the jury as follows: "On the public domain of the United States, a miner may hold the place in which he may be working against all others having no better right; but, when he asserts title to a full claim of one thousand five hundred feet in length, and three hundred feet in width, he must prove a lode extending throughout the claim." This is indefinite as to extent of ground and in conflict with the doctrines of the decision above quoted. If a party on the public lands not mineral can, by bow and spear, hold his possession to a tract of such land, however large, against a party seeking to enter under the pre-emption or homestead laws of the United States, shall not the miner hold the comparatively small tract embraced in his mining claim, while continuously and industriously seeking the vein or lode believed to exist therein? I speak of the surface only, not the vein or lode. I am of the opinion that he can so hold the surface of the claim against all parties having no better right, and eject them therefrom, if any so intrude, and such I understand to be the doctrine of Mr. Justice MILLER's decision above quoted. Judgment affirmed.

PORTER and STILWELL, JJ., concur.

(1 Ariz. 426)

**TOMBSTONE MILL & MINING CO. v. WAY  
UP MINING CO.<sup>1</sup>**

(Supreme Court of Arizona. Jan., 1883.)

NEW TRIAL—APPEAL—ADJOINING MINING CLAIMS  
—VEINS AND DIPS.

1. Though the trial judge retires from the bench pending a motion for a new trial in a case tried by the court, and his successor overrules the motion *pro forma*, refusing to hear it on the merits, the findings of fact will not be disturbed on appeal if there is substantial evidence to sustain them.

2. Rev. St. U. S. § 2322, provides that locators of mining claims shall have the right to possess and enjoy all veins, lodes, and ledges, the top or apex of which is inside of the surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward as to extend outside of the vertical side lines of the surface location. *Held*, that the owner can follow his claim on its dip only when it dips substantially at right angles with the strike of the vein, and he cannot follow the vein outside of his lode, on the course or strike of the vein, in any case; if it crosses the side lines on its strike the side lines become the end lines and terminate the right to follow the vein in that direction.

3. The end line of the "Way Up" mining

<sup>1</sup>This case, filed January, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

claim abutted against the side line of the "Good Enough," which was the older location. In the Way Up, there was a fissure vein which passed from the Way Up, entered the Good Enough, and crossed it. The ore bodies in the Good Enough were connected with this fissure vein and flowed from it, and constituted flat ore bodies lying in strata of limestone some distance from the fissure. Held, that the ore bodies in the Good Enough did not form a separate vein, and its owners could not follow into the Way Up, and were not entitled to the ore at the intersection under Rev. St. U. S. § 2336.

Appeal from district court, Cochise county.

John Haynes and Thomas Mitchell, for appellant. Lewis & Dibble and J. D. Rouse, for respondent.

PINNEY, J. This case comes up on appeal from judgment and order overruling a motion for a new trial. The case was tried by the court without a jury, and the trial judge filed findings of fact and conclusions of law, and a judgment was entered in accordance therewith in favor of defendant. Plaintiff moved for a new trial, but, before the motion was disposed of, the trial judge retired from the bench, and another judge was appointed in his stead. When the motion for a new trial came up for hearing, it was overruled *pro forma*. The court declining to hear the motion on its merits, not having heard the evidence at the trial of the cause, appellant's counsel now insist this court should, under the circumstances, not be governed in its decision on this point by the general rule that an appellate court will not disturb the verdict of a jury or findings of fact by the trial court where there is a conflict of evidence. They insist that the case should be now heard on appeal, as if it were on motion for a new trial in the district court. In the consideration of the case, we have borne in mind the peculiar circumstances surrounding it. Still, it must also be borne in mind that every presumption is in favor of the correctness of the judgment, and that neither appellate nor trial court will disturb the verdict of a jury, or the findings of fact by the court, where there is substantial evidence to sustain such verdict or findings, unless errors of law have occurred requiring a reversal. *Covington v. Becker*, 5 Nev. 281; *Kile v. Tubbs*, 32 Cal. 332; *Miller v. Balthasser*, 78 Ill. 302. One of the main reasons for upholding the verdicts of juries, and the findings of fact of a court, where there is no indication of improper motives influencing them in coming to a conclusion, and where no errors of law occur, is that they have heard the testimony, have had an opportunity of observing the conduct and bias of the witnesses, their intelligence, etc., and are therefore better enabled to arrive at the true facts of the case than an appellate court possibly can be. Having in mind the rule, upon an examination of the entire record, if it shall be found that there is no substantial evidence to sustain the findings of fact, or if there be found a material error in the conclusions of law of the court below, it is the duty of this tribunal to reverse or modify the judgment appealed from; otherwise, the judgment

must be affirmed. The questions, then, for our consideration, are: (1) Should the case be reversed on questions of fact, or findings of the trial court? (2) Is there error of law in his conclusion and judgment?

The complaint alleges the incorporation of plaintiff and defendant; that plaintiff company was the owner and in possession of the Good Enough mining claim and lode in Tombstone mining district, Cochise county, Ariz., which is therein described; that within said claim there is a valuable vein, lode, lead, or ledge, and mineral deposit of rock in place, bearing silver and other valuable metals, having its top or apex within the exterior boundaries of said claim, and dipping in a north-easterly direction at an angle of 20 to 24 degrees from the horizontal, passing beyond the said line of the Good Enough claim in that direction, and entering the adjoining land; that on or about March 1, 1881, defendant ousted the plaintiff from that portion of its vein or lode which had been opened and developed by defendant beyond the north-east side line of the Good Enough claim, and beneath the surface of the Way Up mining claim, which at that point adjoins the Good Enough claim. Then follows allegations of value of ore and occupation. The other causes of action are substantially the same, with variations as to value of ore mined, etc., followed by a prayer for an injunction, and for recovery of said land and premises, and for damages. The claim for damages was dismissed without prejudice, and the question of right of possession alone tried. The defendant's answer specifically denied the material issuable facts stated in the complaint, and for defense alleges that the Way Up Company is the owner of, and was in the possession of, and entitled to the possession of, the Way Up mining claim, and of all veins, mineral deposits, etc., the apexes of which were embraced in its exterior limits; alleges that the ore body developed within the Way Up claim; and prays that defendant may go hence, and for costs. It is not a cross-bill, but set up as matter of defense, and not as a counter-claim, which seems necessary under this practice. *Brannan v. Paty*, 58 Cal. 330. An injunction was granted at the commencement of the action, which was dissolved on the rendition of the judgment. On the issue thus formed, the case was tried in the court below; the judge filed his findings of fact and conclusions of law; and judgment was entered accordingly. The findings are, in substance, that plaintiff and defendant were each incorporated, and the respective owners, and in possession of the Good Enough and Way Up mining claims; that there is no vein or ledge running through the Good Enough claim parallel with its side lines, but that the only vein, lode, etc., shown by the evidence runs across the said Good Enough claim, and crosses its side lines, and enters the Way Up claim on its strike, and the ore raised and taken out by defendant company was from said vein, lode, etc., extending on its strike or course, as aforesaid, across said Good Enough

claim in a north-easterly direction, beyond its side lines, and into defendant's Way Up claim; that plaintiff had not, within the boundaries of its said claim, any mineralized lead, lode, belt, zone, etc., of rock, dipping beyond its side lines into the Way Up claim, as alleged and described by plaintiff; that all ore shown by the evidence to have been found within said Good Enough claim, and the extended side lines of the Way Up claim, came from, was connected with, and was a part of, said vein, lode, or ledge, which, upon its strike in a north-easterly direction, entered the Way Up claim; that there is no vein, ledge, lode, or mineralized deposit, having its apex within the exterior boundaries of plaintiff's claim, except that which crosses its side lines and enters the Way Up claim. The sixth and last finding is that there is no vein, lode, ledge, or mineralized deposit, having its apex within the exterior boundaries of plaintiff's claim, dipping beyond the side lines of plaintiff's said claim into the Way Up claim. And as conclusions of law the trial judge found that the defendant was the owner of the Way Up mining claim, with all its veins, etc., and was entitled to recover and work the same, and that plaintiff is entitled to take nothing by the action, and that the injunction and restraining order heretofore granted should be dissolved, and for costs. Upon these findings judgment was entered, which is, in substance, a repetition of the findings and conclusions of law.

The assignments of error on the part of appellant are full and elaborate. They cover every point in the findings, conclusions of law, and in the judgment. The argument is ingenious and exceptionally able. Under our view of the case, only one finding of fact was necessary, and that is embraced in the sixth finding. The material fact, at last, is, did plaintiff's claim have a vein, lead, lode, or mineral deposit, whose apex was located within the exterior boundaries of the Good Enough mining claim, and which dipped into the Way Up claim? This is the ultimate fact to be found, and the one upon which the judgment must stand or fall. The sixth finding is a complete answer. That plaintiff should take nothing by this action, and the injunction and restraining order granted should be dissolved, was all that was necessary, and disposes of the case. As shown above, the answer does not contain a cross-bill, and it follows that the only proper judgment that could be rendered is that plaintiff take nothing by its action; that the injunction be dissolved, and costs awarded to defendant. But plaintiff contends that the evidence is insufficient to sustain the findings of fact, and that the court erred in the conclusions of law, and that the judgment is unsupported by the findings; in other words, that the judgment is contrary to the law and the evidence. An examination of the evidence shows that the Good Enough claim was located in a north-westerly and south-easterly direction adjoining this claim. On its north-easterly side line lies the Way Up. The latter extends lengthwise in a north-easterly and south-westerly direction, so that the south-west end

line of the Way Up abuts against the north-east side line of the Good Enough.

Plaintiff claims that the Good Enough is located along a vein or ledge of mineral-bearing rock in place, which extends through it, substantially parallel with its side lines, and that this vein or ledge dips in a north-easterly direction, passing its side lines into the Way Up; that defendant sunk a shaft near the line dividing the two claims, encountering plaintiff's vein on its dip, and were extracting the ore therefrom. Defendant, on the other hand, insists that the Way Up claim is located along a fissure vein extending in a north-easterly and south-westerly direction, and substantially parallel with its side lines; that its shaft is sunk on this vein, and that the ore being taken out by it is from this vein; that this vein extends through the Good Enough claim in a direction substantially at right angles to the side line to the Good Enough; and that the ore bodies which the plaintiff claims to be on its vein, and which he has a right to follow on its dip into the Way Up, form part of the Way Up vein or lode. Section 2322 of the Revised Statutes of the United States gives the owner of a mining claim the right to follow his vein or lode on its dip only when such vein or lode dips—that is, departs from a perpendicular position—substantially at right angles with the strike of the vein or lode, and does not allow him to follow the vein outside of his claim on the course or strike of the vein in any case. If the vein crosses the side lines on its strike, such side lines become the end lines and terminate the owner's right to follow the vein in that direction. *Mining Co. v. Tarrbett*, 98 U. S. 463. A large number of witnesses for defendant testify to existence of a fissure vein in the Way Up claim. They swear that they examined, saw, and traced it, and found ore in it; that it passes from the Way Up claim, enters into the Good Enough, and crosses it. The judge who tried the case believed that, and it is not for this court to say that his findings are incorrect. The rule is too well established on this point for us to disturb it now. But plaintiff's counsel contend that, conceding that the Way Up fissure vein exists as testified by defendant's witnesses, still the evidence establishes the existence of the Good Enough vein, lode, ledge, or deposit; that this Good Enough claim lode is parallel to its side lines, and dips into the Way Up; that it has an average width of some 60 feet; and that plaintiff has the right, under section 2336 of the United States Revised Statutes, to take all ore at the intersection of the two veins, the Good Enough being the older location. If, however, the sixth finding of fact is sustained by substantial evidence, (and we think it is,) then this point is not well taken. There is much evidence in the record which goes to show that the various ore bodies in the Good Enough claim, opposite the Way Up claim, are connected with the Way Up fissure vein, and flow from it, and, although constituting flat ore bodies lying in *strata* of limestone, and at considerable distance from the fissure, yet are at-

tached to and form a part of the Way Up vein. Ore bodies thus formed off from and connected with a fissure vein do not form a separate vein, lode, ledge, or mineral deposit. This evidence sustains the sixth finding of fact. It notes the ultimate fact at issue, and it was not necessary to find the probative facts which establish this ultimate fact. *Mining Co. v. Taylor*, 100 U. S. 37.

The second conclusion of law, to the effect that plaintiff is entitled to take nothing by this action, and that the injunction and restraining order be dissolved, properly follows.

The point made by plaintiff's counsel, that the findings are insufficient in form, and are mere conclusions of law, we think not well taken. The true test of the sufficiency of the findings is this: would they answer if presented by a jury in the form of a special verdict? Tested by this rule, we think them sufficient to sustain the judgment. *Miller v. Steen*, 30 Cal. 402. From the fact, however, that defendant's answer does not contain a cross-bill entitling it to affirmative relief, the judgment will be modified to the extent that plaintiff take nothing by its action, and that defendant go hence without day, and recover of plaintiff all costs and disbursements in this behalf incurred. In other respects, the judgment and orders appealed from will be affirmed, and it is so ordered.

FRENCH, C. J. I concur in the foregoing decision of Mr. Justice PINNEY that the judgment, as modified, and the order appealed from, be affirmed.

(1 Ariz. 397)

OSBORN v. CLARK, Auditor.<sup>1</sup>

(Supreme Court of Arizona. Jan. Term, 1881.)

MANDAMUS—TO TERRITORIAL OFFICERS.

Where a claim is presented to a territorial auditor, who acts on it, and allows and issues his warrant for a part thereof, *mandamus* will not issue commanding him to draw his warrant for the balance of the claim. PORTER, J., dissenting.

Appeal from district court, Maricopa county.

John Haynes and Baker, Alsap, Lemon & McCabe, for appellant. Fitch & Churchill, for respondent.

FRENCH, C. J. This is an application for a writ of *mandamus* commanding and enjoining the said auditor to draw his warrant on the territorial treasurer for the sum of \$180, under an act of the legislature of Arizona. No facts are stated in applicant's petition, but an affidavit of the applicant is annexed to the petition, from which it appears that petitioner was an officer of the legislative council of the session of 1881, as assistant clerk of said council, and that his claim is for compensation for services in that capacity. It further appears from the affidavit that the auditor has acted on the claim of applicant, which was \$540, auditing and al-

lowing thereon the sum of \$360, and has issued a warrant for the sum allowed, which has been accepted by petitioner. This action of the auditor is fatal to petitioner's application for *mandamus*. If the auditor has erred in auditing petitioner's claim, such error cannot be reviewed by *mandamus*. If it could be reached by writ at all, it must be by *certiorari*, not *mandamus*. The writ of mandate lies to compel an inferior court, board, tribunal, or officer to act, but never to command how to act, unless the act be purely ministerial. If the act sought for be judicial or discretionary in its character, no court, by its writ of mandate, can command what this action shall be, much less can it command how and what the said action shall be after he or it has already fully acted upon the matter, no matter how erroneously. The writ of mandate is in no case a process for the review or correction of errors.

But it is clear that the auditor committed no error as against petitioner. The error of the auditor, if any, was in favor of petitioner, as fully appears by the direct, positive, and express provision of section 1855 of the United States Statutes, as follows: "Sec. 1855. No law of any territorial legislature shall be made or enforced by which the governor or secretary of a territory or the members or officers of any territorial legislature are paid any compensation other than that provided by the laws of the United States." Wherefore it has been ordered that petitioner's application for a writ of *mandamus* be denied, and his application be dismissed.

STILWELL, J., concurs. PORTER, J., dissents.

(1 Ariz. 411)

In re RODDICK'S ESTATE.<sup>2</sup>

(Supreme Court of Arizona. Jan. Term, 1883.)

APPEAL—FROM INFERIOR COURTS.

Under the Arizona statutes providing for an appeal from the probate court to the district court with a review of the proceedings of the district court in the supreme court, an appeal does not lie from the probate court direct to the supreme court.

Ben Morgan, for appellant. Farley & Pomroy, for respondent.

FRENCH, C. J. The appeal in this case is from an order of the probate court of the county of Pima, wherein the claim of Guadalupe Roddick for family allowance was denied. The appeal should have been to the district court of the first district. No appeal lies from a probate court to the supreme court. All appeals from the probate court must be to the district court. The action of the district court on such appeal may be reviewed here. Appeal is the creation of the statute, and the whole matter of appeals is expressly provided for in the statutes of the territory. Appeal dismissed.

PORTER and SILENT, JJ., concur.

<sup>1</sup>This case, filed January, 1881, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

<sup>2</sup>This case, filed January, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.



(1 Ariz. 422)

LOUNT V. LOUNT.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1883.)

## DIVORCE—PLEADING—CROSS-COMPLAINT—FINDINGS.

1. Under Laws Ariz. 1871, c. 31, § 3, subd. 4, providing that a divorce may be granted for extreme cruelty, inflicting grievous mental or bodily suffering, a complaint setting out what the acts of cruelty consist of states facts sufficient to constitute a cause of action.

2. The fact that there are no express findings by the court on the issue raised by defendant's cross-complaint is no ground for reversing the judgment, when it does not appear by the record that any evidence was adduced in support of the cross-complaint.

Appeal from district court, Yavapai county.

W. S. McPheeters and J. M. & J. W. Robinson, for appellant. Charles B. Rush, for respondent.

PINNEY, J. In this case a complaint was filed by respondent, charging defendant with extreme cruelty. And, in the answer of appellant, a cross-complaint is filed charging complainant with extreme cruelty. Both complainant and defendant ask for a divorce. Decree was granted by the court below in favor of respondent, and the case is brought to this court on appeal. And among the points urged in the brief of counsel for appellant as grounds for a reversal are: (1) That the complaint does not state facts sufficient to constitute a cause of action. (2) What acts constitute grounds sufficient for a divorce under the laws of this territory, and is this a case of that character? (3) That the court failed to find upon the issue raised by cross-complaint. Chapter 31, Laws 1871. Section 3 of the statutes contains seven subdivisions or causes for which a divorce may be granted. The fourth subdivision provides: "For extreme cruelty in either party by inflicting upon the other grievous mental or bodily suffering, and other causes." The seventh subdivision provides: "And whereas, in the developments of future events, cases may be presented before the courts falling substantially within the meaning of the law as herein stated, yet not within its terms, it is enacted whenever the judge who hears a case for divorce deems the case to be within the reason of the law, within the general mischief the law is intended to remedy, or within what it may be presumed would have been provided against by the legislature establishing the foregoing causes of divorce had it foreseen the specific case, and found language to meet it without including cases not within the same, he shall grant a divorce." The authorities cited from the decisions of Pennsylvania and other states, as to what acts are sufficient to constitute grounds for a divorce, cannot apply under our statute. The seventh subdivision is certainly very broad and liberal indeed. Arizona may well boast of supporting the most liberal divorce law of any state or

territory on the continent. But outside of this provision the bill of complaint states what the acts of cruelty consist of, and states facts sufficient to constitute a cause of action under the fourth subdivision. Counsel insist that the court below did not find upon all the issues raised by the pleading. Even if that were necessary, the evidence not being in the record, it is impossible for this court to determine whether the findings are in accordance with the proofs or not. For aught that appears in the record, no proofs whatever were introduced in support of the cross-complaint. Error will not be presumed, but must be affirmatively shown. Where a case is tried and an appeal taken from the judgment roll, the mere non-appearance of findings of facts does not necessarily establish that error was committed. *Mulcahy v. Glazier*, 51 Cal. 626. It is also claimed by counsel that, under the decisions in California, findings must be made on the issue raised by cross-complaint, and *Speegle v. Leese*, Id. 415, also *People v. Forbes*, Id. 628, are cited in support thereof. In the *Speegle v. Leese* case, the court say that it is the duty of the court below to find on all the material issues made by the pleadings, whether evidence be introduced or not, and, in *People v. Forbes*, the court say that as the answer set up new matter, and the court below only found all the facts as stated in the complaint, that was not a disposition of the issues of fact involved in the case. The doctrine thus held is under the present Code of Civil Procedure of that state, and cannot be held to apply to cases arising under our statutes. The earlier decisions of the California courts were to the effect that implied findings would be presumed. It is so held in *Buckout v. Swift*, 27 Cal. 433. And the same doctrine has been held in this territory in case of *Federico v. Hancock*, ante, 650. It would be a little less than absurd to hold to the rule that, whether evidence was introduced or not in behalf of defendant's allegations, the court should find upon those allegations, and, in default thereof, the judgment should, for that reason, be reversed. Possibly that might be well enough as a matter of practice, but we have no statute requiring it to be done, and, in the absence of such statutes, the doctrine of implied findings will be adhered to. The judgment and order must be affirmed.

(1 Ariz. 510)

REILLY V. TYNG.<sup>2</sup>

(Supreme Court of Arizona. Jan., 1878.)

## CERTIORARI—WHEN LIES.

Under the provisions of Proceedings in Civil Cases Ariz. §§ 458, 464, that *certiorari* may be granted when an inferior tribunal exercising judicial functions has exceeded its jurisdiction, and appeal will not lie, and that the review on the writ shall be limited to the determination of whether such tribunal has regularly pursued its authority, the writ will not issue except when excess of jurisdiction has occurred, and appeal will not lie. PORTER, J., dissenting.

<sup>1</sup>This case, filed January, 1883, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

<sup>2</sup>This case, filed January, 1878, is now published by request with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

Comp. Laws Ariz. "Proceedings in Civil Cases," provides in regard to the writ of *certiorari*: "Sec. 458. This writ may be granted on application by the supreme and district courts of this territory. The writ shall be granted in all cases when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer; and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." "Sec. 464. The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer."

FRENCH, C. J. The order in this case was erroneously made, and the writ thereon improperly issued. Proceedings in Civil Cases, §§ 458, 464. No grounds whatever existed for the order or writ. This writ issues only when excess of jurisdiction has occurred, and then only when there is no appeal. Every point and proposition raised by appellant in this case is well taken, and uniformly supported by reason and authority. It has accordingly been ordered that the said order be reversed, and proceedings under the same dismissed.

TWEED, J., concurs. PORTER, J., dissents.

(1 Ariz. 511)

ROYCE v. SMITH.

(Supreme Court of Arizona. Jan., 1882.)

FRENCH, C. J. The order and proceedings therein in this cause have been reversed, on the authority of the decision in *Reilly v. Tyng*, 1 Ariz. 510, ante, 798, (decided at the same term.)

(1 Ariz. 81)

IRVINE v. LOPEZ.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1873.)

APPEAL—FROM JUSTICE OF THE PEACE.

1. Comp. Laws Ariz. p. 440, §§ 361, 362, provide that, on appeal from a justice of the peace, the district court may render judgment on the justice's return, or order a new trial, as justice may require. *Held* that, where the only error disclosed by the justice's return is a defect in the issuance and service of the summons, which is cured by a stipulation that the summons was properly served, and there is no special assignment of errors, as permitted by section 626, the district court properly affirmed the justice's judgment on the return, without trying the case *de novo*.

2. A defendant in an action on a note, who permits it to be given in evidence on the trial before a justice of the peace without objection, cannot for the first time on appeal in the district court raise the question of the admissibility of the note, because it was not properly stamped, as required by the United States revenue laws.

Appeal from district court, Maricopa county.

G. H. Oury, for appellant. John A. Rush, for respondent

TWEED, J. This cause comes before us on appeal from the district court of Mari-

copa county. The action was commenced in the court of a justice of the peace, and judgment by default was rendered in favor of the respondent for the sum of \$250, and costs. On the appeal in the district court the appellant moved the court for a trial *de novo*, which motion was denied, and judgment rendered in favor of the respondent upon the returns, for such sums of \$250, and costs amounting to \$7.50.

Two points are made by the counsel for the appellant: (1) That the court erred in refusing a new trial; (2) that the note sued on was insufficiently stamped, and ought not to have been received in evidence. Section 361, p. 440, Comp. Laws, provides that in all appeals from justices' courts to the district court, after the returns are filed, the court shall proceed to examine such returns and render judgment thereon, as the right of the case may appear, without regard to technicalities or imperfections in pleadings, if they do not tend to the prejudice of the rights of any party. Section 362, *Id.*, provides that "such judgment may be rendered upon the returns, or the court may order the same to be tried anew in the district court, as substantial justice may require." Section 626, p. 476, *Id.*, provides that "the party appealing may, in his discretion, file with his notice of appeal an affidavit as to any special matters in the proceedings appealed from; and the justice shall return specially as to all matters contained in such affidavits, and file such affidavits with his return." Section 628 provides that papers shall be transmitted to the district court. The section reads as follows: "Upon receiving the notice of appeal and the undertaking, as required in the next section, and on the payment of the costs of the action, the justice shall transmit to the clerk of the district court a copy of his docket in the case, and the undertaking filed, and the notice of appeal." We think the provisions of section 347, p. 437, *Id.*, under the head of "Appeals in General," are also applicable to proceedings on appeals from justices' courts. See section 535, p. 463, *Id.* What the justice's docket shall contain is prescribed by section 606, p. 474, *Id.* It may be added that justices of the peace are forbidden to grant new trials or to arrest judgments. See section 624, p. 476, *Id.* From the foregoing statutory provisions, it appears to us to be very clear in what cases new trials should be granted in the appellate court. If the transcript be obscure and unintelligible, or if upon its face positive error appears prejudicial to the rights of a party, or if such error appear by an assignment of errors by way of affidavit, sustained by the special return relating thereto from the justice, the appellate court will grant relief by modifying the judgment, if the error be one which can be corrected in this manner, upon inspecting the returns, and by ordering a new trial when the error complained of cannot otherwise be reached. Where no such error appears, either by reference to the transcript or by assignment of errors by way of affidavit, the appellate court can only confirm the judgment, or rather render such judgment as was had in the justice's

<sup>1</sup>This case, filed January, 1873, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

court, with costs of the appeal. In the case before us there was no assignment of errors, by way of affidavit in the justice's court. The transcript from the justice's court is more complete and perfect than such transcripts are usually found to be. If there is in it any defect, it is in relation to the issuance and service of the summons, and such defect, if there be any, is cured by the stipulation that due service of the summons was had in the case.

As to the second point made by the appellant, we are of opinion that it is not well made; conceding that the note sent with the papers to the district court was the note sued on, and that, under the revenue laws of the United States, it was insufficiently stamped, it was too late to raise this objection for the first time in the appellate court, even if the objection would have been good had it been taken in the justice's court,—a point we are not called on now to decide. From a careful consideration of the case under the statutory provisions referred to, we think the judgment should be affirmed, and it is so ordered.

(1 Ariz. 175)

ELDRED V. WARNER.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1875.)

CONTRACT TO MAKE WILLS—ENFORCEMENT IN EQUITY.

An agreement between two persons that the survivor of them shall have all the property left by the other, provided he assumes all of his indebtedness, though not having the requisites of a valid will, constitutes a valid claim on which the survivor may bring suit in equity against the administrator to obtain possession of the property *in specie*. DUNNE, C. J., dissenting.

*McCarty & Clark and C. W. C. Rowell*, for appellant. *J. E. McCaffry*, for respondent.

PER CURIAM. An appeal from a judgment in the first judicial district, county of Pima, and territory of Arizona, wherein said Rufus E. Eldred was plaintiff, and the said Solomon Warner, administrator of the estate of George M. Newsome, deceased, was defendant. The appeal is from the judgment entered in this cause on the 14th day of October, A. D. 1874, that the demurrer filed in said cause be sustained. It is now, on motion of McCarty & Clark, for the appellant, after hearing James E. McCaffry for the respondent, adjudged that the said judgment be reversed, and the cause remanded to the said district court for further proceedings.

DUNNE, C. J. (*dissenting*.) I am unable to concur with my learned associates in the disposition made of this case. The record is as follows:

"On the 14th of May, 1874, the following bill in equity was filed in the district court of the first judicial district:

'Territory of Arizona, county of Pima. In district court, first judicial district.

<sup>1</sup>This case, filed January, 1875, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

Rufus E. Eldred, Plaintiff, v. Solomon Warner, Administrator of the Estate of George M. Newsome, Deceased, Defendant. Now, by attorney, comes the above-named plaintiff, and, complaining of the defendant herein, for cause of action avers and shows that heretofore, to-wit, on the 21st day of February, A. D. 1874, at the village of Tucson, county of Pima, and territory of Arizona, one George M. Newsome, then and there being a resident, died, intestate, and leaving property and estate within the said county; that thereafter, on, to-wit, the 27th day of February, A. D. 1874, the said defendant, as public administrator in and for the said county of Pima, territory aforesaid, duly petitioned the probate court in and for the said county of Pima for letters of administration upon the estate of the said George M. Newsome, deceased; that thereafter, on, to-wit, the 24th day of March, A. D. 1874, the said probate court, by an order duly entered and filed in the said court, granted the petition of the said defendant, and issued to him letters of administration upon the said above-named estate. Plaintiff further avers that thereafter, on, to-wit, the 28th day of March, A. D. 1874, notice to creditors of the said George M. Newsome, deceased, requiring them to present to the said defendant, within ten months from the said last above named date, with the necessary vouchers, all claims against the said estate, was duly printed and published in a weekly newspaper, known and designated as the "Arizona Citizen," and published at the village of Tucson, county and territory aforesaid. Plaintiff further avers that on, to-wit, the 18th day of December, A. D. 1873, at the town and county of Yuma, and territory of Arizona, he, the said plaintiff, and the said George M. Newsome, in his life-time, entered into a certain compact and agreement, said compact and agreement being hereto annexed, marked "Exhibit A," and made a part of this complaint, wherein the said George M. Newsome, of the one part, and the said plaintiff, of the other part, covenanted and agreed, one with the other, that upon the decease and death of either of the said parties to the said compact and agreement, then that all goods, chattels, and property, both individual and partnership, of whatever character, of which either of the said parties was seised at the time of his death should fall to and vest exclusively in the survivor, upon the said survivor paying all of the debts of the deceased party. The plaintiff further avers that the said George M. Newsome died on or about the 21st day of February, A. D. 1874, and that the said plaintiff is now the survivor, as mentioned in said compact and agreement, and legally entitled to the possession and ownership of all the property of which the said George M. Newsome died seised. Said property consists of and is described as follows, viz.: Two diamond rings, one plain gold ring, one large diamond breastpin, and one pair of diamond sleeve-buttons, (plaintiff avers that the above-described property is of great value;) also the interest of the said George M. Newsome in the unsettled business of

the partnership formerly existing between the deceased and the said plaintiff, which is of the value of fifteen hundred dollars. That all of the above mentioned and described property, with the exception of the said partnership interest, above named, is now in the hands of the said defendant, as administrator of the estate of the said George M. Newsome, deceased. Plaintiff further avers that upon the said above last named day the said defendant, as such administrator, rejected the said compact and agreement by his written indorsement of rejection on the back of the same, as will more fully appear by reference to the Exhibit A. hereunto annexed. And plaintiff further avers, and shows as a ground for the equitable interposition of this court, that the real and intrinsic value of the said property in question and above described, with the exception of the said partnership interest, is unknown to the said plaintiff, nor can such real and intrinsic value be ascertained except by and through the most experienced lapidaries, and that the said plaintiff is informed and verily believes that there are no such experienced lapidaries within the jurisdiction of this court; that, if this court should refuse to equitably interfere between the said plaintiff and the said defendant, the said plaintiff could not be compensated in damages, for the reason such damages could not with any certainty be ascertained. And, as a further ground for the equitable relief sought for in the complaint, plaintiff avers that the property in question and above described, with the exception of said partnership interest, is to him of a value altogether beyond their price, or actual money worth,—a *pretium affectionis* on account of the bonds of friendship which united him to the said George M. Newsome; that if the said property were sold or departed from the possession and ownership of the said plaintiff, money or damages could not compensate him for the loss of said property. Plaintiff further avers that he has at all times been ready and willing and is now ready and willing to perform all of the conditions imposed upon him by the terms of the said compact and agreement hereunto annexed, to-wit, the payment of all of the debts of said partnership heretofore mentioned, and the individual debts of the said George M. Newsome, and that he has at divers times notified and informed the said defendant, as administrator of the said estate, of such readiness and willingness on his part to perform the said condition. And now the said plaintiff comes into court and says that he is now ready and willing to perform the said condition in any manner or form as this court shall deem fit and proper in the premises."

The complaint is verified in the usual form.

"EXHIBIT A.

"This agreement, made the eighteenth day of December, A. D. 1873, between George M. Newsome and Rufus E. Eldred, [sic,] witnesseth: That the parties hereto have been and are now full partners in all their business, of whatsoever kind, that has been contracted by them or either

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of them; that it is agreed now that, in the case of death of either partner, the surviving partner shall settle the business of the partnership, and that, after paying all the just debts of said partnership and the debts of the deceased partner, all the property, of every kind, money or stocks, remaining, shall belong to the surviving partner, for his sole use and benefit, without any process of law whatsoever, accounting only to the creditors of the firm, and the creditors of the deceased partner, and to no one else, without exception. This agreement has always been fully understood between the parties hereto, and after careful consideration is now fully understood, and we now bind ourselves, and all persons connected to or with us, firmly by this agreement. G. M. NEWSOME. [Seal.] R. E. ELDRED. [Seal.] Signed in presence of H. N. ALEXANDER."

Then next appears the following affidavit: "Territory of Arizona, county of Pima—ss.: Rufus E. Eldred, [sic,] being first duly sworn, deposes and says the within claim is justly due; that no payments have been made thereon; and that there are no offsets to the same to the knowledge of the said affiant, the claimant. R. E. ELDRED. Subscribed and sworn to," etc.

Then comes the following indorsement of rejection: "Rufus E. Eldred having submitted to me this article of agreement as a claim against the estate of George M. Newsome, deceased, the same is hereby disallowed, this fifth day of May, A. D. 1874. SOLOMON WARNER, Administrator of the Estate of George M. Newsome, Deceased."

Then follows a copy of the summons; next, a demurrer that the complaint does not state facts sufficient to constitute a cause of action by McCaffry for defendant. Upon the hearing in the court below, the demurrer was sustained. Plaintiff appealed.

Appellant's counsel, claiming the instrument to be a contract, cited Logan v. Wienholt, 7 Bligh, (N. S.) 53; 1 Story, Eq. Jur. § 786; De Bell v. Thomson, 43 Eng. Ch. 468; Beckley v. Newland, 2 P. Wms. 182, as referred to in 1 Story, Eq. Jur. § 343.

Respondent's counsel claimed it is not a will, (4 Kent, Comm. 633; Schumaker v. Schmidt, 4 Amer. Rep. 135; Brewer v. Baxter, 5 Amer. Rep. 530; Redf. Wills, c. 2, § 2; Martindale v. Warner, 15 Pa. St. 479;) it is not a claim against the estate, (Prob. Laws Ariz. T.; Fallon v. Butler, 21 Cal. 31;) plaintiff should have gone to probate court first, (Prob. Laws Ariz. T.; Pond v. Pond, 10 Cal. 500; Comp. Laws, p. 376, §§ 13, 14;) it is not a valid will, (St. Wills, Comp. Laws, 250; Alter's Appeal, 5 Amer. Rep. 434.)

On the hearing in this court it was adjudged by the majority of the court that the judgment below sustaining the demurrer be reversed. I cannot concur, and I submit the following reasons for my dissent:

I will first, as a preliminary matter, consider whether the question of jurisdiction has been raised. Section 144 of the New York Code prescribes the first and sixth grounds for demurrer as follows: "(1) That

the court has no jurisdiction of the person of the defendant, or of the subject of the action." "(6) That the complaint does not state facts sufficient to constitute a cause of action." New York Code, § 144. Section 40 of our civil practice act is the same, and is of course taken subject to such judicial construction as was had in New York prior to our adoption of it. Therefore, whatever objection could have been taken in New York under a demurrer for the sixth cause at the time our statute was adopted must also be allowed here. In New York it was held, under that statute, before our adoption of it, that although the usual form of excepting to the jurisdiction of the court is by special demurrer, under the first head, nevertheless this is not necessarily the form for the case of an objection to what is called the "equitable jurisdiction," which depends on remedy at law. Thus, the objection that the facts stated in the complaint do not present a proper case for the exercise of the equitable power of the court to remove a cloud from plaintiff's title is not an objection to the jurisdiction of the court, which must be taken specifically, under section 144, subd. 1, of the Code, but it may be taken by demurrer, under subdivision 6 of that section, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Hotchkiss v. Elting*, 36 Barb. 38, as quoted in 2 Abb. Pr. & Pl. p. 5, note x. The complaint in this case prayed for equitable relief alone, and showed that no other relief was possible, and expressly alleged that there was no adequate remedy at law. Under that showing in the complaint, the demurrer in this case raised the question of jurisdiction. *Hotchkiss v. Elting*, 36 Barb. 38. Besides this, section 45 of our civil practice act, following the sections assigning objections which may be taken by demurrer or answer, says: "If no such objections be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The question of jurisdiction is never waived. It can be raised at any time, and there is nothing in our statute limiting a party to any particular way of raising such an objection, or any particular time when he shall do it. It would appear, then, that at any time such an objection is brought to the notice of the court in any way it must be entertained, and, if found good, it must be sustained. At least, I think there can be no doubt that such is the case, where there is an inherent, insuperable, incurable bar to the jurisdiction. I will not say, if there was a potential jurisdiction, but that, by a technical omission of the service of some notice or something of that sort, it had not been perfected, some formal motion might not be necessary in order to give the party in default a chance to explain or possibly remedy the defect; but where it is found that it is not within the power of the court, by any means known to the law, to acquire jurisdiction, then I do not consider

that it is necessary even for counsel in the case to suggest the objection. It would be the duty of the court, I think, on suggestion of an *amicus curiæ*, or of its own motion, to dismiss the case, because, if objection of counsel was necessary to raise the point, then jurisdiction could be forced upon the court by consent of counsel or of parties, and this, it is well settled, cannot be done,—jurisdiction cannot be conferred by consent. Therefore I think the doctrine in *Hotchkiss v. Elting*, 36 Barb. 38, eminently sound, that a formal demurrer that the complaint does not state sufficient facts to constitute a cause of action very well raises the question whether it is a case of which the court can by any possibility have jurisdiction.

The complaint in this case was a bill in equity for specific performance, but it contains a certain statement of facts. If those facts, as stated, would give the plaintiff a standing in court on any other basis than the one he supposed he occupied, it may be urged that he would have been entitled to the proper relief, although such relief might have been at law, instead of in equity. I shall therefore consider this complaint in every way in which it seems possible to me that it might be made the ground for relief of any kind, either at law or in equity. I shall consider whether the demand made can be regarded as upon a "claim against the estate," in the sense of the probate act, or as upon a "contract" and, if it seems the instrument has reference to neither of these things, I shall endeavor to see what kind of a document it is, judged by the accepted canons of judicial construction, and, if found to be anything at all, whether in such case the court could grant any relief upon it.

Is this a "claim against the estate," in the sense of the probate act? To determine whether the claim made by plaintiff is such a claim as the statute contemplated, we must examine, first, what kind of a claim it is which plaintiff puts forward, and then see whether it falls within the class described in the statute. The plaintiff claims that by virtue of a certain instrument in writing, which he calls a "contract" between him and the deceased, he has practically become the sole and exclusive devisee of the deceased, with the right to take the whole estate and administer upon it himself, paying all just claims against the estate, and retaining the residue thereof to his own exclusive use and benefit. The demand he made upon the administrator was that the whole estate of the deceased, then in the hands of the administrator, be delivered to him. This the administrator refused to do. Whereupon plaintiff brought this action, praying that the court order the administrator to comply with his demand. Such was the claim which the plaintiff presented to the administrator.

Now let us see what kind of claims the statute says may be presented to the administrator, and which, upon his rejection thereof, the district court may examine and order to be paid in due course of administration, and let us consider, as we go along, whether in these sections the

word "claim" does or does not mean a "money demand," and what a creditor may present. Section 128 of our probate act says that "every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper published in the county," etc., "a notice to the creditors of the deceased requiring all persons having claims against the deceased to exhibit them with the necessary vouchers," etc. Section 130: "If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever: provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute," etc. Section 131: "Every claim presented to the executor or administrator shall be supported by the affidavit of the claimant that the amount is justly due; that no payments have been made thereon; and that there are no offsets to the same, to the knowledge of the claimant, or other affiant. The amount of interest shall be computed and included in the statement of the claim, and the rate of interest determined," etc. Section 133: "Every claim which has been allowed by the executor or administrator, and approved by the probate judge, shall, within thirty days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration," etc. Section 134: "When a claim is rejected, either by the executor or administrator or the probate judge, the holder shall bring suit in the proper court against the executor or administrator, within three months after the date of its rejection, if it be then due, or within three months after it becomes due; otherwise, the claim shall be forever barred." Section 140: "The effect of any judgment rendered against any executor or administrator upon any claim for money against the estate of his testator or intestate shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator, and the probate judge, and the judgment shall be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment shall be filed in the probate court. No execution shall issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment." Section 147: "At the same term at which he is required to return his inventory, the executor or administrator shall also return a statement of all claims against the estate which shall have been presented to him. \* \* \* In all such statements he shall designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him." These sections speak of creditors, of amounts being due, payments thereon, offsets to the same, computations of interest, the rate of interest, and the payment of such claims in due course of administration. To my mind, it seems beyond question that in all these sections the legislature had in view one

class of claims only, namely, money demands,—demands of a certain sum of money, or a sum which by examination could be made certain, a claim which would be fully met by a money judgment, or by an order to procure and pay a certain sum of money,—and not prayers for equitable relief, demands for specific performance, or claims for an entire estate. There seems to be no necessity for trying to give the preceding sections a wider range than was manifestly intended by their wording, namely, to provide for the adjustment of money demands, because the act makes full provision by means of other sections for the adjustment of every other kind of demand which can possibly arise in the settlement of an estate. There is no trouble in discovering what shall be done with different demands under the probate act. In its 306 sections, copied mainly from the California law, and profiting by all the experience had in that and other states, all is provided for, in a clear, orderly, and comprehensive manner. Every possible claim or demand or right connected with the settlement of an estate receives full consideration, and its appropriate section or sections prescribe how it shall be presented, and when it shall be determined. Some it sends to the administrator, some to the justice's court, some to the probate court, and some to the district court, each in its separate course, but all in harmony with established principles of jurisprudence. If these sections as to claims against the estate mean other claims than for money demands, then why such care in providing other sections for so many other kinds of demands, on which the proceeding is entirely different from that of going to the administrator with the demand? In the broad, unlimited sense of the word "claim," a person has a claim against the estate when the testator or intestate has wasted, destroyed, taken or carried away, or converted to his own use the goods or chattels of such person; so if he has committed trespass upon the real estate of such person; so where the deceased was bound by contract, in writing, to convey real estate to another; so where he had made any contract with another, on which he was liable during his life; so where a person is entitled to the recovery or possession of real or personal property. Yet all these claims are provided for in special sections, in a portion of the probate act entirely distinct and apart from the portion concerning what are technically called "claims against the estate," which are to be presented to the administrator, which special sections give a right of action, in the proper court, to a claimant of that class; but all of this would be useless and senseless if the term "claim against the estate to be presented to the administrator" covered all claims, even those other than money demands. Suppose a man claimed a pair of horses or 20 cows in the possession of the administrator, the administrator can take no action upon such a claim. The power to reject implies the power to judge and allow. When the administrator allows a claim, the effect is merely that it is set down as one of the just debts of the es-

tate, to be paid in due course of administration, and the time for payment can hardly be less than one year, and may be several years, and how can he pay horses or cows or diamonds? But the owner is entitled to his horses or his cows or his diamonds immediately if he can show title, and so he is given a right of action for them at once, but that right of action is not as upon a "claim against the estate," in the technical sense of the probate act. The foregoing sections are substantially a copy of the California probate law. In that state, the question as to what is meant by the word "claim," in sections similar to those above quoted, has frequently arisen.

In *Fallon v. Butler*, 21 Cal. 24, the subject received careful consideration. Mr. Justice FIELD, who delivered the opinion, stating that titles to property amounting in value to millions of dollars hung upon the meaning given to the word "claim" in the probate act. After a full review of sections similar to those above quoted, the judgment of the court was that, "whatever signification there may be attached to the term 'claim' standing by itself, it is evident that in the probate act it only has reference to such debts or demands against the decedent as might have been enforced against him, in his life-time, by personal actions for the recovery of money, and upon which only a money judgment could have been rendered." Under this view of the meaning of the term "claim" in the probate act, the court went so far as to declare in that case that even a mortgage lien was not a "claim against the estate," in the sense that it should be presented to the administrator for his action thereon, overruling two former decisions of the court on that point.

The same question has arisen in New York, under a law similar to ours, and thereupon the language of the court was: "The statutes contemplate an ordinary debt for which the deceased was liable in his life-time, upon a promise, express or implied; a debt which may be supported by the oath of the creditor, which is justly due, which may be the subject of an offset, and which was cognizable in the common-law courts." *Sands v. Craft*, 10 Abb. Pr. 216, 18 How. Pr. 438, as quoted in *McClellan's Probate Practice*, 234.

But the demand in this case could never have been enforced against the deceased in his life-time, and not even now could a judgment ordering a payment of any certain sum of money be rendered thereon, wherefore I consider it clear that this demand is not a claim against the estate which should have been presented to the administrator, and that therefore the plaintiff was not benefited in any way because he did so present the claim, and the case must be considered as if no such presentation was ever had, except in so far as the recitals in the complaint as to presentation show that plaintiff had notice of all the proceedings in the probate court connected with this estate. It would have been utterly impossible for the court below to have proceeded on this demand as upon a "claim against the estate," in the sense of the probate act, because in such

cause the judgment is compelled, by section 140 of the probate law, to take a certain specific form, viz.: "And the judgment shall be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." This matter being on demurrer, the statements in the complaint are to be taken as true, and the complaint states it is impossible to ascertain the amount in money which will be a satisfaction of plaintiff's demand; that money cannot compensate him; that he is praying for certain mementos of a deceased friend, which have for him a *pretium affectionis*, far beyond their money value, even if that value could be ascertained. So it is clear that no judgment, as upon a "claim against the estate," could have been rendered in this case, and therefore the complaint failed to make a case as on that ground.

Is this instrument a contract on which specific performance will lie? Specific performance will not lie on this instrument, as a contract, because (1) as a contract, the right of action is barred thereon by the probate law; (2) as a contract, the instrument is a violation of the statute of wills; (3) as a contract, it is against public policy, and therefore void.

1. As a contract, the right of action on this instrument is barred by the following section of our probate law: "Sec. 195. Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." Laws 1873, p. 143. Could any action have been maintained upon this instrument as upon a contract during the life of the deceased? Clearly not, for by the terms of the instrument itself no right accrued or could accrue to the plaintiff, until the death of the other party. The legislature has expressly declared that no action can be had upon it as a contract after his death.

2. As a contract, the instrument is in violation of the statute of wills. Section 4 of our statute of wills reads as follows: "Sec. 4. Every person of full age and sound mind may, by his last will and testament, in writing, bequeath and dispose of all his personal estate remaining at his decease, and all his rights thereto and interest therein, and all such estate not disposed of by the will 'shall be administered as intestate estate.'" Comp. Laws 1871, p. 250. There is a similar section as to real estate; and the instrument in this case undertakes to dispose of all property of every kind remaining at the death of either party after payment of debts. Here is a permission to dispose of personal property by will, coupled with the positive declaration that, if not disposed of by will, it must be administered upon as intestate estate; thus cutting off the right to dispose of it by contract. Counsel for plaintiff urge in their brief, filed in this case, the following proposition: "A person may dispose of his property in any way or manner he desires. He may, if not laboring under any legal



disability, enter into any contract for the disposal of his property, either before or after his death, as he wishes. The law does not and cannot restrain him in this particular, unless it be done in subversion or in fraud of the right of others. A person desirous of disposing of his property after death may make a will, but most certainly the law does not limit him to that particular form or method of procedure." I think it is quite clear from the reading of section 4 of our statute of wills that the law does limit him to the particular form or method of procedure known as "making a will," and debars him from disposing of his property by a contract. That our legislature has the power to make such a statute I will consider in another part of this opinion. The supreme court of Iowa says: "A contract made in violation of a statute \* \* \* is void, and cannot be enforced by action. This principle is sustained by a great number of authorities. Besides those just cited, we refer to a few others: *Pennington v. Townsend*, 7 Wend. 276; *Robeson v. French*, 12 Metc. (Mass.) 25; *Lyon v. Strong*, 6 Vt. 219; *Gregg v. Wyman*, 4 Cush. 322; *Davis v. Bronson*, 6 Iowa, 410; *Wheeler v. Russell*, 17 Mass. 258. This last is a leading case upon this subject, in which PARKER, C. J., says: 'No principle of law is better settled than that no action will be maintained upon a contract made in violation of the statute.'" *Pike v. King*, 16 Iowa, 52. And see post, in this opinion, the language of the court in *Habergham v. Vincent*, that a man is bound to follow the forms prescribed by law.

3. As a contract, the instrument is in violation of our public policy. It is the policy of our government, as well as of all civilized governments, to foster and uphold the family relation, the basis of all society. The family is fostered and protected by having the right to succeed to the estate of the ancestor. The right of succession is a part of our public policy. The statute of wills, so far as it allows an ancestor to name his heirs to the exclusion of his natural heirs, is in derogation of that right. The privilege which it gives is a privilege to disinherit the heir. It is a privilege very carefully guarded by the checks and limitations in the statute itself, requiring the act to be done in writing, by a person of full age, of sound mind, and in the presence of two witnesses, who shall attest the instrument at the time. The act of disinheritance in this case is against the public policy of the territory, and would be void independent of the statute of wills, because not sanctioned by any law. The territory is a possible heir itself to all estates. It comes next in succession after the failure of all natural heirs, and takes the property of an intestate as an escheated estate. It has a right to say that a stranger in blood shall not succeed to an estate to the exclusion of the natural and legal heirs, except in accordance with express provisions of law. It has named the conditions under which alone he may succeed. There is no provision of law allowing him to succeed under a simple contract, and such

a contract is therefore void as against the public policy of this territory.

Plaintiff has cited only three authorities in support of his view that the instrument herein is a contract on which a decree for specific performance should be given, viz.: *Logan v. Wienholt*, *De Beil v. Thomson*, and *Beckley v. Newland*, but neither of them seems to me to have any bearing on the case at bar.

*Logan v. Wienholt*, 7 Bligh, (N. S.) 53, cited in 1 Story, Eq. Jur. § 786, was a covenant by which a person bound himself to give, by his will, as much to A. as he gave to B., and it seems that it was held he was bound to do so. The case is expressly stated by Story to be cited to show how far courts of equity will go to enforce specific performance against parties and privies in estate. The case itself is not accessible to me. So many of the English cases of this nature seem to turn on contracts in marriage settlements which are held to pass an absolute present right, and to constitute an irrevocable charge on the estate, that the circumstances of the case may be important. B. may have been privy to the contract, consenting to it for a good consideration, but, however that may be, it seems that in England that case is not considered as governing a contract like the one at bar, for in the recent case of *Ryan v. Daniel*, hereinafter cited, specific performance upon an instrument similar to this was refused.

*De Beil v. Thomson*, 43 Eng. Ch. 468, was as follows: It is an English case. Mr. Thomson was a person possessed of considerable wealth, and had a marriageable daughter. De Beil was a single gentleman, having the title of "baron." Mr. Thomson entered into written agreement with the baron that if the latter would marry his daughter, thus making her a baroness, he would pay down the sum of £10,000 sterling, and would also leave a further sum of £10,000 in his will to be settled on his daughter and her children. The baron, in addition to marrying the young lady, was also bound to settle £500 a year upon her during her life. The baron performed his part of the agreement. He took Miss Thomson to wife, and settled £500 a year on her for life, secured out of his Mecklenburg estate. Mr. Thomson performed a part of his agreement. He paid down the £10,000, but he omitted to charge his estate in his will with the other £10,000, as he bound himself to do. De Beil, the plaintiff, son of the baron, his father and mother being dead, filed a bill praying that the executor of Mr. Thomson's estate should be compelled to pay the remaining £10,000, according to the agreement, and it was so ordered, and that is all there is in the case. I fail to see any material analogy between that case and the one at bar.

*Beckley v. Newland*, 2 P. Wins. 182, cited in 1 Story, Eq. Jur. § 785, the only other authority adduced by plaintiff, is also irrelevant. Fry on Specific Performance (page 496) gives the gist of this case as follows: "In *Beckley v. Newland*, the plaintiff and defendant had married two sisters, who were the presumptive heiresses of Mr. Tur-

gls, a very rich man, who had made and revoked several wills, and ultimately made one leaving a great estate to defendant, and only a small one to the plaintiff. Previously to the execution of the will, the plaintiff and the defendant had entered into an agreement for the equal division between them of what should be left to each of them, and this agreement was upheld and specifically enforced by Lord MACCLESFIELD, who said that the agreement was 'not disappointing the intent of the testator, for he did not design to put it out of the devisee's power to dispose of the estate after it should come to him; but, on the contrary, when the testator gave to either of them, he, by implication, gave to that person a power to dispose of the said estate when it should come to him.' Beckley v. Newland was, then, a contract between two persons to share equally an estate if it came to them or either of them. The contract in that case was one which could be, and was, enforced during the life of the parties making it, and, it might be argued, would not be obnoxious to the section of our probate act before cited, which bars all actions on contracts against an executor or administrator except such as could have been enforced against the deceased during his life-time, although even then, if the plaintiff waited until the decease of the other party, he might be met by the case of *Morse v. Faulkner*, 3 Swanst. Ch. 433, note, to the effect that a liability on such a contract is purely personal, and dies with the person. See Fry, Spec. Perf. (2d Amer. Ed.) 499. But such a contract has been held illegal in this country, even during the life-time of both parties.

In *Mercier v. Mercier*, 50 Ga. 546, "plaintiff agreed with defendant, her brother, (who proposed to contract a marriage of which their father disapproved, threatening if it was contracted to leave all his property to plaintiff,) that she would divide the property, if left to her, equally with defendant, who agreed to do the same if the property should be left to him. Defendant was married accordingly, and his father afterwards died and left him all his property. Held, that the agreement between plaintiff and defendant was against public policy, and that a bill would not lie for specific performance of it,"—as quoted in 10 Amer. Law Rev. (Oct., 1875,) p. 137.

I do not consider either of these cases in point. I have cited *Mercier v. Mercier* merely to place it side by side with *Beckley v. Newland*. I will now cite a case the analogy of which to the one at bar will, I think, be evident. I refer to the recent case of *Ryan v. Daniel, I Young, & C.* Ch. 60. Fry, in his *Specific Performance*, states the case of *Ryan v. Daniel* as follows: "In the latter case, each of two young officers in the army signed and gave to the other a document by which each charged his estate with £1,000 in favor of the other, in case the other should survive him, the consideration of each of these documents being the other of them. Many years subsequently a correspondence passed between these officers with a view to a rescission of the transaction, but that intention was

never carried into effect. The court held that, looking at the circumstances of the transaction, the age and condition of the parties, and their subsequent correspondence, there was no equitable claim which the court could enforce; but it retained the bill for 12 months, with liberty to bring an action to establish, if they could, a legal debt." Fry, Spec. Perf. (2d Amer. Ed.) 499. In this last case the claim was for a certain fixed sum of money, which possibly might have been established as a money demand against the estate, to be paid in due course of administration, and the court, while denying the plaintiff equitable relief on the contract, held the case open for a year to give him a chance to establish it as a legal debt, or what we would call a "claim" or money demand against the estate, so that, if he did succeed in establishing it, the court might make the requisite order, (I suppose in case the executor refused to pay it.) Our system, as I have shown, is different. A claim in that sense does not, with us, come into the equity court at all, and this action is based on the assumption that the demand herein is not a claim of that kind. The probate law and statute of wills of this territory are public acts, of which, together with the public policy of the country, courts must take judicial notice. The instrument set forth as the whole foundation of the action being void on its face as a contract, I think it appeared on the face of the complaint that there were not sufficient facts stated to constitute a cause of action, as upon a claim, or as upon a contract. It remains to be seen whether there was any force in the instrument viewed in any other light upon which the court might have acted, and this brings me to the consideration of the question, what kind of an instrument is this which was executed by plaintiff and deceased?

In law, instruments are classed according to their legal effect, notwithstanding the parties may have considered they had a different effect, or may have given them a different name, at the time of their execution. Parties may sign an instrument and call it a "deed," but the courts will sometimes tell them that it is in fact a bond or a mortgage or a contract, or probably, to their surprise, they may be informed that it is not a deed at all, but a will. The courts have certain legal tests for determining the character of instruments submitted to them. The test to discover whether a document is a will or not is to inquire whether it passes a present interest, or whether it passes no interest until after the death of the maker. In the first case, it is not a will; in the second case, it is a will, no matter what may be its form.

Let us look at some English authorities on the point. *Habergam v. Vincent*, 2 Ves. Jr. 205, 4 Brown, Ch. 353, was argued before the high court of chancery in England, in 1793, Lord LUTHERBOROUGH, chancellor. In this case a person made a will disposing of all of his estate, prescribing the line of succession through a great number of possible contingencies. At a certain point in these limitations he

stopped, weary, possibly, with following the line of possible succession, and declared that he reserved to himself the right to dispose by deed of the way his estate should go if the last contemplated contingency should fail. The next day, fresh for the work, he took up the tangled thread of remainders, and by a deed-poll directed how the estate should go in the event of the failure of the last contingency provided for in the will; and soon after he died. Then, in a surprisingly short space of time, every one of the dispositions in the will failed by the death of all the heirs under the will. Then the latent power of this deed-poll came into play, and the question was, should it operate as a deed or as a will? If it fully operated as a will, it would disinherit the heir at law and pass the estate to a stranger in blood. The case was argued first before Lord THURLOW, and he, the report says, "having taken a long time to consider," sent it to the king's bench in 1792. In consequence of too brief a statement of the case as sent, the court of king's bench held the deed-poll to be a deed, and incompetent to vest any estate in the parties claiming under it. The case was reargued in the high court of chancery, before Lord LOUGHBOROUGH, and he declared that he thought the deed-poll was in fact a testamentary document, but, having been decided differently in the king's bench, he did not like to decree it alone, therefore would give another hearing, and call in two judges from that bench that they may enlighten him in the matter. He called Justices BULLER and WILSON. The case was then reargued before the lord chancellor and those two judges, three counsel being heard on each side, one of whom was the attorney general. The lord chancellor complimented the counsel on their efforts, declaring that the question had been argued with "great industry and ability." I mention all this to show what thorough consideration was given to the question as to how a document may be testamentary in its nature, though it be not in the form of a will, nor intended as a will, but really intended as a deed. It was on this final hearing in the high court of chancery unanimously decided that the instrument was not a deed, but a will; that it would not pass any of the freehold estates, because for that purpose it was defective as a will, it not having sufficient witnesses, but that it was sufficiently attested to pass the copy-hold estate of the testator, one witness being sufficient for that purpose; that therefore the freehold estate should go to the heir at law of the testator, as not having been otherwise devised, but that the copy-hold should go to the heir of the surviving trustee. Mr. Justice BULLER, in delivering his opinion, said: "The first point I shall consider is whether the last instrument is testamentary, or not. \* \* \* It was argued for plaintiff that the testator did not intend to make a will when he executed the deed, and therefore it cannot operate as a will. Whether the testator would have called this a 'will' or a 'deed' is one question; whether it shall operate in law as a deed or a will is a distinct question, and that is now to be consid-

ered. That is to be governed by the provisions in the instrument. A deed must take effect upon its execution or not at all. It is not necessary to convey an immediate interest in possession, but it must take effect as passing that interest executed, but a will is quite the reverse. It can only operate after death, and upon this instrument it is clear the testator had no idea that this paper would have any effect until a distant period long after his death. \* \* \* When this case was argued there, [in the king's bench,] no one of the cases quoted here by the attorney general was mentioned or alluded to. I freely confess they did not occur to me. But those cases have established that an instrument in any form, whether a deed-poll or an indenture, if the obvious purpose is not to take effect till after the death of the person making it, shall operate as a will. The cases for that are both in law and equity, and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after death, it was considered as a will. Therefore, this last instrument must be considered as a codicil, and I shall call it so in what I shall say upon it. The next question is what effect this codicil has upon the freehold. Upon that point I agree with my Brother WILSON that it is void for want of three witnesses;" but as to the copy-hold. BULLER, J., says, the others concurring, that one witness was sufficient.] The Lord Chancellor, in giving his opinion, concurred in the view that the deed-poll was, in law, a testamentary document, and said: "*Thirdly.* There is no difference between law and equity in determining upon the effect of a testamentary act, and this instrument cannot pass the freehold estate, contrary to the provisions of a public law making that act void, [that is, the law for wills requiring three witnesses for such a will.]" \* \* \* The observation made by Justice WILSON is unanswerable, that it is not a personal privilege; that no man can reserve a power to act against the forms the law has imposed. Therefore, if it is to pass by a testamentary act, that must have all the requisite solemnities the law has directed." Mr. Justice WILSON declared: "By the common law a man could not devise land. Then came the statute permitting him to do so by an instrument properly signed. Then, lest testators should be imposed upon, these guards were created by the statute of frauds, and that insists that a will of land shall either be executed in the manner pointed out or be void. [In this territory wills as to realty and personalty are on the same footing.] This does not leave it at the option of the testator, but is a positive provision that a will shall be void if not executed according to the statute, and the testator cannot say he will make a will without the requisites prescribed, either not thinking he will be imposed upon or not caring about it. The law will not suffer that, but requires, in all cases, that these ceremonies, which might be considered as circumstances only if the act had not said otherwise, shall be

essential and be observed in making every will." *Habergham v. Vincent*, 2 Ves. Jr. 205, 4 Brown, Ch. 353. I have quoted language from the above case on points other than construction of instruments, namely, as to the binding force of the statute of wills, as cutting off equitable relief in cases not within the statute, to which I will refer in a subsequent portion of this opinion.

To continue with the English authorities, Jarman states: "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, disclose the intention of the maker respecting the posthumous destination of his property, and, if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded. Thus a deed-poll, or even an *agreement* or other instrument between parties, has repeatedly been held to have a testamentary operation. \* \* \* The ecclesiastical judges (before whom, of course, questions of this kind are most frequently agitated) act fully up to the principle which regards as testamentary *any instrument* that is designed *not to take effect until the maker's decease*, though assuming the form of a disposition *inter vivos*, and more especially if it be incapable of operation in the intended form; and accordingly in repeated instances the prerogative court has granted probate of such irregular documents as the assignment of a bond by indorsement, receipts for stock, and bills indorsed, a letter, marriage articles, and promissory notes, and notes payable by executors, in order to avoid the legacy duty." 1 Jarm. Wills, 13-20, (my italics.) Also unsigned drafts of bonds. (Id. 20;) also a deed conveying real estate, which contained a clause that, on the death of the survivor of two *cestuis que trustent*, trustees should "pay over all the property to different persons," (Id. 20;) and many other cases similar in principle there cited.

Of course, our statute of wills would prevent probate here of such instruments; that is, it would determine that as wills, or testamentary documents, they would be bad, not that they would be good for some other purpose. To make them available for other purposes, it would be necessary to show that they were not testamentary in their nature, for it does not follow that any given instrument must be of some force for some purpose; it may easily be of no force for any purpose. *Dufour v. Pereira*, 1 Dick. 419, cited in *Walpole v. Orford*, 3 Ves. 416, was a case where two persons signed an agreement before a notary public, providing for the disposition of their property after the death of either, and also after the death of the survivor. The parties were man and wife, but they were foreigners, and in their own country some of the property was the separate property of the wife, but the property, consisting of personalty, and being in their possession in England, was, by law there, the property of the husband.

To save their rights, they signed an agreement declaring with great minuteness what should be done after the death of either and of both. The husband died first, but the instrument was not treated, as to him, as a contract. It was probated as his will. By the terms of the instrument, the wife was to have the enjoyment during life, and, limited to that, of all the specific interests. She had a limited power of disposing of part of that property, but all she had was upon condition that she should dispose of it together with such other property as she might acquire after death upon the "dispositions of that will." Such is the language of the opinion. By "dispositions of that will" is evidently meant the terms of the agreement, which agreement was held to be the will of the party who first died. The wife on her death undertook to dispose of the property received by her under this will, and other property she had afterwards acquired, in a manner different from the terms imposed by the agreement or will; and then came a bill for specific performance, and Lord CAMDEN held that, by signing that instrument and taking the benefit of it, she had entered into an agreement to take the property devised to her, subject to the conditions of the instrument under which she took, one of which was that if she took that property she should stand by her agreement that on her death it should go as directed in the agreement, together with whatever property she might acquire after her husband's death. That, I take it, is the extent to which the instrument in *Dufour v. Pereira* was held to be a contract. It was construed to be the will of the party dying first, but the terms of it were binding as a contract upon the survivor who had chosen to accept its conditions.

In the case at bar, the survivor is named as "legatee," conditioned, however, that he will pay the debts of the estate. He may rightfully claim these diamonds, which he alleges are of such great value, and which he declares have a *pretium affectionis* for him, which cannot be estimated in money, if he can get the instrument probated as a will, and will comply with the conditions. The instrument is a contract, as to this plaintiff, to this extent: that he has agreed that he shall have no right to the diamonds unless he pays all the debts of the deceased.

In the case of *Walpole v. Orford*, 3 Ves. 402, from which the above is cited, an attempt was made to prove an agreement for a mutual will. The agreement was not proved, but the chancellor declared that even if it were proved, unless it were shown to be revocable, it would not be enforced. It follows from that, that, if an instrument setting forth such an agreement be not revocable, it cannot be enforced. If it be revocable, then, being a direction for the disposition of property after death, not to take effect until after death, it is ambulatory in its nature, and is a testamentary document.

Let us now look at the American authorities: "A will may be defined to be a legal, revocable disposition of one's property, to take effect from his death."

Langdon v. Astor, 16 N. Y. 49, as quoted in O'Hara on construction of Wills, 4. "Such an instrument may be couched in any form or language, provided that its whole operation is postponed to the death of the grantor. In one case there were both a consideration for the grant and words of immediate transfer, yet the instrument was held to be testamentary." Allison v. Allison, 4 Hawks, 141, cited by O'Hara, p. 4. "In the United States, as well as in England, the testamentary character of a document depends on its substance, and not on its form, except so far as that depends on the statute." Id., referring to Carle v. Underhill, 3 Bradf. 101, and In re Easton's Will, 6 Paige, 186. "A last will and testament may be defined as the disposition of one's property, to take effect after death." 1 Redf. Wills, c. 2, sec. 1; Turner v. Scott, 51 Pa. St. 126; Frederick's Appeal, 52 Pa. St. 338. "Where the payee of a promissory note made special indorsement to the effect that, if he were not living at the time of its payment, he ordered the contents paid to a person named, and died before the note was paid, the indorsement was held to be of a testamentary character, and entitled to probate as a will." 1 Redfield on Wills, 169, referring to Hunt v. Hunt, 4 N. H. 434, 17 Amer. Dec. 438. "A deed which, in terms, was not to operate until after the decease of the grantor has been held testamentary, and as such admitted to probate." Id. referring to Gage v. Gage, 12 N. H. 371; Ingram v. Porter, 4 McCord, 198; Milledge v. Lamar, 4 Desaus. Eq. 617. "Although an instrument is in form a deed, if it appears on its face that it was only intended to have effect after the death of the maker, it will be regarded as testamentary." Sartor v. Sartor, 39 Miss. 760, as cited in 1 Redfield on Wills, 174, note 27. "We are not aware that any essential difference exists in regard to the construction of wills between courts of law and courts of equity." 1 Redf. Wills, 500.

The question as to whether an instrument in the form of an agreement was testamentary in its nature or not was considered in the supreme court of Iowa, and it was held that the instrument was testamentary. The opinion states that the rule of construction by which to determine whether the instrument is a will or a contract is: "If the instrument passes a *present interest*, although the right to its possession or enjoyment may not accrue until some future time, it is a *deed or a contract*; but, if the instrument does not pass an interest or right till the *death of the maker*, it is a *will* or testamentary paper." The italics are as in the opinion. University v. Barrett, 22 Iowa, 60. Certainly the deceased in the case at bar did not intend to pass any interest in his property until after his death, for he did not covenant to stand seised of any property at all, but simply declared that whatever he might have at his death should go to the plaintiff.

In construing instruments, courts look at the intention of the maker, but in the matter of disposing of property the intention which they inquire into is not what kind of an instrument he intended to exe-

cute, but what kind of an estate he intended to create. The subject-matter in the mind of the maker is not what the instrument may be called in law, but what he is doing with the property. A man may very well know whether, in giving away a portion or the whole of his property, he wants to give it out and out, at the time, or whether he intends the gift shall not take effect until after his death, though he may not know or care what legal terms courts would use to designate the instrument he executes. The intention as to the property is the vital thing, and that is the intention the courts try to get at, for an instrument is not the will of the maker unless it is correctly interpreted. His real will is not the paper itself, nor the writing which is upon it. The writing is merely intended as the expression of his will, intention, or desire. It may not correctly express that desire or thought. In fact, correctly expressing it, if properly understood, the language may be misunderstood, and then his real will is not executed at all. Therefore the question the courts try to solve is, what did the maker really wish to do with his property? This distinction was clear in the mind of the supreme court of Georgia when it declared: "In determining whether an instrument be a deed or a will, the court will not consider what the maker believed it to be, but what, in point of law, it is. The intention of the maker as to the character of the estate conveyed is the criterion by which the court will determine whether a given paper is a deed or a will, and, if the intention gathered from the whole paper is that the estate is not to pass until his death it is a will, and not a deed." Brewer v. Baxter, 41 Ga. 212, referring also to Hester v. Young, 2 Ga. 31.

I think I have cited enough to show that, under both the English and American authorities, any instrument, no matter what may be its form, which undertakes to dispose of property, the disposition not to take effect till after the death of the maker, no interest of any kind passing until after his death, is a testamentary document, to be treated entirely as such, so far as it relates to such property, and that the rules for construing such an instrument are the same in equity as in law; that, the character of the instrument once established as a will, it must then be treated throughout, so far as it relates to such property, as a will, to have force as a will so far as the disposition of that property is concerned, or else have no force at all in that respect. In University v. Barrett, 22 Iowa, 72, the court said that counsel, contending that the instrument was a contract, cited 12 cases in support of that proposition. None of these cases cited are accessible to me, but I find, in looking at the brief of counsel citing them, that five of them are cited in support of the proposition that "an instrument conveying personal property absolutely, but retaining possession and control thereof during the life of the grantor, is valid." In reply to those cases, it may be answered (1) that the instrument in this case does not pretend to convey any personal property absolutely; (2) that,

even if it did, such mode of disposing of personal property after death is forbidden in this territory by statute, which declares it can be done only by will, executed with the same formalities as a will for realty. Of the remaining seven cases, three of them are cited in support of the proposition that "an obligation to be performed or to pay money after the death of the obligor is a valid contract, and not a testamentary writing." In the instrument at bar, there is no obligation to pay money after death, and if it be claimed that it imposes an obligation to be performed after death, and is thereby a contract in the sense of those cases, it may be answered that, if the obligation was not to be performed until after death, no action could have been had on such a contract during the life of the party; and, however it may be elsewhere, in this territory the legislature has declared that no action can be maintained against an executor or administrator on such a contract as a contract. The policy and letter of our law practically make all contracts of that nature void as contracts, by taking away all right of action on them as contracts. The wisdom of the law is evident. When the man is dead, the fight for the estate begins. Secret contracts are easily fabricated. The man is dead and cannot contradict or explain them. The estate may be plundered, to the prejudice of lawful heirs. Therefore, to protect the heirs, the law declares that there shall be no incumbrance on the estate except such as might have been enforced during the life of the testator, or such as he imposed upon it by will, in the presence of witnesses, as prescribed by law. But, whether wise or not, such is our law, and we are bound by it. Of the remaining four cases so cited they are in support of the following propositions, respectively: (1) An agreement to devise land in consideration of the payment of an annual sum vests an equitable title in the obligee. *Johnson v. McCue*, 34 Pa. St. 180. (2) A deed referring to and incorporating a will is good, and, taking the two papers together, shall be considered a deed, even if the disposition of the property is to take effect in the future. *Dawson v. Dawson, Rice*, Eq. 260. (3) Where a deed conveys lands for such uses as are not set out in a will already made, neither deed nor will is revocable, if no power of revocation is in the deed. *Mayor, etc., v. Williams*, 6 Md. 262. I do not think there is anything in these three cases to break the force of the long line of authorities cited to show what constitutes a will. And such was the opinion of the supreme court where those cases were cited, for the instrument in question there was held to be a will, although in the form of an obligation to pay a certain sum of money after death.

The last of the 12 cases cited to establish the instrument in the Iowa case as a contract is directly in harmony with those I have cited as establishing the instrument here as a will. It is cited as follows: "A test for determining whether an instrument is a deed or a will is: If the instrument was effective and operative at its execution, it is a deed. If it was

only to be effective and operative in the future, it is a will." *Cumming v. Cumming*, 3 Ga. 479.

Judge SAFFOLD, who delivered the able opinion in *Schumaker v. Schmidt*, 44 Ala. 454, says that in *Golding v. Golding*, 24 Ala. 122, "an instrument conveying a posthumous interest was regarded a deed, because it could not operate as a will for want of the requisite number of witnesses." *Golding v. Golding* is not accessible to me, but, if the court really did adopt that rule for determining whether an instrument was a deed or a will, I can only state that I consider, in so doing, it not only departed from the established authorities, but broke new and dangerous ground. I understand the character of the instrument is determined by the character of the estate conveyed, and not by the argument *ab inconvenienti*. By the rule in *Golding v. Golding*, as stated, every defective will would, if possible, be enforced in some other form, often to the exclusion of a prior perfect will, and the door would thus be opened to endless fraud; for, if the requisite number of witnesses to a will may be dispensed with, all witnesses may be omitted, and the forger require no confederate in wresting any estate from the lawful heirs. The statute of wills would become a nullity, and no estate would be safe. *Golding v. Golding* is in direct conflict with *Habergham v. Vincent*, herein cited, where the instrument was executed for a deed, which could not fully operate as a will, for want of the requisite number of witnesses, and yet was still held a will and not a deed.

In the case at bar, the instrument could not be effective to pass any interest to either party until the death of the other. All of the property prayed for by this bill was the individual property of the deceased, outside of the partnership funds, consisting of jewelry and diamonds, which he might at any time have disposed of as he saw fit. It was only in the event of his death with that property in his possession and ownership that plaintiff could acquire any interest in it. Therefore it seems clear to me that, if plaintiff has any claim at all on this estate, it is a claim as heir under a testamentary document, and not as a creditor of the deceased, nor as one taken under a contract. The instrument at bar is therefore a will.

This brings me to the question, can our district courts establish a will? The instrument in this case is in law a will, but it has not yet been probated so as to have legal force as a will. Could the district court have proceeded to hear proof of the execution of this instrument, and establish it as the will of deceased? Or could it grant any relief to the plaintiff on his bill until the legal proof of the character of this instrument had been regularly made? Or could it even then give relief on original bill? Plaintiff did not pray for the allowance of a money demand against the estate. He expressly declared that no money judgment was possible. He prayed for the estate itself, alleging that he was the person properly entitled to receive it, and asked for an order removing the whole estate from the control of the administra-

tor, and placing it in his own hands for settlement. He asked the court below to set aside all proceedings had in the probate court, and to take upon itself the task of ordering the administration and settlement of the estate. He assigns no reason why he did not seek relief in the probate court first. He did not allege any irregularity or fraud in the proceeding of the probate court connected with this estate, and did not show that he could not at the time of commencing his action in the district court have obtained relief even then in the probate court, but, on the contrary, as will be seen hereafter, he showed that the probate court at that time still had jurisdiction of this estate, and that his demand could have been heard and determined there. Nevertheless, he presented the demand in the first instance to the district court, the presentation he made to the administrator being no presentation at all. Under our system, have our district courts the power, even as courts of equity, to take original jurisdiction of such a demand? To answer this question, we must inquire a little into the constitution of our judicial system. If we go back to the source of our judicial power, and note how this power has been ordered, arranged, and distributed, then, if there has been any express disposition made of the particular power required in this case, we can easily find where it has been lodged. The act creating the territory, in force long before the execution of the instrument which is the foundation of this action, and ever since and now in force, declares as follows: "The judicial power of said territory shall be vested in a supreme court, district court, probate court, and in justices of the peace." Section 10, Organic Act N. M., made applicable to Arizona, February 24, 1863. By the same act the following decree was made concerning the jurisdiction of the said courts: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law." *Id.* By the same act the power to limit this jurisdiction was given to the legislature of Arizona in these words: "The legislative power [of Arizona] shall extend to all rightful subjects of legislation, consistent with the constitution of the United States," etc. *Id.* § 7. The supreme court of the United States has passed upon this question as to what this grant of power means, and has defined it in the following language: "Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system in operation, even to the defining of the jurisdiction of the several courts, as a general thing subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein. The local legislature has been intrusted with the enactment of the entire system of municipal

law, subject also, however, to the right of congress to revise, alter, and revoke, at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively co-extensive with and correspondent to that of the state courts, a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state, courts, are invested with plenary municipal jurisdiction." *Hornbuckle v. Toombs*, 18 Wall. 655.

This disposes of the claim made by plaintiff that the legislature has no power to say that a man may not dispose of his property after death by compact or contract, instead of by will, if he desires to do so. The legislature has full power over all rightful subjects of legislation, and the matter of the disposition of estates is generally admitted to be a rightful subject of legislation. Some deny it, I know. There is a school of sociologists which claims that no man, by any human law, can rightfully have any exclusive control of any property either before or after death, but the *dicta* of these philosophers are not authority in this court. Our political and judicial systems recognize that these matters are proper and rightful subjects of legislation, and our legislature has full power in the premises. In the exercise of this power, the legislature enacted an elaborate probate law of 306 sections, and gave to the probate court exclusive original jurisdiction of the settlement of the estates of deceased persons. Laws 1873, p. 100. It also enacted a law concerning "wills," and gave like jurisdiction thereof to the probate court. Comp. Laws 1877, p. 250. The following is one of the sections thereof: "Sec. 5. No will made within this territory, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some persons in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses," etc. The remainder of the section says, merely, that, if the witnesses are competent at the time, subsequent incompetency is immaterial. Here is another section of the same law: "Sec. 13. No will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court as provided by law, or on appeal in the district court, or supreme court; and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution." It will be noticed by referring to the instrument that it was made in this territory, and section 5 of our statute of wills not only says that the instrument at bar, having only one witness, shall, as a will, not only not pass any estate, but shall not charge or in any way affect the same. This certainly cuts off even all equitable relief under such an instrument, or any



testamentary document not fully up in all respects to the express requirements of section 5. By another act the legislature created the office of public administrator, and made it his duty to administer upon all intestate estates, under the direction of the probate court. The district court has no right to direct him in his duty except on appeal. Comp. Laws, 566. Section 294 of the probate act provides that the mode of reviewing the action of the probate court shall be by appeal to the district court. Laws 1873, p. 162. This appeal is not taken by filing of the original bill in the district court, but must be on notice in the probate court; and the proceedings as to the notice, bond, transcript, etc., are the same as on appeal from the district court to the supreme court. Prob. Act. §§ 293-299. Section 60 of the probate act provides that notice shall be publicly given of all applications for letters of administration, and of the time of hearing. Section 61 provides that any person interested may contest the application, assert his rights, etc. Section 62 provides that, on hearing, the court shall make such order concerning the issuance of letters as the case may require, and in the section concerning appeals special mention is made that an appeal to the district court may be had from such an order of the probate court. There is still another way of removing an administrator, and this one was open to the plaintiff at the time he filed his bill below. Section 98 of our probate law reads as follows: "Sec. 98. If, after granting letters of administration on the grounds of intestacy, a will of the deceased shall be duly proved and allowed by the court, the letters of administration shall be revoked, and the power of the administrator shall cease, and he shall render an account of his administration within such time as the court shall direct." Laws 1873, p. 117. The right to take the property from an administrator once appointed is thus expressly reserved to the probate court. The administrator may answer to the demand made by plaintiff in this case: "I know nothing of orders direct from the district court. I gave a bond to answer for this estate to the probate court. The law requires me to act under the direction of the probate court. I have no settlement with the district court. I must report to the probate court, and settle there before I can get my discharge. If I come back empty-handed to the only court with which I have to deal, an order from the district court direct to me will not excuse me. I can take my orders only from the probate court. The district court may speak to me only through the probate court. By section 299, Prob. Act, the only way a judgment of the district court can reach me is by having a copy sent to the probate court, and there entered as the judgment of the probate court. Then I am able to settle with my court, for I can cite its own judgment as my authority for surrendering the estate; but this can only be done in the case of an appeal, or perhaps in the different actions permitted against me, but of which, in any event, this is not one." All of the aforesaid acts were in force before

the execution of the instrument which is the foundation of this action, and ever since have been, and still are, in force.

The plaintiff states, of his own knowledge, he knows that the deceased died intestate; that the public administrator of Pima county duly applied for letters of administration on the estate of the deceased; and that the probate court, by an order duly entered and filed, granted such letters; and he stated other facts going to show that the proceedings of the probate court in the premises were all in regular accordance with law, and that he had full notice of all proceedings in this matter in the probate court. The question then is, had he the right to ignore all those proceedings of the probate court, to neglect his protest, waive his appeal, and file his original bill in the district court praying that the order of the probate court be considered a nullity, and that the whole estate be removed from the control of the administrator and be given to heirs? I think it is clear that he could not. The district court has no power to entertain such a bill. Plaintiff showed, by his own bill, that the administrator was *prima facie* rightfully in the possession of the estate, and administering upon it, according to law. He alleged no reason why all the regular and orderly proceedings of the probate court should be set aside, ignored, made absolutely null and void, except to allege that he himself, by virtue of a certain document, was the rightful heir to the estate, and should be put in possession thereof. But the twenty-ninth section of the probate act tells him what he should do under such circumstances,—he should have exhibited his testamentary document to the probate court, and asked to have it admitted as the will of the deceased. Administration was still going on in the probate court, and there was a special provision of law for such a case as plaintiff said he had, namely, a document disposing of an estate which had been declared intestate. If the probate court admitted it as good, it would have revoked the letters of administration of the public administrator, and put the plaintiff, or some person, in possession. If the court ruled against him, then he could have gone to the district court on appeal, and he would have been entitled to a hearing; but he might just as well go to the supreme court, or the court of another territory, with his claim, as to go into the district court by original bill. The law has created a special court to consider such claims, and has given it exclusive original jurisdiction of such matter. The only grant of original probate jurisdiction found in our law is to the probate courts, and the statute fixing the jurisdiction of the district courts excludes it therefrom. The sections are as follows: "Sec. 12. In addition to the jurisdiction of the district courts as conferred by the constitution and laws of the United States, their jurisdiction shall be of two kinds,—*First*, original; *second*, appellate. Sec. 13. Their original jurisdiction shall extend to all civil cases where the amount exceeds one hundred dollars, exclusive of interest, and to all criminal cases not otherwise

provided for. In cases involving the title or possession of real property, and in all issues of fact joined in the probate court and brought into this court as provided by law, their jurisdiction shall be unlimited. Sec. 14. The appellate jurisdiction of these courts shall extend to hearing on appeal. \* \* \* (2) An order or judgment of the probate court in the cases prescribed by statute." Comp. Laws, 376. This shows that the probate court has exclusive original jurisdiction at law of all probate matters, and it is only where a matter cannot be heard and determined by the law courts that the powers of a court of equity may be invoked. If a claimant neglects or refuses to appear in the proper court, it is his own lookout, and even the power of a court of equity cannot save him. The district court could not hear the claimant in this case upon original bill, even if he had been beyond seas at the time this administration was granted, and had come back with a perfectly regular will; nay, not even though his will were good, and a forged one had been probated in his absence, the administration being still in progress. An application to a court of equity to practically set aside an order of a probate court giving an estate into the hands of a public administrator differs in no respect in principle from an application to set aside the probate of a will. It is an application, in each case, to review and reverse, upon original bill, the action of a probate court, in a matter where that court has exclusive original jurisdiction.

In the case of *Broderick's Will*, 21 Wall. 503, there was an application to a court of equity to annul the action of a probate court, in admitting a will to probate. As stated by Wallace, it was "a suit in equity brought by the alleged heirs at law of David C. Broderick, late United States senator from California, to set aside the probate of his will, and have the same declared a forgery, and to recover the said Broderick's estate, much of which consisted of lands now comprised in the thickly-settled portions of the city of San Francisco." It is evident from this that it was a great case. It was carried to the supreme court of the United States. The bill charged fraud in the probate, fraud in the will, fraud in the sale, fraud in the purchasers, fraud from beginning to end, and that the plaintiffs were beyond seas at the time, and knew not of the fraud until administration had closed in the probate court, wherefore they had no possible relief at law, and therefore prayed for it in equity. Could a stronger case be presented? Yet the bill was demurred to, demurrer sustained, and the judgment affirmed by the supreme court of the United States. The first ground taken was that the equity courts had no jurisdiction, the matter being vested exclusively in the probate courts. In considering this point, the court declares: "As to the first point, it is undoubtedly the general rule, established both in England and in this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Kerrich v. Bransby*, 7 Brown, Parl.

Cas. 437, decided by the house of lords in 1727, is considered as having definitely settled the question. \* \* \* And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery to give full and adequate relief." The court quotes with approval the language of Lord LYNCHURST in *Allen v. Macpherson*, 1 Phill. Ch. 133; on appeal in the house of lords, 1 H. L. Cas. 191. In that case a bill was filed in chancery to annul the action of the probate court in admitting a codicil, charged to have been obtained through fraud. The bill was demurred to and dismissed. The judgment of the court sustaining the demurrer was affirmed. "If," says Lord LYNCHURST, in the house of lords, speaking of the action of the probate court, "an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a court of equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the court of probate, not by the judicial committee of the privy council, the proper tribunal for that purpose, but by the court of chancery. I think this cannot be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a court of equity, but that doctrine has long since been overruled." 1 H. L. Cas. 209. The court also quotes with approval the language of the supreme court of California in the case of *State v. McGlynn*, 20 Cal. 233, 268, as follows: "Upon examining the decisions of the supreme court of the United States, and of the courts of the several states, it will be found that they have uniformly held that the principles established in England apply to and govern cases arising under the probate laws of this country, and that in the United States, whenever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on appeal to a higher court, to be questioned in any other court, to be set aside or vacated by the court of chancery, on any ground." The following language is also used by the court at page 517: "The question recurs, do the facts stated in the present bill lay a sufficient ground for equitable interference with the probate of Broderick's will, or for establishing a trust as against the purchasers of his estate in favor of the complainants? On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. In such a case, a court of equity will not interfere, for it has no jurisdiction to do so. The probate court was fully competent to afford adequate relief." The last words do not mean that the probate court was open at the time the action was begun. It is admitted that it was closed at that time, as to the complainants, but that it had been opened to them the necessary time, and that it was laches on their part not to apply in time;

that there was nothing in their claim that they did not really have actual notice of the proceedings in the probate court, being beyond seas at the time; that the requisite legal notice was given by publication, etc.; and that they were bound by it; otherwise, all proceedings *in rem* would be unsettled. The particular point decided in the foregoing case was that the action of the probate court in determining that a valid will had been made could not be reviewed in a court of equity on original bill, but on the same principle the court must have necessarily declared that it could not interfere if the decision had been that a valid will had not been made, as was the case here. The principle recognized is that the review cannot be had on original bill, but must be by appeal. In this case, the probate court having regularly acted concerning this estate, and the plaintiff not having appealed, being guilty of laches to that extent, but still having his remedy at law, under section 98, Prob. Act, he did not present a case, as upon a will, of which the court had jurisdiction, and the bill was properly dismissed.

It has been urged that this is a case for the exercise of the large, broad, general principles of equity; that there was a manifest intention here to pass the property in question to plaintiff; and that it is the duty of a court of equity to in some way carry out the intention; that, if this instrument is held to be a will, the intention of the deceased will be defeated, because the instrument cannot stand the test of the probate court, there being but one witness and the statute of wills requiring two, and therefore the court must endeavor in some way to give force to this instrument; otherwise, the plaintiff will be left without relief. There are limitations, however, even upon the jurisdiction of a court of equity. Equity courts have extraordinary powers, but they are not beyond the reach of statute law, neither are they independent bodies, careering at will through the vast domain of law with no fixed rules for their guidance. The system of jurisprudence administered so grandly by Cardinal WOLSEY, so cautiously by Sir THOMAS MORE, defended by Lord ELLESMERE, systematized by Lord BACON, exalted by genius of Lord NOTTINGHAM, the father of equity, defined by the exquisite discernment of Lord HARDWICKE, developed, perfected, and ennobled by the commanding powers of such men as MANSFIELD, CAMDEN, THURLOW, ELDEN, MARSHALL, KENT, STORY, and other worthy compeers, will not be found devoid of definite rules of procedure. If we look for rules to guide us in the present case, we shall not fail to find them. For instance, he who asks equity must do equity. He who appeals to equity must submit to equity, and to obtain relief he must show that the equities are in his favor; that his equities overbalance those on the other side. But where are the superior equities of the plaintiff in this case? Why must he be favored in any especial manner, to the prejudice of the heir he seeks to disinherit? What has the natural or legal heir done that not only his equities but his legal rights must be set aside?

The plaintiff, in form, asks equity for himself, but in fact he has appealed to a court of equity to judge in conscience between him and the heir at law; to weigh the equities in each case, and declare whether or not the conscience of the heir at law is bound by this defective and illegal instrument of the ancestor. To prevail, he must not only show as good a right to the property as that of the legal heir, but he must show a better one. The heir is in possession. The administrator is holding for him. The plaintiff seeks to oust him, and, unless he shows the better right, he must fail, for *in æquali jure, melior est conditio possidentis*. The heir is defending, and, *in æquali jure, melior est conditio defendantis*. Broom, Leg. Max. 564. The heir is first in the field, and *qui prior est in tempore, potior est in jure*. The plaintiff seeks to destroy the legal succession by a private compact, but *fortior et potentior est dispositio legis quam hominis*. He seeks to set aside the strict law of the case in favor of his equity, but "where the equity is equal, the law must prevail." He asks relief against the law, but "where the law has determined a matter, with all its circumstances, equity cannot intermeddle against the positive rules of law." Fonbl. Eq. bk. 1, c. 1, p. 83. "And equity will not interfere in such cases, notwithstanding accident or unavoidable necessity." Id. He says that, under the rules of law, he has no relief, but Lord TALBOT declares: "Where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows." Heard v. Stanford, Cas. t. Talb. 174. He says deceased intended to name him as his heir, but, if a man leaves his will unfinished, there can be no relief. See half a dozen cases cited, 1 Story, Eq. Jur. c. 3, § 61. He says the strict letter of the statute defeats the will of the deceased, but "where a rule either of the common or the statute law is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it." 1 Story, Eq. Jur. § 64, citing Kemp v. Pryor, 7 Ves. 249; 2 Bac. Abr. "Court of Chancery," C. And see Habbergham v. Vincent, supra.

Our statute says distinctly the instrument in the case at bar shall not stand as a will for lack of witnesses, nor, I think, as a contract, because the maker is dead, and it could not be enforced against him during his life; and yet it is either a contract or a will, one or the other, beyond all question, so that it is very far from being clear that the plaintiff has any equities at all under this instrument. No equity can arise under it as a contract, for our statute forbids an action on it, and "if the law prohibits a thing to be done, equity cannot enjoin the contrary." 1 Story, Eq. Jur. § 64. No equity can arise on the instrument as a will, for as such it is defectively executed, and Smith, in stating some of the elementary principles of equity jurisprudence, gives the following illustration: "Thus, no relief will be afforded to the leg-

atees or devisees under a will defectively executed, for, being mere volunteers, they have as little equity as the heir or next of kin, or even less, inasmuch as *fortior et aequalior est dispositio legis quam hominis*, (Co. Litt. 388a,) and therefore the legal right which has vested in the latter will not be taken away, as the maxim is that 'where the equity is equal the law must prevail.' Smith, Man. Eq. (11th Lond. Ed.) 38, 39. A will is not executed until it is signed, duly attested, and declared or published, so as to be rendered complete and operative. See Burrill, Law Dict. "Execution." Bouv. Law Dict.; 4 Kent, Comm. 450, 513, and notes; 2 Bl. Comm. 376. This matter of disposing of property by will has never been recognized by any government as a natural right. It has always been looked upon as a matter of public policy, to be granted as a privilege, subject to such conditions for its exercise as the law-making power chooses to impose, or to be withheld altogether if it is considered that the interest of the state will be promoted thereby. And so we find innumerable varieties of statute law on the subject, not only denying the head of the family the privilege of making a will, but cutting off all right of natural succession. Giving not only all the property to the king, but also the wife and all unmarried children, so that to escape it the children were married in infancy, (*Esprit des Loix*, lib. v., c. 14,) is one extreme in legislation on this subject. This doctrine of escheats, though modified, has never been fully surrendered by any government. It exists to-day in this territory. It is the only part of the law of succession which all nations have always in some shape preserved. All improvements in the law of succession consist merely in concessions by governments of parts of this asserted right. The right of escheat is a corollary of the doctrine that every thing belonged primarily to the crown, and that the subject enjoyed even a life-estate in property only by favor. For the doctrine, see Crag, de Jur. Feud. 233, cited in Wright's Ten. 59.

The people everywhere have always pressed for an increase of rights over property. At first they asked only that it might descend to their natural heirs. Under the feudal law, when this privilege was granted, it was conditional on the lord's choosing the heir, or fine, fealty, homage, petition, proclamation,—whence heriots, relief, *primer seisin*, etc. Gilb. Ten. XVI. Then the people claimed the right to name the heir themselves; in other words, to devise the property to whomsoever they pleased; but this point is not even yet everywhere yielded. It does not yet exist in France or in Scotland as to realty. It is only during the reign of the present queen that it has been fully granted in England, as to realty, and even as to personality, it is only in a period comparatively recent that the privilege has been universally obtained even in England. 1 Redf. Wills, c. 1, § 5, note 10. In at least one of our states, Louisiana, the privilege is not yet fully granted, and in this territory it is only within the last few years that it has been conceded, so that the plaintiff in this case must remember that he has no

natural or inherent equities in this matter. He is a stranger in blood to the ancestor. All the rights he can possibly have herein depend upon a very recent statute, and this statute being the very last and furthest advance made in granting the power, to prefer strangers in blood to the natural heir, he must show a strict compliance with all the essentials of the statute, to acquire any standing at all in court. The equities are in favor of the natural or legal heir. These heirs are in possession, and the plaintiff cannot oust them except by showing not only an equitable claim, but a legal right, to do so. This doctrine is not new. It comes down to us even from the old black-letter days, but, though born of a former age, its sound principles of right and justice keep it ever green and vigorous, and it speaks to us to-day with undiminished power from the pages of our latest and highest authorities. In the tenth edition of Story's Equity it stands in the text as follows: "Equity will not interfere to give effect to an imperfect will against an innocent heir at law, for, as heir, he is entitled to protection, whatever might have been the intent of the testator, unless his title is taken away according to the rules of law." 1 Story, Eq. Jur. § 106. As authority for this proposition, Story cites Com. Dig. "Chancery," 3 F, 6-8; Fonbl. Eq. bk. 1, c. 4, § 25, notes k and n; Grounds and Rudiments of the Law, M. 167, p. 128, Ed. 1751.

The rules of law governing this case are set down in our book of statutes: (1) That the plaintiff cannot acquire this estate by a contract, or in any way except by will; (2) that he cannot acquire it by will, except by a good will, duly signed, attested, and probated. Equity cannot play fast and loose with the essentials of statute law. The legislature is the law-making power, not the courts. The matter of witnesses to a will is not within the maxim, *de minimis non curat lex*. It is one of the primary, essential, indispensable conditions to a valid will, and a court of equity has no more power to dispense with it or avoid it than it has to dispense with or avoid the whole statute of wills, or any other statute. I do not, then, see that the plaintiff made out any case for any relief in the court below. He did not ask legal relief as upon a claim against the estate in the sense of the probate act, and, if he had, or if the court might have entertained the case for that purpose, he did not show any such claim, and, therefore, did not state facts sufficient to constitute a cause of action in that regard. He could have no relief as upon a contract, for the only contract he set up was one on which our statute says no action can be founded; therefore, the complaint failed to state facts sufficient to constitute a cause of action in that regard. He could have no relief as upon a will, for he did not produce a regularly probated will, nor even a properly executed will, and the court has no jurisdiction to establish a will, nor give any relief on one, under the circumstances, even if a perfect will had been produced, for that court has no original jurisdiction of wills, and besides, ad-

ministration was still proceeding in the probate court, a court which had full power to afford him legal relief, and to which he was bound to first submit his claim, and apply to the district court. If at all, only by appeal from the judgment of the probate court. While limiting the reasons to the facts in this case, I do not mean to intimate any doubt about the law going as far as in this case cited. It is sufficient for the present purposes to show that it covers this case. The doctrine in the case of *Broderick's Will*, 21 Wall. 503, evidently goes much further, the court being irresistibly led thereto by the controlling fact that the jurisdiction invoked is, by law, placed exclusively in another tribunal.

In looking over this opinion, I notice in some places what may be thought a little impetuosity of expression. I have not time, pressed as I am with other official duties, to recast the language, but, however it may read, it is written in a spirit of entire respect for the judgment of the majority of the court, orally rendered, their written opinion not having yet been, so far as I know, prepared. This is the only case in which I have felt obliged to dissent from their judgment, and it is because of the greatest respect I know is due and accorded to their opinion, in any case passed upon by them, that I have taken the pains to try to show the reasons which led me to a different conclusion. I am therefore of the opinion that the judgment of the court below, sustaining the demurrer and dismissing the bill, should be affirmed.

(1 Ariz. 99)

*RUSH et al. v. FRENCH et al.*<sup>1</sup>

(Supreme Court of Arizona. Jan. Term, 1874.)

TRIAL — CROSS-EXAMINATIONS — SECONDARY EVIDENCE — MINING LOCATIONS — NON-RESIDENTS — FORFEITURE — EJECTMENT — INSTRUCTIONS.

1. In ejectment for a mining claim, plaintiff's grantor, who has testified in chief that she located the claim, may be cross-examined as to whether or not she then knew of defendant's prior location of the premises, and whether or not she had removed their notice of location, as such cross-examination is not calling out new matters of defense, but is simply showing that the title is not in plaintiffs, but in defendants.

2. Plaintiffs, after testifying in chief as to their purchase of the claim from the second locator, may be cross-examined as to their knowledge, at the time of their purchase, of defendants' prior location, of its record, and of the fact that defendants had done work on the claim, as these facts all go to prove title in defendants, in direct denial of plaintiffs' allegation that the title is in them.

3. A general objection to the admissibility of evidence does not warrant its exclusion, unless the evidence shows on its face that it cannot be available for any purpose.

4. Secondary evidence of the contents of a letter is rendered admissible by the testimony of the recipient, a mining prospector, with no fixed abode, that it is his general custom to burn his letters; that he had made a search for the one in question, and had been unable to find it, and that he supposed it had been burnt.

5. No presumption of fraud arises from the fact that a mining location is made by a pros-

pector for a non-resident, and that the non-resident subsequently deeded the property to the prospector, in the absence of any misrepresentations by the prospector to the non-resident, and of any miners' rules and regulations disqualifying non-residents from being locators.

6. Declarations by the locator of a mining claim, made during the time she claimed the title, that she expected to hold the premises because the prior locator was a non-resident, are admissible against her grantees, as it is an admission by her of a prior location, which may be valid, notwithstanding prior locator's non-residence.

7. Failure of a mining locator to comply with the local miners' rules, under which the location was made, does not work a forfeiture, unless the rules themselves so provide.

8. Under the miners' regulations in force before May 10, 1872, possession and occupancy, though not accompanied by a formal location, were sufficient to hold a mining claim against a subsequent would-be locator.

9. It is error to instruct that the occupancy of a mining claim must be "lawful" in order to protect the occupant against a subsequent locator, without explaining to the jury in what a "lawful occupancy" consists.

10. On the ratification by a non-resident of a mining location made in his name, the title vests in him as of the date of the location, and not of the ratification; and hence it is error to instruct that his title is defeated by a subsequent location made between the time of the first location and the ratification.

11. The law implies an authority in one person to locate a mining claim in the name of another from the fact of making such a location; and it is error to instruct that some express authority is necessary.

12. In ejectment for a mining claim, it appeared that defendants had first located the claim, and taken possession; that plaintiffs then dispossessed defendants, and likewise located the land; and that subsequently defendants regained the possession. *Held*, that the burden of proof was on plaintiffs to show the invalidity of defendants' first location, and that it was error to instruct that the fact of possession by plaintiffs at the time of their ouster gave them a *prima facie* right to recover.

13. Where the evidence shows that a mining claim was in good faith located by a prospector in the name of a non-resident, without any intention by any of the parties to use the non-resident's name as a means of evading the law limiting the number of feet which can be located by any one person, it is error to submit the question of a fraudulent evasion of the law to the jury, though the non-resident afterwards deeded part of the claim to the prospector, who had already located a claim in his own name on the same vein for the full number of feet allowed by law.

Appeal from district court, Yavapai county.

*Joseph P. Hargrave and Coles Bashford*, for appellants. *Rush & Davis* and *J. E. McCaffry*, for respondents.

DUNNE, C. J. This was an appeal from the third district court, Yavapai county, the judge of the second district presiding. It was an action of ejectment to recover possession of a certain mining claim known as the "First North Extension of the Tiger Lode or Vein," in Tiger mining district, Yavapai county, Arizona territory. Tried at the June term, 1874. Judgment below for plaintiff. New trial refused. Defendants appeal from the judgment and order refusing new trial. Appeal heard, January term, 1875.

On the 10th of January, 1871, D. C. Moreland located for himself and others 1,200 feet as the original location on the Tiger

<sup>1</sup>This case, filed January, 1874, is now published by request, with others, in order that the Pacific Reporter may cover all cases in the Arizona Reports from volume 1, p. 1.

vein. On the same day he located 200 feet on the same vein, and immediately adjoining the original location on the north, for the defendant Linn. This last location constitutes the premises in controversy, and was known as the "First Extension North of the Tiger Claim." One of Moreland's co-locators in the original claim was the defendant Washington French. French and Linn were very intimate friends. They had traveled and prospected together in Montana, Utah, and Arizona, as far back as in 1866. In May, 1869, they were at Fort Whipple, in Arizona, near where the premises in controversy are situated. At this time they separated, Linn going to White Pine, in Nevada, where there had arisen a great excitement about mines, French remaining in Arizona. At the time of this separation it was agreed between them that, if Linn found anything that would justify it, French was to be located with him, and that, if French found anything in Arizona that would justify it, he was to inform Linn, and Linn would return. French had furnished Moreland, the discoverer of the Tiger lode, with supplies to enable him to hunt for new mines, and he was to have an interest in all discoveries made by Moreland for so doing. After Moreland reported the discovery and location of 1,200 feet on the Tiger lode, French requested him to make a location on the same lode for Mr. Linn, which Moreland did, as before stated. On the same day that the original location of 1,200 feet and the first extension north of 200 feet for Linn were made on the Tiger lode, Moreland also made another location of 400 feet on the same claim next north of the Linn location for one Daniel Thorne and one John Cassidy, called sometimes the "Thorne and Cassidy Claim," and sometimes the "Second North Extension on the Tiger." This location was made by Moreland for Thorne and Cassidy under an agreement with Moreland alone that they would deed back to Moreland one-half of the ground for his trouble. This agreement was entered into before the location was made, but the agreement was not an agreement to deed back any particular part of the location of 400 feet, but generally to deed back one-half the ground to pay him for his trouble; and Moreland was the only party known to Thorne and Cassidy in this agreement. As a matter of fact, the deed presented by Moreland to Thorne and Cassidy for their signatures, and executed by them, was a deed to Moreland and his co-locators in the original Tiger location, and conveyed, not an undivided interest of 200 feet in the Thorne and Cassidy location, but a segregated interest of the south half of their location, to-wit, 200 feet next adjoining the Linn location. Plaintiffs attach importance to these facts, claiming that they tend to show a fraudulent intent upon the part of the original locators sufficient to vitiate the Linn location, and to allow the location of the plaintiffs' grantor to come in.

Some 30 days before the Tiger mine was discovered and located French wrote to Linn, in Nevada, informing him about the arrangement for prospecting, and stating

that, if anything was found that would justify it, he would locate him. Two days after the location was made, to-wit, on the 12th day of January, 1871, French wrote Linn, informing him that he had located a claim for him on a silver lead in Bradshaw, (meaning this Tiger lode.) He told him that the lead was 12 feet wide, assayed \$1,350 per ton, and that he thought that the location made for him (Linn) would be good for \$10,000 in less than a year; that as soon as he (French) got the claim recorded he would send Linn the name and number, and he wanted Linn to send a deed of it back to him, and he would hold it for Linn, who should have all it would bring. Fifteen days after, to-wit, on the 27th of January, 1871, French again wrote Linn, speaking more enthusiastically than before of the value of the claim, saying that it was 12 to 20 feet wide, averaged \$1,000 per ton; smelting process assayed \$2,000 per ton; to have no fears that their claim would be worth \$100,000 in less than one year; and inclosed a deed of Linn's location from Linn to himself, which he requested Linn to sign and forward as soon as possible, urging as a reason that the local laws were very stringent, and he was fearful of not being able to hold the claim. In due course of mail French received the deed from Linn, together with a power of attorney and a letter. The deed and power of attorney were dated the 9th of February, 1871, and were preserved, and produced at the trial. The letter accompanying them was not produced. French testified that it was his custom to burn all letters as soon as answered; that he had searched for this letter, and could not find it, and that he supposed that it was burned; but defendants were not allowed to give evidence of its contents.

It was not contended by plaintiffs that there had been any failure to do sufficient work upon the Linn location to hold it, nor that, if the Linn location was ever good, it had been forfeited by any non-compliance with the laws or customs governing the district. What plaintiffs claimed was that the Linn location was void *ab initio*, in this: that either there was no sufficient authority in Moreland to make it, or, if he had authority, that the location was a fraud upon the government, and therefore void. And now the foundation of plaintiffs' claim appears. One month after Moreland made the location for Linn of the first extension north of the Tiger lode, to-wit, on the 11th day of February, 1871, one Mary E. Sawyer went on the same premises and placed thereon a notice of location, claiming the same ground for herself. She recorded her notice, did some work on the claim, and on the 13th of June following conveyed her claim in said premises to the plaintiffs. A short time after this purchase plaintiffs put some men to work on the premises. Linn, one of the defendants, who had returned to Arizona about June 21, 1871, came with Moreland and another, and prevented Davis and his men from working, and the latter parties then left the premises. On the 27th of June, 1871, French, in whose name the title to the

Linn location had been standing ever since the deed of Linn to him of February 9, 1841, deeded back one-half of the ground to Linn for a nominal consideration of \$500, as expressed in the deed, but no consideration in fact passed. Linn testified that French retained half of the ground at his (Linn's) request as security for Linn's indebtedness to him which had been accruing at various times since 1866, and which he (Linn) believed amounted to about \$1,000 at the time French deeded to him, June 27, 1871. On July 18, 1872, plaintiffs brought suit in ejectment against defendants. Jury trial. Verdict for plaintiffs. Court set aside the verdict, and ordered a new trial. Plaintiffs appealed from the order. The supreme court, on appeal, held that the verdict was properly set aside. The case went back, and the trial was proceeded with. Verdict for plaintiffs. Motion for new trial denied. Defendants appeal from the judgment and order denying a new trial. Appellants assign 45 grounds of error, duly saved by a bill of exceptions.

The first grounds of error assigned relate to the rulings of the court as to the cross-examination of plaintiffs' first witness, Mary E. Sawyer. Plaintiffs introduced Mary E. Sawyer, who testified that she went upon the premises in person, and placed her notice of location thereon, upon the 11th of February, 1871; that she had the notice recorded, did some work, and conveyed her title to plaintiffs. Defendants then asked the following questions:

"(1) Did you remove any notice or notices from the monument on which you placed your notice at the time you placed your notice there? (2) What did you find upon the monument at the time you placed your notice there? (3) Was the claim in controversy known as the 'Linn Claim' at the time and prior to the time you placed your notice on it? (4) Did you see any work done on the claim at the time you made your location? (5) Was anybody else at work on the claim whilst you were at work there?" Defendants, under a general objection, were not allowed to ask any of these questions, and the refusal to allow these questions to be asked constitutes the first five grounds of error assigned by appellants.

Plaintiffs introduced John A. Rush, one of the plaintiffs, who testified that he and his co-plaintiff purchased the premises in question from Mary E. Sawyer about June 13, 1871; that on the day of the purchase, or day prior, he and his co-plaintiff went on the premises, with a view of purchasing; then purchased, and afterwards put men to work. Cross-examined: "When I went to examine the claim I saw that some considerable work had been done. I do not know by whom it was done." (6) Defendants were then prohibited from asking the following question, and assign such refusal as the sixth ground of error: "Were you not informed by your grantor that the work you saw on the claim had been made by Linn and French before your purchase?"

Alonzo E. Davis, the other plaintiff, was then introduced by plaintiffs, and on direct examination testified to the same

effect as Rush, as to visiting the premises prior to the purchase; that he put men to work, who were driven off by defendants; that no one was on the claim at the time his men went to work; that there was nothing to show that any one was in possession at the time; that the lands were considered public mineral lands at the time; and that he did not know of Mr. French's being in possession of the premises at the time. Cross-examined: "When I went with Mr. Rush to examine the ground I saw a cut that had been run into the hill towards the lead."

(7) Defendants were then prohibited from asking the following question: "Do you know by whom the work in the cut was done?"—wherein they assign error 7.

(8) Defendants were prohibited from asking: "Did you examine the district and county records before purchasing, in regard to the adverse claim to Mary E. Sawyer, of Linn and French, to the premises in controversy?" Assigned as error 8.

(9, 10) Defendants introduced William A. Linn, one of the defendants, who on direct examination testified as to his long friendship and intimacy with French, and as to the correspondence between him and French relative to the premises in question. Exceptions 9 and 10 were taken as to proving the contents of this correspondence, but are not pressed.

(11) Defendants were prohibited from asking: "What authority, if any, did you ever give Mr. French to make location of mining claims for you in this territory, prior to the location of the Tiger mine?"—wherein is assigned error 11.

Defendants introduced Washington French, one of the defendants, who, among other things, testified to his relations and correspondence with Linn. The letter of French to Linn of January 27, 1871, asking Linn to send a deed of the ground, was produced. Witness was asked: "What did you receive in answer to this? Answer: "I received a deed from Linn to two hundred feet of ground; also a power of attorney, and a letter, at the same time. I have not got that letter now. I suppose that it is burned up. I have searched for it, and cannot find it. It was my custom, as I have stated, to burn all letters as soon as answered; and I suppose that this one was burned." (12) Defendants offered proof of the contents of this, as being instructions for the use of the deed and power of attorney accompanying it. Disallowed, wherein is assigned error 12.

(13) Question by defendants: "For what purpose did you request Linn to send you a deed of the premises in controversy?" Disallowed. Assigned as error 13.

(14) Question by defendants: "Did you have or claim any pecuniary interest in the ground in controversy by virtue of the deed from Linn to you?" Disallowed. Assigned as error 14.

(15) Question by defendants: "Why did you have the deed and power of attorney both recorded?" Disallowed. Assigned as error 15.

(16) Question by defendants: "Did you offer to reconvey to Linn the entire interest in the claim in controversy on his re-



turn to Prescott?" Disallowed. Assigned as error 16.

William A. Linn, one of the defendants, recalled. Direct examination. Witness is shown the deed for the premises in question, and the power of attorney from himself to French. He said that he executed them, and that there was no consideration from French for the deed.

Question by defendants: "(17) For what purpose and what induced you to execute the deed and power of attorney to French of the claim in question? (18) Did you execute the deed to French at his request, as stated in his letter of January 27, 1871, and for the purpose therein mentioned? (19) For what purpose did you execute the deed to French, dated February 9, 1871? (20) For what purpose did you execute a power of attorney at the time you executed the deed of the claim in question? (21) Did you execute the deed for the reasons stated in the letter of January 27th? (22) What induced you to execute the deed of February 9, 1871, to French? (23) Did you expect to receive from French all the benefits derived from the claim deeded? (24) Did you at any time have any agreement or understanding with French by which you were to deed to French this ground, or any portion of it, for his own benefit? (25) Had you at any time before the location of this claim any agreement or understanding with French by which he was to cause locations of mining claims to be made for you, and you to deed them to him, for his benefit? (26) Was the letter from French to you, dated January 27, 1871, the only inducement and consideration upon which you executed the deed to French, of February 9, 1871?" All these questions, from 17 to 26, were objected to generally, and were disallowed, and therein are assigned errors 17 to 26, inclusive.

Defendants introduced E. S. Junior, who on direct examination testified that he knew all the parties to, and most of the circumstances of, this case; that he went himself on the premises for the purpose of relocating them a day or two before Mary E. Sawyer placed her location there; saw Linn's notice of location on the claim at that time; knew Mary E. Sawyer, plaintiffs' grantor; had a conversation with her as to her location of this claim about the time her location was made. (27) Question by defendants: "State what that conversation was." (28) "Did you have this conversation with Mary E. Sawyer on the same day that she placed her notice on the claim?" (29) Defendants offered to prove by this witness that at the time Mary E. Sawyer placed her notice on the claim in controversy she said that she relocated and jumped the claim, because Linn was a non-resident of the territory, and was not entitled to hold a claim. Questions 27, 28, and 29 objected to generally, and objection sustained; wherein appellants assign errors 27, 28, and 29.

Alonzo E. Davis, one of the plaintiffs, was called as a witness for the defense. On direct examination the first question was: (30) "Did you not, prior to the purchase by yourself and Rush of Mary E. Sawyer of the claim in controversy, ex-

amine the records in relation to the adverse claim of the Linn location?" General objection, and question disallowed. Assigned as error 30. Witness then stated, in response to other questions, that he was not certain whether he stated on the former trial that he had examined the records prior to purchasing, but he knew in some way that the ground had been taken up for Linn and deeded to French, but that it was considered as a bogus claim. (31) "Did you buy the claim from Mary E. Sawyer because you supposed the conveyance from Linn to French was a bogus affair?" Disallowed. Assigned as error 31.

William C. Collier, for defense. Direct examination. "Have been engaged for ten years locating claims here. Am acquainted with the general custom of miners around here in making locations where no organization exists. My knowledge is confined to this county. Am not acquainted with them elsewhere." (32) Defendants asked: "State what are the general usages and customs of miners in making locations of mining claims in unorganized districts?" Disallowed, under a general objection; and therein defendants assign error 32. The record shows that the premises in question were situated in the county of which witness spoke.

Fred Henry, for defense. Direct examination. "My occupation has been that of mining and prospecting since 1858. I have prospected in what was then Utah, afterwards Nevada, from 1858 to 1861; since then I have been in California, Idaho, Washington Territory, New Mexico, and Arizona. I am acquainted with the usages and customs of miners in making locations in unorganized districts." (33) By defendants: "What is the general usage and custom of miners in like places (unorganized districts) in regard to the discovery of mines in making locations for other parties not present?" Disallowed; wherein defendants assign error 33.

34 and 35 are not pressed by appellants. Counsel for defendants asked for the following instructions:

"*First.* Plaintiffs must recover, if at all, on the strength of their own title; and, having based their title on a location under and by virtue of the local rules and customs of the district, must not only show a compliance with these rules and customs, but that the claim was subject to location and appropriation at the time they, or those under whom they claim, sought to locate the same." Given.

"*Second.* That if the claim or mining ground in controversy had been previously ['lawfully' inserted by the court] located and appropriated by the defendants, and those from whom they derive their title, in accordance with the local rules or customs of the district or vicinity, plaintiffs cannot recover by virtue of a subsequent location of the same claim or ground, unless they show a voluntary abandonment of the claim, or a failure on the part of the first locator to comply with the local rules or customs of the miners of the district." Given. "And that such failure was of itself declared to be a forfeiture of

the claim." Refused. The counsel for defendants then and there excepted to the insertion of the word "lawfully" in the first clause of this instruction, and to the refusal of the court to give all of the above instruction; and assigned therein error 36.

"*Third.* That the right to locate and acquire title to the mineral lands belonging to the United States is not restricted to the inhabitants or residents of any particular district or portion of the country; and unless it is shown that the local rules and customs require the locator to be personally present to make the location, or to do some act in person, before acquiring a right to a mine or claim on a mine, all that is required to be done may be done by an agent or servant, for and in the name of his principal or employer, with the same force and effect as if done by the principal in person." Given.

"*Fourth.* If the defendants were [located and lawfully] inserted by the court] in possession and occupancy of the claim in controversy at the time plaintiffs' grantor attempted to make her location, no right was acquired by such location." The court gave the above instruction after inserting the words "located and lawfully," to the insertion of which counsel for the defendants then and there excepted. Assigned as error 37.

"*Fifth.* To entitle plaintiffs to recover on the strength of possession alone they must show an actual prior possession and occupancy without interruption for a sufficient length of time to show an appropriation to the exclusion of all the world; a mere scrambling possession, with occasional acts of ownership and control, is not sufficient." Given.

"*Sixth.* If the acts done by and under the direction of French for and in the name of Linn in the location and appropriation of the mines in controversy would, if done by Linn in person, constitute a good and valid title to the premises, according to the local rules and customs of the mines and miners of the district, the subsequent ratification and occupation by Linn makes them his own acts, and invests him with all the rights which he would or could have acquired if he had been personally present and performed those acts in person." Given. "*Unless a valid location by some other person had in the interval between the location of French and the ratification by Linn been made and perfected.*" Added by the court. The court gave the above instruction after adding the italicized clause at the end thereof, to which alteration the counsel for defendants excepted then and there, and therein assign error 38.

"*Seventh.* No express or written authority is necessary to constitute an agent to make a location of a mining claim." Given. "And a location made by one person for and in the name of another vests a right in the one for whom the location is made, which can only be divested by his own acts or omission, or by operation of law." Refused. The court added: "But some authority, either express or implied, must exist, or the agency must be ratified, before other valid claims intervene." To the refusal of the court to give the in-

struction as asked, counsel for the defendants then and there excepted, and assigned error 39.

"*Eighth.* The law makes the discoverer of a mine the agent of those for whom he chooses to act, and his act becomes their act, regardless of the fact whether the party for whose benefit the location is made has any knowledge of it or not. In such cases, however, the agent making such location has no power, afterwards to make any change in the same, so as to affect injuriously the right of the party for whose benefit the location was made. A failure to comply with the local rules and customs of the district will not work a forfeiture, unless such failure is declared by such rules and customs to be a forfeiture." The court refused to give the above instruction, to which counsel for defendants excepted, and assigned error 40.

"*Ninth.* It is not necessary that the record of a mining claim should be an exact copy of the notice placed upon the claim. If the record is substantially the same, describing the same ground by the same name, and of the same date, and substantially the same as the notice on the claim, it is a sufficient record."

Plaintiffs asked for the following instructions:

"*First.* That if Moreland acted as the agent of Linn in locating the ground in controversy and located in the name of Linn, the defendants, to avail themselves of such location, must show that Moreland, at the time of making such location, had written authority from Linn to make such location." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

"*Second.* That the location of a mining claim upon the public mineral lands of the United States under the laws of the United States is the creation of an interest in lands within the purview of the statute of frauds, and an agent cannot make such location for his principal, unless he be thereunto authorized by his principal in writing." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

"*Third.* If the jury believe from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, they will find for plaintiffs, unless the jury believe from the evidence that defendants had a better right to the premises than the plaintiffs." Given. Assigned as error 41.

"*Fourth.* If the jury believe that French had authority to act as the agent of Linn in locating the ground in controversy, that authority could not be delegated by French to any other person without express authority from Linn to do so." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

"*Fifth.* If Moreland had the authority to make the location in question, defendants, in order to avail themselves of it, must show that the location was made in accordance with the local rules and regulations of miners in the mining dis-

strict in which the said location was made, and that the notice of location was transmitted to the county recorder within sixty days after the location was made." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

"*Sixth.* If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim without further consideration, Moreland and French having already located two hundred feet each on the same lode, and Linn ratified the act of location for the purpose of making such conveyance, such location was void, as made in fraud and evasion of law." Given. Assigned as error 42.

"*Seventh.* That if the jury believe from the evidence that Linn and French were partners, and that French located the ground in controversy in the name of, and for the individual use of, Linn, and not for Linn and French, then the partnership conferred no authority upon French to locate for Linn." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

"*Eighth.* That no person can make more than one location upon the same lead or lode." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

"*Ninth.* A person, having made for himself, or other person or persons, a location for mining purposes on a quartz lead or lode, cannot afterwards make, either for himself or any other person, another location on the same lead or lode." The court refused to give the above instruction, to which counsel for plaintiffs then and there excepted.

The court also gave the jury the following instructions:

"*First.* A party locating a mining claim upon the public lands of the United States, and complying with the laws of the United States and with the local rules and customs of miners in the mining district in which the claim is situated, in locating and holding such claim, acquires a right to the possession of such claim against every one except those who have legally appropriated such claim prior to such location.

"*Second.* If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of the said mining claim, without further consideration, Moreland and French having already located two hundred feet each upon the same lode, then the location was absolutely void, and made in fraud and evasion of law." To the above, counsel for defendants then and there excepted.

"*Third.* A bona fide possession of the premises by plaintiffs, of however short duration, prior to an ouster by defendants, will entitle plaintiffs to recover, unless defendants show a better right to posses-

sion than that of the plaintiffs." To the above the counsel for defendants then and there excepted, and assigned as error 43 the giving of said second and third instructions.

"(44) That it was error to refuse a new trial in this: that the evidence is insufficient to justify the verdict.

"(45) That it was error to refuse a new trial in this: that the verdict is against the law as given to the jury by the court."

In approaching the consideration of this case, we find a multitude of objections to evidence certified from the court below, and we deem it well to call attention to some general rules on the subject. In doing so we do not mean to reflect on the practice of attorneys in this particular case; on the contrary, we feel more like complimenting the counsel on both sides for the extraordinary care bestowed on the case, and for the very able briefs filed, which have rendered the examination of the questions raised more a pleasure for the court than a task. But it is astonishing how many appeals are lost through a defect in the transcript as to the presentation of the grounds of objection to evidence. Case after case occurs in every state where the whole benefit of an objection is lost by an imperfect record on the matter of exceptions to evidence. The mere exception itself is generally taken correctly, and we think, as a matter of fact, that the proper grounds of objection are generally stated on the trial, and strenuously urged; but when the record comes to the supreme court the transcript fails, with wonderful frequency, to show what grounds of objection were urged, and the benefit of the exception is lost. This, doubtless, arises in a great measure from the absence of phonographic reporters, and the disinclination of all parties to stop in the midst of a trial, and keep a judge and jury waiting, in order that counsel may clearly settle their exceptions. We know that it is very hard to do this in the absence of short-hand writers, but until a more enlightened public opinion furnishes us with these wonderful aids to the dispatch of business, we must plod on in the old cumbrous way, and let juries possess their souls in patience, as best they may. We hope the consideration we have given this subject, and the reference we have made to adjudications on the point, will enable the bar of this territory to avoid many difficulties of this kind in the future.

The cases where we are called on to review rulings on the admission of evidence may be reduced to two classes: (1) When the party objecting was overruled, and he appeals; (2) when the party objecting was sustained, and the other side appeals. In the first case, where the party objecting was overruled, and he appeals, he must show by the record (1) what the question was, and what answer was given to it, or what the evidence was which was introduced against his objection. This is important, because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was

injured, because that would often be impossible, but he must show that the evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this court is not to determine the abstract question as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling. (2) He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. (3) He must show what kind of an objection was made; and, to avail him here, he must show that the objection as made was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the evidence as against the objection made. The amount of showing the latter party must make depends upon the nature of the objection. If the party objecting interpose merely a general objection, all that is necessary is to show enough to obviate the general objection. If the objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this, we cannot, in reason, require him to go. He should defend himself against the particular attack made, but we cannot ask him to fortify himself against all possible attacks which might have been made. In the second case, where the party objecting was sustained, and the other side appeals, and asks to have the ruling declared erroneous, the party appealing must see that the record shows (1) what question he asked, or what evidence he sought to introduce; (2) sufficient of the other evidence to illustrate the admissibility of that offered; (3) that the evidence so offered was excluded; (4) that there is reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds of exclusion.

What grounds of objection will be considered on appeal. The supreme court, in examining a question as to whether a ruling of the court below on an objection to evidence was correct or not, will not consider any other grounds of objection to the evidence than those urged in the court below. This rule is of universal adoption in the courts of this country. We do not see that it makes any difference which party it is that complains of the ruling, the question not being one of parties, but simply whether the ruling was correct or not. Of course, no one can complain of the ruling unless he appeals. *Martin v. Travers*, 12 Cal. 245, and numerous cases there cited; *People v. Glenn*, 10 Cal. 33, and cases hereinafter cited under the question as to what is the effect of a general objection. The reason of the rule is apparent. Courts are instituted, and judicial proceedings are granted, for the purpose of securing speedy justice. The right of parties to be protected against improper evidence is mutual, and is secured in the most ample manner. All that is required is that the party com-

plaining state a proper objection, and, if the judge below refuse to exclude, when the proper objection is made, or exclude when the objection made is not proper, relief is granted here on review. But a party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, "he must lay his finger upon the point of objection." 2 Bac. Abr. 529. See, also, *Martin v. Travers*, 12 Cal. 245; *Frier v. Jackson*, 8 Johns. 396; *Jackson v. Cadwell*, 1 Cow. 622; *Whiteside v. Jackson*, 1 Wend. 418; *Waters v. Gilbert*, 2 Cush. 29; *Covillaud v. Tanner*, 7 Cal. 38. He must not merely complain in a general way, and say that to let certain evidence in will hurt his case, and that, under the law, it ought to be excluded, and leave the judge and opposite side in the dark as to what principle of law he relies on, and compel them to decide hap-hazard, or else stop the trial of the cause with a jury waiting, while the counsel examine the whole body of the law, from the earliest judicial expositions down to the latest act of legislature, to see if they can discover any valid objection to the testimony. The opposing counsel can make no reply to a general objection except to throw the whole responsibility upon the judge at once, or else begin systematically, and argue that under any possible objection the testimony should come in. Many trials under such a system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, where all things are said to be fair; but life is too short to transact business on such a system in courts of justice. It may be urged that where a judge below has ruled on an objection, we should uphold his ruling, if any reason can be found to sustain it, even though it be a different one from that assigned, as in the case of a judgment. It is true that we must do so when the ruling is correct, but the very question raised by the exception is whether the ruling is correct or not. We are driven at once to the question: Did the party objecting state at the time good grounds of objection? If he did, of course his objection must prevail; if he did not, of course it must fail.

Why grounds of objection should be stated. The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities, and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time,—and

thus appeals could often be saved, delays avoided, and substantial justice administered. Counsel are held to the grounds of objection stated at the time they call for a decision of the judge below, because they are supposed to know the law of their case; and if they do not offer other objections they are supposed to waive them, and evidence admitted without valid objection should stand. Counsel must not be permitted to wink at the introduction of evidence to which they think there is a valid objection, hoping that it may benefit them, and, if it goes the other way, move to exclude it. Neither must they be permitted to plead inattention as an excuse. It is their business to be attentive on a trial, and if they miss a point by neglect they must lose it. Neither can we allow them to strike between wind and water on the trial, and then go home to their books, and study out other objections, and urge them here. They must stand or fall upon the case they made below, for this court is not a forum to discuss new points of this character, but simply a court of review to determine whether the rulings of the court below on the case as presented were correct or not.

Effect of a general objection. A general objection is unworthy of consideration. This is stating the rule very broadly, but perhaps the only limitation it can ever require is in those exceedingly rare cases where it is apparent on the face of the proposition that it is impossible the evidence is or can be available for any purpose. As the object of requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent, and it is clear that the defect cannot possibly be obviated, a specific objection would not help the adverse party, and in such case a general objection would be sufficient. But, of course, such cases will be very rare, and a prudent practitioner will hardly risk any point on a general objection. *People v. Apple*, 7 Cal. 290; *Killer v. Kimbal*, 10 Cal. 267; *Martin v. Travers*, 12 Cal. 245; *Baker v. Joseph*, 16 Cal. 180; *Mabbett v. White*, 12 N. Y. 451; *Railroad Co. v. Pointer*, 9 Kan. 629; *Wilson v. Fuller*, Id. 186; *Walker v. Armstrong*, 2 Kan. 226; *Jackson v. Cadwell*, 1 Cow. 639; *Michel v. Ware*, 3 Neb. 235; *Johnson v. Adleman*, 35 Ill. 265; *Carroll v. City of Benicia*, 40 Cal. 390; *Rosenheim v. Insurance Co.*, 33 Mo. 230; *Greene v. Gallagher*, 35 Mo. 226; *Clark v. Conway*, 23 Mo. 438; *Grimm v. Gamache*, 25 Mo. 41; *Stone v. Oil Co.*, 41 Ill. 85; *Graham v. Anderson*, 42 Ill. 514; *Howell v. Edmonds*, 47 Ill. 79; *Moser v. Kreigh*, 49 Ill. 84; *Hanford v. Obrecht*, Id. 146; *Harmon v. Thornton*, 2 Scam. 351; *Gillespie v. Smith*, 29 Ill. 473; *Sargeant v. Kellogg*, 5 Gilman, 273; *Swift v. Whitney*, 20 Ill. 144; *Buntain v. Bailey*, 27 Ill. 410; *Johnson v. Adleman*, 35 Ill. 265; *Tozer v. Hershey*, 15 Minn. 261, (Gil. 197;) *Welde v. Davidson*, 15 Minn. 330, (Gil. 253;) *Schell v. Bank*, 14 Minn. 47, (Gil. 34;) *Gilbert v. Thompson*, 14 Minn. 544, (Gil. 414;) *Bickham v. Smith*, 62 Pa. St. 45; *Batdorff v. Bank*, 61 Pa. St. 179; *Moore v. Bank*, 13 Pet. 302; *Elliott v. Peirsol*, 1 Pet. 328; *Camden v. Dorenius*, 3 How. 515, 530; *Hinde v. Longworth*, 11 Wheat. 199.

Effect of special objection. An objection that the testimony is irrelevant, without specifying wherein or how or why it is irrelevant, will not be considered in the supreme court as raising any issue, if the testimony could, under any possible circumstances, have been relevant. *Dreux v. Domec*, 18 Cal. 83. An objection that the testimony is inadmissible may be disregarded. It amounts to no more than the assertion that the evidence is illegal. The objection should fully and specifically point out how it is inadmissible. *Leet v. Wilson*, 24 Cal. 402. When an objection is that the evidence offered is incompetent and illegal, it is the duty of the court to overrule it if the evidence was admissible for any purpose. *Sneed v. Osborn*, 25 Cal. 627; *Bohanan v. Hans*, 26 Tex. 450. An objection that evidence is incompetent does not raise any issue as to whether the question is leading or not. The only way to raise such an issue is to object specifically that the question is leading. *Railroad Co. v. Pointer*, 9 Kan. 627. Where a witness was clearly incompetent by express statute as to certain conversations by reason of the death of a party, an objection to the evidence as irrelevant, immaterial, or improper was held not sufficient. There must be a specific objection that the party is not a competent witness, because the person with whom he transacted the business, and about whose statement he proposes to testify, is dead. *Cornell v. Barnes*, 26 Wis. 480, (June term, 1870.) This case is somewhat interesting, from the fact that the court, while adhering to the law, expressed its personal regret that the proper objection had not been made, the party deceased having been so well and favorably known to the court that it would not believe the charges made against him, even though the evidence had been properly admitted. The objection was that the evidence was immaterial, irrelevant, and improper. But it was very relevant, very material, and very proper if it were competent. But the question of its competency was not raised, and therefore it was error to exclude it. An objection to a deposition for substance raises no question as to competency, but the party objecting subsequently raised the point of competency, just as the judge was going to charge the jury, asking to have the evidence excluded for incompetency. Refused, and refusal upheld. On appeal, the court said it would be unjust to the plaintiff to allow the defendant, after the testimony is closed, and the court ready to charge the jury, to raise the question of competency when he had placed his objections upon some other grounds at the time the testimony was introduced. If the defendant had objected for competency at the time, the plaintiff might have availed himself of other testimony on the points. *Motley v. Head*, 43 Vt. 636.

An objection was made that certain evidence was incompetent. The judge refused to entertain the objection unless accompanied by a specification of grounds upon which the party objecting claimed that the evidence was incompetent. Exception to such ruling. On appeal, the supreme court declared: "We think the

judge very properly refused to entertain the objection. A judge presiding at the trial of a cause is not to be burdened with the duty of searching for objections to an inquiry put by counsel which the opposing counsel is himself unable to discover, or which, if apparent to his own mind, he sees fit to conceal for no other purpose apparently than to prevent a full consideration of the objection, and with the ultimate intent of taking advantage of an error, in case of defeat, which might have been avoided if his views of the matter had been fairly and candidly expressed at the proper time." *Bundy v. Hyde*, 50 N. H. 121, (July term, 1870.) An objection that evidence was irrelevant, incompetent, and immaterial was held to be merely a general objection, and not good if the evidence was admissible for any purpose. *Voorman v. Voight*, 46 Cal. 398. There are numerous authorities and adjudications in support of the natural, common-sense proposition that a general objection raises no issue except it is as to whether the evidence would under any circumstances or for any purpose be admitted; and that a special objection raises no other issue than the particular one tendered. They are also in support of the proposition that, if a judge overrule a general objection, he must be sustained, unless it clearly appears that under no possible circumstances in the case could the evidence come in; and that, if he sustain a general objection, he must be reversed if it is possible that under any view of the case the evidence might be admitted. That if he overrule a special objection, he must be sustained if the particular objection is bad, no matter how many other good objections might have been offered; but, if he sustain a special objection, he must be reversed if the special objection urged is not good, notwithstanding that there may be other objections which, had they been urged, would have sustained his rulings. The policy of the law is, evidently, to admit evidence unless a good objection to it is clearly shown. All the equities and all the presumptions are, not that a ruling is correct, but that evidence offered ought to come in, unless at the time it is offered good reason is shown why it should be excluded. "Competency is presumed until the contrary is shown." *Hall v. Gittings*, 2 Har. & J. 112, 120, 121, and cases cited by CHASE, C. J., at the last page; *Stoddert v. Manning*, 2 Har. & G. 147; *Callis v. Tolson*, 6 Gill & J. 80, 91; *Saxon v. Boyce*, 1 Bailey, 66; *Smith v. White*, 5 Dana, 382, 383.

**Limits of cross-examination.** The first five assignments of error may be considered together, they being all based on the refusal of the court to allow defendants to cross-examine plaintiffs' witness as to what she saw and did with regard to an alleged former location, at the time she claimed to have made a mining location on the same premises. The witness testified in chief that she went upon the ground, put up a notice, and did some work. On being cross-examined, she said she did not erect any monument, but put her notice on a stone monument already there, by lifting a rock, placing her notice under it, and then replacing the rock. She

was then asked by defendants whether she removed any notice from the monument at the time; what she found on the monument at the time; whether the premises were not known as the "Linn Claim" at the time; whether she saw any work done on the claim at the time; and whether anybody else was at work on the claim while she was at work there. General objections to all these questions were sustained by the court. Respondents argue that defendants could not cross-examine as to these matters; that it was opening defendants' case, and that testimony to open their case could not be so introduced. But, while respondents make this argument here, it does not appear from the record on what grounds they urged their objection below. No grounds are stated in support of any objection made by either party at any time in the trial below.

**English rule.** The English rule on cross-examination is that when a witness has been introduced and sworn and examined as to any material point in the case, the other party may cross-examine him as to the whole case, including any new matter of defense; but the extent to which he may be allowed to press the witness with leading questions will depend upon the circumstances of the case, the demeanor of the witness, his apparent bias, and other things; and must, to a great extent, be left to the discretion of the judge. 2 Phil. Ev. 896-911. This rule is followed to a great extent in the United States. Parties may cross-examine as to all matters pertinent to the issue. *Webster v. Lee*, 5 Mass. 335, (June term, 1809.) Where a witness is sworn generally in a suit he cannot be restricted, on cross-examination, to such points as the party calling him may choose to select. *Merrill v. Berkshire*, 11 Pick. 274. Chief Justice SHAW of Massachusetts reviews the question thus: "But upon the question, whether, as a general rule, the cross-examining party is prohibited from putting a leading question, to a matter not inquired of by the party calling him, on his examination in chief, there is a diversity of opinion. It was held by Mr. Justice WASHINGTON that such questions could not be put. *Harrison v. Rowan*, 3 Wash. C. C. 580. This is a very respectable authority, and entitled to great consideration. But in the case cited the nature of the question and the circumstances under which it was put are not stated, and no argument was had, and no authority cited. The same view seems to have been taken by the supreme court of Pennsylvania. *Ellmaker v. Buckley*, 16 Serg. & R. 77. But we think the general practice has been otherwise both in England and in this state, and is so laid down by the compilers. 1 Starkie, Ev. (4th Amer. Ed.) 131; 1 Phil. Ev. (6th Ed.) 260. There is one authority directly in point, where the objection was taken, and it was decided by Lord KENYON, at nisi prius, that such leading question is admissible. *Dickinson v. Shee*, 4 Esp. 67. So in several recent cases it has been held that, where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to the whole

case, and no distinction is suggested as to the mode of cross-examination. *Morgan v. Brydges*, 2 Starkie, 314; *Rex v. Brooke*, Id. 472. On the whole, the court are of opinion that the weight of authority is in favor of the right to put leading questions under the circumstances stated, and that this is confirmed by practice and experience. It is most desirable that rules of general practice, of so much importance, and of such frequent recurrence, should be as few, simple, and practical as possible, and that the distinctions should not be multiplied without good cause. It would be often difficult in long and complicated examinations to decide whether a question applies wholly to new matter or to matter already examined into in chief. The general rule admitted on all hands is that on a cross-examination leading questions may be put, and the court are of opinion that it would not be useful to ingraft upon it a distinction not in general necessary to attain the purposes of justice in the investigation of the truth of facts; that it would often be difficult of application; and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary powers of the court, where the circumstances are such as to require its interposition." *Moody v. Rowell*, 17 Pick. 498, 28 Amer. Dec. 317. It should be borne in mind that the point involved in the case from 3 Wash. C. C., quoted by Chief Justice SHAW, was not whether the witness might or might not be cross-examined as to new matter, but whether on that cross-examination leading questions as to such new matter might be put. There is a general impression that the right to cross-examine implies the right to put leading questions, but the very point of *Harrison v. Rowan*, 3 Wash. C. C., is that the judge there was of the opinion that such is not always the case that you may cross-examine and lead while you keep within the limits of plaintiff's case, but that, when you strike new matter, though you may still cross-examine, you must not, in that part of the cross-examination, put leading questions; and, though this seems a fine distinction, it may often be broad enough to secure valuable results. But in Massachusetts and many other states they reject even this limitation on the English rule, and hold that leading questions may be put in cross-examination as to all matters in issue in a case. It may be urged that great hardship to a plaintiff might arise under so broad a rule; that he would never be safe in calling any witness, unless he knew, to an absolute certainty, how he would stand the fire of cross-examination all along the line of the case; but, after an experience of 50 years under this rule in Massachusetts, the court say, in the October term, 1854: "Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party producing a witness. On the other hand, a different rule, by making it necessary for the court, during the examination of a witness, constantly to determine what is or is not new matter, upon which the opposite party has the right to put leading ques-

tions, leads to confusion and delay in the progress of trials." *Beal v. Nichols*, 2 Gray, 264. The English rule is followed in New York. *Jackson v. Varick*, 7 Cow. 238; *Varick v. Jackson*, 2 Wend. 167; *Bank v. Stafford*, Id. 483. It prevails in Vermont, (*Linsley v. Lovely*, 26 Vt. 123;) in Ohio, (*Legg v. Drake*, 1 Ohio St. 286;) in Missouri, (*Page v. Kankey*, 6 Mo. 433; *Brown v. Burrus*, 8 Mo. 26; *Railroad Co. v. Silver*, 56 Mo. 265;) also in Wisconsin, (*Knapp v. Schneider*, 24 Wis. 70.) To what extent it prevails in other states we are unable to say, on account of the limited number of Reports accessible to us here.

American rule. Greenleaf says (volume 1, § 445) that some of the states have adopted a contrary rule, which is called, by way of distinction, the "American rule," but refers to only two cases: *Harrison v. Rowan*, 3 Wash. C. C. 580, and *Ellmaker v. Buckley*, 16 Serg. & R. 77. But 3 Wash. C. C. is not a state report, and it does not say that the cross-examination shall not be had, but simply that leading questions shall not be put on such cross-examination as to new matter; and *Ellmaker v. Buckley* does not say it shall not be done, but simply that it may be refused, as a matter in the discretion of the judge. 1 Greenl. Ev. § 447, says that, though the party may not cross-examine as to new matter before opening his case, he may recall the witness, and cross-examine him, after he has opened. In the same section (447) he says that the rule is considered well settled by the supreme court of the United States that a party has no right to cross-examine except as to facts and circumstances connected with the matters stated in his direct examination, and quotes *Railroad Co. v. Stimpson*, 14 Pet. 448. We cannot comprehend how this matter could have been considered by the supreme court as well settled. It certainly had not been settled by the supreme court itself. The point had never been before the court, and was not before it in 14 Pet. The question before the court was as to the admissibility of certain evidence which was excluded below. The record showed that it was offered for the purpose of proving that the Baltimore Railroad Company, in making a compromise with a certain patentee and paying him an agreed sum to settle a claim he made upon them for an infringement of his patent, did not recognize that the patentee's claim was good, or that he had any right in the invention, but that the money was given to him simply to get rid of him. The supreme court said that on this showing the court below was right in excluding the evidence; that it was immaterial, or inconsequential, as they say; that the reasons which induced the Baltimore Railroad Company to pay money to the patentee have nothing to do with the patentee's right to his invention. Then, after disposing of the question as presented by the record, they go a little further, for the purpose of satisfying counsel, and say: "But it is now said that evidence was in fact offered for the purpose of rebutting or explaining certain statements made by one of defendant's witnesses in answer to cross-examination



made by plaintiff's counsel." Then the court replies: (1) It does not seem natural from the record that the evidence could have been offered simply to rebut those statements. (2) Defendant might have objected to the admission of those statements as not being legitimate under the cross-examination, they not being statements of facts and circumstances connected with the matters stated in his direct examination. (3) The question is then presented whether defendant, having omitted to object to improper evidence brought out on cross-examination, can thereby found a right to introduce testimony in chief to rebut or explain it.

This is the question to which all this introductory matter leads up, but they do not decide the question, and therefore it cannot be said that, having decided a question wherein the other proposition was taken as a necessary premise, they, by implication, decided that also. They dismiss the question with the remark that, if this improper cross-examination by the plaintiff had brought out something to his disadvantage, he would not have been allowed to rebut it, and therefore there is great difficulty in saying that if he could not do so defendant might; and then they waive the question altogether, and say that they place their ruling sustaining the exclusion of the evidence on other grounds, viz., that it was not distinctly stated below that it was offered in rebuttal, and that it was seeking to introduce parol evidence as to a matter evidenced by a written instrument, without producing or accounting for the instrument. Now, is it not apparent from this that the second declaration, on which it is claimed that so important a principle as the American rule on cross-examination is founded, is a mere *dictum* occurring in the statement of matters of inducement made for the purpose of bringing another question into notice, which other question was finally dismissed without adjudication? We apprehend that no court holds itself responsible, or desires to be held responsible, for every incidental remark made for the purpose of illustrating a question under consideration. We cannot know what the court meant by saying that the principle involved in the second declaration was well settled. They could not have meant well settled in England, for such had never been the rule there. Nor in Massachusetts, Vermont, New York, Ohio, Wisconsin, or Missouri. The case they had in hand was from Pennsylvania, and the rule in that state was, it is true, settled, as the supreme court says; but whether they meant that, or that it was settled in the United States circuit court for Pennsylvania, or what they meant, we cannot tell. A "*dictum*" is defined by Bouvier to be "an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication." It frequently happens that in assigning its opinion upon a question before it, the court discusses collateral questions, and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection and without previous argu-

ment at the bar, and as, moreover, they do not enter in the adjudication of the point before the court, they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. 1 Bouv. Law Dict. 476. This *dictum* in 14 Pet. may have contributed somewhat to the declaration in Houghton v. Jones, 1 Wall. 705, which still further contracts the rule. But even the rule as stated in 14 Pet. is very broad; it covers an inquiry into all the facts and circumstances connected with the matter stated in the direct examination; but, while it is broad, it is also uncertain, and uncertainty is almost the greatest defect a rule can have. Whatever may be urged against the English rule, it cannot be charged with uncertainty. It possesses certainty even to my Lord Coke's celebrated third degree. There is little danger of trenching upon its limitations, for it is practically without any. We do not wonder that it is popular with judges, for it relieves them of all anxiety upon one of the most intricate and delicate branches of their duty.

But it seems very hard that a party may be allowed to set up new matter in defense, and draw the proof to support it out of the plaintiff's witnesses by cross-examination. Doubtless, it is the apprehended hardship of this part of the rule which has tempted courts to depart from it; but whenever they have done so, and have failed to adopt some other definite rule, great trouble and difficulty have followed. The matter is one of the greatest possible moment. It affects, or may affect, the examination of every witness in the opening of every case; and it is a question which the *nisi prius* judge must pass upon at once when presented. It is of the greatest importance to suitors, judges, juries, and counsel that some clear, well-settled rule be adopted, which may be applied with some reasonable celerity and certainty. In California they have cut loose from the old rule, and the consequence is that such renowned jurists as Baldwin and Sanderson confess that even on appeal, with full time for examination, they have difficulty in coming to a satisfactory conclusion as to what the judge below should have admitted, and what he should have excluded. Under such a condition of things, no matter what the ruling of the judge below may be, there is always a fair chance for an appeal. It is a reproach to the law to admit that such an imputation is just. Rather than have such a state of things obtain here, we would be in favor of adopting the English rule out and out; for that, at least, has certainty to commend it. Judges in this country, who have worked under it, say it entails no hardship.

The first case in California where this question arose was in 1855. A majority of the court claimed to follow the case in 14 Pet., and excluded the question, but HEYDENFELDT, J., dissented, and stated that he thought the English rule ought to be adopted. Landsberger v. Gorham, 5 Cal. 451. In 14 Cal., four years later, Judge BALDWIN speaks of difficulty under the construction adopted in California. He

finally says that the question proposed was proper, but the only definite reason he gives for its propriety is that it did not concern new matter of defense, but was simply in denial of plaintiff's case. He comments on Greenleaf's rule, but does not touch the point whether defendant might not subsequently call the witness, and cross-examine, even on new matter. *Jackson v. Feather R. & G. W. Co.*, 14 Cal. 24. The next time we find the point appearing in California is in 1864, when it was held that, "the witness not having testified in chief upon the subject of the alleged breach, defendant had, in strictness, no right to interrogate the witness upon that subject at that time." *SHAFTER, JR.*, in *Aitken v. Mendenhall*, 25 Cal. 213. The qualifying words, "at that time," might seem to point to that portion of the rule in Greenleaf which says that defendant may cross-examine the witness by recalling him after his case has been opened. We next find the question raised in *Wetherbee v. Dunn*, 32 Cal. 106, in 1867. Defendants offered testimony by cross-examining one of plaintiffs' witnesses, which, though relevant, did not tend to rebut anything which that witness had said in his direct examination. Held, that "it was properly excluded, upon the objection of plaintiffs as to that mode of proof. So far as we can learn from the transcript, the offer was not subsequently renewed." *SANDERSON, J.* By the concluding sentence, it would seem that the court had also in mind the provision in Greenleaf as to cross-examination on recall. The question came up again in 33 Cal., in the same year as the last case. Judge *SANDERSON* acknowledges having difficulty with the point. The plaintiff sued for an accounting of a partnership, concerning a mining company, in which there were shares of stock. Defendant asked one of plaintiff's witnesses, on cross-examination, whether the plaintiff had not assigned to him 25 shares of stock, which it was not contended was not the property of plaintiff to dispose of as he pleased. The object of the question was evidently to throw some discredit upon the witness, as showing him to be biased in favor of plaintiff. He says that the court erred in prohibiting the cross-examination, but the only reason he gives is that the witness was intimately associated with the plaintiff in matters directly connected with the facts involved in the action, and spoke to the main points in issue; that, under the circumstances, the defendant had a right to test his credibility by any mode of examination that was calculated to illustrate the attitude and relation of the witness to the parties and the subject-matter of the action. *Harper v. Lamping*, 33 Cal. 641.

But the question is, under what general principle of law was it proper to exclude this question? How is a party to bring himself under the rule of this case? How is he to know what may reasonably be held to be within the rule in *Harper's Case*? That the decision did not settle the point, we may infer from the fact that it was very soon after again presented to the court. We find it in *Thornton v.*

*Hook*, 36 Cal. 223, in 1868. Plaintiff sued a sheriff for attaching and taking from him a team of horses. In presenting his case he proved by a witness that he had placed the horses in possession of witness to keep them for him on witness' farm, and that while witness was so keeping them for him the sheriff attached and took them in a suit brought by creditors against one Bogart. Defendant, on cross-examination, asked the witness if he knew how plaintiff came into possession of the horses, and if he knew whether, before the property was put into his possession by plaintiff, it had ever belonged to Bogart. Excluded. On appeal the court began by declaring: "It is not always easy to determine the precise point beyond which a cross-examination should not be allowed to proceed." They say, in effect, that this question tended to the destruction of plaintiff's case, but it also tended to help defendant's case; that it was pertinent to the matter pending, but that it also affected new matter. Then they say they will declare no rule in such a case, but leave it to the discretion of the judge below, and cite *Ellmaker v. Buckley* and 7 Cush. as authority for so doing. But the case in 7 Cush. (*Burke v. Miller*, 550) is a Massachusetts case, where the English rule prevails, and the right to a full cross-examination was admitted; the only objection made being that the judge ordered the defendant to wait till he had opened his case. There being no denial to him of his right, but merely a ruling on the order of testimony, it was held to be discretionary with the judge. But the supreme court of Nevada meet this issue squarely on this point of double pertinency, and say that in such a case "the fact that circumstances called forth by legitimate cross-examination happen also to sustain a cross-action or counter-claim affords no reason why they should be excluded." *Ferguson v. Rutherford*, 7 Nev. 391. And in support of such proposition they cite *Mondel v. Steel*, 8 Mees. & W. 858. This seems to us the more reasonable doctrine—*First*, because there is certainty in it; and, *second*, because it seems unfair that a question, legitimate to bring out some truth which will help the defendant, may be suppressed because it must necessarily bring out other evidence which, in strictness, ought to be offered at another time, and possibly in another form. Illinois is also vague and indefinite as to just what the new rule, called the "American rule," means. In fact, no two authorities that we can find agree as to what the rule is. The United States supreme court, in 14 Pet., does not follow Greenleaf; the case in 1 Wall. does not follow 14 Pet.; and the state courts follow none of them, but seem to decide each case on its own inherent equities. The first glimmer of light, in the matter of precedent, which we can see upon the subject of how to proceed, if the English rule is departed from, is from Judge *BALDWIN* in the case of *Jackson v. Feather R. & G. W. Co.*, in 14 Cal. He decides the matter first upon the general equities, and then adds that there is another reason why the evidence was proper, viz., that it did not relate to new matter of defense, but was a

mere denial of plaintiff's case. Judge GARBNER, of Nevada, in *Ferguson v. Rutherford*, 7 Nev. 390, takes up the idea shadowed forth by BALDWIN, and evolves from it a clear, definite rule, which everybody can understand, and which any one thoroughly versed in the effect of pleadings can apply, viz., that the one invariable test to determine whether the cross-examination can be permitted is, does it concern new matter of defense or not? As we understand the purport of this decision, it means that whatever is in mere denial of plaintiff's case may be brought out on cross-examination, whether the witness directly testified concerning it or not. That any such matter is, for this purpose, a fact or circumstance, legitimately connected with the matter testified to. If the witness has testified to any material fact in behalf of plaintiff's case, he may be compelled to disclose on cross-examination all he knows about the plaintiff's case, and everything that will go towards denying and destroying the case set up by plaintiff. That, so far as defendant has a right to cross-examine on such matter, he shall have the full benefit of cross-examination, viz., the right to make such examination leading, thorough, and exhaustive, and the fact that the evidence thus elicited, while pertinent to the pending matter, will also help defendant's case, is no ground for its exclusion. But he does not touch at all upon the other point in the rule as given by Greenleaf, (1 Ev. § 447,) that though a party may not before opening his case introduce evidence by way of cross-examination of the witnesses of the adverse party, yet he may do so after opening by recalling them for that purpose. We have only one objection to the rule as stated by Judge GARBNER, and that is the difficulty of applying it with certainty in the hurry of *nisi prius* trials. The test as to whether matter is or is not new matter of defense is, can it be given in evidence under a general denial? and very often it is not easy to say, at a moment's notice, whether the matter is new or not in this sense. The rule would hardly forward business on the trial. There would be the same objection by counsel as to admissibility, the same consumption of time in argument, and the same hesitation on the part of the court to decide. But there is this advantage: After the trial is over, all parties know just what is necessary to determine whether an appeal will lie or not. They know where the line is drawn. They can look for it, and when they find it they know that they have struck "wall rock," and that it is useless to go further. This is a great deal better than trusting to some other man's idea of the general equities of the case. Still, it is a very poor substitute for the plain, simple, English rule, which avoids all possibility of dispute, saves all contention at the trial, dispatches the business at once, and yet, according to the testimony of our oldest and busiest states, hurts nobody. Nevertheless, the supreme court of the United States has discarded the English rule, and has furnished some suggestions for a new rule, which different states have accepted as a basis on which to build up

what is called, by way of distinction, the "American rule," though it has hardly received an adoption sufficiently general to warrant such a title.

These suggestions have been adopted in California and Nevada, and our intimate relations with these states lead us to believe that, on the whole, it will be more satisfactory to all parties interested to have our practice in harmony with theirs. As the matter of determining rules on these matters is almost universally left to the courts, and as it is exceedingly desirable to have something definite on the subject, we shall adopt the following rules, believing them to be clearly in accordance with the doctrine held in Nevada, and substantially in accordance with the practice in California: (1) When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him, except exclusively new matter; and nothing shall be deemed new matter except it be such as could not be given under a general denial. (2) The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counter-claim affords no reason why it should be excluded. (3) The party entitled to cross-examine may waive his right to do so at the time, and recall the witness, and cross-examine him, after he opens his case. (4) The court, in its discretion, may forbid the cross-examining party putting leading questions when the objection is made that the witness is biased in favor of the party cross-examining, and the court is satisfied that the objection is good.

Under this view the assignments of errors from 1 to 5, inclusive, are good. The questions were improperly excluded. They merely tended to show that the title to the premises was really in the defendants, and not in the plaintiffs. In ejectment it is not new matter to set up defendant's title. *Marshall v. Shafter*, 32 Cal. 176. It was error generally to exclude the question, because no valid grounds of objection were stated. A general objection is bad.

Errors 6, 7, 8. The court erred in rejecting the evidence offered by defendants to prove that plaintiffs knew that the work on the claim had been done by Linn, and that they had examined the records, and knew of defendants' title to the premises in question, (1) because no specific objection was made to the introduction of this evidence; (2) it was evidence tending to show title and possession in defendants, and was therefore not new matter, as was ruled in *Marshall v. Shafter*, 32 Cal. 176. Parties must distinguish between new matter and new evidence, between new matter of defense and new facts and circumstances connected with plaintiff's case. A new fact, properly brought out, is in one sense a new matter, but it is some matter connected with plaintiff's case, which goes to break down the case he is attempting to make; and so long as it is not exclusively new matter of defense which could not have been offered under

a general denial it is admissible. We do not mean that this evidence was proper because it might show that plaintiffs had notice of defendants' title; but, whether proper for that purpose or not, it was proper for defendants to show by these witnesses, as well as by any others, that they had located and recorded the claim, and had done work upon it. The questions were directed to facts going to prove title in defendants, and such proof, if made, would have been in direct denial of plaintiff's allegation that the title was in them, and therefore was not new matter of defense.

Error 11. The court erred in rejecting the question: "What authority, if any, did you ever give Mr. French to make locations of mining claims for you in this territory prior to location of the Tiger mine?"—because no specific objection was made to the question; and herein becomes painfully apparent the consequence of bringing a question before us in this form, because we cannot strike at the heart of the matter upon such an objection. The object of an appeal is to settle something, so that, when the case goes back, the parties can know where they stand as to the questions raised on appeal. What can we settle on this question? Are we to go into an examination as to whether this question is leading or not, or whether it was a proper question to ask the witness at the time it was propounded, or whether it was immaterial or irrelevant at any time? We cannot guess as to which of these points counsel desire a ruling; but as no authority is necessary to enable one to locate a mining claim for another, we think that the question might have been excluded as immaterial, if objection had been made on the ground. But, though immaterial so far as authority to locate being necessary was concerned, it might have been material for some other purpose, and, therefore, if objected to as immaterial, the particular reasons why it was claimed to be immaterial should be stated.

Error 12. The court erred in excluding evidence of the contents of the letter from Linn to French, which accompanied the deed and power of attorney to French, because no specific objection was made to the introduction of such evidence. This evidence stands, in one respect, on much the same ground as that objected to in the last exception. We cannot tell what objection plaintiffs had to it; whether it was immaterial, or that sufficient foundation had not been laid for its introduction. We think that the foundation was sufficiently laid. We must distinguish in these matters as to the character, occupation, and business habits of the person claiming to have lost a paper, and as to the importance of the paper itself. If the witness were shown to be a lawyer or business man, with an established office or place to keep his papers, and who claimed to be unable to produce an important document received by him in the course of business, we would hold him to very full proof of loss and search; but if it were an unimportant document, one of trifling value to anybody, we could not hold him to

such full proof. But the witness in this case was shown to be a wandering miner, a prospector who moved over the whole mineral region west of the Rocky mountains, flitting hither and thither at a moment's notice, according as the mining excitement raged in one part or another. Naturally we would not expect such a man to carry many papers about with him. He testified that it was his custom to burn all letters as soon as answered. He said that he could not find this letter, and supposed that he had burned it, as was his custom. It is true that the proofs of search were not very full, and would not have been sufficient in the case of an ordinary business man, with an established place of business or residence, as to a document received by him in the ordinary course of business, but in this case we think that it was sufficient. We do not see, though, how it was material, but no objection was made on that ground.

Error 13. The court erred in rejecting the question: "For what purposes did you request Linn to send you a deed of premises in controversy, or power of attorney?"—because no specific objection was offered to such evidence.

Errors 14-26. The court erred in rejecting the evidence offered, because no specific objection was urged against its introduction. So far as the evidence was offered to rebut the presumption of fraud in using Linn's name as a locator with the expectation that he would convey his title to French or Moreland, the parties who made the location for Linn, it might have been successfully objected to as immaterial, because no presumption of fraud arises from such a fact. It is no fraud on anybody for one man to locate another in a mine, and receive back from such person a deed to the property, having made no misrepresentations to such person as to such transfer. Nobody is injured by such a proceeding. The law and customs of miners permit persons to make locations for persons not present. When so made, all the title anybody can acquire by location vests in the persons so located. They cannot be divested of it except by their own voluntary act, or by forfeiture in not complying with the rules and regulations of the district. The title thus acquired is theirs to dispose of as they please. They may bargain, sell, transfer, or give it to whomsoever they like. By having once been located in the claim, their right to acquire any further interest in the discovery by location is exhausted. The fact of their non-residence is immaterial, unless the contrary is expressly declared in the rules and regulations of the district. Whether the miners would have power to disqualify non-residents from being located is, of course, not passed upon here; but when there is no attempt at such disqualification, non-residents stand in the same position as those in the district. They must contribute to the development of the district by working their claims, or paying the fees, the same as those present; and it has been the policy of miners to encourage such locations, rather than look upon them with disfavor. It causes their mining district to be known abroad, and fur-

nishes additional means for its development.

Errors 27-29. The court erred in rejecting the evidence as to the declarations of plaintiff's grantor relative to the grounds on which she based her title, viz., that she expected to hold the premises because Linn was a non-resident, and that therefore his location was not good, because no specific objection was urged against such evidence. Evidence on this point would have been material, and admissible if it formed a part of the *res gestæ*. The witness was the immediate grantor of the plaintiffs. Declarations of a grantor as to the nature of the title he asserts, when they go to limit his title, are admissible, not only against himself, but as against parties claiming under him. *Stanley v. Green*, 12 Cal. 148. The reason of this rule is that, when a person admits anything against his own interest, he cannot claim that such admission is unworthy of belief. He cannot object to it as insufficient evidence against himself, and his grantees take his interest in the premises *cum onere*. If this were not so, a party could always avoid his own admissions by simply deeding to some one else. But these admissions must be contemporaneous with the fact to which they relate. The material fact in the case of this exception is not the mere act of Mary Sawyer placing the notice on the mine, but the grounds on which she based her title. As long as she claims title to the premises she is supposed to be interested in maintaining that title. Any admissions made by her as to her title during the time she claimed it, which would go to limit, impair, or modify that title, must be admitted as against her and her grantees. But the moment she had parted with the title, she becomes a stranger to the contest, and her remarks as to the title, made after she had ceased to claim under it, are of no consequence. She may be interested, then, in decrying the title. The evidence sought to be introduced went to show that she knew that defendants had already located the premises, and the reason assigned by her why she thought defendants' title not good was the simple fact of non-residence. Such evidence might often be of great importance. Defendant has a right to show title under a general denial. The record of this title may be lost. He may have no witness to prove that he was located. He may have been, as in this case, a non-resident at the time he was located. The party who located him may be dead or inaccessible, and then an admission of a would-be ejector that defendant was in fact located, but that there was a question whether he was entitled to hold or not, might be decisive of the whole case. The jury might find that, the location being admitted, he was entitled to hold, notwithstanding his non-residence.

Errors 30, 31. These assignments of error are practically the same as 7 and 8. In 7 and 8, Davis, one of the plaintiffs, testifying in the opening in his own behalf, was asked by defendants in cross-examination if he did not know that defendants had worked and recorded their claim.

Objected to and excluded. Subsequently defendants, after opening their case, called Davis as a witness, and asked him the same questions. Objected to by plaintiffs. Objection sustained. Defendants except, and assign errors 30 and 31. It was error to exclude the testimony—*First*, because no specific objection was made thereto; and, *second*, for the reasons given in considering points 6, 7, and 8.

Errors 32, 33. The court erred in excluding the evidence of Collier and Henry as to mining customs, because no specific objection was made thereto. The question asked of Collier was open to objection, as being too general for the foundation laid. He showed a knowledge of the customs of Yavapai county alone, and was asked as to general customs without limitation to place; but to raise the point the special ground of objection should have been stated. The effect of such an objection, we may naturally suppose, would have been to limit the question to that county, and then there would have probably been no appeal on this point. Question 33 to Henry seems to us free from objection as to lack of foundation, but, in any event, as no particular objection was urged, and the question seems proper, it was error to exclude it.

Errors 34, 35. Plaintiffs introduced proof of an agreement between Thorne and Cassidy on the one part, and Moreland, an owner in the original Tiger claim, on the other, whereby Moreland was to locate for them 400 feet next north of the premises in controversy, on condition that they would deed back to him one-half of the ground, and that the agreement was fully carried out. Defendants objected, were overruled, and assign therefor errors 34 and 35. The objections were properly overruled, no specific grounds of objection having been stated, and we cannot say that the testimony might not have been admissible for some purpose. Counsel for plaintiffs urge here that the testimony was relevant, and of weight, as relating to an attending circumstance going to show a fraudulent intent of the original locators of the Tiger in trying to hold, by this agreement, more ground on the claim than they were entitled to retain by location; and that such a circumstance, if proved as to the Thorne and Cassidy claim, would tend to raise a presumption, taken in connection with other circumstances, that the same thing was true as to the Linn location. We will notice the point in considering assignment No. 44.

Error 36. The refusal of the court to give the concluding clause of defendants' second instruction was, in effect, a refusal to charge that a claim, being located according to local rules and customs, a failure to comply with such rules as to making and holding the claim would not, of itself, work a forfeiture, unless such failure was, of itself, ordained by such rules and customs to be a forfeiture. This was error. The general rule is that a statute without a penalty is mere *brutum fulmen*. The miners are recognized as law-makers in the matters of their rules and customs. When they prescribe a duty, and affix no penalty for non-compliance, how are we to know

what penalty they intended? For us to fix the penalty would be to make laws for them, which we have no right to do. The province of the courts in this matter is merely to receive the evidence, and from it to declare what laws or rules the miners have in fact adopted. Courts do not presume in favor of forfeiture; but, on the contrary, when parties claim a forfeiture under the mining laws, these laws, instead of being liberally construed to establish the forfeiture, will be strictly construed against it. *Colman v. Clements*, 23 Cal. 248. The failure of a party to comply with a mining rule or regulation cannot work a forfeiture, unless the rule itself so provides. *Bell v. Mining Co.*, 36 Cal. 219; *McGarritty v. Byington*, 12 Cal. 426; *English v. Johnson*, 17 Cal. 118.

Error 37. Defendants asked the court to instruct that, "if the defendants were in the possession and occupancy of the claim in controversy at the time plaintiffs' grantor attempted to make her location, no right was acquired by such location." The court refused to give this instruction, but gave in its stead another and very different one, by inserting the words "located and lawfully" before the words "in the possession." This was calculated to seriously mislead the jury. It was the same as to say to them that possession and occupancy were not sufficient unless accompanied by a formal location, and that, in addition to location, the possession and occupancy must be lawful. This, so far as it related to possession before May 10, 1872, was error, and the possession claimed in this case was before that time. Before that time, possession and occupancy, so long as they continued, were sufficient to hold a mining claim against a would-be subsequent locator. The main object of recording a claim is to give parties the opportunity of ascertaining, by visiting the records, what ground is claimed in the district. The only object of putting a notice on the claim is that it shall speak for the owner in his absence, and to give notice to parties coming on the premises that some one has claimed them; but if the party is there himself in possession and occupancy of the claim by himself or his agent, he gives the parties fully as much notice as they could derive from inspecting a slip of paper. If it be suggested that a written notice speaks with more certainty, the answer is that it is doubtful if that be so. A notice never does more in regard to boundaries than to describe the length of the claim. A party claiming to hold by mere actual possession must mark his boundaries by such distinct physical marks or monuments as will indicate to any person what his exterior boundaries are, and he must occupy within them, or do work which is intended to affect the premises; and he is bound by any declaration he may make as to what his possession covers, in this: that he cannot hold more than he claims. If he claims more than the law allows him, a stranger may locate the surplus, just as he could in case a written notice claimed an excess. Of course, if the miners had legislated upon the subject, and in their local assemblies, known as "miners' meet-

ings," had adopted a law that mere possession should not hold against a party regularly locating under the laws, then such possession would not prevail as against such subsequent location; but, in the absence of such law,—and its absence is presumed until the contrary is shown,—actual possession is good so long as it lasts. Before 1866, the courts, of their own motion, adopted the rules, regulations, and customs of miners as a standard by which to determine issues arising between such miners. But from July 26, 1866, to May 10, 1872, which covers the possession and occupancy involved in this case, citizens, and those who had declared their intention to become such, were, by act of congress, permitted to explore and occupy mineral lands of the public domain, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. Here was as absolute a grant of legislative power given to the miners themselves as congress ever gave to the legislature of any territory, or, rather, much larger, for there was no local veto that could nullify their acts. The customs, rules, or regulations of miners were thus given, with the limits named, the full force of legislative enactments, as binding upon the courts of this territory as any law of the legislature, and subject to the very same rules of construction. It gave, in this country, probably the first example of the pure democracies of ancient times as seen in the Grecian states, when the citizens made their laws, not through the medium of representatives, but by assembling in person, and directly declaring their will in the matter. These laws come directly from the source of all political power,—the people themselves,—duly authorized to act in this manner; and this is why they have just as much solemnity and binding force as though they had been enacted by representatives of the people instead of the people themselves.

The questions as to rules or customs, thus adopted, are the same as with any other legislative acts presented. Did the act, or rule, become a law? Was it in force at the time claimed? What is the meaning of the words used? What rule do they establish? How does that law or rule affect the case? Up to May 10, 1872, there was generally no limit to the power of the local legislatures known as "miners' meetings" except the general principles of law. During this time, then, actual possession was good, so far as it did not claim more than the law allowed; it not being shown that a failure to comply with the rules by posting a notice, recording, working, etc., was of itself declared to work a forfeiture. Since May 10, 1872, there are some restrictions upon the powers of miners to legislate. The United States act of May 10, 1872, prescribe some conditions as being necessary to sustain a possessory title, and expressly declares that a failure to comply with those conditions will, of itself, work a forfeiture, and leave the premises open to relocation. But those provisions do not apply to this case as to the

points now in hand. It was also error to insert the word "lawfully," as qualifying the possession and occupancy of the premises in controversy, without explaining what force or meaning it was intended the term should have. *People v. Byrnes*, 30 Cal. 206. Legal terms must not be used without explanation. There is a great necessity for this rule. The law is full of expressions familiar as household words to a lawyer, but no more intelligible than so much Greek would be to the average juror. Not to go back to the old books at all, but to take the language of judges in our own country in comparatively modern times, it may be, and doubtless is, perfectly correct to say that the devisee of a remainder in fee, after death of tenant for life, formerly had remedy by formedon in remainder, or, on entry after death of donee for life, by writ of entry declaring on his seisin, (*Wells v. Prince*, 4 Mass. 66;) that in double pleading to writ of entry *sur disseisin*, first plea, *nul disseisin*, second in bar, that plaintiff was never seised, second is bad, (*Martin v. Wood*, 6 Mass. 6;) that a plea of non-tenure in formedon without remainder is good, (*Prout v. Libby*, 14 Mass. 151;) that in a writ of right a plea of seisin to save an easement is bad, for confessing easement alone confesses non-seisin, (*Miller v. Miller*, 4 Pick. 244;) that *darrein seisin* is good against a writ of right, that generally a descent cast tolls the entry, but the equity of the *jus postliminii* sometimes saves the right to an infant heir, (*Smith v. Lorillard*, 10 Johns. 357;) that in pleading a common recovery assued to the use of the tenant in tail, who was to the *foræcipe*, it is not necessary to show that the indenture to lead the uses was executed by him, (*Dow v. Warren*, 6 Mass. 328;) that, in California, defendant in ejectment must set up subsequently acquired title as in the plea *puls darrein continuance*, (*Hardy v. Johnson*, 1 Wall. 371;) or that under the plea of non-tenure, with disclaimer and issue to the country, with or without finding for the tenant, plaintiff is not entitled to possession, (*Porter v. Rummery*, 10 Mass. 64;) but if it be a plea of *nul disseisin* only, in a writ of entry by a trustee against a *cestui que trust*, plaintiff may recover, (*Needham v. Ide*, 5 Pick. 510.) But it would be a hardship to suitors to instruct a jury in such language, and then say to them: "Gentlemen, this is the law of the case; you are bound to follow it, and render your verdict accordingly." Why should not this language be used? It is English by adoption and use; it is clear, forcible, exact, and terse beyond any colloquial words which can be found; but the trouble is, the jury might not understand it. It was necessary, therefore, to adopt the rule that legal expressions should not be used without explanation in such cases. The term "lawful" may seem simple enough for any comprehension, but day after day is often spent in the sole effort to determine whether a certain act was lawful or not. It would be manifold error to instruct, without further explanation, "If you believe that the defendant lawfully killed the deceased, you will acquit;" for that is to make the jury the judges of the

law. And so of the use of any legal term; if it is reasonable to think it may have misled the jury, the use of it without explanation will be error.

Error 38. Defendants, in their sixth instruction, asked the court to charge "that the subsequent ratification by Linn of the location by him gave the location the same effect as if made by himself." Given, with the qualification added, "unless a valid location by some other person had in the interval between the location of French and the ratification by Linn been made and perfected;" thus saying, in effect, that the title in an absent locator does not become perfect until he has knowledge of it and ratifies it. This was error. When a location is made for an absent locator, whether with or without authority, or with or without his knowledge, whatever rights are given to him by such location vest in him at once; and even the person locating such absentee, without authority, cannot take down the name of such absentee and insert another, even if he do it before the absent locator has knowledge of the fact that he has been located. *Morton v. Mining Co.*, 26 Cal. 527.

Error 39. The court refused to give the words in defendants' seventh instruction, "and a location made by one person for and in the name of another vests a right in the one for whom the location is made, which can only be divested by his own acts or omissions, or by operation of law." This was error. *Id.* The court added the words, "but some authority, express or implied, must exist, or the agency must be ratified before other valid claims intervene." This was error. It tended to mislead the jury. As a matter of law, there is implied authority in the very act of making the location, but it tended to impress upon the jury that some other authority was necessary. None other is required. *Id.* Counsel for respondents urge that a mining claim is an interest in lands within the meaning of the statute of frauds, and that it cannot be created without authority in writing. The point is not fairly before us, and we will dismiss it with the remark that the object of the statute is to guard the owner of an estate in lands against any new estate in the same property being created for another out of the estate of the owner, except by the operation of law, or by his written consent. This writing is to be signed by the party creating the estate, or by some one having written authority to do so. The party who locates a mine obtains an estate therein by such an act, but it is not he who creates that estate. Whatever estate he obtains he derives from some source. There is a proprietor of the land above him. This proprietor says to the locator: "Do thus and so, and you may have a certain estate in the mine." The locator performs the act and obtains the estate, but it is the proprietor who creates the estate in him. If another person places a notice on the claim, that other person does not thereby create an estate for anybody. He has no estate in the premises out of which he can create an estate for another. He is merely perform-



ing the acts which are a condition precedent to the creation of an estate in the premises by the real proprietor. It is only after the estate comes into being in the locator that the statute of frauds as to his acts in creating estates in the premises for others applies. The court, in refusing plaintiff's instruction on this point, ruled correctly.

Error 40. The eighth instruction of defendants was refused, and was as follows: "The law makes the discoverer of a mine the agent for those for whom he chooses to act, and his act becomes their act, regardless of the fact whether the party for whose benefit the location is made has any knowledge of it or not. In such cases, however, the agent making such location has no power afterwards to make any change in the same, so as to affect injuriously the rights of the party for whose benefit the location was made. A failure to comply with the local rules or customs of the district will not work a forfeiture, unless such failure is declared by such rules or customs to be a forfeiture." This instruction is obnoxious to criticism in this: that it contains two distinct legal propositions relating to entirely different questions. Still it stated the law correctly as to all cases arising before May 10, 1872, of which this was one, and it was error to refuse it. The territorial law declaring forfeitures for non-compliance with its requirements was repealed in 1866, and no other law declaring forfeitures was enacted until the United States act of May 10, 1872. The latter portion of the instruction as to forfeiture would require modification, but it was correct as to cases arising between 1866 and 1872.

Error 41. Plaintiffs asked for the following instruction: "(3) If you believe from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, you will find for plaintiffs, unless the jury believe from the evidence that defendants had a better right to the possession than that of plaintiffs,"—which was given. This instruction raises the question as to what plaintiff must show in order to entitle him to recover in ejectment. The answer is, he must show a right of possession. Formerly he was obliged to show, not only a right of possession, but also a valid, legal, subsisting title in himself at the commencement of the action. Showing even an equitable title was not sufficient: Adams, Ej. 32; Lord Mansfield, in *Taylor v. Horde*, 1 Burrows, 119. It was formerly the rule, without any qualification whatever, that any defendant, no matter under what circumstances he entered, might defeat the action by simply showing an outstanding title in some one else than the plaintiff, even though the defendant did not in any way connect himself with that title. This was the logical sequence of the rule that plaintiff must recover on the strength of his own title, (3 Com. Dig. 553;) that, therefore, it mattered not in what way defendant showed that plaintiff was not within the rule; if he showed it, that was sufficient to defeat the action. This doctrine was held in our United States supreme court as late as in

*Love v. Simm's Lessee*, 9 Wheat. 515. The learned judge who delivered the opinion in that case felt that there might be some force in the objection; that it was extending too much consideration to tort-feasors, mere naked trespassers, to give them the benefit of such a rule; but he remarked that such cases must be of rare occurrence, and that it was time enough to consider them when they arose. The judge evidently never lived in a mining country; that is, one where the "jewels of sovereignty," the precious metals, were the subject of contention; where it is not uncommon for a man to retire at night from premises of which he has had peaceable possession for years, and, on his return next morning, find strangers encamped upon his grounds, with barricade erected, shotguns and six-shooters displayed with reckless prodigality, and a wild-mannered captain accosting him with the bland salutation: "Don't you think it would be healthier for you to keep away from here, my friend? We don't want to hurt you, you know; but we have been requested to retain possession of these premises." The gallant captain himself would admit that we had outdone him in courtesy if we were to give him the benefit of the rules as applied to *bona fide* innocent holders claiming under color of title. The first case of tort-feasor presented in the supreme court subsequently, was from the Texas border country, in *Christy v. Scott*, 14 How. 282, and the court then modified the rule so as to declare that a mere intruder, entering without any claim of title upon the peaceable possession of another, and ejecting him therefrom, cannot then question the title of the party dispossessed, nor can he undertake to show that the real title is in somebody else. He has made a contest simply on possession, and, if plaintiff shows a prior peaceable *bona fide* possession, and the defendant shows nothing but his mere intrusion, the plaintiff shall have judgment. But if the defendant entered under color of title, under a claim of right, he is not under the ban, and he may rebut the plaintiff's claim of title or right of possession by showing that it is in himself, or in another, subject, however, to one additional limitation, which it was found necessary to adopt in California. In California and other mining countries on the Pacific slope the general government refused for a long time to grant any title to the mineral lands, but tacitly acknowledged a license to work the mines, raising a kind of tenancy at will in the first occupier. The courts found it necessary to declare that this *bona fide* prior occupation should be sufficient to maintain ejectment against any one not connecting himself with the paramount title; that the possessory title sufficient to maintain the action vested in the first possessor, and flowed from him. The defendant was not prevented from showing that the possessory title was outstanding in another, but merely showing that the paramount title in fee was in the government was not sufficient. This rule is stated in *Coryell v. Cain*, 16 Cal. 573, and the reasons most lucidly given by Mr. Justice Field, who did so much in California to add to

the glory of the common law, by showing how admirably the animating principles of its apparently rigid rules could be applied to the newest and strangest condition of society.

There are two kinds of possessory rights recognized in this territory; one based on the act of November 9, 1864, (Comp. Laws, p. 586,) the other resting on mere prior occupation. To maintain a right under the first, plaintiff must show a compliance with the requirements of the statute; to succeed under the second he must show prior possession, without alienation or abandonment, down to the time of the entry complained of. The action of ejectment is a possessory action, and possession always raises some presumption of right. Plaintiff begins in ejectment, as to this matter, by averring that he is entitled to the possession; that the defendant has the possession; then he undertakes to overcome the presumption flowing from defendant's acknowledged possession by showing that defendant obtained that possession wrongfully by entering upon the possession of plaintiff. If the matter stop here, plaintiff must recover; but if defendant show in reply, as here, that plaintiff obtained his possession by entering on the possession of defendant, presumption is shifted again in favor of defendant. Then, unless plaintiff can go higher in the history of possession, and bring the presumption back in his favor, he does not, through proof of possession alone, put the defendant upon his defense at all; and, if this be the end of the showing made by the plaintiff, he must fail. But plaintiffs did not stop here in this case; they showed color of title, to-wit, a notice of location of the premises. Defendants replied by showing an earlier notice of location for the same ground. Here, then, was a case where plaintiffs, according to the evidence, had failed, so far as a naked possession was concerned, for defendants showed a prior possession. The question then stood as between the parties as to the effect of plaintiffs' notice of location. Instructions should be in harmony with the proof in the case. It was therefore error to instruct the jury "that if they believed from the evidence that plaintiffs were in possession of the premises in dispute, and that defendants entered and ousted them therefrom, they will find for plaintiffs, unless they believe from the evidence that defendants had a better right to possession than that of plaintiffs." This instruction, we may reasonably infer, led the jury to believe that the mere fact of possession by plaintiffs at the time of the ouster gave them, under the evidence in the case, a *prima facie* right to recover. This was not the law, because the presumption flowing from that possession by plaintiffs had been met and overcome by defendants when they showed an earlier and continuing possession under an earlier location of the same premises. The qualifying clause as to their belief of defendants' better right did not save the instruction, because the jury, we may reasonably believe, were misled as to the condition of defendants on that issue, and as to what *onus* of proof was on them.

Any charges given to the jury as to the effect of possession in this matter should have informed them that, if they believed defendants had shown a prior and continuing possession, all presumptions, so far as mere possession was concerned, were in favor of defendants. As this case goes back for a new trial, and as the conflict will probably be as to the effect of the two notices, and as the case has already been here twice, it may be well for us to remark that any charge given concerning the notices should be given with careful regard to the evidence adduced respecting them, and that the jury be instructed as to what the effect will be in law upon the rights claimed under the notices, according as they believe any particular set of facts has been proven, and not leave it to them to say generally which they consider gives the better title.

Error 42. The court gave the following instructions at the request of the plaintiffs: "If the location of the mining claim in question was made in the name of Linn by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim, without further consideration, Moreland and French having already located two hundred feet, each, on the same lode, and that Linn ratified the act of location for the purpose of making such conveyance, such location was void, as a fraud and evasion of the law." There is nothing in the record tending to show that French ordered the location of the claim to be made for Linn for the purpose of having the whole or any part of it deeded back to him or Moreland without further consideration, nor is there anything tending to show that Linn ratified the location for the purpose of making any such conveyance; on the contrary, the evidence is directly the other way, so far as it raises any presumption on this point. The evidence is that, as soon as the location was made, French advised Linn that it was of great value; that the vein was 12 feet wide, assayed \$1,350 per ton silver, and that he thought that the location made for him (Linn) would be good for \$10,000 in less than a year. Fifteen days afterwards, he again wrote him, and speaking more enthusiastically than before of the value of the claim, saying that it was from 12 to 20 feet wide, averaging \$1,000 per ton, smelting process, assaying \$2,000 per ton; to have no fears; that their claim would be worth \$100,000 in less than a year; that he would write for Linn to come as soon as he thought it necessary, but in the mean time he wanted the deed without delay, in order to have no doubt about being able to protect their claim. Linn came on from Nevada some four or five months after, and then French deeded back to him half the ground. Linn testified that it was at his (Linn's) request that French kept the other half of the ground in his (French's) name as security for Linn's indebtedness to him. This is, so far as we can see, all the evidence as to the motive French had in getting the deed for this ground from Linn. Does it tend in any way to raise a presumption that possibly French was

trying to commit a fraud on some one by trying to get a deed of this ground to himself without consideration? We cannot find anything in the record to show that he underestimated the value of the location in his representations to Linn. In the first letter of advice, which it is shown was received by Linn before he made the deed, he gave his opinion that Linn's claim was worth, or would be in the course of a year, \$10,000. Fifteen days later he wrote a letter, which it was shown was received by Linn before he sent the deed, in which he says: "Our claim will be worth one hundred thousand dollars in less than a year." We do not know exactly what he meant by that, but, if we are to consider the evidence for the purpose of saying what inference might be drawn from it, we would infer that, as each one of them had a claim of 200 feet on the vein, the meaning was that their claims were by him considered to be worth \$50,000 apiece. We do not think that this evidence raised any question in the case as to French's honesty of intention in the matter of making the location for Linn, or that he expected to get possession of the premises from Linn without consideration. We are not speaking of the weight of evidence. If there had been any conflicting evidence on this point a question might have been raised for the jury to determine whether French had made these representations or not, whether he had in fact deceived Linn as to the value of the premises, and whether the deed Linn made to him was an absolute conveyance instead of a trust, and whether that was fraud. Even in such case, if they had found fraud, it would only have been a fraud of French upon Linn; would have left the whole title in Linn, and so would not have helped the plaintiffs. But there was no evidence raising such a question in the case, and therefore the instruction had no relevancy to any question involved in the issue. It is never error for a judge to refuse an instruction under such circumstances. Whether it is error to give such an instruction depends upon whether it is calculated to mislead the jury or not. If it appear at all probable that a superfluous instruction might have misled the jury so as to materially affect their verdict, then it is error to give it; and, when error is shown, injury is presumed, unless the contrary plainly appears. This instruction might have misled the jury. It invited them to consider and pass upon a question of fraud not raised by the evidence. Such consideration might have prejudiced the defendants, and therefore the giving of the instruction was error.

Error 43. The following was given as an instruction by the court: "If the location of the mining claim in question was made in the name of Linn, by Moreland and French, or either of them, for the purpose of having Linn convey to them, or either of them, the whole or any part of said mining claim, without further consideration, Moreland and French having already located two hundred feet each on the same lode, the location was absolutely void, as made in fraud and evasion of law."

(1) There was nothing in the evidence

on which to raise any presumption that French or Moreland had located the premises with such expectations, and the instruction was therefore irrelevant. It was likely to mislead the jury to the prejudice of the defendants, because it said to them, in effect, that there was such a question involved, which they should pass upon; and therefore the giving of it was error.

(2) Even if the evidence had left it an open question whether French or Moreland had an expectation of getting the ground deeded to them without consideration,—that is, getting a deed of gift to the premises,—and had made the location for that purpose, it was error to instruct that such location would therefore be absolutely void. The location put the title in Linn, to dispose of as he pleased. Even if the parties locating him had expected that he would deed back to them for nothing, and made the location because of that hope and belief, Linn might have been ignorant of such intention and expectation, and might have declined to gratify it. His title depended upon the fact of location, not on the intention the parties locating him might have had in their own minds at the time. A person locating for an absentee, in the hope that the latter will give away the right thus secured for him, takes the chances as to whether he will give it away or not, and as to whom he will give it, if he gives it at all. In case a locator knew in advance that the object of using his name was to enable the person using it to hold more feet on the lead than he could acquire by location under the laws, and consented to such use of his name for that purpose, the question as to whether such an arrangement between the parties would be a fraud sufficient to vitiate the location is not before us.

The question as to the propriety of the second instruction of the court is practically considered in errors 41, 44, and 45.

The forty-fourth and forty-fifth assignments of error are that the court erred in not granting a new trial, because it is claimed the evidence is insufficient to justify the verdict, and that the verdict is contrary to law. Of course, the general rule is well established that, no matter how much evidence the transcript discloses against the verdict rendered, if it shows sufficient evidence in support of the verdict to raise a substantial conflict with the evidence on the other side, this court will not interfere; for when there is a substantial conflict of evidence it is the province of the jury to weigh the evidence, and decide which side is entitled to prevail. The transcript in this case embodies all the evidence that was given, and sets it all out with wearisome particularity in the exact words as given by the witnesses,—a most objectionable and reprehensible manner of making up a statement. Considering the round-about way in which most witnesses generally tell their story, and the mass of trifling and irrelevant matter they interweave with their statements, a lawyer, when he comes to present to the supreme court a statement of what has been proven on the trial, should not follow the words of the witness, but

should state succinctly what evidence was given which is material on appeal. There may be nothing in the testimony of the witness affecting the appeal, and, if so, his narrations should not be thrust upon us to consume our time and exhaust our patience. In this case about 200 folios of oral testimony have been sent up, when the whole statement could have been much more clearly presented in the compass of 30 or 40 folios. But counsel very considerably caused the transcript to be printed, though not obliged to do so. Had they not done so, this case could not have been examined in time for the approaching term of the court below.

Now as to whether there is a substantial conflict of evidence in this transcript. All presumptions as to possession were overcome as to plaintiffs, because defendants showed a prior and continuing possession down to the beginning of plaintiffs' possession. Plaintiffs were then put upon their right of possession. They introduced paper title,—a notice of location. Defendant proved a prior location. The whole issue turned, then, on the question as to whether plaintiffs' notice was good. Plaintiffs made but two objections to defendants' notice, charging: (1) That it was fraudulent; that, if not fraudulent, it was void, having been made without authority and therefore void *ab initio*. (2) There being no other issue before the jury, in finding for plaintiff they declared that defendants' location was either void for fraud, or void from want of authority to locate. We have read the transcript over repeatedly and carefully, and we cannot find any evidence at all which raises a question of fraud, or which tends to raise the presumption of fraud, even granting that the evidence proved the facts which plaintiffs claimed constituted the fraud. Granting that the agreement between Moreland, individually, and Thorne and Cassidy, as to the latter deeding back half of the ground in consideration of a location being made for them was fraud, it is a long way from the fact to the conclusion that Linn's location is open to the suspicion of fraud. This is the only evidence, taken in connection with the nature of the relations and transactions between Linn and French, from which respondents claim proof of fraud. The conclusions respondents seek to draw are that this agreement showed a desire upon the part of the original Tiger Company to get more ground than they could hold by location; that they took the south half of the Thorne and Cassidy claim, which was the half nearest the original location; that Linn's location lay between; that it was made by French without Linn's knowledge; that, therefore, it was the intention of the Tiger Company to have Linn's location at the time it was made. To this the *first* answer is: The whole vein was open to location at the time the original location was made; the locations were all made the same day, and by the same person. The original locators took only 1,200 feet. If they had wanted more ground, they could have taken it, even to the extent of 3,000 feet. The very fact that they did not locate for

themselves the 200 feet of Linn's location and the south 200 feet of the Thorne and Cassidy claim, if it shows anything as to this matter, shows that the original locators did not want that ground in their company. *Second.* The agreement with Thorne and Cassidy was not an agreement by them with the original locators of the Tiger, but with the individual named Moreland; and it was not an agreement for the south half any more than for the north half. It was not an agreement to segregate any particular part, but simply an agreement to convey to Moreland one-half the premises. Moreland, for reasons which are not explained in the record, got Thorne and Cassidy to consent to segregate the south half of their claim, and also, for reasons not explained, or in any way alluded to in the record, gave the original locators the benefit of his agreement with Thorne and Cassidy, and had the deed from them for that half interest made directly to the original locators on the vein. But there is nothing to show that Linn knew anything of this, or that he consented to any plan they might have had in regard to his location. We do not see in these facts anything which even tends in any way to taint Linn's location with fraud of any kind. If the verdict of the jury was based on the theory that the evidence did not show authority for the location, it should be set aside, because no proof of authority was necessary. The new trial should have been granted. Judgment reversed, and new trial ordered.

(1 Ariz. 274)

#### GRAVES v. ALSAP.<sup>1</sup>

(Supreme Court of Arizona. Jan., 1876.)

##### CONSTRUCTION OF STATUTES.

1. In deciding an issue involving the existence of a public law and affecting public rights, stipulations of the parties as to the law or the action of the legislature will be disregarded.

2. Where there is no evidence of the existence of a statute in the published laws or in the secretary's office, courts will not examine the legislative journals to ascertain whether such a law was passed.

DUNNE, C. J., dissenting.

Appeal from district court, Maricopa county.

G. H. Owry, for appellant. J. T. Alsap, *pro se*.

PORTER, J. This is an action in the nature of a *quo warranto*, in which the plaintiff seeks to obtain possession of the office of probate judge of Maricopa county. The complaint alleges that the plaintiff is probate judge of Maricopa county; that on the 1st day in May, 1875, an election was held for the office of probate judge therein, for the term of two years from the first Monday in June, 1875; and that at such election the plaintiff was duly elected; that he received a certificate of such election from the proper officers, and in due form; that he gave bond and qualified, as required by law, and that he demanded of the defendant, and was entitled to, the

<sup>1</sup>This case, filed January, 1876, is now published by request with others, in order that the Pacific Reporter may cover all the cases from volume 1, Arizona Reports.

possession of said office of probate judge: further alleging that the defendant had, on the first Monday in June, 1875, usurped said office, and has ever since withheld the same from plaintiff, demanding judgment against the defendant that he be ousted from such office, and plaintiff put in possession of the same. The defendant, in his answer, denies that the plaintiff is probate judge of Maricopa county; denies that plaintiff was elected to such office at any lawfully authorized election therefor. That the election pretended to have been held in the said county on the first Monday of May, 1875, was not authorized to be held by any statute law of the territory of Arizona. He further alleges that the defendant was probate judge of Maricopa county; that he held said office by appointment of the governor of the territory of Arizona, under a commission from him dated the 23d day of February, 1875; that said commission, by its terms, appointed him such judge, to have and to hold the same until the 31st day of December, 1876; that he had executed the official bond, taken the oath as required by law, and was in the lawful possession of the office of probate judge. On the trial of the cause no evidence was given by either party, but the case was submitted on stipulations between the parties as follows: That on or about the 25th day of January, 1875, a bill was introduced in the legislature of the territory of Arizona, then in lawful session, authorizing and directing that a general judicial election be held throughout the territory on the first Monday in May, 1875, and every two years thereafter, and that at such election a probate judge for each of the counties should be elected; that said bill passed both houses of said legislature, was duly enrolled, and presented to the governor for his approval; that the governor returned said bill to the house where it originated—to wit, the council—on the 12th day of February, 1875, without his approval; that on the same day the council again passed the said bill by a vote of two-thirds of the members thereof, the vote being taken by yeas and nays; that the said bill was then in the regular manner transmitted to the house of representatives for its action, and on the same day the said house passed the said bill by a vote of two-thirds of its members, the vote having been taken by yeas and nays, and the said bill was then regularly returned to the council. The council returned the bill to the governor. It is further stipulated that the election, or pretended election, mentioned in plaintiff's complaint, was held as therein stated; that the plaintiff received the greater number of votes; that he received a certificate of election from the board of supervisors; that he executed an official bond, and demanded and was refused possession of the office, as alleged in the complaint; that defendant held said office by commission of the governor, in manner and form as set forth in defendant's answer.

The stipulations in this case do not appear to relate to any questions of fact between the parties that are personal and private in their nature, the determination of which might affect only the interest or

conduct of the parties to this action; but they relate almost wholly to what transpired on certain days in a legislative body when having under consideration the question of the passage of a law to provide for the election of a probate judge in every county of the territory,—a law general in its character, of interest to the living, and affecting the estates of the dead. The issue raised by the pleadings clearly is, whether at the time stated in the complaint there was a law of the territory in force authorizing the election of a probate judge in Maricopa county. If there was such a law authorizing such an election in Maricopa county on the first Monday in May, 1875, the same law authorized a similar election in each county in the territory. If the law was then in force, it is still in force, and will by its terms authorize a similar election in May, 1877. The court was asked to decide the issue, the determination of which reached far beyond the parties of record,—to every county of the territory; to decide this by not taking judicial knowledge of such a law, by examining the printed statutes, or the office of the properly appointed custodian of the original copies of laws passed, not even from the proved action of the legislature in considering such a law, but solely from the stipulations of the parties. We hold that parties to an action cannot properly stipulate what the law is that is to govern their case, and that courts should not regard such stipulations when made, and we are equally of the opinion that they cannot stipulate what the action of a law-making body was in a given case, and from the stipulations thus made ask the court to determine whether a general law is or is not in force. The agreement of parties that a statute with certain provisions is in force does not make it in force. The agreement of parties that a law-making body did certain things when considering a bill, even though the things they agree between them to have been done were all that were necessary in the opinion of a court to constitute its passage, does not constitute the bill a law. In deciding the issue raised, which we think would have been better raised by demurrer than by answer, we shall not regard the stipulation.

Was there, then, a law of the territory of Arizona authorizing the election of probate judge in Maricopa county, as alleged in the complaint? There is no such law among the published laws of the territory. There is no copy of such law in the office of the secretary of the territory,—the officer who is the lawful custodian of the original bills that have been properly passed. Not finding any evidence of the existence of such a law in the published laws or in the office of the secretary, is it competent for the court to examine the journals of the two houses of the legislature, and seek there to find evidence of such law having been enacted, and still in force? The language of the authorities, as marshaled in a leading case of *Sherman v. Story*, 30 Cal. 253, is stated that "the result of the authorities clearly is that, whenever a general statute is misrecited or its existence denied, the question is to

be tried and determined by the court as a question of law. There is no plea by which its existence can be put in issue and tried as a question of fact." In the same case it was held "that the court, upon passing upon the validity of a law that appeared among the published laws, would not examine the journal or the enrolled bill to see if it was published as passed." If it is not competent in such a case to examine the journal or enrolled bill, to verify or alter the published law, it appears to us still more certain that the same rule should govern in a case like the present, where there is a total absence of any evidence of legislative action upon the law in question. If the enrollment, authentication, and depositing with the secretary of state is conclusive that a law has passed, the want of all these things may be conclusive that there is no such law. It appears to the court that it was never intended that the journals of a legislative body were to be regarded as evidence to the courts as to what laws were enacted by it, and that a court, in a merely collateral issue, would not be warranted in declaring a general law in force on such evidence alone. The presumptions of law all are that if the legislature had passed the law under consideration, the same would have appeared among the published laws, or at least they would have seen that the secretary of the territory was provided with an enrolled copy thereof. We are therefore of the opinion that on the first Monday in May, 1875, there was no law of the territory authorizing the election of a probate judge in Maricopa county, and that the election so held was without authority of law, and void. It follows from these conclusions that the judgment of the district court must be affirmed, but upon views in some respects different from those which seem to have prevailed in the court below. Judgment affirmed.

TWEED, J., concurred.

DUNNE, C. J., (*dissenting*.) I cannot concur in the judgment of the majority of the court affirming the decree below, for the following reasons: The plaintiff, Graves, claiming to be the duly-elected probate judge of Maricopa county by vote of the people, brought his action to oust from said office the defendant, Alsap, claiming to hold the same office under appointment from the governor of the territory. The case was tried by the court without a jury. The court found the following facts: (1) The jurisdictional facts as to the institution of the action, waiver of service, appearance of parties, facts of trial, etc. (2) This is literally copied. "That on or about the twenty-fifth day of January a bill was introduced in the legislature of the territory of Arizona, then in lawful session, authorizing and directing that a general judicial election be held throughout the territory on the first Monday in May, 1875, and every two years thereafter, and that at such election a probate judge for each of the counties should be elected; that said bill passed both houses of said legislature, was duly enrolled and presented to the governor for his approval, and that the governor returned

the said bill to the council where it originated, on the twelfth day of February, 1875, without his approval, and on the same day the council again passed the said bill by a vote of two-thirds of the members thereof, the vote having been taken by yeas and nays; that the said bill was then in the regular manner transmitted to the house of representatives for its action, and on the same day the house of representatives passed the said bill by a vote of two-thirds of its members, the vote having been taken by yeas and nays, and the said bill was then regularly returned to the council; and that the council returned the bill to the governor." (3, 4, 5) In substance. The election was ordered in Maricopa county, and plaintiff elected thereat to the office of probate judge, and qualified, etc.; all in accordance with the requirements of said alleged law. (6, 7) In substance. That defendant was appointed to said office by the governor on February 23, 1875, under the old law, qualified, etc., and was in possession of the office. As conclusions of law from the foregoing facts, the court found, in substance: (1) That the action of the legislature upon said bill subsequent to the return of the same to it by the governor was "without authority of law, and was void." (2, 3) That the said election for probate judge in Maricopa county was without authority of law, and was void, and plaintiff therefore not entitled to the office. (4, 5) That the defendant is entitled to the office, and to judgment accordingly. Judgment was entered in favor of defendant. Plaintiff appeals, and assigns for error: (1) That the court erred in finding the conclusion of law that the action of the legislature upon said bill, after the return thereof without the approval of the governor, was "without authority of law, and void." (2) That the court erred in finding the conclusion of law that the election was void. (3, 4, 5, 6) That the court erred in finding, as conclusions of law, that plaintiff was not entitled to recover, and that defendant was.

It will thus be seen that, if the regularity of the proceedings below be admitted, all the facts relating to this particular case are settled, as regularly found by the court sitting as a jury. They are established just as effectually as if they had been found by a jury of 12 men. They have been found by a jury; that is, by the court sitting as a jury. The findings of facts were reduced to writing and filed. There is no exception by either party as to the correctness of the finding of facts. All the facts which govern the case as between these parties are absolutely settled, and there can now be no question raised by either party as to which facts are or are not proven in this case, so far as the act of finding was warranted by law. The error assigned is not that there has been any improper finding of facts, but that the court did not draw correct conclusions of law from those facts established on the trial. The conclusion of law found below, upon which the court determined plaintiff's demand, was this: that the action of the legislature upon the bill, after it was returned by the governor

without his approval, was without authority of law, and was void. The question here is, was that proceeding regular, and, if so, was it a correct conclusion of law upon the facts established on the trial? The conclusion involves two propositions: (1) That the acts of the Arizona legislature in the premises were without authority of law; (2) that the acts were void. The learned judge below did not find that the acts were without authority, and therefore void, but that they were without authority, and that they were void.

Let us first examine whether the acts were or were not done without authority. All authority in the matter is regulated by the acts of congress. The legislature of Arizona had just so much legislative authority, and no more, as is given by the laws of the United States. The following facts appear from the laws of the United States: (1) Up to December 1, 1873, under the laws of the United States, the governor of the territory of Arizona had absolute veto power. (2) On the 22d of June, 1874, congress adopted what are called the "Revised Statutes of the United States," repealing all laws of the United States passed prior to December 1, 1873, any portion of which was embraced in any section of said revision, except laws of a private, local, or temporary nature. (3) The old law fixing powers of governors of territories as to the veto power was passed prior to December 1, 1873, and was embraced in said revision, and in said revision the provision giving absolute veto power to the governor of Arizona was omitted, and in lieu thereof it was provided that, notwithstanding his veto, a law might be passed by a two-thirds vote of each house of the legislature. (4) The law stood in that shape until the 18th of February, 1875, six days after the legislature of Arizona had passed the law, over the governor's veto, making probate judges elective. (5) On the 18th of February, 1875, congress amended the Revised Statutes by inserting a clause giving to the governor of Arizona absolute veto power. Defendant, in support of the proposition that the legislature of Arizona had no authority to pass said bill over the governor's veto, argues:

1. As stated in his brief, in the following language: That "on the 20th of June, 1874, congress passed an act entitled 'An act providing for the publication of the Revised Statutes and Laws of the United States,' (18 St. at Large, p. 113,) by which the secretary of state was directed to prepare certain 'head-notes, marginal notes, references,' etc., and when so prepared, to certify the law, and when so certified and printed and promulgated, it should be legal evidence of such law. The secretary of state completed this work on the 22d day of February, 1875. See certificate of secretary of state on page next to title-page, Rev. St. This was 10 days after the legislature of Arizona adjourned." It is not clear for what purpose attention is called to this fact. The case was submitted on briefs, and there was therefore no opportunity of calling on defendant to explain the purport of this proposition. If it be intended to lead to the conclusion

that the law itself was not in force until thus promulgated, the answer is that the law became operative as soon as it was signed by the president. Certified copies of the act would have been evidence of the law at any time after its enactment. This was merely a provision to secure a great number of certified copies in a printed form, which, when duly certified, printed, and promulgated, should everywhere be received as evidence of the law. The same thing is done with the acts of state legislatures. Provision is made that printed copies, duly attested by the secretary of state, shall be received as evidence of the law, but it is not supposed, nor is it the fact, that the laws are not in force until the printed copies are circulated. They are only a convenient means of proving the law.

2. Defendant, speaking of the amendments of February 18, 1875, claims that those amendments were to take effect at the same time as the Revised Statutes themselves, because of the wording of section 2 of the amendatory act, which reads as follows: "Sec. 2. That the secretary of state is directed, if practicable, to cause this act to be printed and bound in the volume of the Revised Statutes of the United States." I do not think there is much force in the argument that the expression by a legislature of a desire to have two or more laws printed and bound in the same volume, if practicable, is an indication of an intention on the part of the legislature to have all the laws thus bound together take effect at the same time, particularly when the laws were passed at different sessions of the legislature. The more reasonable method to discover when it was intended a law should go into effect is to look at the provisions of the law itself on that point, and if nothing is said on the subject in the law itself, the presumption is that it takes effect on its passage. In the British parliament at one time the rule was that all laws took effect from the commencement of the session. In other legislatures there is a general rule that, in the absence of other provisions, all laws take effect from the last day of the session; but acts of our congress, in the absence of express provisions to the contrary, take effect from their passage. 1 Kent, Comm. 455, note 1.

3. Defendant urges that the title of the original act is an indication that it was the intention of congress to have the amendatory act of February 18, 1875, take effect from the 1st of December, 1873, and refers us to that title. On reference, I find that the title reads as follows: "An act to revise and consolidate the statutes of the United States in force on the first day of December, 1873." How that title, of an act passed June 22, 1874, can give any indication of what congress intended in a subsequent act passed the following year, is not clear.

4. Defendant urges that the intention of congress to have the act of February 18, 1875, take effect at the same time as the act adopting the Revised Statutes is shown by section 5595 of the Revised Statutes, and refers us to that section. To this argument there is the same objection as to



the last. Section 5595, referred to, reads as follows: "Sec. 5595. The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, 1873, as revised and consolidated by commissioners appointed under an act of congress, and the same shall be designated and cited as the 'Revised Statutes of the United States.'" That section is a part of a law adopted June 22, 1874. How the words just cited can give any indication of what congress intended in a subsequent act passed the following year is not clear.

5. Defendant urges that the intention of congress to have the act of February 18, 1875, take effect 1 year, 2 months, and 18 days prior to its adoption, is shown by the wording of the first paragraph of section 1 of the act itself. This paragraph, in my opinion, is a mere preamble, which undertakes to state the object of the act, and is in these words: "That, for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, A. D. 1873,' so as to make the same truly express such laws, the following amendments are hereby made therein." But a preamble is no part of an act; neither is the title. 1 Kent, Comm. 460. Some modern authorities admit they may be parts of the act, but only formal parts, not governing the act itself. In our acts of congress, when the language of the title or preamble is entirely in accord with the spirit of the act itself, it is simply a corroborating circumstance as showing intent. The attention of legislators is especially directed to the provision of the act itself, to the enacting clause proper. If those are satisfactory to the legislators, they know the phraseology of the title or the preamble is of little moment. The title and preamble are worded in accordance with the ideas of the original introducer of the bill. They are generally in harmony with the bill as originally drawn, but when the bill is submitted to the legislature it becomes the property of the house; it is often amended and transformed until its original author would not know it. Sometimes, when the fight is over, some member with a logical turn of mind rises and proposes an amendment to the title or preamble which will bring them into harmony with the new bill thus made. Sometimes the changes are so great and the amendments so incongruous that no reasonable length of title could express the purport of the bill, and the original title is allowed to stand, and sometimes it stands through oversight, inattention, or indifference; and all this because legislators know that neither the preamble nor the title constitutes any portion of the act itself, and that the plain provisions of the act cannot be affected by any inconsistency or incongruity between the act proper and things which are no part of the act itself. Thus we find that one of the most important acts ever passed by congress—the act changing the whole policy of this government in the matter of the occupation and ownership

of all the mines of gold, silver, and cinna-bar or copper contained in the United States—is entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes;" and the most incongruous provisions of legislation are repeatedly found in acts the titles of which show they were introduced for the purpose of making appropriations. The essentials of an act are the propositions enacted. The rest are but attendant circumstances. "Propositions enacted" argues, of course, enacting clause and actual enactment. In cases where the courts find the language of the act so ambiguous that they have to resort to construction to try to discover the intent of the legislature, they may derive some light from a consideration of the title and preamble, as showing, possibly, to some extent, the intent of the legislature; but courts will not permit an act, plain in its own terms, to be made ambiguous because of some inconsistency between the act and its title or preamble. Only such ambiguities will be considered as are raised by the language of the act itself; for it is the act itself courts are required to enforce, not its title or preamble.

Let us now look at the legislation of congress on this subject of the Revised Statutes, and see whether the acts themselves are intelligible or not. The initial legislation on this subject of the Revised Statutes is the act of June 27, 1866, entitled "An act to provide for the revision and consolidation of the statute laws of the United States." Section 1 provides for the appointment of commissioners to revise, simplify, arrange, and consolidate all statutes of the United States general and permanent in their nature which shall be in force at the time such commissioners may make the final report of their doings." Section 2, fixing the powers of these commissioners, says they shall bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundancies or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text. Section 3 provides "that, when the commissioners have completed the revision and consolidation of the statutes as aforesaid, they shall cause a copy of the same, in print, to be submitted to congress, that the statutes so revised and consolidated may be re-enacted, if congress shall so determine." Sections 4, 5, and 6 provide for the printing of the report in parts, for contemporaneous criticism, salary of commissioners, clerks, etc. From this it will be seen that these persons were not compilers to merely report to congress what did exist as the law, but commissioners with power to revise, omit, supply, make alterations, amend imperfections, and report to congress such a body of law as they thought ought to exist, so that congress might, if it chose, re-enact such revision and declare it to be the law of the land, in lieu of all former laws on the subject embraced in such revision. The commissioners, after a lapse of about seven years, submitted a revised

and consolidated body of laws. Congress, by a regularly enacted law of March 3, 1873, raised a committee of three to accept on the part of the United States the draft of the revision of the laws thus prepared; but, having in view the great powers conferred on the commissioners, and fearful that such acceptance might be construed into an adoption of the revision, they added a saving clause that the effect of this act authorizing acceptance should not be construed as adopting the revision. Then subsequently, on June 22, 1874, congress adopted the revision, possibly with amendments of their own added thereto, the same as they would enact any other law, and repealing all prior laws any portion of which was embraced in said revision. The repealing words are very carefully chosen. They are as follows: "Sec. 5596. All acts of congress passed prior to said 1st day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof, (all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, not being general and permanent in their nature;) provided, that the incorporation into said revision of any general and permanent provisions taken from any act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal or in any way affect any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment." The repeal of the old laws was to date from December 1, 1873, but as the repeal was not made until June 22, 1874, it was seen that acts might have been done, rights might have accrued, and the tenure of office might have continued or have begun under the old laws after December 1, 1873, and before June 22, 1874,—the day of the repeal. Then, by section 5597, provisions were made for such cases by affirming the general principle of law that acts done and accrued rights could not be affected by such repeal, declaring that such repeal should not affect such acts or rights, nor the term or tenure of such offices. It was also seen that various acts have been passed since December 1, 1873, and before the enactment of the Revised Statutes, and it was declared that all such acts should have effect the same as if passed after the enactment of the Revised Statutes, and then there was a declaration as to what that effect would be. This, so far as congress could do so, is a declaration of the effect of an enactment subsequent to the adoption of the revision. If A. is declared equal to B., and then the value of A. is declared, it is a declaration of the value of B. It was there declared that the effect of a subsequent statute would be to repeal any portion of the revision inconsistent with such subsequent enactment.

The question will arise as to the effect of such repeal upon acts done or rights accrued between the time of the adoption of the Revised Statutes and date of such repeal, and the answer to that question will, I think, be decisive of one question in this case. Under the law prior to December 1, 1873, the governors of the territories of Utah and Arizona had absolute veto power. In the territories of Colorado, Dakota, Idaho, Montana, Washington, Wyoming, and New Mexico, the governors had only a qualified veto power. What report the commissioners made on the subject I do not know, and it is entirely immaterial what they reported. The act as passed by congress is before us, and is the law on the subject. In that act we find that congress placed the legislatures of all the territories on equal footing in this respect, giving to all of them the power to pass laws over the veto of the governor by a two-thirds vote, the act to date from December 1, 1873, saving and respecting, however, all acts done and all rights accrued between that date and June 22, 1874. The first question, then, is, were the provisions of the old law, giving absolute veto powers to the governors of Utah and Arizona, repealed and no longer in force after December 1, 1873? The answer is that they were repealed unless such provisions were of a private, local, or temporary character. They were not temporary, because there was no particular time when they should expire. They were not private, because they were a part of the general organic act of the territory, and related to the rights of the whole people of the territory. The courts of the territory would certainly take judicial notice of the organic act, which they could not do if they were private acts. Were these provisions local in their character? "Local" is from "*locus*," a place. It is defined by Webster: "(1) Pertaining to a particular place, or to a fixed or limited portion of space, as, local circumstances; (2) limited or confined to a spot, place, or definite district, as, a local custom." Was this a provision relating only to a particular place? Was it something affecting a place merely, or something affecting the rights of the people of the United States in general? This was a most important provision, relating to one of the most important political rights a people can have,—the right to make their own laws. It fixed their political *status* as a people. It removed restriction on their political power. It referred not to the place, but to the people thereof, and to the people of the United States. If such a provision can be said to be local in the sense of the Revised Statutes, every provision concerning any territory is likewise local, for it is as local to give this right in one place as it is to withhold it in another, and on that theory no laws concerning territories have properly any place in the Revised Statutes, being all local in their nature. By the very act of revising the legislation concerning territories, and consolidating it all into one uniform body of law, congress declared its understanding to be that legislation on this subject was legislation of a general and perma-

nent nature. If the law fixing the political rights of the people of Utah and Arizona was a local law, in the sense of the Revised Statutes as to local laws not being repealed, then there was no propriety in making the amendment at all, for if it was a local law then it was not repealed by the adoption of the Revised Statutes, but was in force without the amendment. True, this argument is not conclusive, for the amendment might have been made *ex industria*; but the facts that congress treated it as a general law by incorporating the general rule into the Revised Statutes, and then again treated the Utah and Arizona matter as a general law by inserting the provisions concerning them in the Revised Statutes, are corroborative facts tending to show that this view of the case is also the one taken by the congress of the United States. This point will be considered again later in this opinion. For the present, I will state that in my opinion all the old laws relating to territories were set aside excepting whatever provisions might have been therein contained of a private, local, or temporary nature, such as the provisions concerning fees of certain officers, the occupation of certain buildings, the prosecution of certain works, or such private, local, or temporary matters; that the legislation concerning political power is not local, but that the general scheme of territorial government as to the exercise of political power in passing laws was uniformly fixed by a new general law, and all old laws on the subject were repealed.

The people of all the territories, then, stood upon an equal footing as to their political rights under the Revised Statutes until February 18, 1875. Up to that time the people of the territories of Utah and Arizona had power to pass laws over the veto of the governor, the same as people of other territories might do. The people of Arizona, it is claimed, exercised that power on the 12th of February, 1875, passing, it is claimed, a certain law over the veto of the governor. Then, six days after the law had been so passed, congress amended section 1842 of the law concerning territories by adding thereto the following provision: "Provided, that so much of this section as provides for making any bill passed by the legislative assembly of a territory a law without the approval of the governor shall not apply to the territories of Utah and Arizona." Now, what effect did the adoption of this amendment have upon the law passed by the legislature of Arizona February 12, 1875? In the absence of any special words in the act of amendment as to the time it was to take effect, it would, of course, take effect only upon and after its adoption. The only words which it is claimed govern on the matter are the following, constituting the first paragraph of the act: "That, for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the 1st day of December, 1873,' so as to make the same truly express such laws, the following amendments are hereby made therein." Now, what is a pream-

ble? Webster defines it as "an introductory portion; an introduction or preface, as to a book, document, or the like. Specifically, the introductory part of a statute, which states the reasons and intent of the law." This introductory part of the statute, which states the reasons and intent of the law, is, then, merely a preamble. It makes no difference that it is placed after the enacting clause instead of before it. Whether a certain collocation of words has force as a law or not depends, not upon their location on a page of the statute book, but whether they enact anything or not. Whether there is any law enacted in this paragraph or not is easily seen. Strike out what follows it, except the approval, and there is nothing enacted. There is nothing in it but a declaration of an intention to do something, namely, to correct errors and supply omissions in a certain act, so as to make the said act truly express what laws were in force December 1, 1873. It is claimed that these words make the amendments take effect at the same time with the act they amend. But suppose there was a concluding section saying they should take effect 30 days after the date of their passage, which would govern then, the preamble or the concluding section? The latter, of course. But why? Is it because they would be the later expression in the act on the subject? No; for they would not be the later expression in the act. They would be the only expression in it on the subject, for the preamble is not a part of the act. There is no expression here in the act proper as to when the amendments are to take effect. They therefore take effect from the date of their adoption. The preamble says the act is to correct errors and supply omissions, but, as I understand it, the first thing the act does is neither to correct an error nor to supply an omission, but to repeal sections and enact new ones, so as to change the law concerning how stationery shall be furnished to congress. Is an act declaring how the clerk of the house shall buy his stationery to be considered a law general and permanent in its nature, and yet an act affecting the political rights of the whole people of the United States to be considered a private, local, or temporary act? In the Revised Statutes, which it is declared contain the laws of a general and permanent character, we find acts regulating the management of the Smithsonian Institution, the salary of pages to the senate and house, compensation of one laborer in charge of private passage, the salary of the steward of the president's household, etc. Why are these considered general acts? Is it not because the people of the whole United States are interested in these salaries, since they have to foot the bill? And are not the whole people of the United States affected by this legislation concerning the veto power of the governor of a territory? Each separate territory is the property of the people of the United States. It is governed by officers appointed indirectly by the people of the United States. All the salaries of all those officers, as well as those of the members of the local legisla-

ture, and all the expenses attending the passage and printing of the laws, are paid by the people of the whole United States. The people of the United States are interested in all that concerns the government of these territories; but when it comes to the matter of making laws for these territories, as the law stood December 1, 1873, and as it now stands, the whole people of the United States are a part of the law-making power of the territory of Arizona,—a part of the legislature. To pass a law in Arizona at present, three consents are necessary: The consent of the assembly, the consent of the council, and the consent of the governor. There are thus three independent houses, so to speak, through which a bill must pass before it can become a law. The governor does not act for himself in this matter, of course. For whom does he act? Whom does he represent? Not the people of Arizona, for they did not make him governor. He represents the people of the United States, for it is they who indirectly have placed him there as a part of the legislature of that territory to act for them, the only owners and sovereigns of that territory. The people of the United States said they would not trust the entire legislative power over the territory of Utah to the people there, because they felt there was a two-thirds majority there which would make laws of which they did not approve, and they reserved to themselves the right to an absolute veto, to be exercised by their governor. For some reason they declared the same thing with regard to Arizona. They will not even trust their governor in some of the territories, but reserve a further right of veto, even over his consent, to be exercised by their representative in congress.

Can it be said that a law that reserved to the people of the United States the right to absolutely veto the acts of the people of Arizona and Utah was a local law, affecting only the people of those territories? Did it not directly affect the people of the whole United States? If it was not a local law, then it was repealed the day the Revised Statutes were adopted, for it was not contained in those statutes, and all other laws were repealed except those of a private, local, or temporary character. Congress has passed many acts concerning the rights of the people of the territories, and it has so carefully guarded the rights of the people of the United States to govern these territories themselves that in no two of the territories are the political rights of the people and right of *habeas corpus* the same. In Idaho, legislative acts become laws unless vetoed in three days; if vetoed, they may be passed by a two-thirds vote; it is not necessary to submit them to congress for approval; postmasters may hold territorial offices; the people control the government penitentiary; the delegate elected to congress must be a citizen of the United States; the people cannot assign the districts of the federal judges; they cannot establish courts and fix their jurisdiction; they cannot fix the day of electing their delegate to congress; and they are not entitled to *habeas corpus* on the same

grounds as in the District of Columbia. In no other territory are the rights of the people the same in all these respects. In two territories the veto may be delayed five days; in two the veto is absolute; in one no postmaster can hold a territorial office; in five the people cannot control the territorial penitentiary; in six the delegate to congress need not be a citizen of the United States; in seven the people may assign the judicial districts; in seven the people may fix the day for electing delegates; in seven the people may have *habeas corpus* for the same reasons as in the District of Columbia; in only one can the people establish courts and fix their jurisdiction. All of these laws are in the Revised Statutes of the General Laws of the United States. Can any one of these provisions be said to be an exception to a rule? If so, which is the rule and which is the exception? They cannot be local acts, because they affect the rights of the whole people of the United States; they are not considered local by congress, because the commissioners, the men chosen as learned in the law, present them as general laws; congress, which may be supposed to know the difference between a general and a local law, enacts them in the Revised Code of General Laws. In what, then, does their generality consist? Not in the application of the rule; for there is no general application of any rule, except the rule that the governing power of all territories is in the whole people of the United States; that not even a law creating the office of constable may stand if the people of the United States at large do not choose to have it so. The generality of this consists in this: that all these acts are legislation on the general subject of the political rights of the people in the territories, and that every act on the subject affects the whole people of the United States, as either taking some power from them, and giving it to the people of the territory, or recalling some such power already granted.

There is another fact which goes to show that congress did not consider that a provision affecting only a particular territory was therefore a local provision. Title 23 of the Revised Statutes is devoted to legislation concerning the territories, but it is divided into three chapters. Chapter 1, consisting of 56 sections, is headed, "Provisions Common to all the Territories;" chapter 2, containing 57 sections, is headed, "Of Provisions Concerning Particularly Organized Territories;" chapter 3, composed of 22 sections, is headed, "Provisions Relating to the Unorganized Territory of Alaska." Now, there is nothing in the chapter relating to Alaska which applies to any other territory of the United States. No provision is made allowing the people of that territory to make laws in any manner for their own government, but it is declared they shall be governed by the general laws of the United States; that is, governed by the people of the whole United States, to whom the territory belongs. No courts are established in Alaska for the administration of those laws; but the Alaskans are given over to the jurisdiction of the United States dis-

strict courts of California, Oregon, and Washington. The principal industry of the territory, the seal-fisheries, is placed under the control of the treasury department of the United States. The secretary of the treasury is authorized to appoint an agent to manage the seal-fisheries, and to perform such other duties as the secretary may assign to him. This agent is the local representative in Alaska of the power and authority of the United States. This act concerning the unorganized territory of Alaska is local, in the sense that it relates on one side to Alaska, but on the other side it relates to the owners and sovereigns of Alaska,—to the whole people of the United States,—as indicating how their power shall be felt in Alaska. It is a declaration of the sovereign power as to how Alaska shall be governed, and affects not only the people who live in Alaska, but the people who bought, paid for, own, govern, and control Alaska, and it is therefore a general law, and is in its proper place in the Code of General Laws. If it was a mere local statute, it had no business in the general code. If it was a mere local act, it remained in force without a re-enactment. But congress did not look upon it as a local act, and the people of the United States do not consider that the government of Alaska is a mere local matter, with which they have nothing to do. In the same way congress enacted, in chapter 1, 56 provisions common to all territories. There remained, then, in the old laws, a great number of particular provisions, some relating to only one territory, some to two or more territories. If those provisions were regarded as mere local exceptions to a general law, and therefore as mere local laws, they would have kept their place in the statute book without re-enactment; but congress did not look upon it in that light. On the contrary, it went carefully through all the laws relating to territories, collected all those acts called by counsel "local exceptions," but called by congress "provisions concerning particular territories," and re-enacted such of these particular provisions as they still desired to continue in force, enacting them in a separate chapter of title 23. In that chapter they filled 57 sections with such particular provisions, even to the point of regulating where the United States marshal should have control of a federal prison and where he should not. If we cannot judge by this what were the particular provisions they intended should be continued, how can we judge? There is a maxim, *expressio unius exclusio est alterius*. But here is an expression as to an intention to retain 57 particular provisions, the fifty-eighth left out, and yet it is claimed that we are bound to consider that they intended to retain the fifty-eighth also. I take it, then, that in leaving out the particular provisions, existing in two separate acts, which gave absolute veto powers to the governors of two territories, congress intended they should be left out, and that the old laws on this subject were repealed by the adoption of the Revised Statutes. We cannot consider them as in force after the adoption of

the Revised Statutes, without construing directly against the letter of the statute. And so far as the spirit of the act is concerned, the action of congress in the matter, having had its attention called to particular provisions, having legislated on particular provisions, having declared what ones it intended to retain, shows, if it shows anything, that congress acted in the matter with full notice of these provisions, and deliberately omitted them. To construe against the very letter of the law is to go to the extreme limit of judicial power in the matter, and will never be done if any reasonable construction can be given to the law as it now stands. Is there anything unreasonable in thinking that congress meant to do what it did do? There were nine territories, and in seven of them the people were granted full legislative powers. In two of them this power was restricted by a particular limitation. The act, as it stands, removed the particular limitation and placed all upon an equal footing. Are we to leave the plain, direct, unequivocal language of the statute, and go about the law, behind the law, and presume an intention different from what is expressed, and construe on that presumed intention, set aside the letter of the law, destroy uniformity, and set up diversity? The effect of the statute as it stands is to remove diversity and establish uniformity.

It is claimed that the legislation concerning the government of the District of Columbia is not in the Revised Statutes, and that that is an argument to show that congress looked upon the legislation as local. This is a mistake. The legislation concerning the District of Columbia is found in the Revised Statutes. It is true it is not found in the first volume thereof, but congress specially ordered that "the revision of the statute relating to the District of Columbia, to post-roads, and the public treaties," be published in a separate volume, and entitled and labeled, "Revised Statutes Relating to the District of Columbia, and Post-Roads, and Public Treaties," which has been done. An act granting certain powers may be a general act. The power thus granted may be exercised only in a particular place. The power may be exercised only in a certain locality, but the act granting the power may still remain a general act. States pass general laws concerning notaries public, providing for a certain number in each county, but limiting the exercise of notarial power to the county in which the notary resides. An exception is made as to one county, providing that the notaries of that county may exercise notarial powers in an adjoining county, also thus giving the notaries of one county more power than is given to others. Then comes a revision of the statutes, in which, by general law, notarial power is abolished. There is a section in the revision saying that all general laws not in the revision are repealed. Would the notaries of the favored county still have notarial powers, on the plea that they had them by virtue of a local law? A law is not necessarily local because it seems to operate only in a particular locality. The territory of Ari-

zona was acquired by treaty; that is, the territorial area now called Arizona was so acquired. A treaty is a law of the land. Was that law by which Arizona was acquired a local law, affecting Arizona alone? It seemed to relate only to Arizona; it seemed to simply change the political condition of the people of Arizona, effecting a change in their citizenship; but that was by no means the extent of the operation of the law. That law, which seemed limited in its effect to Arizona, really affected every member of the body politic of Mexico and of the United States. It effected a change in political and proprietary rights. Would a law transferring Cuba to the United States be a local law? It seems to relate only to the *status* of Cuba. Would a law ceding Arizona back to Mexico be a local law? It seems to apply only to Arizona. Why is it not a local law? Because in ceding Arizona to a foreign power the people of the United States would divest themselves of proprietary and political rights. The people of the United States, by treaty, acquired the political right to make laws for the government of Arizona. Any law by which the people of the United States become divested of those rights, in whole or in part, is a general law, because it concerns the people of the whole United States. When the people of the United States cede political power to the people of Arizona, they are divesting themselves of it for the time being as completely as though they ceded those rights to Mexico. It may be called a "lease" of power, as distinguished from an absolute divestment, because in one case it can be resumed at will, in the other not; but even then, does not a lease of rights affect both parties to the act, the lessor as well as the lessee? When the people of the United States ceded to the people of Arizona a limited power of making their own laws, the law by which it was done was a general law, because it affected the political power of the whole people of the United States. The act, then, which gave the people of Arizona power to make such laws as might receive the sanction of the governor was a general, and not a local, law, because, though it affected the people of Arizona very materially in giving them a certain amount of political power, it affected the people of the United States to the very same extent, for the gain of the people of Arizona was the exact measure of the loss of the people of the United States. I am therefore again led to the conclusion that the act fixing the political power of the people of Arizona, prior to December 1, 1873, was a general law, and was repealed by the adoption of the Revised Statutes June 22, 1874, which established a different rule on the subject, increasing the political power of the people of Arizona by giving them power to pass laws notwithstanding the objections of the governor.

It is, however, contended they did not have power to do so on February 12, 1875, by reason of the amendatory act of February 18, 1875. Having considered the old law as repealed, we may then look on the Revised Statutes of June 22, 1874, as the original law on this subject, and the ques-

tion will then be as to the effect of the amendment of February 18, 1875. I have already shown that I do not consider there is anything in the amendatory act—that is to say, in the act proper—declaring when the amendments are to take effect, and that they therefore take effect only from their enactment, to-wit, February 18, 1875; and that any laws passed prior to that date, and since December 1, 1873, over the governor's veto, stand as laws of Arizona until repealed. I have shown that I consider that the clause which it is claimed gives these amendments a retroactive effect is merely a preamble. But suppose it is not a preamble, but in fact a part of the act, even then it could not affect the validity of the law of the legislature of Arizona duly passed February 12, 1875, in accordance with the provisions of the Revised Statutes of 1874, over the governor's veto, for two reasons: (1) Because congress had no power to give the act that effect; (2) the acts *in pari materia* show it was not the intention of congress, in the adoption of the Revised Statutes, to invalidate any act done or disturb any right which accrued under existing laws.

1. Congress has no power to give a statute such a retrospective effect as will destroy vested rights. The doctrine is stated by Kent in the following language: "A retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void." 1 Kent, Comm. 455. The vested right in the case which cannot be destroyed is not the right of the plaintiff to the office of probate judge, but is the right to a certain amount of political power which vested in the people of Arizona the day the limitation on their legislative power was removed by the adoption of the Revised Statutes, June 22, 1874. From that day until February 18, 1875, they had vested in them the right to make laws by a two-thirds vote of the legislature, notwithstanding the objection of the governor. It was shown that there was at least an attempt to exercise that right. An attempt was made to at least thus pass a law. Under that alleged law, if properly passed, the people acquired the right to elect a certain class of judges. Everything that could be done to give the people that right, if the law was really passed, was fully and completely done. True, they had not yet exercised the right of election, but the right of election was not the right which vested under the act of congress. The right which vested under the act of congress was the right to make laws, notwithstanding the objections of the governor, and that right they had exercised, or at least attempted to exercise. Subsequent acts of congress might recall this right of legislation, but they could not recall the acts done while that right existed. A principal may revoke the authority of an agent, but he cannot annul acts duly performed and consummated while the authority existed. Whether congress thought it had the power to do so or not is immaterial. Its power in the matter was exhausted when it passed the law. The

powers of the government are divided into three co-ordinate branches, each supreme in its sphere. It is the province of the judiciary to declare the effect of laws. This right is not shared by the legislative department, but is an exclusive attribute of the judicial power. The language of what I consider the preamble in the amendatory act of February 18, 1875, undertakes to say that the effect of these amendments shall be to make the Revised Statutes, adopted June 22, 1874, truly express what was the law December 1, 1873, not congress. For congress to undertake to do it is to usurp judicial functions. It would be no more irregular for the president to do this by proclamation than for congress to do it by declaration. In Kent's Commentaries the rule is stated: "It seems to be settled, as the sense of the courts of justice in this country, that the legislature cannot pass any declaratory laws, or acts declaratory of what the law was before its passage, so as to give it any binding weight with the courts." 1 Kent, Comm. 456, note c, and numerous cases there cited in support of the proposition as to the authority of co-ordinate branches of government. Here is an attempt, on February 18, 1875, by congress, to declare what law was in force December 1, 1873. But the courts cannot accept the declaration of a legislature that a certain law was in force on a certain prior day. To admit a contrary doctrine would be to take the construction of statutes from courts and give it to the legislature. The courts must take the statute books, and from them discover and declare what laws were or were not in force on a certain day. Congress claims that the non-insertion in the Revised Statutes of the provision giving absolute veto power to the governor of Arizona was an omission; that congress intended to insert it. So they might have intended to enact a whole law, but from any cause might have omitted to do it. Can we adjudicate upon such an intention? The doctrine of intention in construction is that where a law has really been enacted, but its meaning is by its own terms ambiguous, that is, capable of two constructions,—“ambiguous, and with double sense deluding,”—then, if the intention of the legislature can be clearly ascertained, the sense which will give effect to that intention will be adopted. But to supply a whole proviso of new and independent matter, constituting an exception to the law as it plainly reads, simply because the legislature may declare that they intended to enact that proviso, but that by some mischance it was overlooked and omitted, is further than courts can be expected to go.

When an intention as to the policy of an act is shown by an actual declaration in an act, in the form of an enactment therein, and that policy is in accordance with public policy and sound law, that will be accepted as the declared policy of the act, and as showing the spirit and intention of subsequent acts *in pari materia*, if there be nothing in subsequent acts to make such a construction an unreasonable one. In the first act adopting the Revised Statutes, it was declared, in section 5597,

that the adoption of these statutes repealing former acts should not affect any act done or any rights accrued before the repeal of the former acts. This was because the repeal took place June 22, 1874, to date from December 1, 1873, and this was to save all acts done and all rights accrued while the old acts were in force. In other words, although the repeal was to date back to December 1, 1873, nothing which was regularly done in the mean time should be disturbed, nor any accrued rights be destroyed. In the subsequent act *in pari materia*, it is claimed that it was intended to have the change in the law relate back to a certain date, but the spirit of the organic act saves all acts done and all rights accrued in the mean time. There is nothing in the subsequent act declaring any intention to depart from the declared policy in the organic act in this respect. The language of the statute is much stronger than the general rule of law on the subject. The general rule is that rights to be saved must be clearly vested, but the policy of this act is declared in broader terms. It goes so far as to say that every act done and every right accrued under existing laws stands as good, notwithstanding changes in the law. I am therefore of the opinion that on the 12th of February, 1875, the legislature of Arizona territory had authority and power to pass an act, notwithstanding the objections of the governor. It may then be thought that the only question remaining is, did they really do it? But that is not the question in this case. The question in this case is, was it, in this case, under the pleadings, necessary to prove, and if so, was it proved, that they really did it?

2. This brings me to the consideration of the second proposition contained in the first conclusion of law of the judge below, in which he said that the acts were void.

Were the acts of the legislature void? On this point the defendant urges in his brief a proposition in the following language: “(6) The election held, etc., was void. No law authorizing an election to be held on that day is to be found in the printed statutes of the territory, nor is there such a law on file among the enrolled laws of the territory in the secretary's office. \* \* \* If the journals of the legislature be referred to, it will be found that, after passing the bill the second time, it was by special committee (not in the ordinary manner) returned to the governor. The governor is not the custodian of the laws of the territory, nor is he required to care for their preservation more than any other citizen of the territory. His connection with the bill ceased when he returned it to the house in which it originated, with his objections. There is no statute requiring of him any other duty as to the bill save to approve or disapprove. \* \* \* To say there is such a law, as claimed by the appellant, when the same is not found either in the printed statutes or on file among the enrolled laws, is putting on trial for official misconduct the secretary of the territory and the legislative council, in a merely collateral proceeding, in which they are not parties, and are wholly unheard, and



is a violation of their constitutional rights and the plainest dictates of justice." To this argument there are two answers: (1) The secretary of the territory is not put on trial for any official misconduct, because there is nothing to show the bill was ever delivered to him. It has not been traced to his hands, and he cannot keep what was never intrusted to him. (2) The defendant is bound by the facts established in this court, by the facts found by the court sitting as a jury, filed in the case as the facts found proven, and the finding not excepted to.

It is urged that the stipulation as to proof made by plaintiff cannot help him in this action; that the court below could not take notice of facts brought in only by the stipulation. And yet it is only from the stipulation that the right of the defendant to the office by appointment appears. Yet the court took notice of the facts there shown in his favor, and on them adjudged that he was rightfully entitled to the office. Why must it not take equal notice of the facts stipulated in plaintiff's favor? It was a stipulation as to mere probative facts, entirely capable of actual proof in case they really existed. If defendant thought plaintiff could not prove them, he was not obliged to admit them. He simply waived the formal proof, admitting that the facts were as claimed. He denied the conclusions which plaintiff wished to draw from them. It is not alleged, nor does it appear, that this is a feigned issue. Let us see first what act congress required or directed the legislature to do if it wished to pass an act over the veto of the governor, and then what acts it is proven in this case were done, so as to see whether the legislature fully complied with all the requirements or not. Section 1842 of the Revised Statutes says, (and I number the provisions for convenience in reference:) (1) "Every bill which has passed the legislative assembly of any territory shall, before it becomes a law, be presented to the governor." (2) "If he approve it, he shall sign it;" (3) "but if not, he shall return it, with his objections, to that house in which it originated;" (4) "and that house shall enter the objections at large in its journal;" (5) "and proceed to reconsider it;" (6) "if after such reconsideration two-thirds of that house agree to pass the bill," (7) "it shall be sent, together with the objections, to the other house," (8) "by which it shall be likewise reconsidered;" (9) "and if approved by two-thirds of that house, it shall become a law." (10) "But in all such cases the vote of both houses shall be determined by yeas and nays," (11) "and the names of the persons voting for or against the bill shall be entered in the journal of each house." Now, in the matter of this bill, acted on by the legislature of the territory of Arizona, February 12, 1875, all of these things may have been done, but in this case the record does not affirmatively show that it was proven in the trial below that all of these things were done.

1. The record does not show that the fourth requirement was complied with, viz., that the house to which the bill was returned entered the objections at large

on its journal; but neither does it show that the governor stated any objections. The court found the fact on this point to be that the governor returned the bill "without his approval." I do not see that we can go beyond that finding in this respect, and presume that the governor did state objections. So far as the record goes, it does not appear that he stated any objections. I do not then see how it could be held that the omission to prove that objections of the governor were entered in the journal would affect this case, for we do not know that there were any objections to enter.

2. The seventh direction speaks of sending the objections of the governor with the bill when the latter is sent to the house. The record here does not explicitly state that any objections of the governor were sent with the bill, but the court below found that, after the bill had been passed by a two-thirds vote in the council, "the said bill was, in the regular manner, transmitted to the house of representatives for its action." So far as the transmission was concerned, it seems to me that the finding of the court, if good for any purpose in this matter, shows it was sufficiently regular, particularly as it does not appear that there were any objections to transmit.

3. The eleventh direction says the yeas and nays shall be entered on the journal of each house. The record in this case does not show whether that was done or not. Was it necessary in this case for plaintiff to prove that that was done? How does the matter of proof stand? Under the pleadings in this case, what proof was necessary for the existence of this law? Plaintiff, in his complaint, alleges that he was the duly elected and qualified probate judge of Maricopa county. He alleges the election was duly held, stating the time of his election, the fact thereof, when he received his certificate, when he qualified, and when he made demand for his office. He did not plead the law under which he claimed. The defendant did not demur. He answered, and pleaded *nul tiel record*, alleging there was no law of the territory authorizing such an election. It seems to be pretty well settled that an issue as to the existence of a public law cannot be raised in that way. See numerous cases cited in *Sherman v. Story*, 30 Cal. 253. From that case I quote as follows: "Thus, in *The Prince's Case*, 8 Coke, 28, 'it was resolved that against a general act of parliament, or such act whereof the judges *ex officio* ought to take notice, the other party cannot plead *nul tiel record*, for of such acts the judges ought to take notice. But if it be misrecited, the party ought to demur in law upon it, and in that case the law is grounded upon great reason; for God forbid, if the record of such acts should be lost or consumed by fire or other means, that it should tend to the general prejudice of the commonwealth, but rather, although it be lost or consumed, the judges, either by the printed copy or by the record in which it was pleaded, or by other means, may inform themselves of it.'" See, also, *Dwar. St.* 613.

Defendant says, in this case, in his brief, that the law is lost; that is, that it cannot be found in the secretary's office; that the journals show it was delivered to the governor, but that he is not responsible for it. Yet the case in 8 Coke says that in such cases God forbid that it should tend to the general prejudice of the commonwealth; that in such cases the judges, either by a printed copy or by the records, or by other means, may inform themselves of it. Dwarria says: "The existence of a public act must be tried by the judges, who are to inform themselves in the best way they can." The existence of a law is not a question to be left to a jury to determine on the accidental evidence before them. Senator VERPLANCE's opinion, (as judge,) cited in *Sherman v. Story*, 30 Cal. 264. In *De Bow v. People*, 1 Denio, 14, Mr. Chief Justice BRONSON says the question must be settled by the court as a question of law. *Sherman v. Story*, 30 Cal. 268. The supreme court of California says, in the last-cited case, that "at common law not even the plea of *nul tle record* was admissible. There was no plea by which the existence of a general act of parliament, as a question of fact, could be put in issue and tried. It was regarded as a question of law alone, of which the judges were bound to take notice. If the enrollment was in existence they would consult it, but of course would not go beyond that record. But if that had been lost or destroyed, and there was no printed statute, (which I will remark is what defendant claims here,) it was necessary for the judges to look for it in other documents, where it had been recited or recognized and acted upon, or to inform themselves in the best mode they could. It was still a question of law, and not of fact, and they were supposed to know the law." *Sherman v. Story*, 30 Cal. 259. The legislature of Arizona have adopted the common law as the rule of decision in all courts of this territory, in all cases not in conflict with the statute law governing them. *Comp. Laws*, p. 524, § 7. I do not know of any statute here changing the common-law rule of pleading in this respect. I am confident there is none, and that the question of the existence of the law under which plaintiff claims was never properly raised in this case.

The court found, as facts proven, that all of the proceedings as to the election itself were regular; that the election was held; that plaintiff was elected, received his certificate of election, filed his bond, and took the oath required, and made demand of the office. No question as to the existence or validity of the law under which he was elected having been properly raised, how should it have been determined? I think defendant misconceives the effect of the authorities he quotes from 30 Cal.

Statutes, without some necessary penalty, either expressed or implied, are merely directory. They may be followed or not, as parties choose; for if there is no penalty, how does it matter? In the act of congress governing this case there is no declaration of the consequences of non-compliance. To be fatal, it should have

so declared, unless it can be found from the law and practice in such cases that non-compliance with all these forms is held to be fatal. I am of opinion it will be found that inquiry as to the fact of compliance or non-compliance with these requirements is not allowed, even when the attempt is directly made to invalidate the statute because of the very fact of non-compliance. The effect of *Spangler v. Jacoby*, 14 Ill. 298, is not that the party claiming the existence of a statute must show affirmatively that the yeas and nays were entered in the journal, but that it is a matter of defense that the party denying the validity of the act may prove the journals, and if he can show from them that the vote was not entered, he may thereby defeat the act. Even in this decision the supreme court of California remark that it was decided by two justices, the third being absent, and that the ruling was expressly based upon the very special provision of the constitution of that state. *Sherman v. Story*, 30 Cal. 270. Even in *Spangler v. Jacoby*, the court declared that if the journal is lost or destroyed, it will be intended that the proper entry was made on the journal. *Sherman v. Story*, Id. 271. When the journal is not produced, when the defendant does not attempt to show a non-compliance, then must it not also be presumed by the court that either the journal is lost, and that the entry will be intended, or that defendant, failing to produce it, and failing to undertake to show non-entry, waives any objection on that point? In *Railroad v. Governor*, 23 Mo. 353, it was declared that inquiry could not be made as to whether the legislature had complied with a direction requiring particular forms to be observed in passing a bill. This was where the rules for the action of the legislature were prescribed by the constitution,—certainly as binding a requirement as the provision of the act of congress in this case. The court says to go into an inquiry as to whether all the forms had been complied with "would seem like an inquisition into the conduct of the members of the general assembly; and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law. This inquiry may be extended to good as well as bad laws; to those passed as well with the approval of the governor as those which are passed, his objections to the contrary notwithstanding; for it is clear that if a law passed over the objections of the governor may be impeached by inquiry, whether the forms of the constitution were observed in its enactment, the same inquiry may be instituted in relation to laws passed with his sanction; and thus statutes constitutional on their face, regular in their terms, which may have been the rule of action for years, and under which large amounts of property have been vested and numerous titles taken, may be abrogated and declared void." (I will remark here that every law of Arizona territory rests on this footing. See section 3, p. 179, *Comp. Laws*, which requires the vote on the final passage of all

bills to be by ayes and nays, and entered in the journal. Under the doctrine contended for here by defendant, the validity of every law of this territory would depend upon whether the clerk of either house had or had not possibly, in a moment of hurry, carelessness, or neglect, omitted to make a certain entry in his minutes.) The court continues: "A principle with such a consequence should be supported by a weight of authority which no court can resist. When we reflect on the manner in which journals are made up, and the rank of the officers to whom that duty is intrusted, how startling must the proposition be that all our statute laws depend for their validity on the journals of the two houses of the general assembly showing that all the forms required by the constitution to be observed in their enactment have been complied with! The required form may be observed, and the clerk may fail to make the necessary or correct entry. If the journals had been designed as the evidence in the last resort that the laws were constitutionally passed, would not some method have been adopted by which greater care would have been exacted in entering the proceedings of the two houses? Would the task of making them have been intrusted to a single clerk, with a power in the house to dispense with their reading, even should there be a rule requiring them to be read?—a matter, however, about which the constitution is silent." *Sherman v. Story*, 30 Cal. 272. In *Turley v. County of Logan*, 17 Ill. 152, the correctness of the above decision, on general principles, was expressly admitted, but it was again claimed that the constitution of Illinois required a different rule in that state. But on this point Mr. Justice SKINNER, who was not on the bench when *Spangler v. Jacoby*, 14 Ill. 298, was decided, expressly reserved himself, even under the constitution of Illinois. *Sherman v. Story*, 30 Cal. 274. In *Sherman v. Story*, the supreme court of California say it is a remarkable commentary on the worthlessness of journals as evidence of the law that, out of the dozen cases cited in that opinion, in at least two of them, if not more, it was shown that the clerks blundered in making up the journals, and adds this language: "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose paper of the legislature, and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischief absolutely intolerable." 30 Cal. 275.

What is the effect upon this case of all this law? I take it that it has this effect: that it establishes the proposition that the defendant himself, even if he were regularly at work impeaching the law, having admitted all the substantial facts concerning its passage,—the original passage, the vote, the reconsideration, the two-thirds vote in each house, and the taking of the vote by ayes and nays,—could not himself have introduced proof to show

whether the journals contained the record of the vote or not. This, under the rule in *Sherman v. Story*, 30 Cal. 275, and what the court there says, is the general law. Even under the restricted rule in the case of *Spangler v. Jacoby*, 14 Ill. 298, on which, it is plain, much doubt is thrown by the courts of other states, as also by the new judge on the bench when that case was decided, all the defendant can claim is that if he were regularly impeaching the validity of the act he might bring in the journals, and if the record of entry were not there, he might claim that its omission invalidated the act. But he is not regularly impeaching the validity of the act, and if he were it is not shown that the vote is not recorded; so he makes no point in any event. But the point that is made is by no means clear, that defendant could in any case offer proof that the record of the vote does not exist. If there had been a clear issue as to whether the act had passed, and the act itself had been produced on the trial, what proof of its passage would have been sufficient? Simply this: the certificate of the presiding officer of each house that the bill was passed by a two-thirds vote. It would not have been necessary that this certificate should state anything about the record or transmission of objections, vote by ayes and nays, or record of the vote. See the attestation of the passage of the civil rights bill in congress over the veto of the president, April 9, 1866. The certificate in that case proves one fact only,—the substantial fact that the bill passed by a two-thirds vote. That is all the plaintiff could have been asked to establish in this case. He proved it by the admissions of the defendant. What clearer proof could he give?

As to their disposition of the bill in sending it to the governor. He is the person to whom, under the absolute veto power, they were obliged to send all bills. He received them. If he approved of them, he signed them and handed them over to the secretary for safe-keeping. When the legislature found themselves suddenly in possession of a new power of legislation, they found, after the passage of the bill, that there was no legislation as to where it should be sent. This because they never had any use for such a regulation, never before having had the power to pass bills in that way. They had been in the habit of sending all their bills to the governor. It is well known that our laws are mainly copied from the laws of California. In that state the rule, after the passage of a bill over the governor's veto, is to send the bill again to the governor, who is to deposit it with the secretary of state. Defendant says the journals show that the legislature appointed a special committee to carry the bill to the governor and deposit it with him. Yet defendant says in his brief that because the legislature sent the bill to the governor in this way they evidently did not intend that the act should become a law. For what purpose, then, did they appoint a special committee to carry this act to the head of the executive department of the territory? The clause in section 1842 of the Revised Stat-

ute, as to passing laws over the veto of the governor, is copied from the provision in the constitution of the United States relating to passing laws over the veto of the president. I do not find any provision in the acts of congress prescribing what shall be done with a bill after it is passed over the veto of the president; but I apprehend that if the legislative department of government, in transmitting its laws to the executive department, should send a special committee to the head of the executive department, instead of to a secretary of his department, it would not be considered as irregular, nor as invalidating the act.

There is no mode prescribed in Arizona territory for authenticating statutes passed notwithstanding the objections of the governor. Neither do I find any in the laws of the United States concerning a bill passed over the veto of the president. I find the United States Statutes at Large are printed without any certificate from anybody in the printed copy of laws stating that they are correct copies of the law. There is an act of August 8, 1846, declaring that a certain edition of the laws printed by Little & Brown is declared complete evidence of the laws, without any further proof or authentication thereof. On April 9, 1866, congress passed an act on civil rights. It was vetoed by the president. It was passed over his veto. Under section 7 of article 1 of the constitution, it was required that the vote in such cases should be taken by ayes and nays, and the names of the persons voting for and against the bill should be entered on the journal of each house respectively. In the attestation of the passage of the bill over the veto, it is not stated that the constitutional provisions were complied with as to entering the veto on the journals, nor was it stated that the vote was taken by ayes and nays. The same section of the constitution requires that the objection of the president should be entered at large in the journal, yet it is not stated that this was done. Yet the proof of the mere fact of its having received the two-thirds vote is declared by congress to be sufficient to establish the law. Therefore, the plaintiff in this case could not have been required to prove compliance with the requirements as to entry of objections, nor that the vote was by ayes and nays, nor that entry thereof was made in the journal, even if the validity of the law had been regularly put in issue; much less is he required to establish it when there has been no issue raised on the subject. The pleadings in this case did not raise the issue. It is true such does not seem to have been the understanding of the pleaders, but the question as to what issues are raised by the pleadings is to be determined by the established rules of pleading, and not by the understanding or intent of the pleader. The court has no power to submit this question to be tried by a jury as an ordinary question of fact. Section 153 of our Compiled Laws says issues are of two kinds, of law and of fact. Section 154 says an issue of law arises by demurrer. It cannot, then, be raised by an answer.

Section 156: "An issue of law shall be tried by the court, unless it be referred upon consent, as provided in this chapter." The matter as to reference is settled in the section on pages 413 and 414, Comp. Laws. The trial of an issue of law may be referred. The parties must agree to the reference, and their agreement be filed or entered in the minutes. The reference shall not consist of more than three persons. The existence or non-existence of the statute in this case was a question of law. It was tried by the court sitting as a jury. Properly it could be tried only by the court or by a reference agreed upon by the parties. Therefore the whole matter of trying it by a jury in the ordinary way was irregular, even if the issue had been raised on the pleadings. *A multo fortiori*, was it error when there was no such question raised? It is seen here how easily this issue could have been fully tried. If the existence of the statute were denied, and the issue properly raised as one of law, it could have been tried by the court or by a reference of three persons. The court or the referees would, as Dwarries says, have informed themselves on the matter in the best way they could, and have determined the matter accordingly. But, even if this mode would have been adopted, the conclusion of law from the admitted facts of the case was error.

The substantial facts, viz., the intention of the bill, original passage, veto, and subsequent passage by a two-thirds vote, were all proved, and that was sufficient to prove the existence of the statute. To say that, because the act itself cannot be found in the secretary's office, it cannot therefore be proved in any way, is to say that the will of the people, solemnly enacted in the form of law, may be entirely defeated by any one who chooses to abstract the roll of the statute from the secretary's office; but I call attention again to the language quoted in *Sherman v. Story*, 30 Cal. 275: "God forbid that the will of the people should be thwarted in that way." If such a case arises, the authorities are that the judges will inform themselves of the existence of the statute and its contents, as Dwarries says, in the best way they can. The cases cited in 30 Cal., and relied upon by defendant, are where parties undertook to contradict the actual official record of the law, but in this case there was no attempt to contradict a record. It was claimed the act was lost, and the effort was simply to prove what the record contained. The issue was not raised on the pleadings, but the plaintiff voluntarily furnished proofs of all the essentials of the statute, the substantial facts of its passage, and what it contained. Clearly, under all the rules, he was entitled to do this, even when fairly put on proofs. He furnished the strongest, most indubitable proof,—the admission of the defendant himself, reduced to writing, and filed in the case. He therefore proved the existence of the statute. A statute is the will of the people, just as a certain document may be the will of a deceased person. But neither the paper nor the writing thereon, in either case, constitutes the "will" spoken of. The words are but the

symbols used to convey the will of others, —to show what the will is. The contents of a lost will may be proven. So may the contents of a lost statute. The fact of loss, it may be said, must be first established. Not necessarily. That is a ground of objection to the evidence, but if the objection is not made, and the evidence is admitted, it stands. No objection was made in this case. On the contrary, the fact of loss was set up by the defendant himself, and he there admitted the contents of the instrument and its execution; that is, in this case, certain facts as to its execution, which facts in law are sufficient to establish its execution.

The decision in this case does not extend beyond the parties. It does not bind the people in any other case. If another case arises, the question can be raised again. The decision of the supreme court is the law only of the case in which it is rendered. If the defendant here has admitted more than can be proven in another case, or than could have been proven in this case, it is his own affair. Each case stands on its own merits. It is true, parties cannot stipulate that, as a matter of fact, a certain law exists. Neither can they deny that it exists as a fact, because the existence or non-existence of a statute is not a question of fact, but a question of law. The parties in this case did not stipulate as to what the law was. That is the very thing the defendant would not admit, — that this law did exist. He was willing to admit certain things were done. Whether because he was satisfied they could easily be proven or because he knew himself what they were in fact does not matter. He admitted the facts, but he denied utterly that therefore there was a law. But these facts which he admitted show that the law does exist. I am therefore of opinion (1) that on the whole of the 12th of February, 1875, and up to the 18th day of that month, the legislature of the territory of Arizona had power to pass laws, notwithstanding the objections of the governor; (2) that the existence of the law authorizing the election held in this case was not called in question in this case, nor its effect and purpose, as claimed by plaintiff; (3) that nevertheless, though not required to do so, plaintiff showed facts sufficient to establish the existence of the statute and its contents, sufficient to govern this case; (4) that he showed a right to the office under the law; (5) that therefore the decision of the court below, denying his right to the office, should be reversed.

(45 Kan. 423)

SMITH *et al.* v. DAVENPORT.

(Supreme Court of Kansas. Feb. 7, 1891.)

TORTS OF MINOR—LIABILITY OF FATHER.

A father is never liable for the wrongful acts of his minor son unless the acts are committed with the father's consent or in connection with the father's business.

(Syllabus by the Court.)

Error from district court, Brown county; R. C. BASSETT, Judge.

W. D. Webb, for plaintiff in error. James Falloon, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Brown county by Susan E. Smith and her husband, Joseph Smith, against A. G. Davenport, for personal injuries sustained by Mrs. Smith in consequence of the acts of Albert Davenport, a minor son of the defendant, 11 years old, in riding over her with a horse. The case was tried before the court and a jury, and at the close of the plaintiffs' evidence the defendant demurred thereto upon the ground that it did not prove any cause of action, and the court sustained the demurrer and rendered judgment for costs in favor of the defendant and against the plaintiffs; and the plaintiffs, as plaintiffs in error, bring the case to this court. The facts of this case, stated briefly, are substantially as follows: On September 18, 1885, in the afternoon, the defendant directed his son, Albert, to hunt for a colt that had strayed away from their premises. The boy procured a pony mare belonging to Mr. Cochran that was kept on the premises, and proceeded to hunt for the colt, but not finding it, he returned that same afternoon about sundown. The mare was then led by the hired man, and in about one half hour afterwards the boy went on foot to the house of Mr. E. D. Lacroix, about half a mile distant, to inquire concerning La Croix's health. About the same time a little brother of Albert's, about eight years old, named Byron, and another little boy, named Johnny Nelson, who was about nine years old, rode Mr. Cochran's pony mare to Mr. Lacroix's house. Albert went to the house and made his inquiry. The other two boys with the mare remained at the gate. They then came inside of the inclosure between the house and the gate. They then got off the mare and Albert got on and rode it upon a "lope" towards the gate, and arriving near the gate the pony changed its course and ran back, and in doing so ran against and over Mrs. Smith and injured her; and then the mare changed its course again and ran towards the gate, and getting near the gate it stopped suddenly and threw the boy off and over its head. Albert was not sent to Mr. Lacroix's house by his father. These are substantially all the material facts in the case.

We shall assume, for the purposes of this case, that Albert Davenport committed an actionable tort, for which he himself was liable; for infants as well as others are liable for all the injuries to either person or to property which they themselves wrongfully commit. 10 Amer. & Eng. Enc. Law, 668. But the question arises, was the father, A. G. Davenport, liable for the wrongful acts of his son? This question must be answered in the negative. *Edwards v. Crume*, 13 Kan. 348, 350, and cases there cited; *Baker v. Morris*, 33 Kan. 580, 7 Pac. Rep. 267. A father is never liable for the wrongful acts of his minor son unless the acts are committed with the father's consent or in connection with the father's business. In the present case, the son was not performing any act for his father; he was not directed by his father to go to Lacroix's house; it does not appear that he was even there with his

father's knowledge; and what he did had no connection with his father's business. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 413)

**BURTISS et al. v. LA BELLE WAGON CO.**

(Supreme Court of Kansas. Feb. 7, 1891.)

**APPEAL—PRESUMPTION—MOTION FOR NEW TRIAL.**

Where the record is silent as to the time of filing a motion for a new trial, and it appears that such motion was not considered until more than two months after the verdict and judgment were rendered, and no reason is assigned for such delay, it will be presumed by this court, for the purpose of upholding the judgment of the district court, that the motion was not made within the statutory time, and that the court committed no error in overruling such motion. *Hover v. Tenney*, 27 Kan. 183, and authorities there cited, followed.

(Syllabus by *Green, C.*)

Commissioners' decision. Error from district court, Allen county; L. STILLWELL, Judge.

*Knight & Foust*, for plaintiff in error. *G. A. Amos* and *W. A. Choquill*, for defendant in error.

**GREEN, C.** The record of this case discloses the fact that a trial was had in the district court of Allen county on the 8th day of November, 1886, and on the same day the jury returned into court with a verdict for the plaintiff below. A judgment was accordingly rendered thereon. On the 26th day of January, 1887, the court considered a motion for a new trial and overruled the same. The record is silent as to when this motion was filed. The affidavits used upon the hearing were filed on the same day the motion was heard.

As it does not appear from the record that the motion was filed within the statutory time, and no reason is assigned for the delay, it will be presumed by this court, for the purpose of upholding the verdict and judgment of the district court, that the motion was not filed within the time required by section 308 of the Code. *Bartlett v. Feeney*, 11 Kan. 593; *Nesbit v. Hines*, 17 Kan. 316; *Lucas v. Sturr*, 21 Kan. 480; *Hover v. Tenney*, 27 Kan. 133. The judgment of the district court should be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(45 Kan. 469)

**HITE v. STIMMELL.**

(Supreme Court of Kansas. Feb. 7, 1891.)

**WRITS OF ERROR—JURISDICTION—EVIDENCE.**

1. Section 1, c. 245, Sess. Laws 1889, (Gen. St. 1889, par. 4642,) does not oust the supreme court of jurisdiction of proceedings in error pending in that court prior to the passage of that statute.

2. The case of *Muscott v. Hanna*, 26 Kan. 770, followed.

3. The case of *Simpson v. Smith*, 27 Kan. 565, followed.

(Syllabus by the Court.)

Error from district court, Brown county; R. C. BASSETT, Judge.

*R. F. Buckels* and *W. D. Webb*, for plaintiff in error. *James Falloon*, for defendant in error.

**HORTON, C. J.** On the 21st day of June, 1886, James Hite commenced his action against Joseph Stimmell before a justice of the peace of Brown county to recover the possession of two steers, of the value of \$63. The defendant obtained judgment before the justice of the peace, and the plaintiff appealed to the district court. The case was tried before the court with a jury at the November term of the court for 1886, but the jury having disagreed the case was continued. A second trial was had at the February term of the court with a jury for 1887. The jury returned a verdict for the defendant. Judgment was entered accordingly. The plaintiff excepted and brings the case here. The petition in error was filed in this court on January 25, 1888. The defendant has filed a motion to dismiss the proceedings in error upon the ground that since the filing of the case in this court the jurisdiction of this court in cases of error has been abridged by the Laws of 1889, c. 245, § 1. (Gen. St. 1889, par. 4642.) That statute reads: "No appeal or proceedings in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, shall exceed one hundred dollars, (\$100.) except in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution, or false imprisonment is declared upon, or the constitution of this state, or the constitution laws, or treaties of the United States, and when the judge of the district or superior court trying the case involving less than one hundred dollars (\$100) shall certify to the supreme court that the case is one belonging to the excepted classes." Under this statute it is claimed that this court has no jurisdiction, because the amount or value in controversy, exclusive of costs, is less than \$100. This proceeding in error was brought to this court before this statute was enacted.

The statute does not deprive the court of jurisdiction of cases already pending in the court, but provides that after the passage of the act no appeal or proceedings in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, exceeds \$100, with certain exceptions. "It is in general true," say the books, "that no statute is to have a retrospect beyond the time of its commencement." Again, appeals or proceedings in error are to be favored. It is quite clear, therefore, that this court has jurisdiction to pronounce judgment in all cases pending in this court at the time the statute was adopted, but no jurisdiction to hear or determine cases prohibited by the statute of 1889 from being taken to this court after that statute went into force. In the case of *Ex parte McCordle*, 7 Wall. 506, to which we are referred, we find, upon examination, that the federal statute affirming the appellate jurisdiction of the United States supreme court in cases of that

class was expressly repealed. After the repeal that court had no jurisdiction of the case then pending before it. When the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction. *Insurance Co. v. Richie*, 5 Wall. 541. That case is unlike this. The motion to dismiss will be overruled.

Upon the trial Joseph Stimmell was asked on cross-examination, after testifying that he had taken several parties to the herd to see the cattle in dispute, this question: "Question. Why did you take those parties there to identify the cattle? Answer. Simply because I wanted to be perfectly sure that they were mine, and to substantiate the evidence if I had to go into controversy with Jim Hite, because—well, I say that I took those witnesses there to identify those cattle in case he and I should ever have to have trouble with those cattle." This was an answer to the question, and all the witness was asked for; but, taking advantage of the situation, he testified further before the jury as follows: "I was told that Jim Hite was a man that had trouble with everybody that he had anything to do with; that he had taken cattle that belonged to other parties; and one man in particular told me that he knew that Jim Hite had at one time a steer that belonged to him, but he had no evidence to prove it, and he had just simply let him go." The plaintiff moved to have that part of the answer of defendant which was merely hearsay evidence stricken out. This motion the court overruled. The plaintiff excepted.

The evidence which was asked to be withdrawn from the consideration of the jury was incompetent, irrelevant, and hearsay; therefore the trial court committed error in overruling the motion of plaintiff. *Muscott v. Hanna*, 26 Kan. 770; 1 Greenl. Ev. (15th Ed.) § 99. The evidence was prejudicial, and may have influenced the jury in its verdict. The court's attention was expressly called to the matter, and there seems to be no excuse for its refusal to rule out such hearsay statements. Again, *W. F. Lewis*, a witness called for the defendant, was permitted to testify as follows: "Question. I will ask you, were you present at the trial before the justice? Answer. I was. Q. Did you see either of the cattle there, produced before the jury? A. Yes; saw the two. But the one that I noticed mostly was that with the white stripe on his side. Q. You may state who you say they belonged to. A. I say they belonged to Mr. Stimmell. Q. Whose cattle are they? A. I think they are Mr. Stimmell's." This evidence was objected to by plaintiff. Other witnesses were permitted to testify in a like manner over the objections of the plaintiff. This evidence was incompetent. *Simpson v. Smith*, 27 Kan. 565. It was said in that case that "it is seldom competent to prove a fact by a simple assertion of the fact itself; and this is especially true where the fact is of a complex character, and is the principal, if not the only, ground of contention in the case. \* \* \* As a general rule, only such facts can be

testified to directly by the witness as are comparatively simple, primary, and elementary, and such only as come within the direct and immediate cognition of his senses. The witness should generally be directed to state what he has seen, heard, etc., and then he should state the same in detail, and not attempt to give it in the aggregate. Now, ownership of property is not one of such simple, primary, and elementary facts as come within the direct and immediate cognition of the witness' senses. On the contrary, it is one of that class of complex facts which can only be conceived in thought or realized in consciousness as a combination of a variety of constituent facts, or as an intangible inference or mere conclusion drawn from a variety of other facts more simple and less complicated in their nature." In the present case the principal fact to be proved was whether the plaintiff owned the steers in controversy. If he owned them he was entitled to recover. If he did not own them he was not entitled to recover. It was simply this question of ownership and nothing else which the jury were impeded to try. It was therefore incompetent to permit witnesses to testify simply as to ownership. Other alleged errors are discussed in the briefs, but as they are not very material one way or the other we shall not comment thereon. It is perhaps unfortunate that we are compelled to grant another trial in this case, but as the plain and ordinary rules of evidence were flagrantly violated upon the trial, and as exceptions were properly taken by the plaintiff, we cannot avoid the duty imposed upon us. The judgment of the district court will be reversed and cause remanded. All the justices concurring.

(45 Kan. 439)

## DOUGLASS v. ANTHONY.

(Supreme Court of Kansas. Feb. 7, 1891.)

## NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—MOTION.

1. Where a motion for a new trial is filed in the district court four days after the verdict of the jury was rendered, without any showing being made that the party filing the same was unavoidably prevented from filing it sooner, no ground for the new trial except that of newly-discovered evidence can be considered; and this, although the action is one of forcible entry and detainer, commenced in a justice's court, and certified by the justice to the district court.

2. On a motion for a new trial on the ground of newly-discovered evidence, where the newly-discovered evidence is merely cumulative, and the trial court overrules the motion, and there is sufficient evidence to sustain the verdict, *held*, that the supreme court cannot say that there was any material error in the ruling.

(Syllabus by the Court.)

Error from district court, Leavenworth county; ROBERT CROZIER, Judge.

*John C. Douglass*, for plaintiff in error.  
*Lucien Baker*, for defendant in error.

VALENTINE, J. This was an action of forcible entry and detainer, commenced by John C. Douglass on July 16, 1884, before a justice of the peace of Leavenworth county, against D. R. Anthony, to recover the possession of lots Nos. 9, 10, and 11, in block 17, in Leavenworth city proper. The de-



defendant filed an affidavit with the justice of the peace showing that the title to the property in controversy was in dispute, and the justice certified the case to the district court, where two trials were had before the court and a jury, each resulting in a verdict. The first verdict was rendered in September, 1885, and gave one lot to the plaintiff, and two lots to the defendant; but, both parties being dissatisfied, the verdict was set aside, and a new trial granted. The second verdict was rendered April 27, 1886, and gave all the property to the defendant, and judgment was rendered accordingly; and the plaintiff, as plaintiff in error, brings the case to this court for review.

One of the questions litigated in the court below was whether the plaintiff's cause of action, if he ever had any, was not barred by the two-years statute of limitations, (Civil Code, § 16, subd. 5.) On the last trial, and probably on the first, evidence was introduced showing that the defendant had taken the possession of the property more than two years before the commencement of the action; and the jury on the last trial not only found generally in favor of the defendant, and against the plaintiff, but also found specifically that the defendant had taken the possession of the property more than two years before the commencement of the action. The verdict was rendered and the findings made on April 27, 1886, and four days thereafter the defendant filed a motion for a new trial, including various grounds; but, as no showing was made that he was unavoidably prevented from filing it sooner, (Civil Code, § 308,) the only ground for the new trial considered by the court was the one of newly-discovered evidence. Upon the hearing of this motion, a vast amount of evidence was introduced on both sides; but it was all, so far as it was material, merely cumulative, tending to show, on the one side, that the defendant had taken the possession of the property prior to July 16, 1882, and, on the other side, that he had not taken the possession of the property until after that time. The court overruled the motion, and we cannot now say that such ruling was erroneous. Even if all the evidence that the plaintiff introduced on the hearing of the motion had been introduced on the trial, the verdict of the jury might have been, and perhaps would have been, precisely the same as it was, and for the defendant; and then, if it had been sustained by the trial court, as the verdict as rendered was actually sustained by the trial court, after the trial court had heard all the evidence that was introduced on both the trial and the motion, we could not grant a new trial.

The plaintiff claims that he was misled and deceived by the manner in which the case was conducted and tried on the part of the defendant; but we do not think that the record discloses anything from which he should have been misled or deceived, and certainly not to an extent that would authorize him to obtain a new trial. What the pleadings were, except the plaintiff's complaint, is not shown. It would seem, however, from the trial of the case, that the principal question in-

volved in the case was this: When did the defendant first take the possession of the property in controversy? Was it more or less than two years before the commencement of this action? Was it before July 16, 1882, or not? On the trial, the court stated the question thus: "I suppose the crucial question is when he [the defendant] took possession; and that depends upon what he did." What the evidence was on the first trial is not shown, and why the plaintiff did not file his motion for a new trial within three days after the rendering of the verdict is not shown; and certainly, upon the record as brought to this court, we cannot say that any material error was committed by the trial court. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 360)

**TOPEKA CITY RY. CO. v. ROBERTS, County Treasurer.**

(*Supreme Court of Kansas. Feb. 7, 1891.*)

**ASSESSMENT OF TAXES—INJUNCTION.**

After the property of a tax-payer had been listed, valued, and assessed, and the taxes levied thereon had been paid, the county commissioners determined that there had been an undervaluation of the property, and directed the county clerk to enter an additional valuation on the property, and to charge additional taxes thereon, which was done without notice. When the tax-payer learned what had been done, he appeared before the board, and asked to have the assessment and taxes canceled and set aside. *Held*, that the taxes so charged were void, and that the owner of the property can maintain injunction to restrain the collection of the illegal taxes, although he first applied to the county board to cancel and set aside the same, and although he did not appeal from the adverse decision of the board.

(*Syllabus by the Court.*)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*Gleed & Gleed*, for plaintiff in error. *Bergen, Welch & Welch*, for defendant in error.

JOHNSTON, J. This was an action to enjoin the collection of certain taxes alleged to have been illegally charged against the property of the plaintiff by the county clerk of Shawnee county. It appears that the Topeka City Railway Company was engaged in business in the city of Topeka in 1885, and had property subject to taxation for that year. On the 1st day of June, 1885, Joab Mulvane, the president of the company, made a statement to the assessor of the company's personal property subject to taxation for that year, which statement the assessor accepted, and returned the valuation of the company's property to the county clerk as the same had been returned by the company in the statement aforesaid, which return the assessor duly certified under oath. Subsequently the county board of equalization met and equalized the property of the county, but they did not change the valuation of the property listed and returned as aforesaid. The county clerk placed upon the tax-roll of the county for that year the valuation so returned, and charged against the company a due proportion of

all the taxes for that year, and afterwards the company in due time paid to the county treasurer the full amount of all the taxes charged against it. Subsequently, a special agent of the county, who had been appointed to search for property subject to and which had escaped taxation, or which had been taxed at less than its true value, made a report that the company had omitted in its statement made to the assessor \$25,395 of its personal property subject to taxation for 1885, by making an undervaluation thereof. On February 6, 1886, the board of county commissioners made an order directing the county clerk to place upon the tax-roll of the county a valuation of \$25,395 opposite the name of the company as an additional assessment on the plaintiff's property, and to charge taxes thereon for that year to the amount of \$1,086.86, which was done. No notice in writing of the proceedings by the special agent or the board of county commissioners or county clerk, in correcting the assessor's return, and in entering an increased valuation of the company's property on the tax-roll, was given to plaintiff until the proceedings had been taken, nor until February 27, 1886, when the president of the company received, through the post-office, a postal-card from the county treasurer, stating that additional taxes had been charged against the company. On March 13, 1886, the president of the company attended a meeting of the board of county commissioners, and made a statement under oath, and advanced arguments to the board, to obtain an order for the cancellation and setting aside of the additional assessments and charges, and for an order to the county clerk to strike the same from the tax-roll. Subsequently the board reduced the charge of taxes against the plaintiff from \$1,086.86 to the amount of \$272.20. The county treasurer was about to collect the taxes charged, when this proceeding was brought to restrain him.

The only authority for the increase of the valuation, and for the additional taxes charged against the company, was under section 70 of chapter 34 of the Laws of 1876. This statute, however, provides that no change or correction shall be made until notice has been given. No notice or opportunity to be heard was given to the company before the increased valuation and additional tax were entered and charged against the company on the tax-roll, and the action of the board and the clerk in entering and charging the same was clearly invalid, and the tax sought to be collected by the treasurer is wholly void. The invalidity of their action is conceded, but it is claimed that the appearance and action of the company before the board on March 13, 1886, waived the notice and cured the invalidity of the levy. We do not agree with this contention. The appearance at that time was for the sole purpose of inducing the board to order the clerk to strike from the tax-roll and to cancel and set aside the illegal assessment and charges that had been made and entered against the company. The right of the county clerk or commissioners to proceed at that time under sec-

tion 70 of the tax-law to correct the assessment of the company was not conceded, nor did the findings show that the company waived the want of notice. The facts and proceedings in this case are very similar to those in *Commissioners v. Lang*, 8 Kan. 284. There, the board attempted to increase the valuation of Lang's property without giving the notice required by law. After Lang learned of the increase, he went before the board, and moved to have the error corrected, as was done by the city railway company in the present case; but, failing in this, he sued out an injunction to stop the collection of the additional tax sought to be charged against him. Chief Justice KINGMAN, who delivered the opinion of the court, held that the board was not authorized to proceed without notice, and that "their action in the premises was clearly invalid. Defendant, when he learned of the action of the board in December, moved the board to correct their error. Failing there, he paid the taxes he was justly chargeable with, and obtained an injunction to stop the collection of the illegal portion of the tax. This he was entitled to." See, also, *Griffith v. Watson*, 19 Kan. 27; *Commissioners v. Sergeant*, 24 Kan. 572. These authorities settle the question that the tax-payer is entitled to the remedy of injunction, although he may have first asked the board to cancel and set aside the illegal assessment and levy made against him, and although he may not have appealed from the decision of the commissioners refusing to cancel and set aside such illegal assessment and charge. The judgment of the district court will be reversed, and the cause remanded, with directions to enter judgment upon the findings in favor of the plaintiff in error. All the justices concurring.

(45 Kan. 363)

TOPEKA WATER-SUPPLY CO. v. ROBERTS,  
County Treasurer.

(Supreme Court of Kansas. Feb. 7, 1891.)

## ASSESSMENT OF TAXES—INJUNCTION.

1. An arbitrary increase of the valuation of property, and the extension of an additional tax thereon by the county clerk after the assessment had been returned, without notice to the owner of such action, is unauthorized, and the taxes charged illegal.

2. The owner is entitled to maintain injunction to restrain the illegal tax, and the fact that the owner first applied to the county officers to cancel and set aside the illegal tax, and failed to appeal from their refusal, will not defeat the remedy. *Railway Co. v. Roberts*, 45 Kan. —, ante, 854.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

*J. D. McFarland*, for plaintiff in error.  
*Bergen, Welch & Welch*, for defendant in error.

JOHNSTON, J. Action of injunction. After the property of the Topeka Water-Supply Company had been assessed for the year 1885, and the taxes thereon had been levied and paid, the county clerk of the county in which the property was situated, and in February, 1886, entered on

the tax-roll, opposite the name of the company, the sum of \$7,769, as an additional assessment of its capital stock for the year 1885, and charged taxes thereon to the amount of \$268.03. A special agent, appointed by the county to look up property that had escaped taxation for the year 1885, reported to the board, in January, 1886, that the company had not listed its property at its true value, and recommended the increased valuation and the additional levy of taxes that have been mentioned. On this report alone the board acted, without notice to the company of any proceeding or intended proceeding to correct the assessment and to increase the taxes. No statement of any facts or evidence upon which the increased valuation was based was ever filed and kept in the office of the county clerk, except the report and recommendation of the special agent. Afterwards, the company was notified by the county treasurer that there were additional taxes charged against the company, and thereupon an application was made by the company to cancel and strike from the tax-roll the additional assessment and charges which had been entered, but the application was denied. The action of the county board and county clerk in correcting and changing the valuation and imposing additional taxes upon the company, without notice or opportunity to be heard before the increase in valuation and additional charges were made, is unauthorized, and the tax levied illegal. Injunction to restrain the collection of the illegal tax may be maintained; and the fact that the company first applied to the county officers to cancel and set aside the illegal tax, and that it failed to appeal from the refusal, will not defeat the remedy. The facts in this case are quite similar to those of *Railway Co. v. Roberts*, ante, 854, (just decided,) and the decision therein is controlling here. See, also, *Commissioners v. Lang*, 8 Kan. 284; *Griffith v. Watson*, 19 Kan. 27; *Commissioners v. Sergeant*, 24 Kan. 572; *Gen. St. 1889*, par. 6918. The judgment of the district court will be reversed, and cause remanded, with directions to enter judgment upon the findings in favor of the plaintiff in error. All the justices concurring.

(45 Kan. 442)

**RENNICK v. BOARD OF COUNTY COMMISSIONERS OF LYON COUNTY.**

(*Supreme Court of Kansas*. Feb. 7, 1891.)

**LOCATING HIGHWAYS—DAMAGES—APPEAL.**

In awarding damages for the location of a county-line road, each board of county commissioners of the respective counties between which the road is to be laid out acts separately, and an appeal from the award made by either board must be taken within 30 days after the order appealed from is made, regardless of the time when final action is taken by the other board.

(*Syllabus by the Court*.)

Error from district court, Lyon county; CHARLES B. GRAVES, Judge.

*E. H. Sanford*, for plaintiff in error. *J. W. Feighan*, for defendant in error.

JOHNSTON, J. This was an appeal from an award of damages, made by the board

of county commissioners of Lyon county, for the location of a county-line road over appellant's land. On the 15th of October, 1886, the board of county commissioners aforesaid, upon a report of viewers who had been duly appointed, proceeded to and did establish the road, so far as that board could. In establishing the road, it was necessary to appropriate to public use several acres of land belonging to Josie P. Rennick, for which the board awarded damages to the amount of \$30. The order and the award were made by the Lyon county board on October 15, 1886; and the action of the Wabaunsee county board, on the part of the road located in that county, was not taken until January 5, 1887. Josie P. Rennick, feeling aggrieved by the award of damages allowed by the Lyon county board, appealed to the district court of Lyon county on January 25, 1887, —more than 90 days after the order appealed from was made. A motion to dismiss the appeal because it was not taken within 30 days—the time allowed by the statute—was made and sustained. This ruling is assigned for error.

The motion was properly decided, as the plaintiff in error was too late in taking her appeal. She was not entitled to 30 days after the final action was taken by the board of county commissioners of Wabaunsee county. In establishing county-line roads, each board acts separately. While the concurrent action of both is necessary to the establishment of the road, each is to determine for itself the amount of damages that shall be allowed for the land taken in the county for which it acts; and the order of award is to be entered on its journal. If any one is aggrieved by the award of damages made by either board, he may appeal from its award to the district court of the county in which the land taken is situate, and for which the county board is acting. The appeal is from the award of damages, and not from the order establishing the road, and it must be taken within 30 days from the time the award appealed from is made. *Gen. St. 1889*, pars. 5480–5483. The appeal-bond was filed and the appeal taken 20 days after the action of the Wabaunsee county board was taken; but the appeal was not from the order or award of that board, nor to the district court of that county. It was taken from the order of the Lyon county board, which was made more than 90 days prior to the time of taking the appeal. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 453)

**BAUGHMAN v. HALE.**

(*Supreme Court of Kansas*. Feb. 7, 1891.)

**ACTION ON ACCOUNT—VERIFICATION—SET-OFF—APPEAL FROM JUSTICE COURT.**

1. The correctness of an account filed before a justice of the peace, duly verified by the affidavit or affirmation of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the opposite party, his agent or attorney. Section 84, *Justices' Act*.

2. A defendant in an action brought against him upon an account, duly verified, before a justice of the peace, has the right in the justice

court, and also upon appeal in the district court, to introduce evidence to prove any set-off or counter-claim which he may have against the plaintiff, although he has not denied the correctness of the account sued on by affidavit.

3. Where, in an action before a justice of the peace, both the plaintiff and defendant file their bills of particulars or accounts, and the case is subsequently appealed to the district court and a trial is commenced in that court before a jury, upon the original papers on which the case was tried before the justice of the peace, amendments to the pleadings at that time by either party is largely in the discretion of the trial court. This court will not interfere, unless that discretion has been abused.

(Syllabus by the Court.)

Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

J. J. Hitt, for plaintiff in error. *Jetmore & Son*, for defendant in error.

HORTON, J. This was an action commenced on December 13, 1886, before a justice of the peace of Topeka, by Lydia Nichols, then in life, against Joel Baughman, on an account for rent, etc., the correctness of which was verified by her affidavit. At her request the justice of the peace ordered the defendant to file his bill of particulars, which was done. Mrs. Nichols, on leave of court, filed an amended bill of particulars on an account, the correctness of which she also verified by affidavit, wherein she claimed \$204.70. These were the pleadings. The case was tried before the justice of the peace on January 4, 1887, and resulted in a judgment in favor of Mrs. Nichols. Baughman appealed to the district court. The case was tried in the district court, with a jury, on October 5, 1887, on the pleadings filed with the justice. When the case was called for trial in the district court Mrs. Nichols offered her bill of particulars in evidence, rested her case, and asked for judgment. Baughman then asked permission to file his affidavit, denying the correctness of the plaintiff's bill of particulars. The court refused, to which ruling he excepted. Baughman then asked permission to file an amended or additional bill of particulars. This was refused, and thereupon he withdrew his bill of particulars or set-off. This proceeding was filed in this court on March 1, 1888, and since that time Mrs. Nichols has died. The action has been revived in the name of George D. Hale, the administrator of her estate. Counsel for Baughman says "that the rulings of the district court deprived him of all hearing; that, even admitting the truth of the account of Mrs. Nichols, would that prevent the account of the plaintiff in error also from being correct? They can both be true, which in part is true in this case. A portion of the accounts of each party is correct, due, and owing by one party to the other, and it only awaits an adjudication and settlement of the disputed items of each side to settle the whole matter in dispute. But the action of the trial court in refusing the filing of the affidavit, denying the validity of plaintiff's claim, and in refusing the introduction of any evidence in the case, was a denial of that justice courts are established to maintain, and was an error that this court ought to cor-

rect." The petition in error contains the following specific allegations of error only: "(1) The court erred in refusing to permit plaintiff in error to file his affidavit denying the correctness of the claim of the defendant in error. (2) The court erred in refusing to permit the plaintiff in error to file his amended and additional set-off when requested. (3) The court erred in the exercise of his judicial discretion in the trial of said cause, whereby plaintiff in error was prevented from having a fair and impartial trial. (4) The court erred in overruling the motion for a new trial."

In *Railway Co. v. Gould*, 44 Kan. —, 24 Pac. Rep. 352, this court decided that, "where a claim or demand for money arises out of contract, either express or implied, and is for something furnished or performed by one party for another, but is not founded upon a promissory note or other instrument in writing, and a statement of such claim or demand is made out in detail and in writing by the claimant or demandant, and presented to the other party, such statement constitutes an account, within the meaning of section 84 of the justices' act, and section 108 of the Civil Code." Under the provisions of said section 84 of the justices' act, the correctness of an account, duly verified by the affidavit of a party, his agent or attorney, is taken as true, unless the denial of the same be verified by the affidavit of the opposite party, his agent or attorney. The opinion in *Railway Co. v. Gould*, supra, further stated that a defendant had the right, under said section 84, in both the justice's court and the district court, to introduce evidence to prove any set-off or counter-claim which he had, without any affidavit denying the correctness of a plaintiff's account. Therefore, if Baughman simply desired to prove his bill of particulars or set-off, which he had filed, it was not necessary for him to file any affidavit denying the correctness of Mrs. Nichols' account. In this view, the court committed no error in refusing to permit him to file the affidavit which he requested. If Baughman desired to dispute the items in the bill of particulars of Mrs. Nichols, he ought not to have delayed his motion until after the jury had been impaneled and the plaintiff had submitted her case. The statute provides that the case shall be tried *de novo* in the district court, upon the original papers on which the cause was brought before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed. Section 122, Justices' Act. The matter of amending the pleadings after a trial is commenced is largely within the discretion of the trial court, with which we cannot interfere, unless that discretion has been abused. *Taylor v. Clendinning*, 4 Kan. 525; *Robbins v. Sackett*, 23 Kan. 301; *Map Co. v. Jones*, 27 Kan. 177-180. If the bill of particulars of plaintiff below was not correct, Baughman must have known it before the trial. The trial before the justice of the peace was several months prior to the trial in the district court, and nothing is shown by the record of any surprise. The pleadings in the district court were the same as

the pleadings before the justice of the peace. Under the circumstances, we cannot say there was any abuse of judicial discretion upon the part of the trial court in refusing to permit the verified affidavit to be filed after the commencement of the trial. There is no showing or statement contained in the record that Baughman had any further offset, and, as he made no motion to amend his bill of particulars or set-off until after the commencement of the trial, the refusal to amend, without any other showing, was not an abuse of discretion on the part of the trial court. We are referred to the case of *Chinberg v. Manufacturing Co.*, 38 Kan. 228, 16 Pac. Rep. 462, as decisive against the ruling of the trial court. In that case, Chinberg had paid, as he supposed, the note sued upon. Only a copy of the note was contained in the bill of particulars. He expected to prove payment, nothing else. He had in his possession the note, and, as he supposed, the original note, and therefore was surprised upon the trial when it was claimed that he had paid a forged note. Under such circumstances, we held that he should have been permitted to deny, under oath, the execution of the note sued on, so that the question whether the note sued on was a forgery, or the note paid was a forgery, could be submitted to the jury. In the *Chinberg* case there was surprise at the claim of the manufacturing company that a copy or forged note had been paid, but not the original note. All this came up on the trial, and therefore the application to deny the execution of the note could not have been intelligently made at any prior time. If a party, through his own laches, fails to make a motion to amend, or correct his pleadings, until after the trial of the case has actually commenced before a jury, he cannot complain if the court, in its discretion, refuses to permit the issues to be changed. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 481)

KANSAS CITY, FT. S. & G. R. Co. *et al.* v. SCAMMON, County Treasurer, *et al.*

(*Supreme Court of Kansas.* Feb. 7, 1891.)

TOWNSHIPS—TAXATION FOR ROAD PURPOSES.

Under paragraph 7084, Gen. St. 1889, township trustees are authorized, with the advice and consent of the board of county commissioners of their respective counties, to levy a tax for township, road, and other purposes; and the fact that such taxes are set out and extended upon the tax-roll in detail, as so many mills for road purposes and so many mills for township bridge purposes, instead of grouping the tax together under the single head, "For Road Purposes," is not such an irregularity as will invalidate the tax, so long as the amount levied is not in excess of that authorized by law.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Cherokee county; Hon. GEORGE CHANDLER, Judge.

Wallace Pratt and Charles W. Blair, for plaintiff in error. H. G. Webb and C. D. Ashley, for defendant in error.

GREEN, C. The plaintiffs in error filed their petition in the district court of Cher-

okee county, praying for a temporary and permanent injunction to prevent the collection of a tax levied on the railroads of the plaintiffs in error, in certain townships in said county, by the township trustees, with the concurrence of the board of county commissioners, for township bridge purposes. To this petition a demurrer was interposed, which was sustained by the court. The plaintiffs excepted to the ruling of the court, and stood upon their petition, and judgment was rendered against them for costs. To reverse the ruling and judgment of the court below, this proceeding in error is prosecuted.

The record shows a waiver of any question in regard to a misjoinder of parties, so the only question presented is the authority of the township trustees, acting with the concurrence of the board of county commissioners, to levy a separate tax for township bridge purposes. The claim is made that the township tax attempted to be levied for bridge purposes is without warrant or authority of law. The authority for such a tax levy as the one complained of is found in paragraph 7084, Gen. St. 1889, which requires that the township trustee "shall, at the July session of the board of county commissioners, annually, with the advice and concurrence of said board, levy a tax on the property in said township for township, road, and other purposes," etc. It is insisted that the levy made under this law was threefold: *First*, for the general revenue and expenses of the township; *second*, for road purposes in said township; *third*, for township bridge purposes in said township; and that the latter is illegal. Can the levy for township bridge purposes be upheld under the clause, "for other purposes?" The principle is fundamental that there must be legislative authority for every tax that is levied, whether state or municipal; hence we must examine the power conferred under the phrase "for other purposes," which is indeed quite broad. In defining the clause "necessary charges," Chief Justice PARKER took occasion to say, in the case of *Stetson v. Kempton*, 13 Mass. 272: "The proper construction of the terms must be that, in addition to the money to be raised for the poor, schools, etc., towns might raise such sums as should be necessary to meet the ordinary expenses of the year; such as the payment of such municipal officers as they should be obliged to employ, the support and defense of such actions as they might be parties to, and the expenses they would incur in performing such duties as the laws imposed, as the erection of powder-houses, providing ammunition, making and repairing highways and town roads, and other things of like nature, which are necessary charges, because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town-houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term 'necessary.'" It is not claimed that the phrase "other purposes," as used in the statute, would au-

thorize every expense a township, through its officers, might incur, but, where the statutes of the state impose certain duties upon the township to build bridges and keep them in repair, that the clause "other purposes" certainly authorizes the township trustees, with the advice and concurrence of the board of county commissioners, to levy a tax for township bridge purposes. The township board, consisting of the trustee, clerk, and treasurer, constitute a board of commissioners of highways, and have charge of the roads and bridges of their respective townships, and it is made the duty of such board to keep the same in repair, and to improve the roads and bridges, so far as practicable. Chapter 168, p. 269, Sess. Laws 1885. To carry out the provisions of this statute funds must be provided, and there can be no other method devised except by taxation. It is contended by plaintiffs in error that, under the doctrine laid down in the Lawrence Bridge Case, 22 Kan. 438, bridges upon public highways are public roads, and that there are, therefore, two different levies in the same township for road purposes. Still we do not see any objection to apportioning a certain percent. of the levy to one specific purpose and another portion to another purpose, so long as the levies are within the limits authorized by law. Upon this question of apportioning the levies, in a case not unlike this, in the supreme court of Nebraska, Chief Justice LAKE, in delivering the opinion of the court, said: "The 'general fund' of a county, as its name implies, is one devoted to a variety of uses; and its expenditure is left mainly to the discretion of the board of county commissioners. The amount which may be raised for this fund the legislature has wisely restricted; the limitation being as we have seen, ten mills on the dollar of taxable property. Now, in the performance of the duty of determining the amount that should be raised within this limit, the commissioners must necessarily make an estimate of the probable needs of the county for the current year in the way of legitimate expenditures. Having done this, and the total rate being ascertained, suppose that, in making the levy, instead of grouping the several items together under the comprehensive head of 'General Fund,' as is usually done, and as the statute above quoted evidently contemplates, they are set forth in detail, giving the amount estimated for each, would the tax therefore be illegal? We think not, so long, at least, as no item is included not proper to be satisfied from the general fund of the county. It would be at most an informality, in no way invalidating the levy." *Railroad Co. v. Lancaster Co.*, 12 Neb. 324, 11 N. W. Rep. 332. It is not claimed that the levies were excessive in amount; the only contention being that there was no authority to levy "a township bridge tax." We think the levy was authorized, and the doctrine has long since been settled by this court that equity will not interfere to restrain by injunction the collection of taxes, where the property is subject to taxation, the tax legal, and the valuation not excessive, simply be-

cause of irregularities in the tax proceedings. *Challiss v. County of Atchison*, 15 Kan. 50; *Cooley, Tax'n* (2d Ed.) 775. We think the demurrer was properly sustained, and recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 365)

DAVIDSON v. BEERS *et al.*

(*Supreme Court of Kansas. Feb. 7, 1891.*)

ESTABLISHMENT OF DESTROYED JUDGMENT—DEFENSES.

In a proceeding under chapter 92, Laws 1883, to establish the record of a judgment destroyed by fire, a defendant in the original action, and a party to the proceeding to establish the judgment, has the right to establish the record of any judgment that he may have obtained, by parol evidence, and to plead and prove any new matter that may have occurred since the rendition of the judgment sought to be established, which operates in whole or in part to extinguish such judgment.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Dickinson county; M. B. NICHOLSON, Judge.

*J. P. Campbell and Webb & Webb*, for plaintiff in error. *C. F. Mead and C. J. Crawford*, for defendant in error.

SIMPSON, C. The plaintiff in error, Davidson, commenced an action in the district court of Dickinson county against E. T. Pulliam, Malinda Pulliam, and Charles Beers, under chapter 92 of the Laws of 1883, to establish a judgment rendered by the district court of Dickinson county; the record of such judgment having been destroyed by fire. This law provides, in substance, that any person desiring to establish such a judgment shall file a petition containing certain averments, (the parties being the same as in the original case,) and notify the parties by personal service of summons, or by the publication of summons, and upon the trial the court may render judgment according to the fact established by the record of such destroyed judgment. Section 5 of the act provides that "the defendant may answer by general denial, or by setting forth such new matter arising subsequent to the decree, judgment, or order which operated in whole or in part to extinguish or set aside the same, or both, as the facts may warrant." To new matter the plaintiff may reply. The issues are tried to the court, who may, in addition to the evidence, refer to his own recollection, etc. Beers filed an answer, alleging, in substance, that, after the plaintiff had obtained the judgment he is seeking to establish of record, he (Beers) had obtained a judgment upon a prior mortgage, and that the land had been sold at judicial sale by the sheriff of the county. It appears from the recitations in the petition in this case that in the judgment sought to be restored there was a finding that Beers was the owner and holder of a prior mortgage on the land against which Davidson was enforcing his mortgage lien. Counsel for plaintiff in error filed a motion to strike Beers'

answer from the files. This motion was overruled. The plaintiff filed a reply to the answer of Beers, and at the trial the court finds: "That on the 17th day of January, 1882, a fire destroyed the record of said judgment in this court; that subsequently the defendant Charles Beers sold said premises by virtue of an order of sale issued by the clerk of this court after said fire, on a judgment obtained prior to said fire, and without establishing his judgment of record on a prior mortgage to that of the plaintiff herein. The court finds further that the plaintiff's former judgment be modified so that he recover judgment against said defendants E. J. Pulliam and Malinda Pulliam for the amount of his judgment and costs, without having an order for the sale of said premises, or to have his former lien enforced by reason of said subsequent sale as above set forth." The proper exceptions were saved, and the cause is here for review.

Counsel for plaintiff in error insists that the trial court committed error in overruling his motion to strike the answer of Beers from the files. In his answer, Beers recites the execution of a prior mortgage by Pulliam and wife to T. C. Henry: the assignment of the same to him; that he had brought suit to foreclose it; that Davidson was a party to that action, and had full knowledge of all the proceedings therein; that Beers had obtained judgment; that on the 29th day of May, 1882, the sheriff of Dickinson county, pursuant to the order of said court, sold said premises as provided by law, and that T. C. Henry became the purchaser; and that a sheriff's deed is hereto attached, etc. Now, this answer alleges certain new matter arising subsequent to the judgment of Davidson. This new matter consists in an institution of a suit by Beers, the recovery of a judgment, an order for a sale of the premises, and the execution of a sheriff's deed. All these things occurred subsequent to the judgment of Davidson, and the judicial sale took place after the fire occurred. This answer was fully authorized by the fifth section of the act of 1883, and there was no error in the ruling of the court in this respect.

It is again insisted that the judicial sale made on the Beers judgment is void because there was no record of said judgment, and before it could be enforced it must have been established of record by proper proceedings under the act of 1883. This is the most serious question in the case. It is established by the evidence of Mahan, and the recitations contained in the order of sale, that Beers had before the fire obtained a judgment against Pulliam and wife. It also appears from the order of sale, notice of sale, and from the order confirming the sale, that Davidson was made a party in the action of Beers v. Pulliam and others, in which the judgment was rendered. All these things are matters of record in the district court of Dickinson county. We cannot accept the theory that the legislative act of 1883 is and was the only mode in which the burned contents of records could be established. We suppose that, outside of this statute, proceedings could be instituted and the rec-

ords supplied. When a judgment has been ordered by the court, and the clerk has failed to enter it of record, the fact that it had been ordered must be established by some memoranda among the papers in the case, and then parol evidence is admissible to show the nature of the judgment so ordered. See a long list of cases cited in 12 Amer. & Eng. Enc. Law, p. 82. If parol evidence can establish the nature of a judgment that was not made a matter of record, it seems that it ought to be admissible to show the nature of a judgment that was duly entered on the records of the court, when the record was subsequently destroyed by fire. Again, this whole proceeding, both on the part of the plaintiff in error as well as the defendant in error, is under the law of 1883. We do not understand that Beers would have to commence a separate and independent action to establish his judgment; he could do so as a defendant. We are satisfied that there is no material error in the case, and that substantial justice has been done between all the parties. We recommend that the judgment be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 466)

HAYES v. HOUKE *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

#### DEDICATION—EVIDENCE.

The evidence in this case reviewed, and held sufficient to support a finding that the land in question had been dedicated to the public, for use as a cemetery, by grantors of the plaintiff in error, and accepted for such use; and also held, that such dedication by the grantors of the plaintiff in error is binding upon him, especially as he purchased with knowledge of the occupancy of such ground by the public, though there was no reservation of such ground in his deed, nor in the deeds of any of his grantors.

(Syllabus by Strang, C.)

Error from district court, Neosho county; L. STILLWELL, Judge.

John L. Denison, for plaintiff in error.  
Cox & Stratton, for defendants in error.

STRANG, C. This action was instituted February 15, 1887, by the above-named defendants, to restrain the plaintiff from interfering with a certain grave-yard in Neosho county, known as "Valley Cemetery." A temporary injunction was allowed, and upon the trial of the case, August 1, 1887, the court found for the plaintiffs below, making the injunction perpetual. Motion for new trial was overruled. There were two questions raised in the record, one arising upon a demurrer to the petition, which was overruled, in which it was claimed there was a misjoinder, and nonjoinder of parties, and also a misjoinder of causes of action. The questions growing out of the action of the court in overruling the demurrer were abandoned by the plaintiff in error before filing his brief, as he says therein in his statement of the case: "The only question, then, to be determined by the court was as to the claim of dedication,—was there a dedication on the part of the owner of the fee, and was such dedication



accepted by the public?" The question thus raised the court below answered in the affirmative. We do not see how we can reverse the action of the court in this respect. There is evidence in the case proving or tending to prove both a dedication, and acceptance thereof, for the purpose of a public cemetery. It is conceded that Jarritt, who first settled upon the quarter of land, to which the land taken for a cemetery originally belonged, dedicated at least a portion of the land, now occupied as a cemetery to the public for that purpose, so far as he could do so. He did not own the land in fee, however. He was simply a settler upon the land, which was school land, and the title in the state of Kansas. Jarritt sold his settler's right to the land to one J. A. Auton, who purchased the land of the state, and obtained a patent therefor in 1873. Jarritt settled upon the land in 1867. Auton, having obtained a patent to the land, owned it in fee, and had the power to dedicate the land for a cemetery, or for any other purpose. The public was already using said land for a cemetery, when Auton purchased Jarritt's right to the land, and, after he became the owner in fee, he recognized and ratified the dedication of the original acre for cemetery purposes. J. A. Huston in his testimony says: "I said to Auton that the plat was not large enough; that it was a matter the whole neighborhood was interested in; and he said Jarritt reserved it, and dedicated it as a burying ground." V. Reddick, a witness, testified that he worked for Auton. That Auton instructed him, in setting out the hedge for a fence, to stop when he got to the grave-yard. He says: "I was not to set any further than the grave-yard." There could hardly be any question after that but that there was a sufficient dedication of the first acre of land then used by the public for a cemetery, and no question as to its acceptance by the public for that purpose. Using the ground for the purpose of burying the dead, by the public, constituted an acceptance.

As to the additional acre, the evidence shows that the public were encroaching upon it by burying the dead beyond the limits of the original acre before Auton left the premises. He talked with the people of the neighborhood about it, and said he would sell the land to them. He never objected to the use of the ground as a place of burial for the dead. Auton sold to Clark and Ketchum. He told them there was a burying ground there, but that the land had not been paid for. The public continued to bury the dead of the neighborhood in this cemetery after Clark and Ketchum took possession of the farm. They never objected to the use of the ground for that purpose. While they were in possession there was talk of the people buying both acres of the ground occupied by the cemetery of them. At that time the land was surveyed, staked off, and platted, but the plat was never recorded, and the land was never paid for, nor did they object to its continual use as a cemetery. They sold the farm to Morris & Morris, who occupied it awhile. During their occupancy,

the public used the grounds as before, without objection by them. They sold to one Guss, who held the land but a short time, and conveyed to plaintiff in error in 1886. Guss, through whom the title passed to the plaintiff in error, was the surveyor who made the survey of the cemetery land when Clark and Ketchum owned the farm. We think Clark and Ketchum dedicated the second acre to the public as a part of the grave-yard when it was surveyed and staked out, and they permitted the public to use it for burial purposes. It is true they were never paid for the land; but after they had joined in a survey of the land, and it had been staked out and thus, by them, turned over for cemetery purposes, and they sat by and saw the public using it for burial purposes, without objection, the fact that they were not paid therefor would not interfere with the dedication of the ground to the public, and as the public accepted it, and used it with their knowledge, and without any objection on their part, they would have been estopped from saying the ground was not dedicated to the public. But they never raised the question, nor did their grantees nor the successors of their grantees; nor did any one question the right of the public to use and occupy the ground as a cemetery, until the plaintiff in error purchased the land in 1886, about 20 years after the cemetery was started. We think that, whether the land was ever paid for or not, the fact that it was used, a part of it for 20 years, and all of it for many years, as a resting-place for the dead, without objection by any one of the numerous owners of the tract from which it was taken, is sufficient to vest in the public a right, superior to any that the plaintiff herein could get by purchase of said original tract with full knowledge of the existence of the cemetery when he purchased. Permission by his grantors to use and occupy the ground as a cemetery was a waiver or abandonment of their rights, which subordinated them to its use by the public, and the plaintiff, having purchased with knowledge of the occupancy of the public, is bound by it. *Boyce v. Kalbaugh*, 28 Amer. Rep. 464; *Hagaman v. Dittmar*, 24 Kan. 42; *Giles v. Ortman*, 11 Kan. 59; *Brooks v. City of Topeka*, 34 Kan. 277, 8 Pac. Rep. 392; *Beatty v. Kurtz*, 2 Pet. 566; *Davidson v. Reed*, 53 Amer. Rep. 613. We advise that the judgment of the district court be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 417)

DEVER v. CITY OF JUNCTION CITY *et al.*

(*Supreme Court of Kansas*. Feb. 7, 1891.)

STREET IMPROVEMENT—INJUNCTION—PLEADING.

1. A city of the second class, having authority to improve a street, cannot be enjoined from making such improvement, by the abutting property owner, upon the ground that the work is being defectively performed.

2. Where a petition for an injunction to enjoin a city of the second class from improving a certain street therein alleges, as a ground for the order, that the character of the work is such that it will necessitate a special tax against the

abutting property owners to pay therefor, and the ordinance under which the improvement is being made is attached to the petition, as a part thereof, and said ordinance does not provide for any special tax to pay for such improvements, and the petition does not allege that any such tax has been levied, nor any act done indicating that such a tax is about to be levied, *held*, that the petition in this respect does not state a cause of action.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Geary county; M. B. Nicholson, Judge.

Thomas Dever, for plaintiff in error. J. R. McClure, for defendants in error.

STRANG, C. A temporary order of injunction was allowed in this case by the district judge of Geary county, February 23, 1888. On the 27th of the same month a motion to vacate said injunction was heard, and sustained. The plaintiff complains of the order vacating said injunction, and asks this court to reverse it. There is no pretense in this case that the defendants or either of them has or is about to appropriate any property belonging to the plaintiff. But the plaintiff alleges that the defendant city, and William Fisher, under direction of said city, is engaged in the improvement of one of the streets of said city, and that the work is being defectively performed, because of which he will suffer damage. The city has authority to improve its streets, and, possessing the power to improve them, we do not think the plaintiff can enjoin the city upon the ground that the work is being defectively performed. Plaintiff also says that the work being done by the city is of that character that will necessitate the levying of a tax against the abutting property to pay for the same, and that the city has not taken the necessary steps required to be performed, by the statutes providing for such improvements, as conditions precedent to the making of said improvements, and the assessment of a tax to pay for them, and that therefore the injunction should have been continued. No assessment has been made to pay for the work being done, and no act done that indicates the making of an assessment therefor. But, on the contrary, the ordinance which provides for the improvement, and which is made a part of the plaintiff's petition, makes no provision for any assessment against the abutting property to pay the expense of such improvement. This fact should dispel the fears of the plaintiff that any special tax is to be levied against the abutting property to pay for said improvements. It is recommended that the action of the district judge in vacating the order of injunction be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 447)

ORDWAY V. COWLES *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

PLEADING—DEMURRER—QUIETING TITLE—BURDEN OF PROOF—TAX-TITLES—LIMITATIONS.

1. Where a reply contains a general denial, and that certain tax-deeds are void, and a de-

murrer is interposed to it, on the ground that the facts stated therein do not constitute a defense to the matters set forth in the answer, and the demurrer is not directed against the latter defense, it is not error to overrule the same.

2. Where, in a suit to foreclose a mortgage, a party asks to interplead and sets up title by virtue of certain tax-deeds, and alleges ownership and possession under such deeds, and asks that the title be quieted in him, it is not substantial error for the trial court to hold the burden is upon the party asking relief under the tax-deeds.

3. The plea of the statute of limitations cannot be interposed by the holder of a tax-title, to a note and mortgage not barred at the commencement of the action against the original mortgagor.

4. When the plaintiffs, in a foreclosure suit, attack certain tax-deeds, set up by a party interpleading in the case, and ask that their title be quieted, as against such tax-deeds, they should show some title in the mortgagor, to entitle them to a judgment and decree.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Greenwood county; A. L. L. HAMILTON, Judge.

R. P. Kelley, for plaintiff in error. John Marshall, for defendants in error.

GREEN, C. This was an action begun in the district court of Greenwood county, by Cowles & Eldridge against E. O. Walton, to foreclose a mortgage. The coupon notes and mortgage were executed on the 1st day of January, 1880, and matured in three years. This action was commenced on the 14th day of October, 1887. Service was made upon Walton by publication. On the 5th day of January, 1888, George Ordway, the plaintiff in error, asked to be made a party to the suit, and leave was granted, and, on the 27th of the same month, filed his answer setting forth—*First*, a general denial; *second*, his ownership and possession of the land described in the mortgage, and that such ownership was by virtue of tax-deeds duly executed; and, *third*, the statute of limitations,—that more than five years had elapsed from the time the notes and mortgage became due to the beginning of the action,—and asked that his title be quieted against the mortgage in suit. To this answer, the plaintiffs below replied by general denial, and that the tax-deeds were void, and asked to have title quieted against them. To this reply, Ordway demurred, which was overruled. When the cause came on for trial, the trial court held that the burden of proof was upon Ordway, to which he excepted. Upon the issues joined, a trial was had, and a judgment and decree of foreclosure rendered in favor of Cowles & Eldridge. The court found that the tax-deeds of Ordway were invalid, and gave judgment for the amount of his taxes and costs, and that the same should be first paid out of the proceeds of the sale of the mortgaged premises, and, upon the payment of such sums, the title was to be quieted. To this judgment and decree, the plaintiff in error excepted and brings the case here, assigning error.

The first claim made is that the court committed error in overruling his demurrer to the reply of the plaintiffs below. This was not error. The reply contained a general denial, and alleged that the tax-

deeds were void, because no notice of the tax-sale of 1881 was published by the county treasurer as required by law. These allegations constituted proper defenses, and the demurrer was properly overruled. *Flint v. Dulany*, 37 Kan. 332, 15 Pac. Rep. 208.

*Second.* It is next claimed that the court erred in holding that the burden was upon plaintiff in error. A reference to the answer will show that he alleged that he was the legal and equitable owner of the land, and also in possession thereof, and his ownership was by virtue of certain tax-deeds duly executed by the county clerk of Greenwood county. The deeds were not set out in full, or made a part of the answer. Under the state of the pleadings there was no substantial error in the ruling of the trial court which cast the burden upon the plaintiff in error.

*Third.* The plaintiff in error insists that the note and mortgage of the plaintiffs below were barred by the statute; that the notes became due January 1, 1883; and that the five years had completely run before he filed his answer. The suit was commenced on the 14th day of October, 1887, and the five years had not elapsed; besides, we do not think Ordway can avail himself of the statute of limitations. He claims under a distinct and independent title in no way derived from the mortgagor. Generally, the plea of the statute of limitations is a personal privilege, and a third party cannot interpose the defense. *Baldwin v. Boyd*, 18 Neb. 444, 25 N. W. Rep. 580; *Wood, Lim.* (1st Ed.) § 41; 18 Amer. & Eng. Enc. Law, p. 710; 7 Walt, Act. & Def. p. 236; *Waterson v. Kirkwood*, 17 Kan. 9. Walton, the maker of the notes and mortgage, could not successfully plead the statute of limitations, and we do not see by what process of reasoning we could reach the conclusion that Ordway could, even if he had succeeded to the right to the land in question, through Walton, which he did not; he certainly could obtain no greater right than Walton had. We think the statute can only be set up by Walton, or some one holding under him, and, when it is not available for Walton, no other person can take advantage of it. It necessarily follows that, because Walton never had the right, no other person could avail himself of such right.

*Fourth.* The final error assigned is that no decree of foreclosure should have been entered until the plaintiffs below showed title in the mortgagor. It seems evidence was offered in regard to the title to the mortgaged premises, but did not extend beyond the title from the government to the patentees. No conveyances were admitted in evidence to prove title in Walton, the mortgagor. An examination of the record discloses the fact that the record of certain deeds was offered, but not admitted, for the reason that the proper foundation had not been laid. The interplea of Ordway raised the question of title to the land described in the mortgage. The tax-deeds of Ordway were attacked by the plaintiffs below, and they asked to have the title to the mortgaged premises quieted in them against Ordway; and we think,

from the nature of the issues made by the pleading, that the plaintiffs below should have shown title in the mortgagor, before they were entitled to a decree. It is fundamental that a person attacking a tax-deed must show some title to the land in question. *Picquet v. City Council of Augusta*, 64 Ga. 254; 2 *Desty, Tax'n*, p. 904.

Again, the title to the mortgaged premises being in controversy, and the plaintiffs asking that the cloud of the tax-title might be removed, they should recover on the strength of their own title, and, under the circumstances of this case, we think the chain should have been complete in the mortgagor. A person should have a reasonably clear title to maintain an action to have a cloud upon his title removed. He must proceed upon the strength of his own title, and not the weakness of his adversary. The real question is, who has the paramount right to the property? *Simpson v. Boring*, 16 Kan. 248; *Lawrence v. Zimbleman*, 37 Ark. 643; *Hurley v. Street*, 29 Iowa, 429; *Stephenson v. Wilson*, 50 Wis. 95, 6 N. W. Rep. 240. For the failure of the plaintiff in error to show title in the mortgagor, we recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 369)

#### OLDHAM v. STEPHENS.

(*Supreme Court of Kansas. Feb. 7, 1891.*)

RES ADJUDICATA—SETTING ASIDE DEED—FRAUD.

Where, in an action brought to set aside a quitclaim deed to certain real estate claimed to have been obtained by fraud, it appeared upon the trial that the title to the property had been quieted in another, in an action previously commenced and terminated in the same court against the plaintiff in this action, who was a non-resident, and upon whom service had been duly made by publication, *held*, that the findings and judgment in the former case are conclusive and binding upon the plaintiff below in this case on the question of title to the real estate in question; and, the plaintiff below having had no interest in the property in controversy at the commencement of this action, no fraud could be committed in obtaining a deed to property to which he had no title at the time.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county; T. B. WALL, Judge.

*Hallowell, Hume & Gordon*, for plaintiff in error. *Campbell & Dyer* and *J. R. Shields*, for defendant in error.

GREEN, C. John T. Stephens brought this action in the district court of Sedgwick county to set aside a deed, alleged to have been fraudulently obtained by G. T. Oldham, for lot No. 36, on Court street, in the city of Wichita. At one time it seems the plaintiff below had owned the lot in question, but did not pay the taxes assessed against it, and it had been sold for the taxes, and a tax-deed executed to the purchaser. Some time after this the grantee in this tax-deed commenced a suit against Stephens, the former owner of the lot, to quiet title, and on the 22d day of October, 1883, obtained a judgment against him, quieting the title to said real estate as against Stephens, and all per-

sons claiming under him. Stephens being a non-resident of the state at the time, service was made upon him by publication. On the 3d day of January, 1887, Stephens and his wife made a quitclaim deed to Oldham of all their interest in and to the lot, and, on the 18th of January following, this action was commenced by Stephens to set aside this deed, alleging that the same had been obtained by deception as to the title and value of the lot. The claim was made that Oldham, through a brother who lived near Stephens in Jasper county, Mo., represented to Stephens that he had lost the title to said lot by a tax-deed, and that the lot was of little value, being some distance from the business part of the city; that most of the improvements of the city were being built on the other side of the river from where this lot was located; that, relying upon these representations, Stephens made the quitclaim deed, in consideration of \$100, \$10 of which was paid in cash some time after the delivery of the deed; Oldham assumed the payment of a debt of \$40 which Stephens owed, and gave his note for \$50; that at this time the lot was reasonably worth \$4,000. The answer of Oldham put in issue all of the allegations of the petition, except the agency of the brother living in Missouri. The case was tried to the court, and special findings of fact and conclusions of law made in favor of the plaintiff; and the defendant below brings the case to this court for review.

It is contended by the plaintiff in error that no fraud can be committed against a person respecting property in which he has no interest, where such person simply makes a quitclaim deed; that Stephens showed upon the trial of this action in the court below that at the time of the giving of the quitclaim deed he had no title to the lot. It appears from a record of a judgment in the same court wherein Ida E. Harris was plaintiff, and the defendant in error in this case was defendant, that Ida E. Harris was the owner and in the actual possession of this lot, and that the title to the lot had been quieted in Harris, and against Stephens and all persons claiming under him. This evidence was introduced by the plaintiff himself. If this judgment is to have any force and effect whatever, it seems to us that it is decisive of this case. The court had jurisdiction of the property. The findings and judgment of the court barred Stephens of all right and title to the real estate in controversy. Faith and credit must be given to such a judgment. *Venable v. Dutch*, 37 Kan. 515; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. Rep. 693; *Commissioners v. Welch*, 40 Kan. 767, 20 Pac. Rep. 483. It was said in the last case cited that, "in an action to quiet title to land, a general finding of title in the plaintiff, and consequently of no title in the defendants, is a conclusive and binding decision against the defendants on the question of title, from whatever source it may be derived, and forever stops them from asserting a claim of title which existed at the time of the finding and judgment." Whatever doubts may

have existed in the minds of the bench and bar of the state in regard to the force and effect of such proceedings heretofore, the question has been set at rest by a recent decision of the supreme court of the United States in the case of *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557. In speaking for the court in that case, Mr. Justice BREWER said: "A state has power to provide by statute that the title to land within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication only." Giving faith and credit to the judgment in the case of *Harris v. Stephens*, the title to the lot vested in Harris before the quitclaim deed was made from Stephens to Oldham, and Stephens parted with nothing by making conveyance. Fraud has been defined to be the unlawful appropriation of another's property with knowledge, by design, and without criminal intent. 1 *Bouv. Law Dict.* 612. According to the definition, fraud can only be perpetrated on rights; that is, legal rights. *Bigelow, Fraud*, 14. Having lost all interest in the property in question by a failure to pay the taxes thereon, and a judgment and decree of a court of competent jurisdiction having determined and adjudicated that the plaintiff below had no title to the lot, we fail to see how any fraud could be perpetrated. The judgment of the court below should be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 339)

#### STATE V. LAWSON.

(*Supreme Court of Kansas. Feb. 7, 1891.*)

#### INTOXICATING LIQUORS—PROSECUTION—EVIDENCE.

Where the county attorney files with an information charging violations of the prohibitory liquor law a statement of the testimony taken before him under authority of paragraph 2543, Gen. St. 1889, of sales made by the defendant, and no other specification of the particular violations intended to be given in the evidence is made or filed, the state will be confined in its evidence to the sales thus specified in the statement, and testimony of violations not therein referred to is inadmissible. *State v. Whisner*, 35 Kan. 271, 10 Pac. Rep. 852.

(*Syllabus by the Court.*)

Appeal from district court, Wyandotte county; O. L. MILLER, Judge.

*Hale & Fife*, for appellant. *L. B. Kellogg*, Atty. Gen., and *Winfield Freeman*, for the State.

JOHNSTON, J. This was an appeal from a conviction for a violation of the prohibitory liquor law. The information charged A. Lawson with three distinct offenses, in three counts, and was verified by the county attorney on information and belief. Prior to the filing of the information, the county attorney, in pursuance of paragraph 2543, Gen. St. 1889, caused a witness to be brought before him, and examined as to his knowledge of violations of the prohibitory liquor law by the appellant, and, in answer to questions, the witness stated that he knew of sales made by appellant to himself and to four other

<sup>1</sup> 15 Pac. Rep. 520.

persons. The statement of the testimony so taken was attached to and filed with the information. The names of those mentioned in the statement, as well as of numerous other persons, were indorsed upon the back of the information as witnesses for the state. In the course of the trial several witnesses testified, over objection, to specific sales not referred to in the statement filed with the information; and this is the particular ground of complaint.

The statement by the witness examined before the county attorney, and which is filed with the information, constitutes a bill of particulars, specifying the particular offenses on which the state relies. It is filed for the benefit of the defendant, and gives notice to him of what is intended to be given in evidence. Having filed this statement and specification, the prosecutor is confined in his proof to the offenses particularly specified. If he desires to offer proof of other sales, he could, with the permission of the court, have filed an additional specification or bill of particulars. This question was before the court in *State v. Whisner*, 35 Kan. 271, 10 Pac. Rep. 852. In respect to this statement, it was there said: "The county attorney clearly had the right, for the benefit of the defendant, to file with his information a bill of particulars, or any sworn statements, showing what specific offenses he intended to charge, when he verified the information. All of this enabled the defendant to prepare his defense, and, after such statements or evidence had been filed with the information, the defendant could not be convicted of any offense not therein referred to or set forth." See, also, *Com. v. Snelling*, 15 Pick. 321; *Com. v. Giles*, 1 Gray, 466; 1 Bish. Crim. Proc. § 643. While there seems to be abundant testimony to establish the sales that were particularly specified, we are unable to say from the record that the defendant was not convicted of sales not specified. Only three offenses were charged, and there is testimony of many more than three sales by Lawson; but the state did not elect to rely on any particular sale about which testimony was given; so we cannot say that the conviction was not for sales to McNinney, Pugh, and others, —sales not specified or referred to in the statement filed by the county attorney. For this error there must be a reversal of the judgment and a new trial.

(45 Kan. 474)

CRAWFORD *et al.* v. KANSAS CITY, FT. S. & G. R. CO.

(Supreme Court of Kansas. Feb. 7, 1891.)

APPEAL—AMENDMENT OF RECORD—REVIEW.

A judgment was rendered in the district court, and afterwards a motion for a new trial was made and overruled. Within a year thereafter the case was brought to the supreme court, but the petition in error did not assign the overruling of the motion for a new trial as a ground of reversal. More than four years after the order overruling the motion for a new trial had been made an application was made to amend the petition in error by assigning the making of this order as an additional ground of error. *Held*, under section 556 of the Civil Code, that the v.25P.no.13—55

amendment was not permissible, and that the order was not reviewable.

(Syllabus by the Court.)

Error from district court, Linn county; C. O. FRENCH, Judge.

*Blue & Rich*, for plaintiff in error. *Charles W. Blair, Wallace Pratt, and I. P. Dana*, for defendant in error.

JOHNSTON, J. This action was brought by plaintiffs in error to recover damages for certain horses and colts alleged to have been killed through the negligence of the railroad company. After they had offered their testimony, a demurrer to the same was interposed by the railroad company, on the ground that the evidence offered did not prove a cause of action in their favor and against the company. The court sustained the demurrer, and rendered judgment for the company. After the rendition of the judgment, a motion for a new trial was made and overruled, and the plaintiffs then instituted this proceeding to secure a reversal, alleging three grounds of error: *First*, the exclusion of evidence; *second*, the sustaining of the demurrer to plaintiffs' evidence; and, *third*, the giving of judgment for defendants, instead of plaintiffs,—but the overruling of the motion for a new trial was not assigned for error. At the submission of the case in this court an application was made to amend the petition in error by adding a new assignment of error upon the action of the court in overruling the motion for a new trial. The amendment was permitted to be filed, subject to such objections as defendants might make, the court reserving its decision on the effect of the amendment until the final disposition of the case.

It is contended that the testimony offered on the trial tended to sustain the cause of action alleged by plaintiffs, and that the court erred in sustaining the demurrer and taking the case from the jury. This ruling, like all others occurring on the trial, is not available on error, unless a motion for a new trial be made and filed within the time prescribed by law. *Gruble v. Ryus*, 23 Kan. 195; *Norris v. Evans*, 39 Kan. 668, 18 Pac. Rep. 818. Nor can any of the points or questions involved, and which were subject to review upon the motion for a new trial, be considered in this court, unless the overruling of that motion is assigned for error. *Carson v. Frink*, 27 Kan. 524; *Clark v. Schnur*, 40 Kan. 72, 19 Pac. Rep. 327; *Landauer v. Hoagland*, 41 Kan. 520, 21 Pac. Rep. 645; *City of McPherson v. Manning*, 43 Kan. 129, 23 Pac. Rep. 109. We are therefore precluded from reviewing any of the rulings complained of, unless the petition in error may be and is treated as amended in accordance with the application made by plaintiffs. The defendant objects to the amendment and the consideration of the order overruling the motion for a new trial, for the reason that more than one year has elapsed since the order was made. Section 556 of the Civil Code provides that "no proceeding for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or

making of the final order complained of," except in cases where the person entitled to such proceeding be under disability. The judgment in the case was rendered in November, 1886, and the petition in error was filed in this court on August 27, 1887. The motion for a new trial was made and overruled after the rendition of the judgment, and on November 16, 1886, while the application to amend the petition in error and assign the overruling of the motion for a new trial as error was not made until January 6, 1891, more than four years after the ruling complained of was made. We think the application to amend was made too late. Such applications are usually allowed as a matter of course, if made within a year after the final order or judgment complained of is given. Even after that time, if the amendment requested related to matters of form only, or the new error assigned was involved in the final judgment or order of which complaint was made, the amendment would ordinarily be permitted upon such terms and conditions as the court might deem just. But where the new assignment of error is not involved in the assignment already made, but states a new and distinct cause of complaint, the amendment cannot be made after the lapse of the period of limitation. It has been held, in cases where the order overruling the motion for a new trial followed the rendition of the judgment, and the petition in error was not filed in the supreme court until more than a year after the rendition of the judgment, but within less than one year after the motion for the new trial was heard and overruled, that the court could not review the judgment or other ruling of the court, except the order overruling the motion for a new trial and such other orders or rulings as are necessarily involved in the ruling upon the motion for the new trial. *Osborne v. Young*, 28 Kan. 769; *Dyal v. Topeka*, 35 Kan. 62, 10 Pac. Rep. 161; *Bates v. Lyman*, 35 Kan. 634, 12 Pac. Rep. 33. The order complained of was not involved in the judgment, nor included in any of the original assignments of error, but was a distinct and independent ground of complaint, and therefore it is barred by the limitation, and not reviewable at this time. See, also, *Blackwood v. Shaffer*, 44 Kan. —, 24 Pac. Rep. 423; 13 Amer. & Eng. Enc. Law, 746. Nothing further remains for our consideration, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 457)

## COSPER V. NESBIT.

(Supreme Court of Kansas. Feb. 7, 1891.)

## CONSTRUCTION OF CONTRACT—PAROL EVIDENCE—QUESTION FOR JURY—LIMITATIONS.

1. Where an ambiguous expression is used in a contract, extrinsic facts and circumstances showing the practical interpretation placed upon it by the parties may be received in evidence.

2. While generally it is the province of the court to construe written contracts, yet, where a term is used in a technical or peculiar sense, the question of what that sense is, or what the intention and meaning of the parties were, may be submitted to a jury upon competent evidence and proper instructions; but, even if the court alone should have given a construction to the term, and it clearly appears that the jury has put upon it a

correct construction, and such as the court should have given it, the submission of the question to the jury is not a sufficient ground for a reversal.

3. Under the evidence it is held that certain items of indebtedness claimed by plaintiff in error were barred by the statute of limitations.

(Syllabus by the Court.)

Error from district court, Chase county; FRANK DOSTER, Judge.

T. B. Nesbit brought an action against George W. Cosper before a justice of the peace on July 1, 1886, to recover \$49.25, alleged to be due on a written contract, of which the following is a copy: "Article of agreement entered into on this 2d day of November, 1882, between T. B. Nesbit, of the town of Bazaar, Chase county, Kansas, of the first part, and Geo. W. Cosper, of the same county and state aforesaid, of the second part, witnesseth: The party of the first part, in consideration of the sum of four thousand nine hundred dollars, to him in hand paid by the party of the second part, agrees to sell all of his farm situate in the town of Bazaar, county and state aforesaid, containing two hundred and forty acres of land, to the party of the second part. The party of the second part, on the 20th day of January, A. D. 1883, pays to the party of the first part the sum of two hundred dollars, and on the 1st day of March, 1883, give a chattel mortgage to the party of the first part on three thousand dollars' worth of stock for the amount of seventeen hundred dollars, said mortgage to be due one year from the 1st day of March, 1883, at 10 per cent. interest, and also the party of the second part agrees to assume the mortgage of \$1,750 now on the said farm, and give an additional mortgage of (\$1,250) twelve hundred and fifty dollars on said farm; or, if the party of the first part secures a loan of said \$1,250 on the said farm, the party of the second part agrees to pay one-half of the expense of obtaining said loan, and assumes said loan. The party of the first part agrees to return all wood and timber now unsold on said farm, except what he wishes for his own use. The party of the first part also agrees to allow the party of the second part to cut fire-wood and make posts on said farm. In witness whereof the said parties hereby set their hands the day and year first above mentioned. T. B. NESBIT. GEORGE W. COSPER. Witness: BELLE WHITE. H. G. WHITE." Nesbit alleged that in pursuance of the contract he secured a loan of \$1,250 on the farm sold at an expense of \$98.50, and that Cosper had failed to pay one-half of the expense, as he had agreed to do. As a second cause of action Nesbit alleged that Cosper was indebted to him for several items, which in the aggregate amounted to \$41.23. After a trial and judgment before the justice of the peace, the case was transferred by appeal to the district court, where it was tried before a jury, and resulted in a verdict in favor of Nesbit for \$69.31. Cosper alleges error.

*King & Kelley*, for plaintiff in error. *Madden Brothers*, for defendant in error.

JOHNSTON, J. The principal controversy in the case arises upon that provision of the written contract in respect to obtain-

ing the \$1,250 loan and the expense of securing it. Nesbit sold the farm of 240 acres to Cosper for the stated consideration of \$4,900, \$200 of which was to be paid in cash; an existing mortgage on the land of \$1,750 was to be assumed by Cosper; a payment of \$1,700 was to be made on March 1, 1884, to be secured by a chattel mortgage on cattle of the value of \$3,000; and for the remainder of the consideration Cosper was to give an additional mortgage of \$1,250 on the farm, or, if Nesbit secured a loan of \$1,250, Cosper agreed to assume the loan, and pay one-half of the expense of obtaining it. After the making of the contract, which was on November 2, 1882, Nesbit employed an agent to obtain a loan upon the land, and he succeeded in doing so about April 1, 1883. Prior to that time Nesbit had executed a deed for the farm to Cosper, and this, with other papers, had been deposited in a bank, to await the completion of the contract. As soon as the agent employed by Nesbit had procured the money, he made out a written application and mortgage, which were executed by Cosper, and the money was paid over to Nesbit, less the sum of \$98.50, which was the expense incurred by the agent in obtaining the loan. The title papers were then delivered, and the contract completed; but, although Cosper had stated that he would pay one-half of the expense, he finally refused to do so, and this action was brought. It is claimed by Cosper that the agreement was that, if Nesbit secured the loan before the execution of the deed, and negotiated the mortgage in his own name, that then he was to assume the loan, and pay one-half of the expense for securing it; but that, as the loan was not secured by Nesbit in that way, and as Cosper executed the mortgage upon the land, and turned the money over to the plaintiff as payment, that the loan was therefore not secured by Nesbit, and hence there was no liability under the contract. Nesbit contends that he was the active agent or instrumentality in securing the loan; that he helped to negotiate it; and that the application and mortgage were executed by Cosper simply because he, Nesbit, had prior to that time executed a deed of the farm to Cosper, and placed the same in a depository, to await the completion of the contract. After the evidence had been submitted the court explained the contract to the jury, and then left it to them to determine the meaning of the words used in the contract, "secure a loan," stating to them that "we must give that expression the same meaning that the parties to the agreement have," and that they might take into account the situation of the parties, their conversations and conduct at and during the making of the contract, as well as their conversations and conduct subsequent to that time, in determining the sense in which the parties used the expression. Two meanings were claimed for the expression; and the court advised the jury what interpretation should be placed upon the contract if it was used in one

sense, and what if used in the other. It is claimed that the court erred in submitting to the jury the question of what the parties understood and meant by the expression. In general, it is the province of the court to construe written contracts, but where peculiar expressions are used it may be left to the jury to determine by the aid of extrinsic circumstances and facts what sense was intended by the parties. Where the language of a contract contains an expression which is ambiguous, or one used in a peculiar sense, evidence may be properly received to show what the parties understood and intended by it. The practical interpretation of such an expression of the parties is entitled to great, if not controlling, influence. 3 Amer. & Eng. Enc. Law, 869, and cases cited in note. The evidence in the record shows that both parties had the same understanding of this expression, and used it in the sense claimed by Nesbit. On two different occasions Cosper admitted his indebtedness for one-half of the expense of obtaining the loan. He knew that Mr. Nesbit had employed an agent to secure the loan; knew that the money was secured by that agent, and at the request of Nesbit. He waited until the agent procured the money, and, at the request of the agent, executed the necessary papers to secure its payment. The mortgage was evidently executed by him because of the fact that during the pendency of these negotiations a deed from Nesbit to Cosper had been executed and placed on deposit. Upon the testimony, which was ample, the jury found specially that the loan was obtained at the solicitation of Nesbit, and the money was in the possession of the agent before Cosper took any steps in the matter. We think no mistake was made in the construction placed upon the contract; and, even if it is such an one as should have been construed by the court alone, it is so clear that a correct construction has been given to it that the submission of the question to the jury is not a sufficient ground for a reversal. *Insurance Co. v. Curran*, 8 Kan. 10. It was also claimed that the contract was abandoned, and a different one subsequently made. There was a modification of the provision concerning the \$1,700 payment, due in March, 1884, but the finding of the jury settled that there was no change in the \$1,250 provision in controversy. The instruction requested, that Nesbit's claim for \$49.25 was barred by the three-years statute of limitation, was properly refused. The claim arose under the written contract, and was not barred until five years after a cause of action had accrued. Complaint is made about the refusal of the court to permit plaintiff in error to show certain items of indebtedness from Nesbit to him; but these were not mentioned in the contract, were not in writing, and were barred by the statute of limitations. We think substantial justice was done in the case, and that no material error was committed. Judgment affirmed. All the justices concurring.



(45 Kan. 433)

**PARSONS v. PARSONS et al.**

(Supreme Court of Kansas. Feb. 7, 1891.)

**DEMURRER TO EVIDENCE.**

It is error for a trial court to sustain a demurrer to the plaintiff's evidence, when such evidence establishes a clear *prima facie* case in her favor. *Railroad Co. v. Goodrich*, 88 Kan. 224, 16 Pac. Rep. 439; *Gardner v. King*, 37 Kan. 671, 15 Pac. Rep. 920.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error from district court, Morris county; M. B. NICHOLSON, Judge.

J. K. Owens, G. N. Elliott, and J. T. Bradley, for plaintiff in error. Miller & Ritchie, for defendant in error.

STRANG, C. In March, 1886, the plaintiff, Roseltha A. Parsons, was the owner in fee of the real estate described in her petition filed in the district court. The defendant Cyrus Parsons represented to her that his brother, who, he said, was a rich man in Pennsylvania, would purchase the said property of the plaintiff, and pay her \$4,000 therefor. The plaintiff consented to sell for that amount. Afterwards said Cyrus Parsons exhibited to the plaintiff a note executed by the defendant Anson Parsons, payable to the plaintiff on demand, for \$4,000, but said he was instructed to hold the note until the deed was executed. The plaintiff then executed a deed to said Anson Parsons for the property, had it recorded, and sent to him. Cyrus Parsons then refused to turn the note over to the plaintiff until she paid a certain obligation signed by himself with Fay Parsons, the husband of the plaintiff. The plaintiff then demanded the note, or that the property be deeded back to her. This demand was made on both of the defendants, and they refused to do either. Fay Parsons, as the agent of the plaintiff, for her made the same demand, which was refused. December 8, 1887, the plaintiff commenced her action to set aside the deed thus obtained from her upon the ground that it was secured through fraud. April 24, 1888, the case was tried by the court, a jury having been waived. Anson Parsons was in default. The court found that due and proper service by publication had been had on him. The plaintiff introduced her evidence, and rested. The defendant demurred to the evidence, and the demurrer was sustained. Motion for new trial was overruled, and case brought here for review.

We fail to discover in the record any reason, in law or in fact, for the action of the district court. The plaintiff alleges that the deed from herself to Anson Parsons was obtained from her fraudulently. We think her evidence establishes a clear *prima facie* case, and, unexplained, is sufficient to support her right to the relief sought. The evidence shows that Anson Parsons, instead of deeding the property back to the plaintiff, from whom his deed came, deeded it to Fay Parsons, notwithstanding both the plaintiff, and Fay Parsons for her, demanded that it be deeded back to the plaintiff. This action of Anson Parsons, together with the stealthy manner in which it was accomplished,

with the other evidence in the case, shows pretty conclusively that the transaction was a scheme on the part of Cyrus Parsons, to which Anson Parsons lent himself for Cyrus' benefit, to get the title out of the plaintiff, and in the name of Fay Parsons, so that a judgment against him and Cyrus could be collected out of the property. The law never uses fraud as a means for the collection of a debt. The demurrer to the evidence should have been overruled. *Railroad Co. v. Goodrich*, 88 Kan. 224, 16 Pac. Rep. 439; *Gardner v. King*, 37 Kan. 671, 15 Pac. Rep. 920. It is recommended that the judgment of the district court be reversed, and case remanded for new trial.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 414)

**SICKINGER et al. v. STATE ex rel. HUTCHINS County Attorney.**

(Supreme Court of Kansas. Feb. 7, 1891.)

**INJUNCTION OF LIQUOR NUISANCE—EVIDENCE.**

Evidence examined, and held sufficient to support the finding and judgment of the trial court as to the defendant Martin Sickinger; but not sufficient to support the finding and judgment against J. M. Anderson, nor against the defendant James Ryan.

(Syllabus by *Strang, C.*)

Commissioners' decision. Error from district court, Butler county; A. L. REDDEN, Judge.

Dale & Wall, for plaintiff in error. E. H. Hutchins, for defendant in error.

STRANG, C. This was an injunction proceeding under paragraph 2533, Gen. St. 1889. The action was in the name of the state on the relation of the county attorney of Butler county. The state alleges that the premises described in the petition was a place where intoxicating liquors were kept for sale; and where such liquors were sold, bartered, and given away in violation of law; and was a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage in violation of law; and charged that such place was, in consequence thereof, a common nuisance; and asked that such premises be adjudged a common nuisance; that the place be abated as such; and that the defendants be perpetually enjoined from using, or permitting said premises to be used, as a place where intoxicating liquors are sold, bartered, or given away, or kept for sale, or a place where persons are permitted to resort for the purpose of drinking intoxicating liquor as a beverage in violation of law. A temporary order of injunction was allowed July 16, 1887. September 1, 1887, the case was tried by the court, which found the allegations of the petition true as therein set forth, and entered a judgment perpetuating the injunction, and for costs against the defendants therein. The petition alleges that the defendant James Ryan was the owner of the building complained of, but we find no evidence in the record connecting him with the building, nor, in any other way, with the case. It

follows that the finding of the court below, so far as it relates to Ryan, is not supported by any evidence, and that the judgment as to him must be reversed, with costs.

J. M. Anderson is made a defendant in the petition, and it is alleged that he was a member of the firm of Sickinger & Co.; but there is no evidence to support the allegation. Through all the evidence in the record relating thereto the firm is referred to as Sickinger & Johnson. Neither the counsel nor any of the witnesses refer to Anderson, but they frequently refer to the firm having charge of the building complained of as Sickinger & Johnson. There being no evidence to connect Anderson with the case, the finding of the court as to him is erroneous, and the judgment based thereon must be reversed, with costs.

As to the other defendant, Sickinger, the only question is, does the evidence sustain the finding and judgment of the court below? There is a conflict in the evidence; and, as the trial court passed upon the testimony, and held it sufficient, this court will not undertake to determine the weight of such conflicting evidence. *Peacock v. Boyle*, 41 Kan. 492, 21 Pac. Rep. 586; *Weir v. Eckard*, 37 Kan. 696, 15 Pac. Rep. 922.

It follows, then, that if there was evidence to support the finding and judgment of the court as to the defendant Sickinger they should not be disturbed, even though an apparent preponderance of the evidence was against such finding and judgment. *State v. Alten*, (Kan.) ante, 224; *Harrington v. Stone*, 39 Kan. 176, 17 Pac. Rep. 853; *Weir v. Plow-Works*, 36 Kan. 460, 13 Pac. Rep. 791; *Stratton v. Hawks*, (Kan.) 23 Pac. Rep. 591; *Gafford v. Hall*, 39 Kan. 166, 17 Pac. Rep. 851; *McKinney v. Ward*, 39 Kan. 279, 18 Pac. Rep. 196; *Railroad Co. v. Kunkel*, 17 Kan. 145, and cases there cited, including cases from a large number of the states of this country. The evidence clearly connects Sickinger with the place complained of, as one of the keepers thereof. It also clearly shows that he sold, to be drunk as a beverage, on the premises, Young's extract of malt. Dr. Kuhn testifies that he analyzed the liquor sold, and found it to contain a sufficient quantity of alcohol to render it intoxicating. Says he analyzed some beer, and found it contained about the same amount of alcohol. Dr. Gill says it contained sufficient alcohol to render it intoxicating. E. D. Stratford drank some of it, and says it was intoxicating; that in his judgment it was beer. W. H. Hardin said, "It tasted like beer." R. D. Hyde testified it "tasted some like beer." Smiley, another witness, said it made him "kindersick." Combe, a witness, saw two men at the place complained of, drunk. Dr. Kuhn, a witness on behalf of the state, and Prof. Lovewell, a witness for the defense, united in saying that the article the sale of which was complained of was a malt liquor, and also a fermented liquor. This evidence, of itself, under our statute, makes the material *prima facie* intoxicating, and greatly strengthens the case of the state. In the face of such evidence,

this court cannot disturb the finding and judgment of the court below as to Sickinger, without overruling the cases cited from our own court which are in harmony with the courts of many other states, as will be seen by an examination of the exhaustive citation of authorities in the opinion of Judge BREWER, in *Railroad Co. v. Kunkel*, supra. It is recommended that the judgment of the district court be reversed as to the defendants James Ryan and J. M. Anderson, with costs; and that, as to the defendant Martin Sickinger, the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 428)

### BARNETT v. LARK.

(*Supreme Court of Kansas. Feb. 7, 1891.*)

#### SECURITY FOR COSTS—POVERTY OF PLAINTIFF—ACTION IN JUSTICE COURT.

Section 581 of the Code of Civil Procedure, providing, in substance, that a plaintiff who has a just demand against a defendant, and who, by reason of his poverty, cannot give security for costs, may maintain his action without a bond for costs, applies to actions commenced before a justice of the peace.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Error from district court, Saline county; S. O. HINDS, Judge.

*Wilson & Moore*, for plaintiff in error  
*J. G. Mohler*, for defendant in error.

SIMPSON, C. January 30, 1888, John Lark, the defendant in error, plaintiff below, commenced this action before A. WELLINGTON, a justice of the peace of Saline county, under chapter 105, art. 10, § 90, Comp. Laws Kan. 1885, to enforce an alleged lien on the hogs of Barnett, the plaintiff in error, in the sum of \$40, claimed as damage to growing crops. On return-day of the summons, on motion of Barnett, the justice ordered that Lark give security for costs. The case was then continued to February 14th, at which time Lark deposited \$5, a non-negotiable promissory note for \$13, and also gave a bond in the sum of \$15. The justice approved the bond, retained the \$5, but rejected the note, and the case was again continued to February 28th, at which time, on application of Barnett, the justice ordered that Lark give additional security, which he neglected and refused to do, claiming that by reason of his poverty he was unable to do so, and in lieu thereof filed his poverty affidavit under section 581 of the Code. The justice also rejected this, and, Lark failing to comply with the order, the case was dismissed at his costs, and the justice thereupon rendered judgment against Lark in the sum of \$56.05, to which ruling and judgment Lark excepted. A bill of exceptions was made, sealed, and signed, and the case taken to the district court on the petition in error. The district court reversed the judgment of the justice, and rendered judgment against Barnett, the plaintiff in error, for all the costs that had accrued in both courts, amounting to \$69.15, and ordered that the case be retained in the district

court for trial. Motion for a new trial was made, and overruled by the court, to which the plaintiff in error duly excepted.

Did the justice err in dismissing the action upon Lark's failure to comply with the order requiring him to give additional security for costs? Is the question propounded by counsel for plaintiff in error. We think he did, for the reason that section 581 of the Code applies to actions before a justice of the peace. That section provides, in substance, that in cases where the plaintiff has a just cause of action against the defendant, and by reason of his poverty is unable to give security for costs, an affidavit that such is the fact dispenses with the usual bond for costs. In this case such an affidavit was filed, and there was no showing made against the truth of the affidavit. Section 186 of the justices' act makes no provision for a person to commence an action before a justice of the peace when by reason of his poverty he cannot give security for costs, or make a deposit of money to secure payment of the same; but section 185 of the same act provides that the provisions of the Code of Civil Procedure, which are in their nature applicable to the proceedings before justices, and in respect to which no special provision is made by statute, shall govern proceedings in justice's court. Section 185 of the justices' act has been construed in the following cases: *Alvey v. Wilson*, 9 Kan. 401; *Points v. Jacobia*, 12 Kan. 54; *Stevens v. Able*, 15 Kan. 584; *Clark v. Wiss*, 34 Kan. 553, 9 Pac. Rep. 281; *Israel v. Nichols*, 37 Kan. 68, 14 Pac. Rep. 438. From an examination of these cases it will appear that this court has universally held that any provision of the Code in its nature applicable to proceedings before justices of the peace, and in respect to which no special provision is made by statute, must govern in actions pending before justices of the peace; the object of this provision, and the controlling idea in its construction, being to assimilate the mode of procedure before justices to that of the district court. We recommend that the judgment of the district court of Saline county be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 435)

#### FREEMAN v. HILL.

(Supreme Court of Kansas. Feb. 7, 1891.)

JUDGMENT BY DEFAULT—SETTING ASIDE—PLEADING—LIMITATION—APPEAL BY ADMINISTRATOR—BOND.

1. Where an application is made to set aside a judgment rendered upon default at the same term at which the judgment is rendered, and the trial court vacates the judgment and permits the defendant to file an answer asserting the meritorious and valid defense, its ruling in that regard is clearly within its sound judicial discretion.

2. In this state, statutes of limitations are regarded not as statutes of presumption, but as statutes of repose, and a trial court may, in its sound judicial discretion, permit a defendant to file an answer out of time, pleading the statute of limitations.

3. Executors, administrators, and guardians who have given bond in this state, with sureties, according to law, are not required to give an un-

dertaking on appeal or proceedings in error. Civil Code, § 577.

(Syllabus by the Court.)

Error from district court, Marshall county; E. HUTCHINSON, Judge.

W. H. H. Freeman, for plaintiff in error.  
E. A. Berry and John V. Coon, for defendant in error.

HORTON, C. J. On November 14, 1885, W. H. H. Freeman commenced his action against Samuel Hill before a justice of the peace of Marshall county to recover \$75 upon an appeal-bond executed by Ed. W. Waynant, as administrator of the estate of J. B. Waynant, deceased, as principal, and Samuel Hill, as surety. On December 1, 1885, he filed an amended bill of particulars claiming \$185, setting up three causes of action, the second and third causes being new. Hill, by his attorneys, made a motion to strike out causes 2 and 3, because they were not stated in the first bill of particulars, or in the summons. The justice sustained the motion. The case was then tried before the justice and decided in favor of Hill. Freeman appealed to the district court. On April 1, 1886, he filed in the district court a petition alleging three causes of action, one on the bond, one for attorney's fees, and one for a pump to be taken out if not satisfactory. At the August term of the district court for 1886, no answer having been filed, Freeman moved for judgment upon the pleadings for \$185. This was granted. Soon afterwards, and at the same term, the judgment was set aside upon the application of Hill, and on the 7th day of September, 1886, Hill filed an answer pleading, among other things, the statute of limitations. On the 2d day of September, 1887, Hill obtained leave to amend his answer. To this answer, Freeman filed his reply. Trial had before the court with a jury. A verdict was returned in favor of Hill, and judgment was entered accordingly. Freeman excepted and brings the case here.

It is claimed by him that the trial court erred in setting aside the judgment rendered upon default, and also erred in allowing Hill to file an answer pleading the statute of limitations. The application to set aside the judgment was made at the same term at which the judgment was rendered. The action of the court in that matter rested, to a very great extent, in its sound judicial discretion. Subsequently, an answer was filed, and the parties had a trial before a jury. Under such circumstances, a reviewing court will not interfere with the vacation of a judgment by the trial court, unless it appears that the trial court has abused its power. This is not shown. *Spratt v. Insurance Co.*, 5 Kan. 155; *Filnt v. Noyes*, 27 Kan. 351. There was no error in permitting Hill to plead the statute of limitations. In this state, such statutes are favorably considered. *Taylor v. Miles*, 5 Kan. 498. In that case, it was said that, "when the statute has run its full time, the effect is to leave the parties in possession of just what they had before, nothing more and nothing less; and neither party has a right of action against the other. The in-

jured party has lost his remedy." At one time, the decisions of the courts were largely in favor of regarding the statute of limitations as a statute of presumption, but now they are generally considered, as in this state, as statutes of repose. *Sibert v. Wilder*, 16 Kan. 176. Under some of the decisions, where statutes of limitations were regarded as statutes of presumption only, an answer pleading such statute was not considered meritorious, or treated with favorable consideration. In this state, however, as the statutes of limitations are statutes of repose, such a ruling does not apply. The court may allow a party to file his answer out of time, whether he pleads payment or the statute of limitations. It is a matter within the discretion of the trial court, and, unless that discretion is abused, its ruling will not be reversed.

It is also urged that the instructions of the trial court were erroneous, and therefore that the plaintiff was denied a fair trial. The trial court instructed the jury to disregard the evidence introduced under the first cause of action, and also stated to the jury that the plaintiff had not shown any facts to entitle him to recover thereon. Section 577 of the Civil Code reads: "Executors, administrators, and guardians who have given bond in this state, with sureties, according to law, are not required to give an undertaking on appeal or proceedings in error." Section 185 of civil procedure before justices reads: "The provisions of an act entitled 'An act to establish a Code of Civil Procedure,' which are, in their nature, applicable to the jurisdiction and proceeding before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace." The bond executed by Waynant, as administrator, and by Samuel Hill, as surety, cannot be regarded as a statutory bond. It cannot be considered good as a common-law bond, because Waynant, as administrator, had the right to appeal without giving any undertaking. Therefore no benefit was obtained by the execution of the bond, and no injury or damage resulted from its execution to the plaintiff or to any one else.

Again, the action in which the bond was given has never been disposed of, and is still pending before the district court of Marshall county. At the December term of the district court of Marshall county for 1880, Waynant made a motion to dismiss the action brought against him by Freeman, upon the ground that the court had no jurisdiction. The court granted this motion, but its ruling was reversed by this court. *Freeman v. Waynant*, 25 Kan. 279. The mandate of this court was sent to the court below, and filed May 14, 1881, but nothing seems to have been done with the case since that time. Upon the facts disclosed, plaintiff could not recover upon the bond, the first cause of action. It is not shown by the record that all the evidence is preserved, and therefore we cannot say from the record, as presented, that the court committed any error in the other instructions referred to. If the plea of the statute of limitations was support-

ed by sufficient evidence, the instructions given by the trial court stated correctly the law. A claim is made that, as the affidavit to the answer alleged, Hill was a non-resident of the state at the time the answer was filed; therefore, that the causes of action of plaintiff were not barred. This, however, depends upon the evidence presented to the court, all of which is not shown to be in the record. If the claims of plaintiff were barred by the statute before Hill became a non-resident, the point presented is without force. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 425)

FOWLER *et al.* v. RUSSELL, Sheriff, *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

BOARD OF EQUALIZATION—RECORDS—VALIDITY OF PROCEEDINGS.

1. The fact that the county clerk recorded the proceedings of the board of equalization in a journal containing also the proceedings of the board of county commissioners will not invalidate the action of the board of equalization.

2. After the board of equalization had convened, they temporarily suspended action from time to time, and acted as a board of county commissioners, and the record of such action is included with their proceedings as a board of equalization; and, in the record of the proceedings of the board of equalization, the members of the board are sometimes designated as the "board of county commissioners," and again as the "board." But the entire record indicates that the action of the commissioners in equalizing the values of property was taken as a board of equalization. *Held*, that the irregularities mentioned are not such as could have misled any taxpayer, nor such as will destroy the validity of their proceedings in equalizing the values of property within the county.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; R. B. SPILLMAN, Judge.

*Malcolm Nicolson*, for plaintiffs in error.  
*J. B. Barnes*, for defendants in error.

JOHNSTON, J. This was an action to enjoin the collection of taxes levied against the plaintiffs in error for the year 1886 upon a herd of cattle that were kept in Maple Hill township, Wabaunsee county. After the cattle had been listed and assessed by the township assessor, the board of equalization met and increased the valuation of all cattle within the township 15 per cent., except those of the plaintiffs in error, the valuation of which was increased 25 per cent. All the taxes levied on the cattle were tendered by the plaintiffs in error to the county treasurer, except the sum of \$34.45, which is claimed to be illegal on account of an unwarranted increase in the valuation by the board of equalization. The objections to the action of the board are not that it acted without the giving of statutory notice, nor that the valuation placed upon the cattle was unjust or unequal, as compared with that placed on other cattle within the county, but they are of a more technical and unsubstantial character. Complaint is made that the proceedings of the board of equalization were recorded in one of the journals of the board of county commissioners, and that the report of the proceedings of the board of equalization

on the journal of the board of county commissioners does not create or constitute a record of the board of equalization. And another objection is that the county commissioners, in equalizing the property of that township, were acting as a board of county commissioners, and not as a board of equalization. The county clerk is made clerk of the board, and is required to keep a record of the proceedings and orders of that board. He is not required to keep a record in a particular form, nor to record the proceedings in any particular book or journal. The report of the proceedings in the present case was recorded in one of the journals provided by the county, and in a portion of which were kept the proceedings of the board of county commissioners. This fact will not invalidate the action taken by the board of equalization. Possibly it would have been more formal and satisfactory to have kept a separate and independent journal for the proceedings of the board of equalization; but it is not essential to the legality of their action. It is sufficient if a true and permanent record is made by the clerk of the proceedings of the board, regardless of whether it is transcribed in an independent book, or one which is in part devoted to other purposes. The objection that the commissioners were not organized as a board of equalization at the time the valuation of plaintiffs' property was changed cannot be sustained. In the record of the proceedings it appears that the commissioners convened as a board of equalization on June 7th, as required by law, and that they adjourned from day to day until June 15th, when they completed the work of equalization and adjourned *sine die*. It appears from the report of their proceedings that the work of the board was suspended several times between the time of convening and the final adjournment, for the transaction of business as a board of county commissioners; and the record of these matters is also recorded with the proceedings of the board of equalization. Then, again, in the report of the proceedings made by the county clerk, there is some confusion of terms in designating the members of the board. They are referred to as the "board of equalization," sometimes as the "board of county commissioners," and again simply as the "board." It is true that the board of equalization and the board of county commissioners are distinct tribunals, with different functions and duties, and the confusion of terms in the report of the county clerk is in this respect informal and irregular, but we think not to the extent of defeating their action in equalizing the property of the township, or the taxes levied upon the valuation which they made. The record showing the equalization complained of is found within what is entitled "Proceedings of the Board of Equalization, Wabaunsee County," and, taking the record altogether, the change made in the valuation of the cattle in Maple Hill township was manifestly the act of the board of equalization. The records of these tribunals are not always kept with care and precision, and courts are inclined to treat the reports of their proceedings with liber-

ality and indulgence so far as form and regularity are concerned. In the present case, the board was regularly convened, pursuant to a legal notice, and had complete jurisdiction, as such board, to change and equalize the values of cattle within the township to the extent which they did. Neither the interruptions in the work, as a board of equalization, in order to perform some of the functions of a board of county commissioners, nor the fact that the record which was kept of the proceedings of the board of equalization included some of the business done as a board of county commissioners, could mislead any tax-payer, and we do not think that these, or any of the irregularities mentioned, should destroy the validity of their proceedings. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 410)

HOLDERMAN v. POND.

(Supreme Court of Kansas. Feb. 7, 1891.)

COURTS—JURISDICTION—TORTS COMMITTED OUTSIDE OF STATE.

An action for the conversion of certain corn and corn-stalks, grown and standing upon land in the Indian Territory, leased in violation of law and the treaty between the United States and the Cherokee Nation, brought by a citizen of this state against a person residing in such territory, but personally served with summons, cannot be maintained in this state.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Labette county; GEORGE CHANDLER, Judge.

*Leroy, Neale & Son* and *H. G. Webb*, for plaintiff in error. *F. M. Smith*, for defendant in error.

GREEN, C. This was an action brought in justice court in Labette county by J. W. Pond against Marion and Mary Holderman, on the 12th day of March, 1885, upon the following bill of particulars: "The plaintiff, for his cause of action against the defendants, says that the defendants are indebted to the plaintiff in the sum of one hundred and ninety dollars, upon an account for 700 bushels of corn, at 25 cents per bushel, \$175.00; and for 60 acres of corn-stalks, at 25 cents per acre, \$15.00. Said defendants took and converted the same to their own use, and said amount is still due. Wherefore, plaintiff prays judgment against the defendants for one hundred and ninety dollars, with 7 per cent. interest, from January 1, 1885, and costs of suit." The case was taken to the district court and there tried, and resulted in a verdict and judgment for the plaintiff, and against Marion Holderman, for \$209.88. No service seemed to have been made upon the other defendant. The plaintiff in error filed a motion for a new trial, which was overruled, and he brings the case here for review. From the special findings of the jury, it appears that the land upon which the corn in question grew was situated in the Cherokee Nation, in the Indian Territory, and, at the time of the alleged conversion, was fully matured, but ungathered; and that the defendant purposely caused his stock to be driven to the field where said corn was stand-

ing, to have them feed upon it. It further appears from the evidence that this land had been leased by the defendant to a firm, of which the plaintiff was a member, and that he had succeeded to the interest of the firm in such lease; that, at the time of the making of the lease and the alleged conversion of the crop, the plaintiff was a resident of Kansas, and the defendant, who was a "squaw-man," resided in the Indian Territory.

It is contended by the plaintiff in error that, at the time of the alleged wrong, no jurisdiction had been accorded to any court outside of the limits of that country, unless one of the parties be an inhabitant of that country, and the other an inhabitant outside thereof, either as a plaintiff or defendant, and, in that case, exclusive original jurisdiction was then given to the nearest United States district court; that an action of such a character as this cannot be maintained in this state.

Laying aside the question of the right of the plaintiff below to waive the tort and recover as upon an implied contract, which seems to be well settled upon reason and authority, can the courts of this jurisdiction give the plaintiff below a remedy for a wrong committed in the Indian Territory, when there is a question as to whether there was a remedy there? The primary right of the plaintiff below to recover rested upon a tort committed where the remedy was confined to the nearest United States district court, which had exclusive original jurisdiction. Could the plaintiff below, "upon the theory of the implied promise, and its invention," recover in this jurisdiction for a wrong committed where the jurisdiction is restricted to the federal court, if indeed any remedy existed at all? We think the tort charged, and the right and remedy growing out of such tort, must be determined by the law of the territory where the wrong was committed. The rule is well settled that if there is no right to recover for an alleged injury, in the state or territory where it is said to have been committed, there can be none in any other state; and, if the state in which the alleged injury is committed has declared the consequences and defined the liability therefor, that law must govern. *Campbell v. Rogers*, 19 Law Rep. 329. By the seventh article of the treaty between the United States and the Cherokee Nation, proclaimed August 11, 1866, (14 U. S. St. at Large, p. 800,) it is provided that the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all civil and criminal cases. We think this provision of the treaty settles the jurisdiction of this case. Section 2103 of the Revised Statutes of the United States makes void all contracts for the leasing of land in the Indian country, unless executed in the manner therein provided, and approved by the secretary of the interior. The lease between Pond and Holderman was in violation of this law, and conferred no rights upon Pond to cultivate the land. He was there without authority. The question naturally suggests itself whether or not, under such a state of facts, he could have maintained an action in any form

against the defendant below in the Indian Territory. If he could not there, he should not be permitted to do so here. He can obtain no greater rights here than he had there. In order to maintain an action founded upon an injury to person or property, the act which is the cause of the injury or damage, and the foundation of the action, must be actionable or punishable at least by the law of the place where the injury was done. *Cooley, Torts*, 471; *Whart. Conf. Laws*, § 478; *Holland v. Pack, Peck*, (Tenn.) 151; *Le Forest v. Tolman*, 117 Mass. 109; *Smith v. Condry*, 1 How. 28; *McLeod v. Railroad Co.*, 58 Vt. 727, 6 Atl. Rep. 648; *Carter v. Goode*, 50 Ark. 155, 6 S. W. Rep. 719. In the latter case, Goode sued Carter in Arkansas, to recover damages for an injury to a mule. It was proved upon the trial that the injury was committed in the Cherokee Nation, where Carter and Goode were at the time residing; that they were citizens of Arkansas, and had no permit to reside in the Indian country; that, at the time the injury was inflicted, the mule was trespassing in Carter's inclosure, which Goode knew it was in the habit of doing; and that Goode had no redress whatever for the injury, and that the act was not punishable in the Indian Territory. The court held that the action could not be maintained, because the act which caused the injury was not punishable or actionable by the law of the place where it was committed. As the plaintiff below had no permit or license to lease the land where the corn was raised, and there being grave doubts whether he had any right to recover for the alleged conversion of this property in the Indian Territory, where the tort was committed,—and, if such right did exist, the jurisdiction was vested in another court,—we think it follows from such a state of facts that the trial court had no jurisdiction. We recommend a reversal of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 341)

#### SWARTZ v. NASH et al.

(*Supreme Court of Kansas*. Feb. 16, 1891.)

#### ELECTION CONTEST—SETTLING BILL OF EXCEPTIONS—MANDAMUS.

When a bill of exceptions, containing over 200 pages of written matter, purporting to contain all the proceedings in a contested election, is presented to the contest court for settlement and signature, and the attorney who presents it declares his willingness to supply any omission or make any addition to it that may be suggested by the trial court, so as to make it speak the truth, and the trial court refuses to consider it, or to make any suggestions as to omissions or amendments, and refuses to settle it or sign the same as prepared, they can be compelled by *mandamus* to settle and sign a true bill of exceptions in said case.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Original proceeding in *mandamus*.

A. M. Mackey and J. K. Beauchamp, for plaintiff. S. B. Bradford, John H. Pitzer, and William O'Connor, for defendant.

SIMPSON, C. An alternative writ of *mandamus* issued from this court on the

30th day of November, 1890, reciting that it was represented to the court that prior to the 25th day of November, 1889, one W. H. Swartz was duly declared elected to the office of county commissioner of the third commissioner district of Stevens county. That on the said 25th day of November, 1889, J. W. Spoon, as contestor, filed with the county clerk of said county a notice of his intention to contest the election of the said W. H. Swartz to said office of county commissioner. That thereupon the said T. B. Nash, as probate judge of said county, selected as associate judges for the trial of said contest R. H. Chism and George H. Storms, and that they constituted and were the contest court for the trial of said action. That they proceeded with the trial of said case from time to time until the 3d day of March, 1890, when said court rendered a decision in said contest adverse to the said W. H. Swartz, to which decision the said contestee at the time duly excepted. That said contestee immediately filed with the clerk of said court a motion to vacate said decision, and grant him a new trial, which said motion was overruled on the 14th day of March, 1890, to which ruling the contestee duly excepted. That the said contestee, immediately upon the refusal of the court to grant a new trial, presented to the court a bill of exceptions in due and legal form, and requested the court to sign the same as required by law; but that said court refused to settle a bill of exceptions in said court, and adjourned the court *sine die*. That the said contestee was and is desirous of having a bill of exceptions settled and signed in said case, in order that he may have the same reviewed in the proper court upon a petition in error. That, unless the said contest court is required to settle and sign a bill of exceptions in said case, the contestee is without adequate remedy at law, and will suffer great damage and loss. The contest court was commanded to convene at the office of the probate court in said county at the hour of 10 o'clock in the forenoon on the 10th day of November, A. D. 1890, and then and there proceed to settle and sign such bill of exceptions as may be tendered by the contestee, or show cause before the court on the 20th day of November, 1890, why performance as herein commanded has been delayed or refused. To this writ the defendants answered on the 28th day of November, 1890, admitting that on the 14th day of March said Swartz, by his attorney, presented to said contest court a pretended bill of exceptions, and requested them to settle and sign the same, and that they refused to do so for the following reasons: *First*. That said bill of exceptions so presented did not fully and truthfully set forth and recite the matters and things therein contained, and that they called the attention of the attorney presenting the same to the defects, errors, and misstatements and omissions in said pretended bill of exceptions, and suggested wherein said pretended bill of exceptions should be amended to make it speak the truth, and informed the attorney, if he would make such amendments as were suggested, that they would sign

the bill of exceptions, and that the attorney refused to make the amendments. That afterwards, on the same day, the attorney reduced to writing a pretended statement of the corrections and amendments suggested by the court, but attached thereto an instrument in writing, the nature of which was unknown to the court at that time, and asked these defendants to sign the same; whereupon the court asked the attorney if he presented that instrument as his bill of exceptions, to which he answered "it was none of the court's business, but is mine as attorney for Swartz." The said Swartz and his attorney not having made a true bill of exceptions, and refusing to make the amendments suggested, and it being apparent from the insolent and contumacious demeanor of said attorney that said corrections would not be made, and that Swartz and his attorney did not want a bill of exceptions settled and signed that would speak the truth in reference to said trial, and such court having no other business before it, adjourned *sine die*. *Second*. They allege the pendency of another action between the same parties for the same cause of action before the district court within and for the county of Stevens, in the thirty-second judicial district of this state, and that said action was pending at the time of the commencement of this action, and is still pending. On the issues raised by the alternative writ and the answer, a trial was had before this court on the 7th day of February. The material facts appearing at the trial are that on the 14th day of March, 1890, the attorney of Swartz appeared before the contest court with a bill of exceptions that was identified on the trial as the one offered, and presented it to the court, and requested them to settle and sign the same. This bill of exceptions consisted of over 200 pages of written matter, and purported to contain everything connected with said case. Two amendments were suggested by the opposing attorney, and these were immediately inserted in the bill of exceptions. The contest court still persisted in the contention that the bill of exceptions was not a true one, but declined to suggest wherein it was deficient, and refused to make any additional suggestions as to amendments, corrections, or omissions of important and material matter. The court stated that they were not compelled to sign any other than a true bill, and finally on that day adjourned *sine die*. They reconvened on the 10th day of November,—the day designated in the alternative writ,—and the identified bill of exceptions was again presented to them, with an offer on the part of the attorney who presented it to draft and incorporate into the bill any suggestions, amendments, or corrections; but none were made, and the court refused to sign because it was not a true bill. They made no effort at that time to perfect the bill of exceptions. The bill was then left with them or their attorney for examination. Subsequent to this, they prepared a statement enumerating the defects and omissions in the bill of exceptions presented, and this statement constituted their answer to an al-



ternative writ of *mandamus* that had prior to the commencement of this action been issued out of the district court of their county, but subsequently withdrawn. This statement of omissions and defects in the bill of exceptions presented was by them introduced as evidence on the trial of this action.

It is made the statutory duty of a court to settle and sign a bill of exceptions. If the bill is not a true one, the court should correct it, or suggest the correction to be made. Section 303, Civil Code. We hold it to have been the plain duty of the contest court in this case, when the bill of exceptions was presented to it, to have correctly settled and signed it. If the bill as presented was defective in any respect, the defect should have been remedied then and there. It is a clear legal right belonging to any party, when a case is decided against him, to have a bill of exceptions settled and signed by the court embodying all the pleadings, evidence, and rulings; and it amounts to an absolute denial of legal right and of justice for a trial court to arbitrarily refuse to settle a true bill of exceptions. It is true that a trial court is not required to draft a lengthy bill of exceptions, or perform clerical work of moment; but, when a bill is prepared that is claimed to embrace the whole proceedings, it is their duty to carefully examine it, and correct it, if need be, so as to make it speak the absolute truth. The power of the trial court to make such alterations, erasures, and additions in a prepared bill of exceptions presented for signature as may be necessary to make it speak the truth is undoubted, and has been declared by this court. But the trial judge has no right to fold his arms, and say that the bill of exceptions is not true, and yet not point out wherein it is defective, and refuse to settle and sign it because it is not true. It is as much a part of the duty of the trial court to settle as it is to sign a bill of exceptions. By settlement, we mean to make it recite the absolute truth as to all of the proceedings in the action. All these things are clear deductions from the statutory command to trial courts to settle and sign bills of exceptions. The trial court cannot, by *mandamus*, be compelled to sign a certain bill of exceptions, or any particular bill of exceptions; but when a bill is presented, and they refuse either to settle or sign it, or to suggest amendments, or to require certain parts to be stricken out, they can be compelled by *mandamus* to settle and sign a bill of exceptions. This is the prayer and command of the alternative writ in this case. The objection that any other suit is pending in the district court of Stevens county by the same parties for the same cause of action is obviated by showing from the records of said court that all the papers in the action were withdrawn by both parties by leave of the court, and without prejudice. We recommend that a peremptory writ be issued, the question of costs being reserved for further investigation and future consideration.

PER CURIAM. It is so ordered; all the justices concurring.

# BITMAN et al. v. MIZE.

(Supreme Court of Kansas. Feb. 7, 1891.)

## SHERIFFS—FAILURE TO EXECUTE PROCESS—EVIDENCE.

An execution reciting a judgment rendered October 14, 1886, is not supported by proof of a judgment entered October 14, 1885, and a sheriff is not liable to amercement for failure to serve and return such execution in 60 days.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HERICK, Judge.

*Finch & Finch* and *S. S. Sisson*, for plaintiff in error. *Brand & Loug*, for defendant in error.

STRANG, C. This was an application to amerce C. D. Nelson, sheriff of Barber county, for failure to return an execution issued out of the district court of Harper county in the case of *Bitman, Taylor & Co. vs. W. O. Mize*, within the time prescribed by law. The application was heard by the court January 26, 1887. Plaintiffs introduced their evidence and rested their case. The defendant, Nelson, demurred to the evidence of the plaintiffs, which demurrer was sustained, and judgment was rendered against the plaintiffs for costs. Motion for new trial was overruled. The plaintiffs bring the case here for review. Among other alleged errors the plaintiffs assign for error the action of the court in sustaining the demurrer of the defendant to their evidence. Was the action of the court in this respect erroneous? We think not. The court based its action on the ground that the execution in the hands of the sheriff was not supported by any judgment, and was therefore void; and, being void, the sheriff was under no legal obligation to execute and return it. The execution offered in evidence recites a judgment obtained in the district court of Harper county on the 14th day of October, 1886, while the judgment introduced to support said execution was obtained October 14, 1885.

The question is, was there such a variance between the execution, and the judgment introduced to support it, as will excuse the sheriff, or save him from amercement? We think there was. This is a statutory proceeding, and its character penal, and strict compliance with the law must be observed in its enforcement. The record in this case shows there was but one judgment in the Harper county court between *Pitman, Taylor & Co.*, as plaintiffs, and *W. O. Mize* as defendant, and that was dated October 14, 1885. There being no judgment in said court between said parties bearing date October 14, 1886, it follows that the clerk of the district court of said county had no authority to issue the execution in question in this case. If the clerk had no authority to issue said execution it was void, and the sheriff was under no obligation to respect it in any way. In *Cutler v. Wadsworth*, 7 Conn. 6, the execution recited a judgment rendered on the fourth Tuesday of February, and the record showed a judgment rendered on the second Tuesday of February. It was held that such execution was void, and

that the officer to which it was committed was not bound to execute it. In *Rider v. Alexander*, 1 D. Chip. 267, it was held that where the execution recited a judgment entered at one term, and the record produced to support said execution showed a judgment entered up at another term, such execution was irregular, and all proceedings had under it were void. The law certainly will not require a sheriff, under penalty of amercement, to do a thing which, when done, would be void. In *Fulmer v. Wells, Fargo & Co.*, 42 Kan. 551, 22 Pac. Rep. 561, it is held that, where a plaintiff is seeking to amerce a sheriff for his neglect or failure in returning an execution, the execution to sustain such a proceeding must conform strictly to the judgment rendered. See, also, *Fisher v. Franklin*, 38 Kan. 251, 16 Pac. Rep. 841. A number of errors were assigned upon the rejection of testimony by the court below, but we think it unnecessary to review them. None of the rejected evidence could in any way have reconciled the variance between the judgment and the execution. It is recommended that the judgment of the district court be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 503)

TENNIS V. INTERSTATE CONSOLIDATED  
RAPID TRANSIT RY. CO.

(Supreme Court of Kansas. Feb. 7, 1891.)

INJURIES TO PERSON ON RAILROAD TRACK — DECLARATIONS — RES GESTÆ.

1. Where, in an action by an administrator against a railway company for negligently killing his decedent, it appeared that the decedent was passing along the double track of the defendant's road, in a westerly direction, within the limits of a city, and discovered a train coming towards him, and, to avoid said train, stepped from the track upon which he was walking to the one immediately north, and, before he had taken more than two or three steps, was struck and killed by the engine of a train going west, and the accident did not occur in a public street of the city, and the train was not running at an unusual rate of speed, or in violation of any ordinance of the city, and a demurrer was sustained to the evidence by the trial court, *held*, that it was not error.

2. Declarations, to be admissible as part of the *res gestæ*, must be contemporaneous with the principal facts which they serve to qualify or explain. *State v. Montgomery*, 8 Kan. 351, followed.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Wyandotte county; HON. O. L. MILLER, Judge.

*Sherry & Hughes*, for plaintiff in error.  
*Warner, Bean & Hagerman* and *N. H. Loomis*, for defendant in error.

GREEN, C. This action was brought by Henry N. Tennis, as administrator of the estate of John S. Tennis, deceased, in the district court of Wyandotte county, to recover the sum of \$10,000 damages, on account of the alleged negligent killing of the decedent. The record discloses that John S. Tennis was killed under the following circumstances: On the afternoon of August 30, 1887, he was walking on the railroad track of the defendant, in a west-

erly direction, in Kansas City, some 200 feet from a coal-chute, where engines took on coal. At the point in question there was a double track, located upon a fill, the south side of which sloped downward some 20 or 30 feet to a stream called "Jersey Creek;" the other side of the fill was a few feet above the natural surface of the ground. The general direction of the road was east and west, but west of the coal-chute some distance the railroad curved towards the north. Just prior to the fatal accident the decedent was observed walking westward upon the track used for east-bound trains. A west-bound train was standing at the coal-chute, taking on a supply of fuel. It appears that the deceased was within 30 or 40 feet of this train when it was coaling. About the time he reached a point 200 feet west of the coaling place, an east-bound train came around the curve in front of him. In the mean time the train which had been standing at the coal-chute started westward. To avoid the east-bound train the deceased stepped from the south to the north track, and had not taken more than two or three steps before he was struck and instantly killed by the train going west. The train was running at the rate of 12 miles an hour. The road had been in operation something over a month before the accident. It was admitted upon the trial that the accident complained of did not occur in a public street of the city, and no claim was made that the rate of speed at which the train in question was running was in violation of any ordinance. The case came on for trial on the 23d day of March, 1888, before the court and jury, and upon the conclusion of the evidence for the plaintiff the defendant interposed a demurrer to the evidence, on the ground that no cause of action had been proved, which was sustained by the court; and the plaintiff below brings the case to this court, alleging that the trial court erred in sustaining the demurrer to the evidence, and also in sustaining an objection of the defendant to a question asked by the plaintiff of one of the witnesses, as to what statement the engineer made in regard to the accident.

The first and principal contention of the plaintiff in error is that the court erred in sustaining the demurrer to the evidence; that where the injury occurred was a sort of thoroughfare, where men, women, and children had been in the habit of walking; that the train on the north track was being run at a wanton and reckless rate of speed, and that the decedent was run over and killed without any notice or warning whatever. The defendant in error insists that the testimony of the plaintiff showed that Tennis was a trespasser upon the defendant's right of way, and the negligence of the deceased was the direct cause of his death; that there is nothing in the evidence to show willfulness or wantonness upon the part of the railway company; and that the demurrer was properly sustained. Was the decedent killed under such circumstances as to indicate that his death resulted from negligence? If so, the demurrer should have been overruled. The

law of this jurisdiction has been settled that a railroad company has the exclusive right to occupy, use, and enjoy its railway track; and such exclusive right is absolutely necessary to enable it to properly perform its duties; and any person walking upon a track of a railway, without the consent of the company, is held in law to be there wrongfully, and, therefore, to be a trespasser; and, in case of an injury happening to such person so trespassing upon it from the movement or operation of the cars of the company over it, he is without remedy, unless it be proved by affirmative evidence that the injuries resulted from culpable negligence after the deceased was noticed upon the track. *Mason v. Railway Co.*, 27 Kan. 83.

We do not think the evidence indicated that the public had acquired any right to the railroad track as a thoroughfare, with the consent of the railway company. The road had been in operation but a short time, and it could hardly be contended that the use of the track had been acquired by prescription. The settled policy of the law is to make the track of a railroad, which is exclusively the road-way of the company, and upon which cars are operated by steam and kindred agencies, clear of all obstruction which might impede the free and exclusive use of the track, for the purpose for which it was constructed. There seems to be sound reason for this policy. It is stated by Mr. Justice PAXSON in the case of *Mulherrin v. Railroad Co.*, 81 Pa. St. 366: "We hold these corporations to a strict line of responsibility whenever passengers are injured by accidents to their trains. It follows that we should be equally emphatic as to their control of their tracks. Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way, but such right is exclusive at all times and for all purposes. This is necessary, not only for the proper protection of the company's rights, but also for the safety of the traveling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man, who desires to walk upon the track. In England it is a penal offense for a man to be found unlawfully upon the track of a railroad. It would add materially to the public safety were there a similar law here." The law would have a different application where a railroad track was laid in a public street. The rights of the public and the railroad company, respecting the use or the same, would be mutual. *Railway Co. v. Phillips*, 112 Ind. 59, 13 N. E. Rep. 132. It is claimed that the place where the decedent was killed was almost a public thoroughfare, and made so by people passing up and down the track; and that it was gross negligence for the defendant to run its trains at such a high rate of speed as to endanger the lives of persons walking upon its road. Admitting that such was the case, still a duty rested upon the decedent to keep a sharp lookout for trains from both directions. He must have known that trains passed over the line at frequent

intervals. He certainly knew of the train at the coal-chute, and the direction in which it was going. He could see the condition of the fill in front of him, and determine whether it was a safe place to venture or not. The evidence was to the effect that he saw the east-bound train coming around the curve, and stepped from the south to the north track, but a few feet in front of the west-bound train. We think the engineer of this train had the right to assume that the decedent would get off the track in time to avoid danger, and there would not be willfulness in letting his train move on. We think the fact that he did leave one track and pass to the other strengthened the engineer in this assumption, that the man would avoid the danger from the approaching train, and there would be no necessity for his giving any signals or stopping his train. Again, the evidence clearly indicated that the decedent stepped but a few feet in front of the moving train; that he had taken but two or three steps before the engine struck him. A signal would have been of no avail, and the train could not have been checked in time to prevent the accident. It is now the settled rule in this and other states, where the plaintiff seeks to recover for injuries on the ground of defendant's negligence, that, if the ordinary negligence of the plaintiff directly or proximately contributed to the injury, he cannot recover, unless the injury was intentionally or wantonly caused by the defendant. *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. Rep. 529, and authorities there cited. Whenever persons undertake to use a railroad track as a footway, they are supposed to do so with full knowledge and understanding of its dangers, and they assume the risk of all its perils. *Railroad Co. v. State*, 62 Md. 479; *McLaren v. Railroad Co.*, 8 Amer. & Eng. R. Cas. 219; *Railroad Co. v. Goldsmith*, 47 Ind. 43; *Railroad Co. v. Houston*, 95 U. S. 702; *Railroad Co. v. Jones*, Id. 442; 1 *Thomp. Neg.* 453, 459; *Morrissey v. Railroad Co.*, 126 Mass. 377; *Railroad Co. v. Monday*, 49 Ark. 262, 4 S. W. Rep. 782; *Williams v. Railroad Co.*, 72 Cal. 120, 13 Pac. Rep. 219; *Railroad Co. v. Hummel*, 44 Pa. St. 378. In a recent case decided by the supreme court of California, where the decedent, while walking along a railroad track without license, was run into and killed a distance of 150 yards from a crossing behind him, from which direction the train was coming, the engine was in a reversed position, and there was no head-light or cow-catcher on the tender; the bell was not rung, nor was the whistle blown at the crossing, though provided for by statute. Had such signals been given, decedent would probably have heard them, and escaped injury. He was not seen by the engineer until after the accident. It was held that the decedent was a mere trespasser, to whom the company owed no duty, and therefore it is not liable. *Toomey v. Railroad Co.*, (Cal.) 24 Pac. Rep. 1074. The rule has been stated by Judge Cooley, in his book on Torts, p. 660: "The general duty of a railway company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to

complain of the neglect. The tramp who steals a ride cannot insist that it is a duty to him. Neither can he, when he makes a highway of the railway track, and is injured by the train." It was held in Iowa that a railroad company did not owe to trespassers upon its track such care that an engineer was required to look out for them; but, after discovering them, it would be negligence not to use every means to avoid inflicting injury. *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. Rep. 776. We think, under the facts in this case, and the great weight of authorities, the demurrer to the evidence was properly sustained.

It is next contended that the court erred in sustaining an objection to a question asked one of the witnesses for the plaintiff, as to what the engineer said about the accident. The transaction was complete. The train had run a little more than the length of itself, and stopped, and was standing some little distance from where the man was struck, and the witness stated that some five minutes after he walked across to the place; and he was asked if he had any conversation with the engineer, which was objected to and sustained. To have made the statement of the engineer admissible the declaration attempted to be drawn from him must have constituted a part of the *res gestæ*; that is, the statement must have been connected with, and part of, the transaction in question. Any statement the engineer might have made would have been concerning a past and completed transaction, and hence would have been incompetent evidence against the railway company to prove the manner and cause of the decedent's death. The fact that the statement was made in five minutes after the accident would not render the evidence admissible, if the conversation referred to a past occurrence, and not connected with the *res gestæ*. "There must be concurrence in point of time between the act and the declaration; otherwise it is but a narrative of what has been, or an assertion of what will be, done." *State v. Montgomery*, 8 Kan. 351; *Swenson v. Aultman*, 14 Kan. 273; *State v. Pomeroy*, 25 Kan. 350; *Jenkins v. Lewis*, Id. 479; *Railway Co. v. Fray*, 35 Kan. 700, 12 Pac. Rep. 98; *Dodge v. Childs*, 38 Kan. 529, 16 Pac. Rep. 815. We recommend an affirmance of the judgment.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 462)

HENTIG v. SOUTHWESTERN MUT. BEN.  
ASS'N *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

ATTORNEY'S LIEN — MUTUAL BENEFIT INSURANCE  
— ESTABLISHMENT OF LIEN.

1. An action against a mutual life insurance association and a person holding an insurance certificate in such association, to enforce an attorney's lien for services for the holder of such certificate, cannot be joined with an action on an official bond given by the officers of the association, under chapter 131 of the Session Laws of 1885.

2. In a petition against an assessment insurance association to establish an attorney's lien, it is necessary to allege that the funds upon

which a lien is claimed were a part of the proceeds of the assessment made on account of the death of the person named in the certificate, upon which the judgment had been rendered where-in the services had been performed, or allege that the company had funds sufficient to pay the claim out of the surplus fund of the company.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Shawnee county; JOHN GUTHRIE, Judge.

F. G. Hentig and E. A. Austin, for plaintiff in error. Johnson, Martin & Keeler, for defendant in error.

GREEN, C. This action was commenced in the district court of Shawnee county to enforce the payment of an attorney's lien. As a first cause of action, the claim is made in the "amended and consolidated" petition that one George P. White held a certificate of membership in the Southwestern Mutual Benevolent Association on the life of his wife, who had died, for the sum of \$2,500; that the plaintiff, who was a practicing attorney, had made a contract with White, whereby it was agreed between them that the plaintiff was to collect said certificate, and for his services was to have a sum equal to 50 per cent. of the amount of said certificate; that he sued the insurance company, and obtained a judgment thereon for \$1,360 on the 26th day of July, 1886; that on the 17th day of November, 1885, the insurance company had money in its hands due and owing the said George P. White, and the plaintiff gave a notice to the company in writing that he claimed a lien upon the money in its hands due White, to the amount of \$1,250, for his fees; that he filed a copy of said notice with the clerk of the district court; that the insurance company afterwards settled with White, without his knowledge, by an assignment of the judgment to J. W. Brown, one of the defendants, who caused a satisfaction to be entered of said judgment. For a second cause of action, the plaintiff declares upon a bond given by the insurance company, under chapter 131 of the Session Laws of 1885; and, as a breach of the bond, says "that they failed, neglected, and refused to proper payment and disbursement make of the sum of twelve hundred and fifty dollars, which came into their hands, to the legitimate purposes of the association, but caused the same to be paid to George P. White and J. W. Brown." The action is against the association and the bondsmen and George P. White, but no service was made upon him. A demurrer was interposed to this petition on the ground that several causes of action were improperly joined, and that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff in error brings the case here, and asks a reversal of this ruling of the court below.

A number of errors are assigned to the rulings of the court prior to the filing of the last amended petition. It is not necessary for us to pass upon them, because the plaintiff, in filing his pleading and complying with the order of the court, waived any right to complain of the or-

der. Having filed his "consolidated and amended petition," no substantial right of his has been thereby prejudicially affected. *Lindh v. Crowley*, 26 Kan. 47.

Can the cause of action for an attorney's lien be united with an action on the bond given by the association, under chapter 131 of the Session Laws of 1885? This court has held that the bond given is an official bond, and not a corporation bond. The promise is made for the officers, and not the association itself. *Association v. Lemke*, 40 Kan. 664, 20 Pac. Rep. 512. The giving of this bond is a statutory requirement, and constitutes one separate and distinct transaction, and is in no way connected with the transaction out of which the claim of the plaintiff arose, in which he claims an attorney's lien. His contract with White, his suit against the association, and his effort to obtain a lien grew out of one transaction; but the liability on the official bond is an entirely different transaction. Each cause of action attempted to be stated in the pleading did not arise out of the same transaction or the same thing done. One was the failure of White to make proper compensation to his attorney, and the neglect of the association, after notice given, to pay the amount claimed; all growing out of the contract made with White for certain services. The other is the official liability of certain persons in giving a bond that certain officers of an insurance association will faithfully perform what will be required of them during their terms of office. It is quite apparent that each cause of action arose out of entirely different transactions. It will be seen, too, at a glance, that the several defendants are not charged in the same character. The defendants in each cause of action must be the same; that is, all the parties must be affected by each cause of action. The language of section 83 of the Code is: "But the causes so united must all belong to one of these causes, and must affect all of the parties to the action, except in actions to enforce mortgages or other liens." The first cause of action in this case does not affect the bondsmen, who are alleged to be liable in a representative character. It is one of the prerequisites to the uniting of different causes of action that all of the causes of action must affect all the parties to the action. *Pomeroy's Rem. & Rem. Rights*, § 479; *Bliss, Code Pl.* § 123; *Harsh v. Morgan*, 1 Kan. 293. We think the plaintiff failed to state facts sufficient in his first cause of action. The allegation that the association had money in its hands due White, at a certain time, was not sufficient to require the defendants to answer. It appears from the petition that one of the defendants was an insurance company, organized on the mutual plan, and the only way it had of raising funds to pay a particular certificate was to make assessments upon the members when a death occurred; and there is no allegation in the petition that the sum of money on hand was derived from an assessment made on account of the particular certificate sued upon in the original action against the association. The officers of the association could only be re-

quired to pay the particular loss out of the funds derived from the assessment made on account of it, unless it was shown that they had a surplus fund in the treasury of the association out of which it could be paid. The officers of such societies are trustees of the funds of the association, and should be held to a strict account of each particular fund. We think the demurrer was properly sustained.

It appears from the record that no service was made upon the defendant George P. White. We think he is a necessary party in that branch of this action in regard to the establishment of the plaintiff's right to an attorney's lien, and would suggest that service should be made upon him before further action is taken in the case. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 419)

CHICAGO, K. & N. RY. CO. v. CITY OF MANHATTAN *et al.*

(*Supreme Court of Kansas*. Feb. 7, 1891.)

RAILROAD AID BONDS—DEPOT FACILITIES—LIMITING ISSUE.

Section 5, c. 99, Sess. Laws 1885, (paragraph 797, Gen. St. 1889,) does not control or limit the amount of bonds to be issued under the provisions of chapter 67, Sess. Laws 1886, (paragraph 1305, Gen. St. 1889,) authorizing cities of the first and second class to issue bonds for the purpose of aiding railroad companies in securing depot grounds and terminal facilities.

(*Syllabus by the Court*.)

Original proceeding in *mandamus*.

*M. A. Low, J. D. McFarland, and John E. Hessin*, for plaintiff. *Sam Kimball*, for defendant.

HORTON, C. J. This is an original action of *mandamus* to compel the mayor and council of the city of Manhattan to issue to the Chicago, Kansas & Nebraska Railway Company \$15,000 of bonds of that city. The action is submitted upon an agreed statement of facts, which shows that on the 17th day of June, 1887, a petition was presented to the mayor and council of the said city of Manhattan, signed by more than two-fifths of the resident tax-payers of said city, praying that an election be held to vote upon the question of issuing the bonds; that the mayor and council acted upon the petition, and ordered the election; that proclamation was made; that on the 5th day of July, 1887, the election was held; that the returns of the votes cast at the election were canvassed, and by the canvass it was ascertained and declared that the proposition to vote the bonds had carried by a majority of 22 votes; that the election was held, and the bonds voted, under and pursuant to chapter 67 of the Laws of 1886, commonly known as the "Terminal Facilities Act;" that all of the provisions and conditions of the act were duly complied with; and that afterwards the plaintiff demanded of the defendants that they issue the bonds, which was refused. The assessed value of all taxable property within the city of Manhattan, as shown

by the assessment books and records in the office of the county clerk of the county of Riley, for the year 1886, is the sum of \$594,000; for the year 1887, the sum of \$607,400; for the year 1888, the sum of \$723,640. The defendants refused to issue the bonds upon the grounds—*First*, that the house and senate journals of 1886 show affirmatively that no law was at that time passed entitled "An act to authorize cities of the first and second class to issue bonds," etc., known as "House Bill No. 301;" and, *second*, that, if they issue the \$15,000 of bonds voted at the election, the bonded indebtedness of the city would then exceed 10 per cent. of the value of the taxable property within the city, and that, by virtue of section 5 of chapter 99 of the Laws of 1885, cities of the second class are prohibited from issuing bonds in excess of that amount. Paragraph 797, Gen. St. 1889. The title of the act of 1886 in the enrolled bill on file in the office of the secretary of state reads: "An act to authorize cities of the first and second class to issue bonds for the purpose of aiding railroad companies in securing and paying for lands for right of way, depot grounds, and terminal facilities." The body of the act embraces cities of the second class, as well as cities of the first class.

Upon the authority of *State v. Francis*, 26 Kan. 724, it must be held that the title of the act of 1886 was properly agreed to, and that the act was properly passed and approved. In that case it was decided, among other things, that "the enrolled statute on file in the office of the secretary of state is very strong presumptive evidence of the regularity of the passage of the statute, and of its validity; and it is conclusive evidence of such regularity and validity, unless the journals of the legislature, clearly, conclusively, and beyond all doubt, show that the act was not passed regularly or legally." The serious question in this case is whether the limitation of the bonded indebtedness of a city of the second class to 10 per cent. of the assessed value of its taxable property, as prescribed by section 5, c. 99, of the Session Laws of 1885, (paragraph 797, Gen. St. 1889,) limits the amount of the aid that may be extended to a railroad company under chapter 67, Sess. Laws 1886, (paragraph 1305, Gen. St. 1889.) In 1872 the legislature of the state passed an act to incorporate cities of the second class, and to repeal former acts. Section 40 of that act reads: "At no time shall all the bonded indebtedness of any city of the second class exceed twenty per cent. of the assessed value of all the taxable property within said city, as shown by the assessment books of the year previous to the one on which the last issue of bonds was made." In 1885 the legislature amended said section 40 so as to read: "At no time shall the bonded indebtedness of any city of the second class exceed ten per cent. of the assessed value of all the taxable property within said city, as shown by the assessment books of the year previous to the one on which the last issue of bonds was made: provided, bonds issued for improvements for which

a special tax is levied upon the property improved shall not be included in estimating said bonded indebtedness: and provided, further, that nothing in this section shall be construed to prevent the issuing of bonds to refund existing bonded indebtedness." The act of 1872 made no provision for cities of the second class to subscribe for stock to any railroad company, or to issue bonds for the purpose of aiding any railroad company. An examination of the various provisions of the act of 1872, and the amendments thereto, renders it doubtful whether that act was intended to apply to any bonds except those referred to or issued under that act. We need not decide this question at this time. Chapter 67, Sess. Laws 1886, is the latest statute, and is complete in itself. It covers the entire subject-matter therein referred to. It contains a limitation upon the amount of bonds to be issued to any railroad company. This is as follows: "That no city of the first class shall extend aid under this act to any one railroad company to a greater amount than thirty thousand dollars, and no city of the second class shall extend aid under this act to any one railroad company to a greater amount than twenty thousand dollars: provided, that aid shall not be extended to any railroad under this act which has received aid from the same city under any former act." We think, therefore, that section 5, c. 99, Sess. Laws 1885, does not control or limit the provisions of said chapter 67, Sess. Laws 1886. *State v. Studdt*, 31 Kan. 245, 1 Pac. Rep. 635; *State v. Commissioners*, 35 Kan. 150, 10 Pac. Rep. 535; *Quincy v. Jackson*, 113 U. S. 332, 5 Sup. Ct. Rep. 544; *Com. v. Commissioners*, 40 Pa. St. 348; *Amey v. Allegheny City*, 24 How. 364. Upon a careful consideration of all the statutes referred to, we are of opinion that the reasons of the defendants for the refusal to issue the bonds voted are not sufficient in law. The peremptory writ of *mandamus* will be issued as prayed for. All the justices concurring.

(46 Kan. 443)

## CROSS v. STEVENS.

(Supreme Court of Kansas. Feb. 7, 1891.)

## PRACTICE—SERVICE OF AMENDED PETITION.

1. Under section 136, a plaintiff who is compelled to file an amended petition by an order of the court, such petition being challenged by a motion directed against it, is not required to serve a copy of the amended petition on the defendant.

2. A defendant who files a motion directed against the petition of the plaintiff is bound to take notice of the ruling of the court on said motion.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HERICK, Judge.

*Hatton & Ruggles*, for plaintiff in error. *George E. McMahon*, for defendant in error.

SIMPSON, C. This action was commenced in the district court of Harper county on the 29th day of September, 1886, upon an alleged contract for services that Stevens claims that Cross employed

him to perform. On the 14th day of October Cross filed a motion to require Stevens to amend his petition, and state whether or not the contract was a written or verbal one. At the time the motion was filed, we think the record shows that the court was in session, and continued for some time, but no one called the motion. At the January term, 1887, the attorney of Stevens called the attention of the court to the motion, and it was sustained, and leave was given Stevens to amend his petition within 10 days from the 5th day of January, with leave to Cross to plead to the amended petition within 10 days. At the time this motion was called to the attention of the district court and the order made to file an amended petition, neither Cross nor his attorneys were present. Stevens caused an amended petition to be filed on the 7th day of January, 1887. The April term of the court passed by, and at the June term, Stevens produced his witness. A default was entered, and judgment rendered in favor of Stevens for \$663 and costs. Neither Cross nor his attorneys had knowledge of the rendition of such judgment until a day or two before the 7th day of July, but on that day Cross filed a motion in said action to set aside said judgment, and for leave to file an answer to the amended petition. This motion was supported by the affidavits of Cross and Hatton & Ruggles, his attorneys, showing that none of them had knowledge or notice that their motion to compel Stevens to amend his petition had been sustained, or that the plaintiff had obtained leave to amend his petition. The motion of Cross to compel an amendment to the petition of Stevens was noted on the motion docket in these words: "Oct. 14, 1886. George B. Stevens vs. George D. Cross. Motion to require plaintiff to state in his petition whether contract or agreement was in writing or verbal. HATTON & RUGGLES." On the margin of the motion docket there was an entry in the handwriting of the judge of the court, as follows: "Jan. 5, 1887. Sustained. 10 days given to file amended petition; 10 days to defendant to plead." A somewhat similar entry was made by the clerk in the "minute docket," but no journal entry was made of the ruling on the motion. Pending the motion to vacate and set aside the final judgment, Stevens filed a motion for a *nunc pro tunc* entry to be made on the journal of the court, showing that the motion of Cross to the petition had been sustained, and leave given to file an amended petition, and 10 days allowed within which to plead to the amended petition. The court sustained the motion for the *nunc pro tunc* order, and overruled the motion to vacate and set aside the judgment. Exceptions to these rulings were saved, and we are asked to review them.

The first proposition of counsel for the plaintiff in error is that a copy of the amended petition should have been served on Cross, and this was not done, and hence Cross had no notice or knowledge of the disposition of his motion. That the only records of the district court that impart notice are an appearance docket,

journal, the judgment, and execution dockets. That the entry on the motion docket, or the minute docket of the clerk, does not bind them. They also rely on section 136 of the Code, which provides that "the plaintiff may amend his petition without leave at any time before the answer is filed, without prejudice to the proceedings; but notice of such amendment shall be served on the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto, as to the original petition." This section has no application to the facts presented by this record. In this case a motion was directed against the petition that was sustained by the court, and leave given to file an amended petition within a limited time. The amendment was not a voluntary one, as is contemplated by this section of the Code; and we do not believe, under all the circumstances of this case, that the plaintiff was required to serve notice of the filing of the amended petition. The motion was filed by Cross. It primarily was the duty of his attorneys to call it up for discussion and ruling. If they neglected to do so, the attorneys of Stevens had the right to have it disposed of. They waited for more than a reasonable time before doing so, no attention being paid to it by Cross or his attorneys. They could not indefinitely prolong a case by directing a motion against the petition of the plaintiff, and then absenting themselves, and require notice to be given of its disposition. The power of the court to make its journal speak the truth, and to show the action of the court upon any question, has been so often discussed and maintained that there can no longer be any doubt, but that whenever by mistake, accident, or omission an order has not been entered on its journals, or has been improperly transcribed, or defectively stated, it can be entered or corrected either at the term or at any subsequent term, so that what actually did occur shall truthfully appear. It is clear to us that the court below did not commit error in requiring the *nunc pro tunc* order to be entered on the journal of the date when the order was made and noted on the motion docket. There was delay in urging the motion; there was negligence in not inquiring about its final disposition. That, in our judgment, excludes any equitable consideration of the motion to vacate and set aside the judgment rendered at the July term against the plaintiff in error, and we feel certain that the court below committed no error, under all the facts of this case, in overruling it. We recommend that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 405)

MEIBERGEN v. SMITH, Sheriff.

(Supreme Court of Kansas. Feb. 7, 1891.)

TRIAL—INSTRUCTIONS.

When the instructions of the trial court embody the law applicable to the facts, although stated with much verbiage and with frequent repetitions, there is no cause for reversal.

(Syllabus by Simpson, C.)



Error from district court, Russell county; S. O. HINDS, Judge.

*Robinson & Lawrence and H. L. Pestana*, for plaintiff in error. *R. G. Hays and W. G. Eastland*, for defendant in error.

SIMPSON, C. The material facts are that one M. A. Neff was a merchant possessing a stock of merchandise at Lucas, Russell county, Kan.; that on the 21st day of January, 1888, the defendant in error, as sheriff of that county, levied upon and took possession of such stock of goods by virtue of several writs of attachment against Neff. The plaintiff in error at once replevied the goods, claiming that he had purchased the same in good faith, and for a valuable consideration, before the levy of the attachments. His claim is that one J. W. Huff, president of the Bank of Downs, had a chattel mortgage for \$2,400 that was the first lien on said goods; that Huff had taken possession of the goods under and by virtue of the terms of his chattel mortgage; and that he had purchased from Huff. Neff was indebted to various non-resident wholesale merchants in a large sum. The value of the stock of merchandise when Huff took possession was about \$3,000. The case was tried to a jury, and answers to special interrogatories, and a verdict, returned as follows:

Findings of fact: "Question 1. Did the plaintiff, Meibergen, at the date of the purchase of the stock of goods in question, know of any indebtedness of M. A. Neff to either Schuster, Hingston & Co., R. L. McDonald & Co., Donald Bros., Kirkendall, Jones & Co., Julius Kuhn, or Englehart, Winning & Co.? Answer. Yes. Q. 2. If question No. 1 is answered in the affirmative, state to which of the above-named parties said Meibergen knew said M. A. Neff was indebted at the time of his said purchase. A. Julius Kuhn. Q. 3. What was the actual value of the said stock of goods in question at the time plaintiff, Meibergen, bought the same of Huff? \$3,000? A. Three thousand dollars. Q. Did Neff transfer the goods to Huff for the purpose of hindering, delaying, or defrauding his creditors? A. Yes. Q. Did Meibergen, when he purchased said goods, know of the fraudulent intent of Neff? A. Yes. Q. Were the facts and circumstances surrounding Meibergen, when he purchased said goods, sufficient to put a reasonable prudent man upon inquiry as to Neff's fraudulent intent? A. Yes. Q. Did Meibergen, at the time he purchased these goods, know whether Neff was in debt to anybody except small debts in town? A. Yes. Q. Did Meibergen, when he purchased these goods, know of sufficient facts and circumstances to put a reasonably prudent man upon inquiry as to whether Neff was in debt to any person, except small debts in town? A. Yes."

Verdict: "Hartog Meibergen, Plaintiff, vs. James E. Smith, Sheriff of Russell County, Kansas. We, the jury, duly impaneled and sworn in this cause, do upon our oaths find that at the commencement of this action the defendant was entitled to the possession of the goods in contro-

versy, and that the actual value of said goods was \$3,000; and we do further find that the value of the special ownership of the defendant therein was the sum of \$2,269 39-100. FRANK HULETT, Foreman."

A motion for a new trial was made and overruled, and the case brought here for review. Two principal questions are discussed by counsel for the plaintiff in error.

1. The first is that the special findings of the jury are not supported by the evidence. The stock of merchandise, which is the subject-matter of this litigation, had been owned by Neff for some months at Lucas, but before that time he had been located at Delhi, and prior to his residence at Delhi he had lived at Downs, where J. W. Huff and the plaintiff in error reside, and where the bank of which Huff is president is located. Huff claims that he loaned Neff money to the amount of \$2,800 between October 1, 1887, and December 8, 1887. The only written evidence about this indebtedness is a chattel mortgage given by Neff to Huff on the 15th of January, 1888. This mortgage recites that it was given to secure one note, dated October 10, 1887, for \$300; one note, dated November 2, 1887, for \$300; one note, dated November 15, 1887, for \$1,000; one note, dated November 28, 1887, for \$500; and one note, dated December 8, 1887, for \$700. Huff claims that he never loaned Neff any money until after Neff moved to Lucas; that he loaned the money on the personal note of Neff, and did not take or demand security. Huff also swore that all these loans were made to Neff at Downs, and that on each of these occasions he paid Neff in currency; did not check it out of the bank; and there is no check or record in the bank or in his private books or papers showing these payments to Neff. A witness testified that he had a talk with Huff at Downs on or about the 15th day of December, in which he asked Huff about the financial standing of Neff; was told by Huff that he knew nothing about it, as Neff did his business at the other bank, (meaning the First National Bank of Downs.) This was after Huff had loaned Neff money, as he claims. Huff and the plaintiff in error went to Lucas on the 17th day of December, stayed with Neff all day, and told the landlord of the hotel at which they stopped that they were traveling salesmen from Chicago. On January 13th, Huff went to Lucas, and, after being there a day or two, telegraphed to plaintiff in error to come. Meibergen goes to Lucas, and is informed that Huff is taking a chattel mortgage, and he wants the plaintiff in error to help invoice the goods; he being a merchant of large experience, while Huff has no knowledge of such goods. The invoice is completed, a chattel mortgage executed by Neff to Huff, that is witnessed by plaintiff in error, and then Huff takes possession, and sells at a loss of several hundred dollars to plaintiff in error, who sends for his son and puts him in charge. There is some evidence tending to show that, at the times Huff claims to have loaned Neff money at Downs, Neff was not away from home, and that, at one of the dates fixed by Huff at which he had personally delivered the money to

Neff at Downs, he (Huff) was absent attending court at Mankato. There is some direct and much circumstantial evidence tending to show that the plaintiff in error knew that Neff had many creditors, was practically insolvent, and unable to pay his debts, at the time he purchased the stock of goods from Huff. Indeed, there is abundant evidence tending to sustain the special findings of the jury, and to support the general verdict. Of course, it is largely circumstantial, as the common experience of the profession is that direct proof of commercial fraud is hardly ever produced either before court or jury. Huff's dealing with Neff is not conducted with ordinary business prudence. His loans to Neff of large sums of money, the loans following each other so speedily without security or a demand for security, are not in accordance with business methods. No explanation is offered as to how the proceeds of the loan were disposed of. The knowledge of the loans are confined to Huff alone, so far as the record discloses. He claims to have been making these loans on individual account, and carries about his person large sums of money with which to accommodate Neff whenever he calls upon him. These, probably, are some of the many considerations that controlled the verdict of the jury, and operated on the mind of the court; and they appear to us such strong and natural inferences from the special acts and general conduct of the parties that we deem these and other established facts sufficient to sustain the special findings and the general verdict.

2. The next cause for reversal urged is that the trial court erred in giving to the jury the following instruction, (No. 13.) "That if you find from the evidence that Neff sold, or pretended to sell, the goods in question to J. W. Huff on a pretended or fictitious indebtedness, and that the same was done for the purpose of hindering, delaying, or defrauding Neff's creditors, and that Meibergen knew of such fraudulent intent, and bought with such knowledge, or if you should find from the evidence and surrounding circumstances that Meibergen was in a situation that a reasonably prudent man should or would have known of such fraudulent intent, then Meibergen cannot recover in this action. Meibergen could not blind his eyes to the facts and circumstances which surrounded him, and protect himself by the claim that he had no actual or express knowledge of such fraudulent intent. If facts and circumstances came to the knowledge of Meibergen as should have excited the suspicions of and put a prudent man upon inquiry, and that such inquiry would have led to a discovery of the fraudulent intent of Neff in selling said goods to Huff, the law holds Meibergen to be possessed of all such knowledge, in respect to such transaction or fraudulent intent, as such inquiry might have developed. And, if you find from the evidence that Meibergen bought the goods at a price much less than their actual value, then it is for you to say whether or not this fact, together with the other circumstances which came to the knowledge of Meibergen as shown by

the evidence, were not sufficient to arouse the suspicions of a reasonably prudent man in his situation, and put him upon inquiry as to why Neff and Huff were selling said goods at a sacrifice." While this instruction is somewhat verbose, and frequent repetitions of the same principle are indulged in, still, stripped of its verbiage, it contains the essence of the law applicable to the state of facts presented by the record. We cannot reverse this case for the errors suggested and urged. We are disposed to think that justice has been done, and that there has been no such serious departure from established rules as compels a new trial. We recommend that the judgment be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 484)

DOUDNA *et al.* v. HARLAN.

(Supreme Court of Kansas. Feb. 7 1891.)

TAX-TITLE—ADVERSE POSSESSION—TAX-SALE—REDEMPTION BY MINORS.

1. A tax-deed valid upon its face starts the statute of limitations provided in paragraph 6995 of the General Statutes of 1889 to running when recorded in the proper county, and, after said statute has fully run in its favor, such deed cannot be overthrown by an action begun thereafter, except by showing that the land was not subject to taxation when listed therefor, or that the taxes have been paid, or the land redeemed, as provided by law.

2. When lands are advertised to be sold for taxes, and at the time of the sale no one bids the amount of the taxes and costs thereon, and the land is bid off by the county treasurer for the county, *held*, that such "bidding off" constitutes a sale of said land under our statute relating to tax-sales.

3. Paragraph 6977, Gen. St. 1889, provides "that lands of minors, or any interest they may have in any land sold for taxes, may be redeemed at any time before such minor becomes of age, and during one year thereafter." *Held*, that the right of redemption conferred by this paragraph applies only to lands that belong to minors and lands in which minors have an interest at the time they are sold for taxes.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Labette county; GEORGE CHANDLER, Judge.

F. M. Smith and J. H. Crichton, for plaintiff in error. Case & Glasse, for defendant in error.

STRANG, C. Action of ejectment for the possession of lots 9, 10, 11, 12, and 13, in block 38, in the city of Chetopa, Labette county, Kan. Defendant admits possession in herself, and alleges that she is the owner of the lots in dispute by virtue of a tax-deed and other conveyances. The case was submitted to the court below without a jury upon the following agreed statement of facts, November 2, 1887: "(1) Before the sale in September, 1875, hereinafter mentioned, the title of the property in controversy in this suit was perfect in Willoughby Doudna, the husband of the plaintiff, Ruth A. Doudna, and the father of the other plaintiffs. (2) Said property was sold for taxes in September, 1875, for the taxes thereon for the year 1874, costs,

penalties, and expenses, and was, by the county treasurer of Labette county, at such sale bid off to and for said county. (3) Said Willoughby Doudna died intestate on November 4, 1878, leaving a widow, said Ruth A. Doudna, and four children, who were then minors; and the younger died in March, 1886. The other three children are the plaintiff above named, Mrs. Mattie Bennett, now 23 years of age; Hosea W. Doudna, now 16 years old; and Oliver R. Doudna, now 14 years old. (4) In the month of July, 1880, Lee Clark purchased and took an assignment of the tax-sale certificate of said property on said tax-sale of September, 1875, and in said month of July procured tax-deeds therefor, the records of which, including date of recording, may be used in evidence instead of originals, as hereinafter stipulated; and thereafter he and his wife sold and conveyed said property to one J. L. Van Note, and Van Note and his wife thereafter sold and conveyed said property to said defendant, Emma J. Harlan. The records of these conveyances, including date of recording, may be used in evidence instead of originals. (5) Defendant, Emma J. Harlan, since the purchase of said property improved same to an extent left for further inquiry and determination, if necessary to an adjustment of the rights of the parties to this suit. She is now in the possession of the property, and has been in the possession thereof since this suit. (6) In October, 1886, said plaintiff paid to the county treasurer of said county, for the purpose of redeeming said property, except lot 13, from tax-sale of September, 1875, the sum of \$114.60, and received from the treasurer of said county the redemption certificate, which is to be introduced in evidence, to speak and show for itself, and for all purposes for which it is competent. The payment of said money was for and on behalf of said minors, and the money is still in the hands of the treasurer of said county. (7) Said property was no part of the homestead of said Willoughby Doudna nor of his family. That Exhibit A, hereto attached, contains the levies of the taxes for general county purposes and poor and incidental funds for the year therein described and set forth. (8) Said lots 9, 10, 11, 12, and 13, and lots 14, 15, and 16, comprise the north-west quarter of said block 36; and in the summer and fall of 1881 said Van Note built a house on lots 15 and 16, and a barn on 12, 13, and 14; and in February, 1882, completed the building of an iron fence in front of all said lots, and part way on each line of said lot 9, and part way on west line of said lot 16, and a wooden fence around balance of said quarter block. This house was burned down in February, 1884." It was likewise admitted on the trial of the cause that more than five years had elapsed from the time of the recording of the tax-deeds under which the defendant claims and the commencement of this action, and that at the time of the sale of the property therein described the plaintiffs had no interest therein other than that Ruth A. Doudna was the wife of Willoughby Doudna, and the other plaintiffs were his children, he then being alive.

## EXHIBIT A.

COUNTY TAX LEVIES IN MILLS.				
C.	Years.	General County		Poor & Inc.
		Fund.	Fund.	
446-	1874	10 Mills	2 Mills	
D. 4-	1875	8 "	4 "	
D. 210	1876	8-5 "	3 "	
D. 376	1877	8-5 "	2 "	
D. 560	1878	10 "	4 "	
F. 100	1879	10 "	2 "	

That the assessed valuation of both personal and real property in Labette county, Kan., from 1874 to 1880, did not exceed \$3,000,000, and that the levies made by the county commissioners, as above stated and set forth, were not submitted to a vote of the electors of said county of Labette and state of Kansas before said levies were made, or at any time.

"No. 1179-1180-1181-1182. \$113.75. County Treasurer's Office. State of Kansas, Labette county—ss.: I, C. W. Littleton, treasurer of Labette county, Kansas, do hereby certify that Mrs. Ruth Ann Doudna, for Hosea Doudna and Oliver Doudna, 'minors,' has this day redeemed the following real estate from the sale of 1875, to-wit: Chetopa, lots 9, 10, 11, & 12, block 36. The above-described real estate was sold on the 7th day of September, A. D. 1875, to Labette county, and assigned July, 1880, to Lee Clark, for the sum of three and 4-100 dollars, being the delinquent tax for the year 1874, by the payment to the said treasurer of the following amounts:

Paid by purchaser at sale.....	\$ 3 04
The following tax indorsed on sale:	
1875-6-7-8-9 amt. ....	5 56
Tax paid by purchaser 1880.....	1 12
" " " 1881.....	1 20
" " " 1882.....	2 11
" " " 1883.....	2 13
" " " 1884.....	9 93
" " " 1885.....	10 04
Interest.....	68 88
Costs and certificate of sale.....	9 80

Total..... \$113 75  
Deeded July 13th, 1880.

"Witness my hand this 18th day of November, A. D. 1888.

"C. W. LITTLETON, Treasurer.

"By H. T. Atwood, Deputy.

"County fees: Treasurer's, .40; county clerk, .25."

The court, upon said statement of facts, found for the defendant, and adjudged that she recover her costs. The plaintiffs objected to the findings of the court, and moved for a new trial, which motion was overruled.

The first contention of the plaintiff in error is that the tax-deed relied upon by the defendants in error is void, and therefore never operative as a transfer of title. Coupled with this is the further contention that, said deed being void, it never did and could not set the five-years statute of limitations to running, and therefore the trial court should have set aside the tax-deed in controversy, and found for the plaintiff in error. In support of this position counsel cite the case of *Richards v. Thompson*, 43 Kan. 214, 23 Pac. Rep. 106. An examination of that case shows that the tax-deed involved therein was void on its face. It is well settled that a deed void on its face will not set the stat-

ute to running. The defect in the deed in that case is patent. The deed itself, and the record thereof, carry with them the evidence of their invalidity, of which the grantee and those who claim under him must take notice; and the five-years statute of limitations prescribed in paragraph 6995 of the General Statutes of 1889 will not run in favor of such a deed. But the defect which renders a deed invalid may not appear upon its face. It may be ascertainable only upon an examination of the proceedings antecedent to the issuance of the deed or the sale. Such a deed carries with it a presumption in favor of the regularity of the conditions precedent thereto, and in such a case our understanding is that it is sufficient to set the statute to running in its favor. In this case it is not insisted that the land was not subject to taxation at the time it was listed. It is admitted the tax was not paid before the sale, and that the land was not redeemed according to law, before the deed was issued. But it is claimed that, as the tax upon which it was sold was in excess of the amount that the commissioners were by law allowed to levy, they had no power to levy the tax upon which the sale was had, and that a deed following a sale on a tax that the commissioners were without jurisdiction to levy could not start the statute of limitations to running in its favor. If there were no question of the statute of limitations involved in the case the showing might be sufficient to avoid the deed. But this court has settled the question, as presented here, against the plaintiff in error, in the case of *Edwards v. Sims*, 40 Kan. 235, 19 Pac. Rep. 710. In that case Mr. Commissioner SIMPSON, writing the opinion for the court, says: "We have noticed all the objections urged against the tax-deed, and, it not being pretended that the taxes were paid, the land redeemed, or that it was not subject to taxation at the time it was listed, it becomes to us a matter of positive duty, in obedience to the law-making power of the state, to apply the limitation contained in section 141 of the tax law to the facts as shown by the record; and the result is that none of the matters alleged against the deed can be considered by the court, because the deed had been recorded for more than five years before the commencement of this action against the assigns of the tax purchaser for the recovery of the land, and at that time the bar of the statute is complete." In *Jordan v. Kyle*, 27 Kan. 190, it is held that, "where the land is taxable, and the taxes have not been paid, or the land redeemed as provided by law, and the tax-deed is executed by the officer authorized by law, is regular on its face, contains a perfect description of the land conveyed, and has been of record more than five years before December 3, 1879, the date of the commencement of the suit against the tax purchaser, the bar of the statute of limitations fully attached to said tax-deed before the action was brought." In *Maxson v. Huston*, 22 Kan. 643, the court held that "a tax-deed regular on its face, containing a perfect description of the land conveyed, and of rec-

ord the time prescribed by the statute of limitations, is protected by said statute from impeachment by evidence that the description of the land on the assessment roll and in the sale certificate is fatally defective." In this case, Justice BREWER, in promulgating the opinion of the court, very pertinently says: "If the proceedings must be so regular as to make a valid sale before the statute of limitations will start to run upon a tax-deed good upon its face, then the statute has but little virtue in these cases as a statute of repose; for upon a valid sale a valid deed can be compelled, and the statute will rarely be invoked except in cases where it is not needed." See, also, as bearing upon this question: *Barr v. Randall*, 35 Kan. 126, 10 Pac. Rep. 515; *Mack v. Price*, 35 Kan. 134, 10 Pac. Rep. 521; *Sanger v. Rice*, 43 Kan. 580, 23 Pac. Rep. 633. We are referred by counsel for plaintiff to the case of *Kemper v. McClelland*, 19 Ohio, 327. In that case, however, there was no question of the statute of limitations, and we have no doubt that the court properly avoided the tax-deed, because of the excess of tax upon which the sale was had. If, however, the deed had been valid upon its face, and the five-years statute had run in that case, as in this, the question would have been analogous to the one in the case before us, and the decision would have been different. The tax-deed under which the defendant claims being valid on its face, and having been of record more than five years before the commencement of this action, and it being admitted that the land in controversy was subject to taxation when listed, that the taxes were not paid, and the land not having been redeemed as provided by law, the action to avoid the deed cannot be maintained.

The plaintiff next complains that "the court erred in finding that the bidding off of the lots in controversy by Labette county was a sale." The contention of the plaintiff is that, when the county bids off property at a tax-sale, it does not become a purchaser, but simply bids off property, and holds it until someone pays the taxes and penalties thereon, and takes an assignment of the bid from the county; and that in such case there is no sale of the property until it is assigned by the county to the party paying the county the taxes, penalties, and costs thereon. We do not think this position is tenable. There is but one sale mentioned in the statute, and that very clearly refers to the bidding off of the property at the time it is advertised to be sold for the taxes. Nor do we think it any less a sale, because it is bid off by the treasurer for the county, than when bid off by some person for himself or some other individual. The "bidding off" of the property by the treasurer in the name of the county and for the county has been constantly treated as a sale by the bench and bar of the state. If the county is not a purchaser when property is so bid off, who is the owner in the mean time? The former owner has lost his title, except so far as he has the right of redemption. No third party has obtained any interest therein as yet, and there must become per-

son, natural or artificial, in whom the ownership of the property rests. Besides, if the county has obtained no interest in the property bid off, how can it transfer by assignment any interest therein? We think the county becomes a purchaser at the tax-sale, when, in the absence of other bids equal in amount to the taxes, penalties, and costs against the property, the treasurer bids the property off in the name of the county; and that the redemption period commences to run from the date thereof. *Stevens v. Casady*, (Iowa,) 12 N. W. Rep. 803.

The third complaint is that the court erred in not permitting the minor plaintiffs to redeem. Paragraph 6977, Gen. St. 1889, so far as it relates to this question, reads as follows: "The lands of minors, or any interest they may have in any lands sold for taxes, may be redeemed at any time before such minor becomes of age, and during one year thereafter." It will be seen that the lands that may be redeemed by minors are lands of said minors sold for taxes, or lands in which minors have some interest when they are sold for taxes. The lots in controversy in this case were not the lands of the minor plaintiffs herein when they were sold, but were the lands of their ancestor, Willoughby Doudna. Nor did the minor plaintiffs in this case have any interest in the lands in controversy at the time they were sold for taxes. We do not think it will do to say that the lands sold for taxes in which minors may subsequently obtain an interest may be redeemed by said minors at any time during their minority and during one year thereafter. If that were the law, then, by a series of transfers, the right of redemption might be prolonged indefinitely. The ancestor, before the right of redemption expired, could transfer the land to his minor child, who, before his right of redemption expired, could transfer to a second minor, and so on without end. The Iowa supreme court has settled the question, so far as that state is concerned, and we believe the construction placed upon the Iowa statute by the court of that state in *Stevens v. Casady*, supra, was in accord with the meaning of both the statute of that state and of our own. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 334)

SHAW *et al.* v. SMITH *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

BREACH OF WARRANTY—DAMAGES.

1. Shaw & Co., dealers in flaxseed, and Smith, who desired to raise a crop of flax, entered into a contract that Shaw & Co. should furnish and deliver to Smith flaxseed to sow and to raise a crop from it, which crop Shaw & Co. were to purchase from Smith, upon certain terms and conditions stated in the contract. The flaxseed was not present at the time the contract was made. Afterwards, Shaw & Co. furnished and delivered to Smith the flaxseed, which appeared to be good, and which the parties believed to be good, but which in fact was worthless. Smith prepared his ground and sowed the flax-

seed, but it did not germinate, and he lost all his time and labor in procuring the seed, and in sowing it, and in preparing the ground for it, and also lost the use of his ground. *Held*, under such circumstances, that a warranty may be implied upon the part of Shaw & Co. that the flaxseed should be sufficient for the purpose of sowing it and raising a crop from it.

2. And also under the foregoing contract, and the circumstances of the case, *held*, that Shaw & Co. cannot recover on the contract for the agreed price of the flaxseed, and Smith may recover for all losses necessarily sustained by him by reason of the worthlessness of such seed.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. TROUP, Judge.

*Samuel Dalton*, for plaintiffs in error. *S. E. Fink*, for defendants in error.

VALENTINE, J. This was an action brought before a justice of the peace of Cowley county on January 31, 1887, by G. B. Shaw & Co. against Yates Smith and James W. McClellen, for the recovery of \$12, and interest, upon the following instrument in writing, to-wit: "Cambridge, April 30, 1886. On or before the first day of October, 1886, we promise to pay to the order of G. B. Shaw & Co., at their office in Cambridge, twelve dollars, for value received, with interest after maturity, at the rate of ten per cent. per annum until paid. This note is given in part consideration of the sale to Y. Smith of eight bushels flaxseed, by said G. B. Shaw & Co.; and, as a further consideration thereof, we agree to plant 14 acres with said seed, to cultivate, harvest, and clean the same in proper and careful manner, and deliver to G. B. Shaw & Co. at Cambridge, Kansas, on or before the 1st day of December, 1886, the whole crop raised therefrom, at a price mentioned below, per bushel of 56 lbs., for pure and prime flaxseed; flaxseed not pure and prime to be inspected and graded subject to the rules of the St. Louis Merchants' Exchange. And should we sell or trade, or attempt to offer to sell or trade, such crop to any other person or persons than said G. B. Shaw & Co., or order, then the note hereto attached shall immediately become due and payable; and the said G. B. Shaw & Co., or their assigns, are hereby authorized to enter any building or premises without any legal process whatever, and seize and remove such crop whatsoever (and in whosesoever possession) the same may be found, and to pay me the balance on demand, after the amount due upon said note has been deducted, together with all costs and expense incurred, where seizure is necessary; price to be paid per bushel, on basis of pure, to be 35 cents less than St. Louis market price on day of delivery. YATES SMITH. JAMES W. MCCLELLEN." Afterwards the case was taken on appeal to the district court, where the case was tried before the court and a jury, with the result hereafter stated. The plaintiffs' bill of particulars simply set up the foregoing instrument, and asked judgment thereon for \$12, and interest at the rate of 10 per cent. per annum from October 1, 1886. The defendants' amended answer thereto and cross-petition alleged that the flaxseed for which the instrument sued on was given was

purchased by Smith, for the purpose of sowing it and raising a crop; that it was warranted by the plaintiffs to be good, but that it was worthless; that he (Smith) sowed it, but that it did not germinate; and that he lost his time, labor, and use of his ground; and that he was damaged thereby in the sum of \$150. And he asked judgment for that amount, and costs of suit. The trial resulted in a verdict in favor of the defendants and against the plaintiffs for the sum of \$90, and judgment was rendered accordingly; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

It appears from the evidence that the facts of the case are substantially as follows: The plaintiffs, G. B. Shaw & Co., were dealers in flaxseed at Cambridge, in said Cowley county. Smith went to their place of business about April 20, 1886, and found Joseph Fraley, their agent, in charge. Shaw & Co. did not have any flaxseed on hand, but they were about to order some. Smith told Fraley to order eight bushels for him, for the purpose of sowing it and raising a crop. Fraley told Smith that they would furnish the flaxseed upon the conditions substantially as set forth in the foregoing instrument. Afterwards the flaxseed arrived, and Fraley gave notice to Smith. Smith then, on April 30, 1886, went to Cambridge and received the seed, about 8 bushels in amount, inclosed in sacks, from Fraley, and took it home and sowed it upon about 12 acres of ground. The seed appeared to be good, and Fraley and Smith believed it to be good, but in fact it was not good, and it did not germinate; and Smith lost all his time and labor in procuring it, and in preparing the ground for sowing it, and in sowing it, and he got no crop, and lost the use of his ground. And upon these facts the jury found in favor of the defendants and against the plaintiffs, and assessed the defendants' damages at \$90, as aforesaid. The only questions now involved in the case are as follows: (1) Under the contract between the parties, and under the circumstances of the case, was there any such implied warranty on the part of Shaw & Co., respecting the sufficiency of the flaxseed for the purposes of sowing it and raising a crop, that the plaintiffs may be defeated in their action on the aforesaid written instrument? (2) If so, then under such contract and warranty and circumstances, may the defendants, Smith and McClellan, or rather Smith, recover damages for Smith's losses, necessarily occasioned by reason of the worthlessness of the flaxseed? (3) And, if so, then what is the measure of Smith's damages? The maxim of the common law, *chveat emptor*, is the general rule applicable to purchasers and sales of personal property so far as the quality of the property is concerned; and, under such maxim, the buyer, in the absence of fraud, purchases at his own risk, unless the seller gives him an express warranty, or unless, from the circumstances of the sale, a warranty may be implied. In the present case no express warranty was given, and the question then arises, was there any implied warranty? At the time when the

contract for the purchase and sale of the flaxseed was entered into, such seed was not present so that it could be inspected by the purchaser, and, when it arrived and was delivered to him, the defect in the seed was not apparent, and was probably not discoverable by any ordinary means of inspection, and it was not discovered until after it was sowed, and when it failed to germinate. When the original contract for the purchase and sale of the flaxseed was made, the flaxseed was purchased and sold for the particular purpose, known to both the buyer and the seller, of sowing it in a field, and of raising a crop from it; and therefore this purpose was a part of the contract, and demanded that the seed should be sufficient for such purpose. It, in effect, constituted a warranty on the part of the seller that the seed should be the kind of seed had in contemplation by both the parties when the contract was made. The purchaser had to rely upon the seller's furnishing to him the kind of seed agreed upon, and the seller, in effect, agreed that the seed furnished should be the kind of seed agreed upon. The entire contract when made was executory, and it was to be executed and performed afterwards, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about 10 days after the contract was made, and of course the seed was to be a kind of seed that would grow. The purchaser was afterwards to sow it and to raise a crop, and afterwards the purchaser was to sell, and the seller was to buy, the crop, upon certain terms and conditions expressed in the contract. We think there was an implied warranty on the part of the seller that the seed should be sufficient for the purpose for which it was bought and sold. *Wolcott v. Mount*, 36 N. J. Law, 262, 38 N. J. Law, 496; *Van Wyck v. Allen*, 69 N. Y. 61; *White v. Miller*, 7 Hun, 427, 71 N. Y. 118; *Whitaker v. McCormick*, 6 Mo. App. 114. We also think that the purchaser may recover damages from the seller for all the losses necessarily sustained by the purchaser, by reason of the worthlessness of the flaxseed furnished by the seller. See the authorities above cited, and also the following: *Passenger v. Thorburn*, 34 N. Y. 634; *Flick v. Wetherbee*, 20 Wis. 392; *Ferris v. Comstock*, 33 Conn. 513; *Randall v. Raper*, El. & El. 84. And it is not claimed that the purchaser in the present case recovered for more than the foregoing losses. The claim is that the purchaser had no right to recover at all, and that the seller had the right to recover on the instrument sued on. No other questions are presented. We think no material error was committed in the case, and the judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 339)

SHAW et al. v. JONES.

(Supreme Court of Kansas. Feb. 7, 1891.)

Error from district court, Cowley county; M. G. TROUP, Judge.

Samuel Dalton, for plaintiffs in error. S. E. Fink, for defendant in error.

**PER CURIAM.** It is understood that the same questions of law and fact are involved in this case that were involved in the case of *Shaw v. Smith*, ante, 886, (just decided,) and the judgment of the court below in this case will be affirmed upon the authority of that case.

(45 Kan. 346)

**SEDGWICK CITY BANK V. WICHITA MERCANTILE CO.**

(*Supreme Court of Kansas.* Feb. 7, 1891.)

**FRAUDULENT CONVEYANCES—CHATTEL MORTGAGOR IN POSSESSION.**

Where a chattel mortgage is given upon a stock of groceries, safe, fixtures, pony, and delivery wagon, which contains a stipulation that the property mortgaged shall remain in the possession of the mortgagor until default in the payment of the debt thereby secured, and, by agreement outside of the mortgage, the mortgagor is permitted to dispose of the stock in the usual course of business, and pay out of the proceeds of the sales, monthly, or oftener if the business would permit, certain sums upon the debt secured, such mortgage is not thereby rendered void as against creditors, but should be upheld if entered into in good faith.

(*Syllabus by Green, C.*)

Commissioners' decision. Error from district court, Sedgwick county; *C. REEN, Judge.*

*Parsons & O'Bryan*, for plaintiff in error.  
*Adams & Adams*, for defendant in error.

**GREEN, C.** On the 22d day of August, 1887, this action was commenced in the district court of Sedgwick county, by the Wichita Mercantile Company against J. H. Mann on an open account to recover the sum of \$812.71. An order of attachment was issued and levied upon a stock of groceries, fixtures, delivery wagon, safe, pony, etc., belonging to Mann. A receiver was appointed to take charge of and dispose of the attached property. On the 19th of September, 1888, the plaintiff in error asked to be made a party to the suit, and be permitted to file an interplea, claiming to have a valid and subsisting lien on the property attached by virtue of a chattel mortgage executed by J. H. Mann to L. A. Anderson, and by him assigned to the plaintiff in error. Leave was granted to answer, and the bank set up its claim to the property attached under this mortgage, executed by Mann to Anderson on the 7th day of May, 1887, and filed the same day in the office of the register of deeds of Sedgwick county. The property was described in the mortgage as follows: "All of the stock of groceries, queen's-ware, flour, canned goods, meats, lard, syrup, vinegar, tobacco, cigars, etc.; one Mosler, Bauham & Co. iron safe; one Ludlow delivery wagon; one Texas pony, buckskin color; four show-cases,—one six-foot oval front, two three-foot oval front, one three-foot square front; one Enterprise coffee-mill; one platform scale, (Fairbanks;) three counter scales; all the fixtures belonging to the stock of groceries bought this day from L. A. Anderson; also all goods added to said stock from this date, situated in a frame building on East Oak street, number 728, owned by S. J. Cus-

tater." The consideration expressed in the mortgage was \$407. Fifty dollars had been paid upon said debt, leaving a balance due of \$373.28. The note was made payable at No. 728 Oak street, in Wichita. The Wichita Mercantile Company denied that the bank had any claims to the property; that the mortgage in question was void as against the mercantile company, and was made for the purpose of hindering, delaying, and defrauding the creditors of Mann. The case, under the issues joined, was submitted to the court, and a finding was made that the mortgage was void, and judgment was rendered for the mercantile company. The Sedgwick City Bank brings the case here for review.

It seems from the evidence the mortgage was given for the balance due Anderson for the purchase price of the stock of goods and fixtures, and was for a valid consideration. The only theory upon which it could be held void was based on the fact that Mann was permitted to go on and sell the stock of goods at retail. The mortgage did not contain any provision for an accounting for the proceeds of the sale, and the claim is that there was an agreement outside of the mortgage permitting the mortgagor to sell in the ordinary course of business, and account for the proceeds of the sales from time to time. The evidence clearly indicates that the mortgage was given in good faith; and it appears from the evidence of the mortgagee that the mortgagor was to pay on the debt, out of the sale of the grocery stock, all the money he could spare out of the business, once a month or oftener. This, we think, brings the case within the rule laid down in the case of *Frankhouser v. Ellett*, 22 Kan. 128: "Where a mortgage is given on a stock of goods, with a stipulation for possession thereof by the mortgagor, and by agreement outside the mortgage the mortgagor is permitted to continue disposing of the goods in the ordinary course of business, and to use a portion of the proceeds thereof in the support of his family, paying the remainder over in discharge of the mortgage debt, the whole transaction is not thereby, as matter of law, rendered fraudulent and void as against creditors and subsequent purchasers, but will be upheld or condemned, according as the arrangement is entered into and carried out in good faith or not." See, also, *Cameron v. Marvin*, 26 Kan. 612; *Muse v. Lehman*, 30 Kan. 514, 1 Pac. Rep. 804; *Howard v. Rohlfing*, 36 Kan. 357, 13 Pac. Rep. 566; *Whitson v. Griffiths*, 39 Kan. 211, 17 Pac. Rep. 801. The mortgage described certain property outside of the stock of goods, consisting of a pony, wagon, scales, counters, etc., and we see no reason why the mortgage should not have been upheld as to the specific personal property described. We do not think the mortgage was void because it contained a clause which purported to extend the lien of the mortgage over subsequently acquired property. Having been given in good faith, it would cover the property actually in existence at the time the mortgage was executed; and, as to such property, we think the mortgage should have been upheld. *Yates v. Olm-*



sted, 56 N. Y. 362. We recommend a reversal of the judgment.

BY THE COURT. It is so ordered; all the justices concurring.

(45 Kan. 381)

CITY OF KANSAS CITY v. BRADBURY.

(Supreme Court of Kansas. Feb. 7, 1891.)

DEFECTIVE SIDEWALKS—NOTICE OF DEFECT—INSTRUCTIONS—SPECIAL FINDINGS.

1. Where a city is sued for injuries resulting from a defect in a sidewalk, it must appear either that the city had notice of the defect or that it was a patent defect and had continued so long that notice might reasonably be inferred, or that the defect was one which, with reasonable and proper care, should have been ascertained and remedied. *Jansen v. Atchison*, 16 Kan. 358, and cases there cited.

2. An incorporated city, which negligently leaves one of its sidewalks out of repair, by reason whereof a person, without fault or negligence on his part, is injured, is liable to such party in damages for the injury so sustained. *Ft. Scott v. Brothers*, 20 Kan. 455; *Gould v. Topeka*, 32 Kan. 485, 4 Pac. Rep. 823.

3. If a city carelessly and negligently permits defects to exist in one of its sidewalks, no matter how caused, after notice thereof to the city, or for so long a time that notice is presumable, then it becomes liable, if a person is injured thereby without fault or negligence on his part. *City of Atchison v. King*, 9 Kan. 550.

4. If the instructions of the court cover the entire ground, and inform the jury upon all matters necessary for their determination, and inform them correctly, this is sufficient.

5. Either party has a right to a written finding of the jury upon any material question of fact involved in the case, but where a verdict is returned for the plaintiff in an action for personal injuries, and the trial court refuses to submit to the jury, at the instance of the defendant, "what sum the plaintiff is entitled to recover, on account of money paid out for medicine and the services of a physician," *held*, such refusal is not a sufficient ground for the reversal of the judgment, if the evidence of the plaintiff as to the expenses for medicine and medical attendance is uncontradicted, and therefore undisputed.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. MILLER, Judge.

On the 27th day of January, 1887, Mary J. Bradbury commenced her action against the city of Kansas City, to recover \$10,000 for personal injuries alleged to have been received by her on the 29th day of August, 1886, on Seventh street, in that city, by reason of a loose board or plank in the sidewalk upon that street flying up, tripping, and throwing her down. Trial had at the September term of the court for 1887, before the court, with a jury. The court instructed the jury as follows: "The plaintiff in her petition alleges, in substance, that the defendant is a municipal corporation, and that it was the duty of defendant to keep the streets in repair and safe, one of its streets being, as alleged, called 'Seventh Street,' in the original city of Armourdale, now a part of defendant city, Kansas City, Kan.; that the said defendant, the city, failed to construct a sidewalk in said street of sufficient scantling and boards, and that the work was unskillfully performed, and that both in material and workmanship it was insufficient, unsafe, and dangerous for public travel, and that said defendant

knowingly permitted said sidewalk to be and remain out of repair in allowing boards on said sidewalk to become loose and unfastened; and further alleges that on or about the 29th day of August, 1886, while plaintiff was walking on said sidewalk, in the exercise of ordinary care and caution, unfastened boards in said sidewalk, tipped up under her feet, causing her to fall with violence upon said sidewalk, by reason of which she received the injuries complained of, to the damage of plaintiff, as she alleges, in the sum of ten thousand dollars. The defendant, answering the petition, denies each and every allegation thereof, except that defendant is a municipal corporation as alleged, which defendant admits. And the defendant for a further answer says that the injuries of plaintiff, if any, she received by the want of care and negligence of plaintiff directly contributing thereto. *Second*. The burden of proof is upon the plaintiff, and she must make out her case by a preponderance of the evidence. By 'preponderance of evidence' is not meant the mere greater number of witnesses upon the one side or the other, but that evidence which is most convincing and satisfactory to the minds of the jurors. In determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest, if any, or want of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence and other facts and circumstances appearing upon the trial; and from all the circumstances determine the weight or preponderance of the evidence. The jury are the sole judges of the weight of the evidence and the credibility of the witnesses. *Third*. If the jury believe from the evidence that any witness has willfully and corruptly testified falsely concerning any material matter in dispute, they may disregard the whole or any portion of the evidence of such witness. There is no inflexible rule interposed between the witnesses and the jury, requiring the jury to accept or reject all the testimony of any witness. *Fourth*. Before the plaintiff can recover a judgment in this action, it must appear by a preponderance of the evidence (1) that the plaintiff, Mary J. Bradbury, was injured as the result of a defect in the sidewalk on said Seventh street, in the defendant city, as set out in her petition; (2) that said city or its officers were negligent in permitting said sidewalk to remain in said unsafe condition at the time said plaintiff was injured. To charge the defendant with negligence, it must appear that the proper officers of said city had notice of the unsafe condition of said sidewalk in time to have prevented the injury to said plaintiff by falling on said defective sidewalk, (if you find she was so injured,) or that, by the exercise of reasonable and ordinary care and diligence, they could have known of the unsafe condition of the sidewalk. *Fifth*. You are instructed that it is not

necessary that the defendant city should have had actual notice of the unsafe and dangerous condition of the sidewalk, if you find that the sidewalk was unsafe. If you find that said condition of said sidewalk existed a sufficient length of time before the injury to plaintiff to have enabled the defendant city or its officers and agents, by the exercise of ordinary care and diligence, to have known of the existence thereof, and remedied the same, then the law implies a notice to the defendant city of the existence of the condition. *Sixth.* The city is liable not only for injuries occasioned by negligently constructing defective sidewalks on its streets, or by causing such defects in them after they are constructed, but also for negligently permitting them to remain in a dangerous or unsafe condition, no matter how such condition was caused. Any person traveling upon a street has a right to use any portion of the street or sidewalk for that purpose, not already otherwise in use, and a person traveling upon a street or sidewalk of a city has a right to assume that such street or sidewalk is in a safe condition, and to act upon that assumption, relying upon the belief that the city has performed its duty and placed and maintained such street or sidewalk in a safe condition. If the jury find from the evidence that said plaintiff is entitled to recover herein for the injuries complained of in her said petition, she will be entitled to a verdict for an amount which shall be full compensatory damages for the loss of time from the performance of her usual and ordinary labors and duties, the expenses necessarily incurred for medicines and medical attendance, and for the physical pain which has resulted from the injury up to the time of the commencement of the action; and, if you find from the evidence that said plaintiff is still disabled from such injury, such further damages as appear from the evidence to be the natural and probable result of such injuries, taking into consideration the permanency or probable duration of the same, not exceeding in all the sum of ten thousand dollars. *Seventh.* In order for the plaintiff to recover in this action, she must satisfy the jury from the evidence that she received her injuries, (if you find she received any injuries) from defects in the sidewalk of the defendant city, at the place and of the character and in the manner set out in her petition, and that such defects were of a character that they could be discovered by the exercise of ordinary care and diligence. *Eighth.* By reasonable and ordinary care and diligence is meant that degree of care and prudence which an ordinarily careful and prudent man would be expected to use under similar circumstances."

At the instance of the defendant, the court instructed the jury as follows: "*First.* Municipal corporations are bound to keep their streets and sidewalks in a reasonably safe and suitable condition of repair only for public travel by night and by day. Accidents may happen notwithstanding the utmost care and diligence, and the corporation does not warrant against accidents. The amount of care and diligence to be reason-

able may vary with the circumstances of each case, but in all cases they must be relative to the risk to be reasonable care and diligence. When this is done, the corporation has performed its duty to the public. *Second.* The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care and diligence in traveling along the sidewalk to avoid accidents, and this care and diligence increases or diminishes with the circumstances of the case. For instance, if the night was dark when traveling on the sidewalk, it would be a duty to exercise more care and caution than in open day; and, if you find from the evidence that plaintiff did not exercise care and caution commensurate with the surrounding circumstances, and such want of care materially contributed to the injury, then the plaintiff cannot recover. *Third.* In the absence of express notice to the defendant city or its officers of the defects which caused the injury sustained by plaintiff, the plaintiff cannot recover, unless it is shown from the evidence that the time that the sidewalk was out of repair (if you find from the evidence that it was out of repair) was so long that the city defendant ought to have known of it and repaired it before the accident, or that the officers of the city were guilty of negligence in not knowing of it and repairing it before the accident. *Fourth.* Evidence of the existence of loose boards other than the one upon which the plaintiff tripped is not competent for your consideration for any purpose except as it may tend to show the want of the exercise of due care on the part of the defendant, which would have led to the discovery on its part of the fact that the board upon which plaintiff tripped was loose at the time of the injury."

The jury returned a verdict for the plaintiff, and assessed her damages at \$2,300. They also made and returned the following special findings of fact: "(1) Was there any defect in the sidewalk on Seventh street where it is claimed the plaintiff sustained the injury? If so, what was the defect? Make full specifications. Answer. Yes; a loose plank. (2) If you find there was any defect in the sidewalk where plaintiff was injured, how long was such defect in the walk before the happening of the accident to the plaintiff? A. About six months. (3) When the sidewalk was constructed, was it constructed with reasonably good and sufficient material in all respects, and with reasonable good and sufficient workmanship? A. No. (4) Did the city, defendant, have any notice of the defect in the sidewalk, if you find there was any defect? If so, what officer of said city defendant had such notice? A. There was no notice, except implied notice. (5) How did the accident happen to the plaintiff? From what cause did plaintiff fall on the sidewalk, if you find she did so fall upon it? A. By unfastened board tipping up. (6) Was the cause of the fall of plaintiff on the sidewalk a loose plank tipping up and throwing her down? A. Yes. (7) Did the defendant, the city of Kansas, have notice that the board upon which plain-

tiff tripped was loose at the time of the injury? A. Yes. (8) How many nails were in the board upon which plaintiff tripped? A. There were none. (9) What were the dimensions of the posts and of the stringers, and the thickness of the boards in the sidewalk, at the place of the injury? A. Posts, 4x4; stringers, 2x4; planks, 2x6, and 2x8, and 2x12. (10) How long had the board upon which the plaintiff tripped been loose at the time of the injury? A. Six months. JOHN RILEY, Foreman."

The defendant filed a motion for a new trial, which was overruled. It excepted and brings the case here.

*William S. Carroll*, for plaintiff in error.  
*Allen & McGrew and Scroggs & Gibson*, for defendant in error.

HORTON, C. J., (*after stating the facts as above.*) This was an action brought by Mrs. Mary J. Bradbury against the city of Kansas City to recover damages for personal injuries alleged to have been caused on the night of the 29th of August, 1886, by reason of the unsafe and defective condition of a sidewalk on Seventh street, in that city. It was clearly established by the evidence that Mrs. Bradbury was tripped up and thrown down by a loose board or plank in the sidewalk, and thereby severely and permanently injured. There is no evidence in the record tending to show any contributory negligence upon her part, and the principal question of fact for the determination of the jury was whether, prior to the injuries complained of, the defects in the sidewalk were known to the officers of the city having charge of the streets, or could have been known by the exercise of ordinary care and diligence upon their part. The jury found specially that the sidewalk was defective where Mrs. Bradbury was injured, and that the defects in the sidewalk had existed about six months before she was injured. The jury also found that the sidewalk was not properly constructed.

It is contended that the board or plank of the sidewalk which caused Mrs. Bradbury to fall was loose for only a short time before her injury. An instruction was asked by the city to the effect that "if the jury believed from the evidence the sidewalk upon which the plaintiff fell and was injured was in a reasonably safe and suitable condition of repair at the time of alleged injury, save and except the loose board that flew up and tripped the plaintiff, they should find for the defendant." An examination of the record shows there was evidence supporting the findings of the jury, and therefore we cannot say that there was no proof to sustain the judgment. In this view, the instruction was properly refused. All questions of fact in such a case are for the jury to decide, not the court.

It is also contended that the trial court committed error in refusing various other instructions prayed for. The instructions given sufficiently covered the ground. The facts of the case were in a very narrow compass. Other and further instructions would not have been beneficial, unless the court had explained to the jury

what it meant when it referred to "the proper officers of the city having notice of the condition of the sidewalk." The court undoubtedly meant the officers of the city having charge of the repairs of the streets, but the city did not ask the court to define "the proper officers," and the instruction cannot be said to have been erroneous or misleading. The objection to the order in which the evidence was admitted is not well taken, because in such matters a court has some discretion. A trial court may even open a case for the purpose of receiving further evidence. *West v. Cameron*, 39 Kan. 736, 18 Pac. Rep. 894; *State v. Sowders*, 42 Kan. 312, 22 Pac. Rep. 425, and cases there cited.

It is further contended that the court erred in refusing to submit to the jury the following questions: "Question. What sum do you find, if any, that the plaintiff is entitled to on account of money paid for medicine and the services of a physician? Q. What damage do you find, if any, for the plaintiff for loss of time from the performance of her usual labors and duties?" The court very properly might have submitted the first question. A similar question was submitted in *City of Salina v. Trosper*, 27 Kan. 544.

Either party has a right to a written finding upon any particular question of fact involved in the case. *Railway Co. v. Reynolds*, 8 Kan. 623; *Bent v. Philbrick*, 16 Kan. 190; *City of Wyandotte v. Gibson*, 25 Kan. 236. But an examination of the record shows that no material error was committed in the refusal to submit the first question, and no error whatever in refusing to submit the last one. The evidence as to expenses for medicine and medical attendance was uncontradicted. Mrs. Bradbury testified upon that matter. Her evidence was not controverted. As to the last question, there was no positive or specific statement by any witness of the value of the services of Mrs. Bradbury. She testified that she was a nurse, but did not state what her daily, weekly, or monthly wages were. Therefore there was no evidence offered upon which to submit the last question. Upon the record presented to us, we cannot perceive any error occurring upon the trial prejudicial to the rights of the defendant, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 372)

SOUTHERN KANSAS RY. CO. v. SANFORD.

(*Supreme Court of Kansas. Feb. 7, 1891.*)

CARRIERS—EJECTION OF TRESPASSER.

1. Removing a trespasser from a train of cars while the train is in motion, when the train is moving very slowly, is not negligence or wantonness *per se*.

2. In cases of ejection of trespassers from trains in motion, the question of negligence or wantonness is usually a question of fact for the jury.

(*Syllabus by Strang, C.*)

Commissioner's decision. Error from district court, Johnson county; J. P. HINDMAN, Judge.

*George R. Peck, A. A. Hurd, and Robert Dunlap*, for plaintiff in error. *A. Smith Devenney*, for defendant in error.

STRANG, C. This action was brought by the defendant against the plaintiff to recover damages for an injury which he alleges was inflicted upon him by the agent of the plaintiff in ejecting him from its train of cars on October 11, 1887. The defendant was a passenger on the plaintiff's train from Kansas City west, on the evening of that day. When the conductor in charge of the train demanded his ticket he did not produce any, and refused to pay fare, and was put off of the train. At some time, either while being put off the train or after he was off, his ankle was sprained, and this action was brought to recover damages therefor. The case was tried by the court and a jury, and a verdict for the plaintiff therein returned for \$150, \$100 compensatory damages and \$50 as punitive damages. Motion for new trial was overruled.

The undisputed evidence in this case clearly shows that the defendant twice failed to produce a ticket, when his ticket was demanded by the conductor,—once before reaching the station at Argentine, and again before reaching Holliday; and each time he not only refused to surrender his ticket, but refused to tell where he was going, simply saying, in response to the inquiry of the conductor as to where he was going, "I guess I know where I am going." The first time he refused to surrender his ticket or tell where he was going the conductor directed him to get off the train at the next station, Argentine, which he failed to do. The defendant thus ceased to be a passenger on the plaintiff's train, and became a trespasser thereon, and especially so after he had the second time refused to surrender his ticket or tell where he was going, so the conductor could fix the amount of his fare, and the conductor had the right to put him off, at a station or between stations, only so he did not put him off at a dangerous place, nor use any more force than was necessary to eject him, or put him off with a wanton disregard of the consequences of his ejection. *Lillis v. Railway Co.*, 64 Mo. 464; *Railroad Co. v. Van Houten*, 48 Ind. 90; *Stone v. Railroad Co.*, 47 Iowa, 82; *Hibbard v. Railroad Co.*, 15 N. Y. 456; *Frederick v. Railroad Co.*, 37 Mich. 342; *Railroad Co. v. Gants*, 38 Kan. 621, 17 Pac. Rep. 54, and cases there cited. Was the defendant ejected at a dangerous place? This question must be answered in the negative. He was put off near the station, in sight of the depot, where the ground was level and smooth, he himself testifying: "I had pretty good footing from there on. I could see all before me. Pretty good road where I came." That is, it was a pretty good road from the place where he was put off to the depot. There is nothing in the record that shows that the conductor assaulted the defendant, or used violence, or any more force than was sufficient to eject him. The evidence shows there was very little resistance. The defendant was led or pushed out of the car, and put off of the platform onto the ground, without

much fuss or force. We think the evidence clearly shows that the defendant was at the time just enough under the influence of liquor to make him somewhat stupid when left to himself, and more or less contrary when aroused; unable to offer much resistance, and certainly not able to remember afterwards much about what transpired. Was the conductor guilty of negligence or wantonness in putting the defendant off, under all the circumstances of this case? A strong preponderance of the evidence shows that the train was standing still when the defendant was put off. The conductor says the train was standing still. The defendant also says it had stopped when he was put off. It is true that he says, in answer to a leading question in his examination in chief it was moving. But, having testified both ways, his evidence must be taken more strongly against himself, and, under ordinary circumstances, his evidence against himself would outweigh the evidence of a mere witness in his behalf, contradicting him on this point. All the witnesses agree that the train stopped outside the switch, to allow the brakeman to turn the switch, and again, after it had run in on the switch, to let the brakeman get on. And it must be remembered that this stop was within 200 or 300 yards of the depot, where the train must stop again. Mr. Hodges, a passenger on the train, says the train was in motion when the defendant was put off. He says the train had stopped inside the switch; but he says it had started up again before the defendant was put off. He also says that the first thing he saw in connection with the ejection of the defendant was the conductor setting down his lantern and pulling the bell-rope to stop the train. That immediately thereafter he went out upon the platform at the rear end of the car to see what the train was stopping for; and, while there, he heard a noise inside, as though made by a shuffling of feet, and went into the car, and as he went in the conductor and the defendant were going out of the front end of the car; and that he did not see or hear anything further. He did not go out again, but says the train was in motion. The evidence also shows that the conductor stepped off from the platform onto the ground with the defendant. Under such a state of facts the ordinary mind would not long hesitate in reaching the conclusion that the train was standing still when the defendant was ejected; that he was put off after the train had run in on the switch, and stopped, and before it had again started. It is hardly within reason to believe that, having stopped outside of the switch, where the conductor says he would not put the defendant off because it was not a good place, and then, having run in on the switch and stopped, where it was a good place to put him off, that he waited until after his train had started to run up to the depot, not 300 yards away, and then pulled the bell-rope, and slowed his train up, and put him off. Under such circumstances, it is much more in consonance with reason to believe that Hodges was mistaken about the train being in

motion when the ejection occurred, especially as he is directly contradicted on this point by the conductor and the defendant himself; and that the train was in fact standing still when the defendant was ejected.

But counsel for defendant remind us that the jury found for the defendant, and that, with no special finding in the case, the general verdict is conclusive upon all questions upon which there was a conflict in the evidence. We concede this, though reluctantly, under the evidence in this case, and are therefore confronted with the question, was it negligence or wantonness *per se* for the conductor to put the defendant off from the train while it was in motion? As there is no finding of the jury as to how fast or how slow the train was moving when the ejection was made, we must, to sustain the verdict and judgment in this case, say that it is negligence or wantonness *per se* for a conductor to remove a trespasser from a train in motion, no matter how slow it is running. In the case of *Railroad Co. v. McCandless*, 33 Kan. 366, 373, 374, 6 Pac. Rep. 587, this court held that "stepping from a train of cars in motion, to a stationary platform, or to the stationary ground, which is more dangerous, is not negligence *per se*;" and cited in support of that position: *Railroad Co. v. Smith*, 59 Tex. 406; *Doss v. Railroad Co.*, 59 Mo. 27; *Filer v. Railroad Co.*, 49 N. Y. 42; *Banking Co. v. McCurdy*, 45 Ga. 288; *Railroad Co. v. Kilgore*, 32 Pa. St. 292. The court also said in that case that "the same rule obtained in getting on a train while in motion," and cited *Swigert v. Railroad Co.*, 75 Mo. 475, and *Eppendorf v. Railroad Co.*, 69 N. Y. 195. It is held in that case that "the question of negligence in such cases is usually a question of fact for the jury, although sometimes, and under some circumstances, it may be a question of law for the court." So, where a trespasser is removed from a train of cars by the agents of the company operating the train, while a train is in motion, we think the question of negligence, of wantonness, of the amount of force used, and of the character of the place where the ejection took place, are usually questions of fact for the jury. Where the evidence shows the train at the time of the ejection is moving very slowly, it is not negligence or wantonness *per se* to put a trespasser off of the train. In this case the plaintiff below could not have recovered, except upon the theory that it was negligence or wantonness *per se* for the conductor to put him off of the train while it was in motion. It is difficult to say whether the court intended to instruct the jury that it is negligence or wantonness *per se* to remove a trespasser from a train of cars while in motion, because of the fact that the court coupled so many other conditions with the element of motion of the train in its charge. But we have no doubt the jury were led by the charge to believe that the plaintiff below had a right to recover if he was put off of the train while it was in motion, without regard to the rate of its speed. This is apparent from the verdict, since the evidence clearly shows that there was no other element of

negligence or wantonness in the case; and to that extent we think the instructions misleading and erroneous. We also think some of the instructions refused should have been given. They stated the law correctly, and the matter was not covered properly by the instructions that were given. If it ever is a question of fact for a jury to say whether it is a wanton wrong to put a trespasser off of a train while in motion, then this case is such a one, for the evidence clearly shows that the train was moving very slowly, if moving at all, while the ejection occurred. The court should have submitted it as a question of fact, coupled with proper instructions in relation thereto, for the jury to say. If they should find the train was in motion when the defendant was removed therefrom, whether or not the train was moving at such a rate of speed as to render the removal dangerous. For the reasons herein given it is recommended that the judgment of the district court be reversed, and the case remanded for a new trial.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 377)

HENDRYX v. KANSAS CITY, F. S. & G. R. Co.

(Supreme Court of Kansas. Feb. 7, 1891.)

#### CARRIERS—EJECTION OF TRESPASSER.

1. Where a person clandestinely enters a box-car of a freight train of a railroad company, to beat his way over the road, he becomes a trespasser on said train, and the only duty the company owes him is not to wantonly injure him.
2. It is not error to sustain a demurrer to the evidence, in a case against a railroad company to recover damages for injuries inflicted by the train, resulting in the death of the person injured, when the evidence fails to show any negligence on the part of the company which contributed to the injury.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Bourbon county; C. O. FRENCH, Judge.

*Ware, Bliddle & Cory*, for plaintiff in error. *Wallace Pratt and Charles W. Blair*, for defendant in error.

STRANG, C. This was an action brought by the plaintiff to recover damages for injuries received by the plaintiff's intestate, through the alleged negligence of the defendant in operating its train of cars, from the effects of which he died. The defendant was, on the 27th day of August, 1886, running its train of freight-cars south over its line from Pleasanton to Ft. Scott. At Pleasanton the deceased, Willie Hendryx, went into a box-car of said train, to steal a ride to Ft. Scott. There was one other person in the car with him, called in the evidence in this case a "tramp." At Hammond station, six miles north of Ft. Scott, the hind brakeman of the train closed the doors of the car, while the boy and his companion were still in the car. From Hammond the train ran to the Missouri, Kansas & Texas junction near Ft. Scott, where it stopped a short time, and then pulled up a short distance, and stopped again. After pulling up, Willie

Hendryx was found on the track in the rear of the train, seriously injured. He was taken home to Pleasanton, where, notwithstanding he was carefully nursed and properly attended by physicians, he died on the 12th of September, 1886. The evidence in the case consisted wholly in an agreed statement, and the depositions of two witnesses, who also got onto said cars at Pleasanton, and rode to Ft. Scott. There was no conflict in the evidence; not a single question of fact was contested in the whole case. The defendant demurred to the evidence of the plaintiff, and the court sustained the demurrer, and entered judgment for the defendant. Motion for new trial was heard and overruled.

There is but one question in the case, and that grows out of the theory of the plaintiff as to the cause of the death of the plaintiff's intestate. The plaintiff claims that when the brakeman shut the doors of the car at Hammond the deceased became alarmed, and in his fright attempted to climb out of the window in the end of the car to the ground, and, in so doing, fell, and was run over and injured. Plaintiff says the shutting of the doors of the car by the brakeman, with deceased and his companion in the car, was such an act as rendered the defendant guilty of negligence in connection with the injury of said Willie Hendryx, and liable in damages therefor. The undisputed evidence shows the deceased was a trespasser on the defendant's train. The only duty, then, that the company owed him, was not to wantonly injure him. *Toomey v. Railroad Co.*, (Cal.) 24 Pac. Rep. 1074; *Mason v. Railroad Co.*, 27 Kan. 83; *Railroad Co. v. Rollins*, 5 Kan. 167; *Pierce, R. R.* 330; *Palmer v. Railroad Co.*, (Ind.) 14 N. E. Rep. 70; *Railroad Co. v. Lindley*, 42 Kan. 714, 22 Pac. Rep. 703; *Railroad Co. v. Sanford*, 44 Kan. —, ante, 891; *Railroad Co. v. Gants*, 38 Kan. 621, 17 Pac. Rep. 54; *Railroad Co. v. Pointer*, 14 Kan. 37; *Taylor v. Clendinning*, 4 Kan. 524; *Hibbard v. Railroad Co.*, 15 N. Y. 456; *Stone v. Railroad Co.*, 47 Iowa, 82; *Railroad Co. v. Van Houten*, 48 Ind. 90. The only act on the part of the railroad company that is complained of was the closing of the doors of the car in which deceased and companion were at the time by the brakeman of the train. What evidence is found, in such act on the part of the brakeman, of any malice towards the deceased? Or of any wanton or reckless disregard of his rights? In what manner did the closing of such doors place the deceased in danger? The car was empty. He did not freeze nor smother therein. He could not have been afraid of his companion, because he had ridden past several stations, at each of which the train had stopped, before the door was closed, and still remained in the car. He knew the train would stop at Ft. Scott, where he was going. There is nothing in the evidence to show that the doors of the car were locked or otherwise fastened on the outside, and nothing to show that the deceased could not have readily opened them from the inside, and stepped out, whenever he desired to. There is nothing to show that he did not so leave the car,

there being no evidence to show how he got out of the car. His companions suffered no injury in getting out of the car, so far as the record shows. And there is not a word of testimony tending to show that deceased was injured in any way while getting out of the car. He was found in the rear of the train, on the track, injured. But how he came to be there no one knows. The theory of the plaintiff below is that he was alarmed when shut in the car, and attempted to get out of the window in the end of the car, and fell, and the train, or part of it, ran over him. There is no evidence, however, to support this theory, unless it can be said that the bare fact that the doors of the car were closed by the brakeman supports it. The deceased may, so far as any evidence shows, have emerged from the car through the door, and, after getting out upon the ground, have slipped, and fell under the train, and, as he got on the car while the train was in motion, he may have jumped from the car, out of the door, while the train was in motion, and been carried off his balance by the motion of the train, and fallen under the cars, and thus been hurt. But it is idle to speculate as to how he emerged from the car, or how he was hurt. It is enough to say that there must be some evidence of wrong on the part of even a railroad company before it may be mulcted in damages. There is no evidence that the brakeman knew that any one was in the car. It is true, a witness said the brakeman knew; but later, when he disclosed the source of his knowledge, it turned out to be a mere inference of his. He said also that he did not see the brakeman look into the car. We think the evidence in this case barren of anything showing any wrong on the part of the company or its agents, and that there was, therefore, nothing to submit to a jury. It follows that the demurrer to the evidence was rightfully sustained. It is recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 396)

CHALLISS V. ATCHISON UNION DEPOT & R. CO.

(Supreme Court of Kansas. Feb. 7, 1891.)

CONDEMNATION PROCEEDINGS—LOT ABUTTING ON VACATED STREET.

Where a portion of a street in a city of the first class is vacated, pursuant to the provisions of paragraph 582 of General Statutes of 1889, and a lot abutting thereon condemned, and the perpetual use thereof acquired by a union depot and railroad company for the maintenance of a union depot, the portion of the vacated street situated in front of the lot so condemned becomes, as it were, an accretion or appurtenant of the lot, and passes with the same to the company. *Railroad Co. v. Patch*, 28 Kan. 470.

(Syllabus by the Court.)

Error from district court, Atchison county; ROBERT M. EATON, Judge.

Action of injunction brought by the Atchison Union Depot & Railroad Company against Luther C. Challiss, in the district court of Atchison county. After

hearing the testimony, the court made the following findings of fact and conclusions of law:

"FINDINGS OF FACT.

"(1) That the said plaintiff, the Atchison Union Depot & Railroad Company, on the 1st day of December, A. D. 1889, was, and for more than ten years prior thereto has been, a depot and railroad company, duly chartered, organized, and existing under and by virtue of the laws of the state of Kansas. (2) That at the institution of this suit it was, and for more than ten years prior thereto had been, the owner in fee-simple of the north half of block 22 in the city of Atchison, state of Kansas, and the fee-simple owner of the south 30 feet of lots 1, 2, 3, 4, and 5, block 23, in the city of Atchison, and during all said time used and occupied the same for railroad and depot purposes. (3) That on the 1st day of October, A. D. 1888, it became necessary that said plaintiff should acquire the north one hundred feet of lots 1, 2, 3, 4, and 5, in block 23, city of Atchison, for its uses and purposes as such union depot and railroad corporation, and, being unable to agree with the owners thereof as to the price it should pay therefor, it duly applied to the board of county commissioners of Atchison county, Kansas, to lay off and condemn so much of said lots as was deemed necessary by the said plaintiff for its uses and purposes aforesaid. (4) That said board of county commissioners, upon said application, did, after having given due notice as provided by law, on the 7th day of November, A. D. 1888, proceed to lay off and condemn the north one hundred feet of lots 1, 2, 3, 4, and 5, in block 23, in the city of Atchison, as aforesaid, and did ascertain and determine the value of said one hundred feet of lot one, in block 23, aforesaid, to be the sum of \$19,330, and did award L. C. Challiss, as the supposed owner of said north one hundred feet of lot one, block 23, the said sum of \$19,330, the appraised value of said lot, and all interest right, title, and claim of the said L. C. Challiss therein or thereto. (5) That the said board of county commissioners did thereafter duly embody in a written report, and duly filed the same in the office of the county clerk, Atchison county, state of Kansas, their said appraisal and assessment of damages, which said report was duly filed, and all proceedings thereunder were duly had in accordance with the provisions of law in such cases made and provided; and, within due and proper time, the said plaintiff did deposit with the treasurer of Atchison county, Kansas, for the use and benefit of the north one hundred feet of said lot one, in block 23, the said sum of \$19,330, the amount awarded by said commissioners, and caused a copy of said report to be filed with the said treasurer in due time and with the register of deeds, as by law made and provided. (6) That within ten days of the time of the filing of such report with the county clerk of said county, the said defendant, L. C. Challiss, claiming to be the owner of said north one hundred feet of lot one, block 23, as aforesaid, took an appeal from the award of said county commissioners to the district court of Atchison

county, state of Kansas, by filing the necessary bond and undertaking for such appeal, and caused said appeal to be duly filed in said district court. (7) That Third street in the city of Atchison, between blocks 22 and 23, as originally laid out and dedicated by the Atchison Town Company, a corporation, was eighty feet wide, and the same had been opened for public travel, and on the 15th day of January, A. D. 1889, the city council of the city of Atchison, in the state of Kansas, being satisfied that the interests of the public would be subserved thereby, and to enable the plaintiff to build and erect a union depot in the city of Atchison for the accommodation of the citizens of said city, passed an ordinance entitled 'An ordinance vacating certain portions of Third street in the city of Atchison,' whereby and by the terms of which said ordinance all that portion of Third street beginning at the south line of Main street, and running thence south between said two blocks 22 and 23 in the city of Atchison aforesaid, was vacated and abandoned as a public street and thoroughfare, and such ordinance was duly passed and approved by said city council, and duly published. (8) That the interest of the public and the accommodation of the citizens of the city of Atchison made it necessary that said portions of said Third street referred to in said ordinance should be vacated, and the same should be abandoned as a public street and thoroughfare, and the said plaintiff, at the institution of said suit, had the consent and authority of the city of Atchison to close up said portions of said Third street so vacated as aforesaid. (9) That, immediately upon the passage of said ordinance, said defendant, L. C. Challiss, assumed to take possession of said portions of said Third street, so vacated as aforesaid, by building a fence around the same, to the middle of the street, thus inclosing a strip of ground in said city forty feet wide, and one hundred feet deep. (10) After the said L. C. Challiss had appealed from the award of said commissioners, and after the institution of this action, and on, to-wit, the 23d day of February, A. D. 1889, the said L. C. Challiss demanded of the county treasurer of Atchison county, Kansas, the payment to him, as owner of the said north one hundred feet of lot one, in block 23, aforesaid, the sum of \$19,330, the amount of the award so made by said commissioners as the value of said north one hundred feet of lot one, in block 23, and the said county treasurer of Atchison county paid to the said L. C. Challiss the amount of such award, and he duly received and receipted therefor. (11) At the time of the passage of the ordinance hereinbefore referred to, William C. Challiss was the fee-simple owner of record of said north one hundred feet of lot one, in block 23, and thereafter, and after the institution of this action, L. C. Challiss obtained from said W. L. Challiss a quitclaim deed, whereby the said William L. Challiss conveyed to L. C. Challiss all his right, title, and interest in and to said lot 1, in block 23, city of Atchison aforesaid. (12) At and prior to the commencement of this suit the said L. C. Challiss threatened to



retain forcible possession of said lot one, in block 23, and said portion of said Third street so as aforesaid inclosed by him with a fence, and threatened to prevent the plaintiff from entering into the possession thereof for the purpose of occupying the same for railroad and depot purposes. (13) That as soon as the said L. C. Challiss appealed from the award of said commissioners as aforesaid, and after the payment and deposit of said sum of \$19,330 with the county treasurer as aforesaid, the said plaintiff company duly executed a bond with sufficient surety, approved by the county clerk, to pay all damages and costs which said company might be adjudged to pay by said district court of Atchison county, state of Kansas, which said bond was in due form, and duly and properly executed."

"CONCLUSIONS OF LAW.

"(1) At the institution of this suit, said plaintiff was entitled to the possession of the property mentioned and described in plaintiff's petition as against the said defendant, to-wit: The north one hundred feet of lot one, in block 23, in the city of Atchison, aforesaid, together with all that portion of Third street which had been vacated by said city of Atchison under the provisions of said ordinance hereinbefore referred to, and the part which the said defendant had inclosed with the said fence. (2) The plaintiff is entitled to a perpetual injunction enjoining and restraining the defendant from interfering with it in the use, occupation, and possession of said north one hundred feet of lot one, block 23, city of Atchison, together with said portion of Third street so vacated as aforesaid, as prayed for in said petition. (3) Plaintiff is entitled to judgment against said defendant for costs."

Motion for new trial was filed and overruled, and judgment given against the defendant in accordance with the conclusions of law. L. C. Challiss brings the case to this court for review, and asks a reversal.

*L. F. Bird*, for plaintiff in error. *Waggener, Martin & Orr*, and *W. W. & W. F. Guthrie*, for defendant in error.

**JOHNSTON, J.**, (after stating the facts as above.) The record sufficiently shows that at the time of the condemnation proceedings, Luther C. Challiss was the owner of lot 1, in block 23, in the city of Atchison. The perpetual use of this lot, or the north 100 feet of the same, has been acquired by the company for the purpose of maintaining a union depot for the use of the railroads entering the city of Atchison, and for the convenience and accommodation of its citizens. Any question of the regularity of the condemnation proceedings has been set at rest by the action of Challiss in first appealing from the award of damages; and, second, by an acceptance of the \$19,330 that was awarded and deposited by the company with the county treasurer as compensation for the property appropriated. Prior to the deposit and payment of the award, the city council vacated that portion of Third street on which lot 1 fronted, and Challiss claimed that in consequence of the vacation the title to that portion of the street passed to him, and not to the company which had acquired

the abutting lot. The court held that Challiss was not the owner nor entitled to the possession of the vacated portion of the street in front of the lot in question, and granted an injunction restraining him from interfering with the company in the use and occupation of the same. The statute in relation to the vacation of streets in cities of the first class provides that "whenever any street, avenue, alley, or lane shall be vacated, the same shall revert to the owners of real estate thereto adjacent on each side, in proportion to the frontage of such real estate, except in cases where such street, avenue, alley, or lane shall have been taken and appropriated to public use in a different proportion, in which case it shall revert to adjacent lots or real estate, in proportion as it was taken from them: provided, that when, in the opinion of the council of any such city, it is necessary to reopen such street, avenue, alley, or lane, they may order the same opened, without expense to the city." Gen. St. 1889, par. 582. We think the court ruled correctly in excluding the plaintiff in error from the use and occupation of the disputed premises. The fee of the street was never in him, and hence, in a strict sense of the term, there was no reversion. The fee of the streets is in the county for the use of the public, and the control of the same has been placed by the legislature in the city. Aside from the accommodation of the general public, the streets afford access and frontage to the property which abuts thereon; and these rights are incidental and appurtenant to such property, and pass by any conveyance or by condemnation of the same. By the condemnation proceedings, the company acquired the perpetual use of the lot,—a use which in its nature practically excludes any other use or occupancy. Through the appropriation of the lot, the company acquired the incidental and appurtenant rights in the street, and, upon the legal vacation of the street, that portion situated in front of lot 1 temporarily became, as it were, a part of the lot, and passed to the company. The status of the vacated portion of the street cannot now be regarded as an open question in this court, and we need only follow a former decision, wherein substantially the same question was considered and determined. *Railroad Co. v. Patch*, 28 Kan. 470. In that case, Patch was the owner in fee of certain lots in the city of Topeka, and the city council passed an ordinance vacating the street in front of her lots. Afterwards, the railroad company appropriated the lots through condemnation proceedings, and the report of the commissioners showed that they appraised the lots by name, without any survey or indication of what was embraced within the designation. The owner of the fee contended that, as the street vacated was not named in or covered by the commissioners' report, it became her property upon the passage of the ordinance vacating the street, and she asked for an injunction restraining the company from occupying such part of her property; while one contention of the company was that it passed to the adja-

cent lot-owners, and became in fact a part and parcel of the lots, and was therefore covered by and embraced within the condemnation of the lots. The court did not at that time determine whether, upon the vacation of the street, it reverted to the original proprietor or passed to the adjacent lot-owners. The latter view has since been adopted by this court. *City of Belleville v. Hallowell*, 41 Kan. 192, 21 Pac. Rep. 105. In the *Patch Case* it was held that, if it passed to the adjacent lot-owner, then it became something in the nature of an accretion to and would pass in any conveyance of the lot, and that the statute providing for the vacation of the street was only a temporary cession of the street for public use, which might be resumed at any time whenever, in the opinion of the council, it was necessary to reopen the same. Justice BREWER, who delivered the opinion of the court, stated that, if the theory that the vacated street passed to the adjacent lot-owner was adopted, "it would seem from the proviso to the section we have quoted that there was no absolute cession of the property to such adjacent lot-owner, but only a provisional and temporary giving up of the public use; for the lot-owner takes it subject to the right of the city to reopen it without expense. In other words, the city permits the lot-owner provisionally and temporarily to hold and occupy the portion of the vacated street in front of his lot. Under these circumstances we think it fair to consider that it becomes, as it were, a part of the lot,—something in the nature of an accretion to it; and, if so, then any conveyance of the lot takes with it this attached portion of the vacated street." Following the rule of that case, which is decisive of this, we must hold against the contention of the plaintiff in error. The fee of the street not being in the owners of the adjacent lots, as in *Massachusetts*, the case of *Harris v. Elliott*, 10 Pet. 25, and some other cases cited, do not apply here. Something is said against the validity of the vacation of the street, but it follows from the decision made that the private rights of plaintiff in error are not so infringed as to warrant him in raising that question. Neither is he authorized to appear in behalf of the public; and hence we will not enter upon a consideration of the validity of the vacation ordinance, nor the right to use the vacated portion of the street for the contemplated purposes. The judgment of the district court will be affirmed. All the justices concurring.

(45 Kan. 356)

SPIDLE v. McCracken.

(Supreme Court of Kansas. Feb. 7, 1891.)

ELECTIONS—RETURNS PRIMA FACIE EVIDENCE—BALLOTS.

The returns of the election officers are *prima facie* evidence of what they purport to show with regard to the number of the votes cast and for whom cast, although the ballots themselves, when properly identified, are still better evidence. But whenever it is shown that the ballots have been wrongfully tampered with they lose their controlling character as evidence; and when there is nothing but discredited ballots to

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contradict the election returns the returns themselves will be held to be conclusive.

(Syllabus by the Court.)

Error from district court, Ness county; V. H. GRINSTEAD, Judge.

J. G. Ibach, for plaintiff in error. *Smith & Berry*, for defendant in error.

VALENTINE, J. It is urged strenuously by the defendant in error that "the paper filed with the petition in error in this cause, which purports to be the proceedings of an election contest court, and upon which the plaintiff in error relies for a hearing of his alleged grievances, is without any legal or valid authenticity or the legal attributes that entitle it to be considered by this court;" but, passing over the question thus presented, and without deciding it, and to the merits of the case, and considering "the paper filed with the petition in error" for all that it is worth, it does not affirmatively show, nor does it appear, that any material error was committed either by the district court or by the contest court. This "paper" shows, among other things, that Jacob B. Spidle, I. L. McCracken, and others were competing candidates for election to the office of county commissioner from the second commissioner district of Ness county at the general election held in November, 1888. That the returns of that election from the several election boards show that the following persons received the following number of votes for that office, to-wit:

	Highpoint Franklin Johnson			
	Tp.	Tp.	Tp.	Total.
J. B. Spidle.....	31	100	11	142
I. L. McCracken...	83	81	41	156
Walker.....	..	35	1	36
McClanish.....	..	20	47	67
Beck.....	..	..	1	1

That Spidle contested the election as between himself and McCracken. That the contest court before which the contest was tried was composed of S. E. Nicholson, probate judge, and H. M. Kelson and J. R. Berry, as the associate judges. That at the trial ballots claimed by Spidle to be the original ballots voted at such election were introduced in evidence, which showed that the following number of votes were cast for the following named persons, to-wit:

	Highpoint Franklin Johnson			
	Tp.	Tp.	Tp.	Total.
J. B. Spidle.....	29	118	11	158
W. S. Beck.....	3	..	1	3
Walker.....	10	32	1	43
McClanish.....	14	17	47	78
McCracken.....	84	24	41	149

Other evidence, however, was introduced, tending to show that the ballots cast in Franklin township had been tampered with and altered, and that the aforesaid ballots, as introduced in evidence, did not show the actual votes of the people in Franklin township. The finding of the contest court upon this subject is as follows: "The sealed envelope enveloping said ballots cast at said election at said Franklin township district was torn open, and said ballots tampered with, by some unauthorized person after said sealed envelope and ballots were filed with and in

the custody of the county clerk of said Ness county; and that, when said ballots were tampered with as aforesaid, and by the same person, the name of the contestee, I. L. McCracken, was erased from seven of said ballots, and the name of the contestor was written thereon instead; and the name of A. J. Walker was erased from three of the said ballots, and the name of the contestor written thereon instead; and the name of said Chas. McClandish was erased from three of said ballots, and the name of said contestor written thereon instead. \* \* \* It is therefore considered by the court that the said ballots cast at the said election in said Franklin township on the 6th day of November, 1888, are not competent or sufficient evidence of right or title as between the said Jacob B. Spidle, contestor, and said I. L. McCracken, contestee, to said office of county commissioner. It is further considered that the poll-books and returns aforesaid of said Franklin township district are *prima facie* and the best evidence of right and title as between the said contestor, Jacob B. Spidle, and the contestee, I. L. McCracken, to said office of county commissioner. It is further considered and adjudged that said contestee, I. L. McCracken, was on said 6th day of November, 1888, at said election in the districts of Johnson, Franklin, and Highpoint townships aforesaid, and he is hereby declared, elected to said office of county commissioner for the second commissioner district within and for Ness county, Kansas, for the next regular term thereof." Upon these and other findings the contest court found in favor of McCracken and against Spidle, and rendered judgment accordingly; and to reverse this judgment Spidle took the case to the district court upon petition in error, where the judgment of the contest court was affirmed; and to reverse the judgment of both courts Spidle has brought the case to this court.

We think there was sufficient evidence to sustain the findings and judgment of the contest court, and no material error is shown to have been committed by such court. The court had the returns of the several election boards before it, and also what purported to be the original ballots cast in each township, including Franklin township; and heard all the testimony with regard to the election in Franklin township and elsewhere, and with regard to the original counting of the ballots by the election board in Franklin township; and heard evidence showing that Spidle and others were present at such original counting in Franklin township, and that such counting at that time seemed to be correct, and no objection was made thereto; and the ballots, as finally presented to the contest court, seemed to have been changed and altered. That the returns of the election officers are *prima facie* evidence of what they purport to show with regard to the number of the votes cast and for whom cast has frequently been held by this court, and has been so held by every other court to whom the question has been presented; and, in the absence of any contradictory evidence, they

are conclusive. It has also been held by this court in the case of *Dorey v. Lynn*, 31 Kan. 758, 760, 3 Pac. Rep. 557, and in other cases, that, whenever the ballots cast at an election can be properly identified, they are the best evidence, and much better and more reliable than a mere abstract or summary of the same made by the election officers; but whenever it is shown that they have wrongfully been tampered with, as has been shown in the present case, they lose their controlling character as evidence. *Hudson v. Solomon*, 19 Kan. 177, 188; *Coglan v. Beard*, (Cal.) 2 Pac. Rep. 737. And where there is nothing else than discredited ballots to contradict the returns, the returns will be held to be conclusive. The judgment of the court below will be affirmed. All the justices concurring.

(45 Kan. 430)

ERICKSON v. WALLACE *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

## EXECUTION OF CONTRACT—SPECIFIC PERFORMANCE.

To establish a contract for the leasing of real estate, where the negotiations are conducted entirely by letters through the mails, and the plaintiff proposes to lease certain land for five years, and give security for the payment of the taxes, and the defendant replies that he can have the same for three, and there is no unqualified acceptance of such proposition, and no security furnished for the payment of such taxes, *held*, that it is not a completed contract, and the plaintiff is not entitled to a specific execution of the lease.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Geary county; M. B. NICHOLSON, Judge.

*McClure & Marshall*, for plaintiff in error.  
*Humphrey & Humphrey*, for defendant in error.

GREEN, C. Prior to the 15th day of February, 1888, John Brill, one of the defendants in error, owned the N.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 8, township 12, range 7 east, in Davis (now Geary) county, containing 440 acres. The plaintiff in error desired to rent said land, and on February 8, 1888, wrote to Brill, who lived at Green Haven, N. Y., proposing to lease the land for the term of five years, and in payment, as rental, agreed to construct a fence so as to inclose the whole tract, and pay the taxes assessed against it during the continuance of the lease, reserving the right to remove the fencing at the expiration of the lease, and that he would furnish security for the payment of the taxes which might be assessed against the land. In answer to said letter, Brill wrote the plaintiff on the 15th day of February, 1888: "You can have the land as written to me for three years. I wish to sell it, and shall try and sell it to you, if I should see you." Upon the receipt of this letter, Erickson had a lease prepared for the period of three years, which he signed and transmitted to Brill for his signature, but did not furnish any security for the payment of the taxes. This lease was never returned to the plaintiff in error. Upon the strength of Brill's letter, Erickson inclosed the land, and, on the 18th of April following, turned

his stock upon it. John and William Wallace, the other defendants in error, resided on adjoining land, and, it is claimed, knew that Erickson was fencing this land. On the 23d of April, after the plaintiff in error had completed his fence, and put his stock, consisting of 175 head, in the inclosure, the Wallaces went upon the land, and drove all the stock therefrom, and threatened to fight the plaintiff in error, and retained possession of the land until restrained by the temporary order of the judge of the district court. This action was commenced to enjoin the defendants from interfering with the plaintiff's possession or control over the land claimed to have been leased, and for a mandatory order requiring the Wallaces to remove their stock and property from the land, and that John Brill be decreed, by the judgment of the court, to execute and deliver to the plaintiff a lease to the lands, containing the terms and conditions upon which it is claimed he agreed to rent the same to the plaintiff. Brill answered by general denial, and further alleged that he never received any acceptance of his offer to the plaintiff, and that the plaintiff had never given security for the payment of the taxes, as proposed by him in his first letter. John Wallace answered that he was the owner of the land in question, and William Wallace set up the defense that what he did in the premises was done as the agent of John Wallace. Upon the final hearing of the case, the district court found against the plaintiff, and refused to grant him any relief; and he brings the case to this court for review.

The facts are not disputed. There is but one question in the case: Was the plaintiff entitled to the relief asked? We must answer this in the negative. As we view the facts, the plaintiff made a proposition to lease the land for five years, and to furnish security for the payment of the taxes. The defendant Brill proposed to rent it for three. This letter was dated on the 15th of February, and, judging from the date of Erickson's letter, should have reached him by the 22d, and, according to the plaintiff's own evidence, was not answered until the 1st of March; and the moving consideration, so far as Brill was concerned,—the security that the taxes would be paid,—was not furnished; and it does not appear from the letter that the proposition was fully complied with. There was no completed contract between the parties. We do not think, upon this state of facts, the plaintiff was entitled to a judgment for the specific execution of the lease claimed. An offer of one party, assented to by the other, will constitute a contract. But the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them with any new matter. Therefore a proposal to accept, or an acceptance of an offer, on terms varying from those proposed, amounts to a rejection of the offer. "If, in answer to a proposal to grant black acre, a person replies that he is ready to close the matter, and will take white acre, there is no acceptance. Neither is there an acceptance where executory proceedings on each side

are involved in the proposal, and the party professing to accept introduces a variance, and formulates his adoption of the offer with conditions and qualifications which essentially alter some of the constituents or materially vary the effect." *Eggleston v. Wagner*, (Mich.) 10 N. W. Rep. 37; *Burkhalter v. Jones*, 32 Kan. 5, 3 Pac. Rep. 559; *Baker v. Johnson Co.*, 37 Iowa, 188; *Hamlin v. Wistar*, (Minn.) 18 N. W. Rep. 145; *Bentz v. Eubanks*, 41 Kan. 28, 20 Pac. Rep. 505. We recommend an affirmance of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 492)

#### STATE v. BEATTY.

(*Supreme Court of Kansas*. Feb. 7, 1891.)

##### COMPETENCY OF JUROR—HOMICIDE—EVIDENCE.

1. A person called to serve as a juror in a criminal case, who shows by his answers to questions touching his qualifications to serve as a juror that he has formed and entertains an opinion, with reference to the guilt or innocence of the accused, that would require evidence to remove, is not a competent juror in the case, and it is error for the trial court to overrule a challenge for cause directed against him.

2. At the trial of a person charged with murder, it is error for the trial court to allow the wife of the deceased to testify to a conversation she had with a person who claimed to be an attorney for the accused, the conversation not occurring in the presence or hearing of the accused.

(*Syllabus by Simpson, C.*)

Commissioners' decision. Appeal from district court, Harper county; C. W. Ellis, Judge.

*Shepard, Grove & Shepard* and *A. N. Cherry*, for appellant. *L. B. Kellogg*, Atty. Gen., and *George E. McMahon*, for the State.

SIMPSON, C. At the March term, 1890, of the district court of Harper county, the appellant, James M. Beatty, was convicted of murder in the first degree for the unlawful killing of one James W. Hutchinson. The material facts developed at the trial are that on the morning of July 24, 1889, the dead body of James W. Hutchinson was found on the floor of his house, situate in the city of Anthony. He had been killed by being struck in the back by several bullets, or pieces of bullets, that had entered his vital organs, tearing and lacerating them, producing probably instantaneous death. The shot had been fired through the south window of the room in which he had been sitting upon a chair convenient to a table on which there was a lighted lamp. The lower half of the sash of the window had been removed, and a light screen or netting had been fastened over the opening. This netting was torn and powder-burned, and the right side of the window-frame was burned and blackened by powder. Parts of the gun-wadding adhered to the body, and other parts were scattered around the room in which the body was found. It seems that a muzzle-loading gun had been used, and that the muzzle had been held close to the screen or netting at the time the fatal shot was fired. The de-

ceased had been seen and conversed with by his neighbors on the preceding evening. A light had been observed after dark in this room. An explosion as of a heavily loaded gun had been heard by his neighbors between 9 and 10 o'clock the night before, and immediately after the shot the light in his room disappeared. The wife and four children of the deceased were, at the time of his death, absent from home on a visit to their friends in the state of Iowa, and he was consequently occupying the house alone. Hutchinson, at the time of his death, was 29 years old. He had been married 12 years, and was dependent on his daily labor for the support of his family. He had been a resident of Anthony for four years, and was a quiet, inoffensive man. The appellant, James M. Beatty, had a wife and four children. He was a section boss on one of the railroads, and also owned a quarter section of land in Harper county. His wife had gone to the state of Iowa in the preceding February with some of her children, and the remainder had followed her in June. There is some evidence tending to show that Beatty did not intend to live with her again. After the departure of his wife, the wife of the deceased did washing, baking, and mending for Beatty, and for some time in June he took his meals at the house of the deceased, still sleeping at his own. It appears from the evidence of the wife of the deceased that the appellant talked to her several times about going to the state of Iowa with him; that he told her that he had parted with his wife forever; that her husband did not treat her right; that she had to work too hard; that if she was his woman she would not have to work so much; that he could do better by her than her husband had done; that he had furnished her money to buy tickets for her trip to Iowa, and gave her funds with which to buy a trunk and a hat, and had instructed her to tell her husband that this money was sent to her by a brother in Iowa; but the woman strongly denies that any other improper language ever passed between them, or that any improper relations existed. The killing occurred shortly after 9 o'clock p. m. The appellant is shown to have purchased a pistol on the 22d of July, and some musket caps. Later on, the same day, he purchased powder. He was in a deep railroad cut on that day firing the pistol. On this day the appellant boxed some of his household goods and shipped them to Iowa, and sold the balance to a second-hand dealer. On the morning of the 23d of July, he stated to a neighbor that he had stayed all night with Hutchinson, the deceased, and that Hutchinson appeared down-hearted and despondent. On the 23d the appellant is seen with an old musket that he said had not been in use for 9 or 10 years. He goes to a hardware store and purchases a box of cartridges. The next morning this box is found in his room, 10 cartridges being missing, and 8 wounds were found on the body, produced by bullets. Early in the morning, after the body was found, footprints were discovered leading from a railroad track towards the house of the de-

ceased. They were first observed at a point north-east of the house. They were traced west, making a circle around to the south side of the house, the side from which the fatal shot was fired. This peculiarity was noticed in one of the tracks: The upper had been torn from the sole of the right shoe near the toe, and extending formed a lip which made a distinct impression at each step where the ground was soft. These tracks were again traced going west from the south side of the house of the deceased. From the length of the stride, it seemed as if the person who made the tracks had been running, and had, on reaching the railroad track west of the house, plunged over the track into a pool of water formed by an embankment, while a few feet on either side was dry and hard ground. The tracks followed neither railroad track nor street, but ran across a piece of ground from which the surface had been removed, and which, on account of a recent rain, was soft, with little pools of water scattered through it. Some of the parties who had discovered and traced these tracks observed that one of the shoes of appellant had the marked peculiarity heretofore spoken of. Later in the day his shoes were taken, compared with these tracks, and it was found that the shoes fit the tracks precisely. A shirt was found hanging behind a door in the appellant's house. It was damp, and had plainly visible the butt of a gun impressed on the left breast, as if it had been held in the act of shooting. The gun used at the time of the shooting was a muzzle-loading one, and paper had been used for wadding, and small portions of it had adhered to the body, and were found scattered through the room where the body of the deceased was found. Several pieces of the wadding were collected, and found to be a portion of a newspaper called the "Wichita Eagle." On the day of the killing, a small roll of cotton batting, around which was wrapped a Wichita Eagle of a date a year prior, was found in the house of the appellant. A portion of this newspaper had been torn away, and, in, smoothing and straightening these parts of the wadding found in the room of the deceased, it appeared that they were taken from the newspaper around the cotton batting. These are some, if not all, of the most important circumstances that tended to fasten the guilt on the appellant, and are a sufficient statement to afford an easy comprehension of the questions we are required to discuss and determine.

1. The first contention of the appellant that we shall notice arises on this state of facts: The appellant was arrested on the 24th day of July, 1889. His preliminary examination, lasting several days, was concluded on the 9th day of August, and on the 18th day of September the county attorney filed an information against him, charging the appellant with the killing of John W. Hutchinson. On the 2d day of October the appellant waived an arraignment, and entered a plea of "not guilty" to said information. On the 8th day of January, 1890, the county attorney, by leave of the court, amended the informa-

tion by substituting the word "James" for that of "John," a mistake having been made in the information as to the first name of the deceased, it being James instead of John, as stated in the information. The application to be allowed to make this amendment was made in the presence of counsel for the accused, but he was not personally present in court when leave was given and the amendment made. The journal of the court recites that, at the time the amendment was allowed, the trial court ordered that a copy of the amended information be served on the accused, which was done on the 8th day of January, 1890, at 2:20 o'clock P. M. of said day. On the 10th day of January, 1890, at the hour of 9:30 o'clock A. M. the appellant was arraigned and required to plead to the amended information, this being less than 48 hours after the service of the copy. The accused, by his counsel, objected to an arraignment at this hour,—9:30 o'clock A. M.,—for the reason that 48 hours had not elapsed since the service upon him of a certified copy of the amended information. The trial court overruled the objection, and required the accused to plead. This he refused to do, and the court ordered a plea of not guilty to be entered on his behalf. On this state of facts the appellant bases two assignments of error, the first being that it was error to grant the application for leave to amend the information without his personal presence in court, and the second is that he could not be required to plead until after the 48 hours had expired from the time of the service of the certified copy of the amended information; and hence there is no arraignment and plea to support the verdict and judgment of conviction. Section 72 of the Code of Criminal Procedure permits an amendment to the information, either in form or substance, at any time before the defendant pleads, without leave of the court. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. The section further prescribes that no amendment shall cause any delay of the trial unless for good cause shown by affidavit. The occasion for this amendment was the discovery that a mistake had been made in the first name of the deceased; that it was James instead of John. This amendment was made on the 8th day of January, and the first trial commenced on the 10th. After it had progressed for days, the sickness of a juror caused the discharge of the jury, and a continuance of the case until the March term following. At this term the trial was had from which this appeal was made. We do not believe under such circumstances that the allowance of the amendment was such an error, if error at all, that affected any substantial right of the appellant. It was one of form rather than substance. It is unlike the case cited by counsel for appellant, (*Nutt v. State*, 63 Ala. 180,) because in that case a mistake was made in the last name of the deceased. Here it was only in the first name. The court has ample power to allow such an amendment before the trial, nor is it necessary that the accused

be personally present in order to give validity to such action. Under section 207 of the Criminal Code, as construed in the case of *State v. Myrick*, 38 Kan. 238, 16 Pac. Rep. 330, "no person charged with a felony can be tried unless he be personally present during the trial." This probably means during every step and stage of the trial. This amendment was not made during the trial. If it had been, a different question might have been presented. It does not seem to us, by any fair construction of our Criminal Code, the personal presence in court of the accused is necessary to give validity to an amendment of the information against him, when such amendment is made before and not during the trial. On the other question it appears that the defendant appeared, waived an arraignment, and entered a plea of not guilty to the original information. There is no complaint anywhere in the record that a certified copy of the original information had not been served upon the appellant for a period of 48 hours before he waived arraignment and pleaded. The question then presented is this: Was the amendment to the information of such a nature that a certified copy of the amended information should have been served? We have already stated that we regard this amendment one of form, rather than of substance. It was the correction of a mistake made in the first name of the deceased, and, in the very nature of things, it could not have resulted in misleading, surprising, or in any other manner affecting the substantial rights of this appellant. It did not change the nature of the offense, or could not in any way operate to the prejudice of the accused. It could not have been a good cause for delay, as no postponement or continuance of the cause was asked for on account of it. Hence we cannot see that a certified copy of the amended information was required to be served on the accused. It is true the court below ordered it to be served, and it may be that this was done more as a matter of convenience to the attorneys of the accused than as a matter of right to him personally. No error is predicated on the mistrial at the January term, and, as a matter of fact, the trial upon which conviction was had was not commenced until two months after the service of a certified copy of the amended information upon the accused. It is true that the trial court demanded an arraignment and plea on the amended information, but, without the amended information changed the nature of the offense charged, or departed in some other substantial or material respect from the original, so as to plainly affect some substantial right of the accused, we are of the opinion that the waiver of arraignment and the plea to the original information are sufficient to create the issue and support the conviction.

2. The second cause of complaint is that the trial court erred in overruling the challenge for cause made by the accused to the jurors Alphin, Kerke, Green, and Ashlock. One of these jurors remained on the panel, and all the others were peremptorily challenged by the appellant, and he thereby unjustly exhausted three of his

peremptory challenges. It is said that the jurors Alphin, Green, and Ashlock testified on their *voir dire* examination that they had formed an opinion as to the guilt or innocence of the accused that would require evidence to remove. We quote the answers of Alphin to some of the questions propounded: "Question. Have you formed any opinion as to the guilt or innocence of the defendant? Answer. I think I have. Q. Have you that opinion now? A. Well, I hardly know. If what I heard should turn out to be true, yes, I have. \* \* \* Q. Well, nothing has occurred to change your mind as yet? A. No, sir. Q. It will require something to change your mind? A. Why, yes; there would something new have to come up. Q. Different from what you have heard? A. Yes. Q. Then it would require evidence, would it not, to change the opinion you have? A. I expect, if it was different from what I have heard." The juror Green stated, while he had expressed no opinion, that there was an impression on his mind produced from reading accounts of the murder in the newspaper, and from what he heard, at the time it occurred, as to the guilt of the accused, that would require some evidence to remove. He also stated that, according to the general opinion and the press, the accused was guilty. These two men were twice challenged for cause by the accused, but each challenge was overruled, and they were finally challenged peremptorily by the accused. The degree of fixity of the opinion touching the facts in issue, as tending to disqualify the juror who entertains it, varies considerably in the reported cases. In most courts of last resort it is held that an opinion does not disqualify, if it is based on rumor or newspaper statements, and the juror says, upon oath, that he can give an impartial verdict on the evidence. In some states this rule has become statutory. But if a juror have an opinion as to the guilt or innocence of the accused, even if based solely upon newspaper reports, so fixed as to require evidence to remove it, he is not competent, although he may believe that he can render an impartial verdict on the evidence. It is said by Justice VALENTINE, in the case of *State v. Miller*, 29 Kan. 43, that "every person charged with a criminal offense in Kansas has a right to be tried by an impartial jury. Const., Bill of Rights, § 10. Now, is a juror who possesses an opinion with respect to the guilt or innocence of the accused, and who has 'no doubt' as to the correctness of his opinion, an 'impartial' juror? And is a juror who, having such an opinion, and who would continue to entertain the same until it should be removed by evidence, an impartial juror? Suppose that this opinion was that the defendant was guilty, then would it be possible for the juror to presume that the defendant was innocent, until the contrary was proved? Would he not rather presume that the defendant was guilty, until the contrary was proved? Section 228 of the Criminal Code requires that every defendant in a criminal prosecution shall be 'presumed to be innocent until the contrary is proved.' Would the juror, in the case supposed, be competent

under this section? Besides, section 205 of the Criminal Code provides that 'it shall be a good cause for challenge to a juror that he has formed or expressed an opinion on the issue, or any material fact to be tried.' Now, would the juror, in the case supposed, be competent under this section? But it may be said that the opinion of the juror in the present case was founded merely upon rumor. Now, there is nothing in the constitution, or in the statutes, providing, or even intimating, that a juror who has formed an opinion upon rumor only may be competent to serve in the case. It may also be said, in the present case, that the juror stated upon his *voir dire* that he had no bias or prejudice against the defendant, and would be governed entirely by the evidence in the case in making up his verdict, and that he believed that he could try the case impartially. The juror was probably sincere in stating this, and he probably could state the same again with the same sincerity, even though he may have heard all the evidence introduced on the trial of the case. Indeed it is probable that every juror who tried the case could honestly state, if called upon to try the case again, that he believed that he had no bias or prejudice against the defendant, and would be governed entirely by the evidence in making up his verdict, and that he believed that he could try the case impartially. Men are seldom conscious of being biased or prejudiced or of being in such a condition that they could not try any case impartially, and be governed entirely by the evidence introduced on the trial of the case. The fact in the present case that the juror had an opinion with respect to the guilt or innocence of the defendant, and that he had no doubt as to the correctness of his opinion, and that his opinion would remain until it should be removed by evidence, was sufficient to render the juror incompetent to serve in the case, and we think that the court below erred in overruling the defendant's challenge to the juror for cause." To exactly the same effect are the cases of *Jackson v. State*, 77 Ala. 18; *Polk v. State*, 45 Ark. 167; *Andrews v. State*, 21 Fla. 598; *State v. Ricks*, 32 La. Ann. 1099; *Stephens v. People*, 38 Mich. 739; *Olive v. State*, 11 Neb. 1, 7 N. W. Rep. 444; *People v. Casey*, 96 N. Y. 115; *McHugh v. State*, 38 Ohio St. 153; *Frazier v. State*, 23 Ohio St. 551; *State v. Culler*, 82 Mo. 623; *Dejarnette v. Com.*, 75 Va. 867; *State v. Meaker*, 54 Vt. 112. Whenever it appears from the statements of a juror, when being examined touching his qualifications, that his mind is in such condition respecting the issue or any material fact to be proved at the trial that it will require evidence to remove some opinion or impression that has become fixed, relating to such issue or material fact, it cannot be said that he is an impartial juror. An impartial man—one who extends to his fellow men the humane presumptions of the law, and keeps his mind in such condition with reference to the accused that guilt must be affirmatively and conclusively shown before he is willing to convict—is such a juror as the law contemplates, and as the constitution and stat-



utes of the state demand. Every person charged with the commission of a criminal offense has the constitutional right to be tried only by this class of persons serving as jurors. In this case both of the jurors, Alphin and Green, having stated upon their examinations that they had an opinion; that there was an impression resting on their minds as to the guilt or innocence of the defendant that would require some evidence to remove,—were incompetent, and it was error to overrule the challenges for cause that were directed against them.

3. The third cause for reversal insisted on is the error of the court in the admission of that part of the evidence of the wife of the deceased in which she related a conversation she had with Mr. A. N. Cherry, one of the attorneys of the accused. This conversation occurred in the state of Iowa, and took place while the accused was in prison at the city of Anthony. We are unable to discover any legal theory under which a conversation between two witnesses in a cause is admissible, except for the purpose of impeachment. What was said by the defendant in the jail to Mr. Cherry might be sworn to by Mr. Cherry (if it was not a professional conversation) as an admission that would bind the defendant, but we cannot understand what Mrs. Hutchinson said that Mr. Cherry said that the defendant said could be received. This evidence was objected to at the time it was given, and, at the conclusion of the testimony given by the woman, a motion was made to have it taken from the jury, but both objection and motion were overruled. In both instances the trial court committed grave error. The errors noted compel a reversal of the cause, and the other questions so earnestly discussed by counsel on both sides need not now be determined, as they may not arise on another trial. We recommend that the judgment be reversed and a new trial granted.

PER CURIAM. It is so ordered; all the justices concurring.

(45 Kan. 332)

BOARD OF COUNTY COMMISSIONERS OF  
NORTON COUNTY v. SNOW.

(Supreme Court of Kansas. Feb. 7, 1891.)

TITLES OF LAWS.

Section 7, c. 138, Sess. Laws 1889, is unconstitutional, and therefore void, because it is in contravention of section 16, art. 2, of the constitution of the state, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

(Syllabus by the Court.)

Error from district court, Norton county; G. WEBB BERTRAM, Judge.

L. H. Thompson, for plaintiff in error.  
J. R. Hamilton, for defendant in error.

HORTON, C. J. By the provisions of chapter 157, Sess. Laws 1887, the salary of the county treasurer of Norton county is fixed at \$1,200 per annum. In April, 1889, Francis M. Snow, the county treasurer of that county, under the claim that said chapter 157 had been repealed by chapter 138, Sess. Laws 1889, received from the

county salary in excess of that allowed by the act of 1887. This was an action in the court below by the board of county commissioners of Norton county to recover from Snow, the county treasurer, the sum of \$100, alleged to have been illegally received by him as salary. No brief has been filed on the part of the county treasurer, but it seems from the record that the trial court decided that chapter 157 had been repealed, and therefore is no longer of any force. The title of said chapter 157 is as follows: "An act to regulate the salaries of county clerk and county treasurer in Norton county, and to repeal chapter one hundred and thirteen of the Session Laws of 1877, entitled 'An act to regulate the salaries of county clerk and county treasurer in certain counties therein named.'" The title of said chapter 138, Sess. Laws 1889, is: "An act regulating the fees and salaries of the county treasurer, county clerk, county attorney, probate judge, and register of deeds of Dickinson county, Kansas, and to repeal chapter 157 of the Session Laws of 1887." Section 7 of said chapter 138 reads: "That chapter 157 of Session Laws of 1887 be, and the same is hereby, repealed." We think that said section 7 of said chapter 138 is unconstitutional, and therefore void, under section 16, art. 2, of the constitution of the state, which ordains that "no bill shall contain more than one subject, which shall be clearly expressed in its title." Norton county is not named in the title or the body of said chapter 138, and the ordinary impression one would receive from reading the provisions of said chapter 138 is that said section 7 of said chapter repeals some act affecting the fees and salaries of the county officials of Dickinson county, not Norton county, or any other county. Nothing relating to Norton county is clearly expressed in the title. Again, two subjects are contained in said chapter 138. The title does not refer to Norton county, and the body of the act does not purport to fix the fees for the county officials of Norton county, but section 7 of said chapter 138 repeals chapter 157 of the Session Laws of 1887, and therefore is a wholly different matter from fixing the salaries of the county officials of Dickinson county. The judgment of the district court will be reversed, and the cause remanded, with directions to the court to overrule the demurrer and proceed with the case. All the justices concurring.

(2 Wash. St. 40)

STATE v. CITY OF SPOKANE FALLS.

(Supreme Court of Washington. Feb. 2, 1891.)

LIQUOR LICENSE — APPORTIONMENT OF REVENUE.

1. Gen. Act Wash. T. Feb. 2, 1888, § 2, providing that the governing body of each incorporated town or village in the territory shall have power to regulate and license the sale of liquors, and that 10 per cent. of the license fees shall be paid into the state treasury, repeals the former special act of January 29, 1886, allowing the city of Spokane Falls to collect and retain the entire amount of the liquor license fees.

2. Act Wash. T. Feb. 2, 1888, entitled "An act to regulate, restrain, license, or prohibit the sale of intoxicating liquors," and giving the governing body of each incorporated body such powers, and providing that 10 per cent. of the

license fees shall be paid into the state treasury, is not obnoxious to Organic Act Wash. T. § 1924, as failing to express its object in its title.

Appeal from superior court, Spokane county.

*W. C. Jones, Atty. Gen., for the State.*  
*P. F. Quinn, City Atty.*

**ANDERS, C. J.** This was an action by appellant to recover from appellee 10 per cent. of the amount collected by it for licenses for the sale of intoxicating liquors from the 2d day of April, 1888, to the month of December, 1890. The complaint alleges that, during said time, defendant collected and received into its treasury the sum of \$102,000 for such licenses, all of which it converted to its own use, and refuses to pay any part thereof to the plaintiff. To this complaint the defendant interposed a general demurrer, which was sustained by the court. Judgment was accordingly entered for the defendant, from which plaintiff appealed to this court. By an act of the legislature of the late territory, approved January 29, 1888, entitled "An act to amend an act entitled 'An act to amend an act to incorporate the city of Spokane Falls, approved November 28, 1883,'" it is provided that the city shall have power to license, tax, regulate, and restrain bar-rooms, drinking-shops, or saloons, and that the city treasurer must receive and keep all moneys that shall come to the city by taxation or otherwise, and pay out the same upon the warrant of the mayor attested by the clerk. The most material question for our consideration in this controversy is whether the provisions of the act above mentioned are repealed by a later general law, approved February 2, 1888, entitled "An act to regulate, restrain, license, or prohibit the sale of intoxicating liquors." It is provided by section 2 of the latter statute that the mayor and council, or other governing body, of each incorporated town or incorporated village in Washington Territory, shall have the sole and exclusive authority and power to regulate, restrain, license, or prohibit the sale or disposal of spirituous, fermented, malt, or other intoxicating liquors within the corporate limits of their respective cities, towns, or villages, provided \* \* \* said license fee shall be paid annually in advance to the treasurer of the city, town, or village, who shall pay ten (10) per cent. thereof into the general fund of the territorial treasury, and hand the remaining ninety per cent. into the general fund of the city, town, or village treasury."

It is contended by counsel for appellee that the general law will not repeal or amend the special act unless it is the manifest and clear intention of the legislature so to do, which must be gathered from the language used in the act itself, and that such an intention is not thus made to appear. This is conceded to be a correct general proposition of law by counsel for appellant, but he claims that, in this instance, the legislature has clearly manifested its intention to so repeal or modify the special charter of appellee in so far as the general statute is inconsistent therewith, for the reason that the act of February 2,

1888, is a general revision of all prior laws relating to the same subject, and obviously designed to supersede them. An examination of the charters of the various municipal organizations throughout the territory discloses the fact that while they were generally clothed with the power to license and regulate the disposal of spirituous and intoxicating liquors within their respective limits, there was no uniformity of rule as to the disposition of the funds collected from licenses. Some of the charters required a portion of the moneys collected for licenses to sell intoxicating liquors to be paid into the county treasury, while others permitted the municipal corporations to retain the entire amount. From these considerations we are led to believe that the legislature in passing the act of February 2, 1888, intended to enact a general law which should supersede, and which did supersede, all prior laws on the same subject, either general or special.

Appellee further contends that the statute of 1888 is obnoxious to the objection that the object is not expressed in its title, and that it is therefore void as contravening section 1924 of the organic act of the territory; but we think the objection is manifestly not tenable.

Before closing this opinion, it is proper to remark that, at the time of the passage of the act of 1888, there was no city, town, or village incorporated in the territory of Washington, otherwise than by special act. And it is therefore obvious that section 2 of said act must have been intended to apply to and modify the special charters of municipal corporations then existing. For the foregoing reasons the judgment of the court below is reversed, and the cause remanded, with instructions to overrule the demurrer.

**STILES, HOYT, SCOTT, and DUNBAR, JJ.,**  
concur.

(1 Wash. St. 482)

**TACOMA LAND CO. v. BOARD OF COUNTY COM'RS PIERCE COUNTY.**

(*Supreme Court of Washington.* Dec. 19, 1890.)

**ROAD-TAXES—CITIES—GENERAL LAWS.**

Act Wash. Feb. 4, 1886, incorporating the city of Tacoma, provides in section 3 that the city shall be a separate and independent road-district, in which the county commissioners shall have no authority to levy either property or poll taxes for road purposes. *Held*, that the section is not repealed by Act March 28, 1890, "to provide for the assessment and collection of taxes in the state of Washington," nor by Act March 7, 1890, "to provide for keeping highways in repair," both of the latter being general statutes, and not radically irreconcilable with such special act.

Certified from superior court, Pierce county.

*L. D. Campbell, for plaintiff.* *W. H. Snell, for defendant.*

**STILES, J.** This cause was submitted to the court below upon an agreed case, in pursuance of chapter 26 of the Code, and it comes here under certification from that court, under section 453. It appears from the record certified thus that section 3 of chapter 1 of the act of the legislature approved February 4, 1886, which was a

special act incorporating the city of Tacoma in Pierce county, contained the following provisions: "Sec. 3. The corporate city limits aforesaid shall not be included within any road-district, nor shall the county commissioners of Pierce county have any jurisdiction to assess, levy, or collect any road property or road poll tax upon the property or inhabitants therein; and so much of any county public road as lies within said corporate limits shall be kept in repair by the council of said city. But the said council may, by ordinance, vacate any such road or parts thereof, and conform the same to opened and established streets. Said city shall be a separate and independent road-district, under the exclusive control of the said city corporation. All road taxes, whether road poll or road property taxes, levied, assessed, or collected within the corporate limits of said city, shall belong to said city, and be expended therein, under the authority and direction of the city council thereof, upon county roads or parts thereof lying within said city limits, and upon the streets, highways, and alleys of said city. The city may appropriate from its general municipal fund money to aid in the opening of streets, or work upon roads or bridges or the construction or repair of wharves, docks, piers, or landing places within the city limits, but the said city shall not be entitled to receive from the county of Pierce any appropriation of county funds in aid of roads or bridges within the corporate limits of said city." Since the passage of the foregoing act, therefore, the city of Tacoma has constituted an independent road-district within the county of Pierce, burdened with the duty of keeping in repair the public roads within its corporate limits from funds levied and collected under its own authority. No road or poll taxes have been, in the mean time, levied by the county of Pierce upon the property of the citizens of Tacoma, but the jurisdiction for such purposes has been conceded to be in the municipal authorities. But in this year the commissioners of that county, claiming authority under the act of March 28, 1890, have levied and are proceeding to collect a road property tax and poll-taxes from property and persons in the city of Tacoma, of which complaint is made; and the propositions we have submitted here are accordingly as follows: (1) Does the said act repeal the special act incorporating the city of Tacoma? (2) Should the said tax be levied upon the property within the limits of the city of Tacoma? (3) Should it be levied upon the property within the corporate limits of other incorporated towns within the county of Pierce? (4) What disposition should the board of county commissioners make of taxes so levied? These queries were presented to this court hastily, and out of the usual order, and without briefs; but, on account of their public importance, we have considered them in this somewhat unsatisfactory way, and as the result of this consideration, we are constrained to answer the several propositions thus: (1) Neither the act of March 28, 1890, "An act to provide for the assessment and col-

lection of taxes in the state of Washington," nor the act of March 7, 1890, "An act to provide for keeping highways in repair," etc., (Acts 1890, pp. 530, 617,) repeal or affect section 3 of chapter 1 of the act of February 4, 1886, for the incorporation of the city of Tacoma. (2) The said levy of taxes for road purposes should not have been levied upon property or persons within the limits of the city of Tacoma. (3) The board of county commissioners of Pierce county should, to avoid litigation, expense, and a multiplicity of suits, so far as in its power lies, recall and rescind its action in levying said taxes, and in causing the treasurer of said county to collect the same. (4) The question proposed as to other incorporated towns in Pierce county is scarcely material under the case submitted. Suffice it to say, therefore, that the same principles which govern in this instance would naturally govern in the case of any other incorporated town having a charter in substance like that of Tacoma.

The principle upon which we rest our decision in this case is that a special act incorporating a municipal corporation, or conferring upon it unusual powers and duties, is not impliedly repealed by a subsequent general statute which treats at large of the whole subject of which the special statute treats of a part, although the general statute contains words repealing all acts and parts of acts in conflict with its provisions. Endl. Interp. St. § 228; City of Harrisburg v. Sheck, 104 Pa. St. 53. It is only when the two acts are so glaringly repugnant to, and radically irreconcilable with, each other as to render it impossible that both can stand that this rule ceases to be applicable. Endl. Interp. St. § 230. But such is not the case here. The general law for the raising of revenue and the maintenance of roads is substantially the same as it was before the acts of 1890 were passed. True, section 2970 of the Code contained an express exception from the operation of the chapter on roads of all cities and towns whose charters vested in them the sole power to provide for and control the matter of roads within their limits. But this special law would have had full force without that exception thus declared, and it still has full force, although the exception was omitted from the act of March 7, 1890. The constitutional prohibition against special legislation to incorporate any town or village or to amend the charter thereof has no bearing upon this matter. Such constitutional enactments are purely prospective. They do not affect existing special charters. The city of Tacoma continued, and would continue, to hold its special charter, in all its features not necessarily repugnant to other constitutional provisions, until subsequent general legislation, clearly applicable to it, should modify or sweep away its charter. And we hold that there has been no such applicable legislation. It appears by the case before us that, in November last, the inhabitants of Tacoma, under article 11, § 10, of the constitution, and the act of March 24, 1890, adopted a municipal charter of their own, whereby the act of 1886, and

all acts amendatory thereof, and special laws inconsistent with the new charter, were superseded, and this is urged as operating as a repeal of the special road-district feature of that city. But whatever may be the relations of the city of Tacoma, under its new charter, to the general laws of the state, and whether it has now forfeited the powers, and been relieved of the duties, imposed by the act of 1886, and whether the commissioners of Pierce county would now have the jurisdiction claimed, are not matters material to this inquiry. These taxes were levied in August, 1890, when the board did not have jurisdiction, and no subsequent change in the charter of the city of Tacoma could cause any jurisdiction which they would now have, to revert to a time when the law forbade the exercise of any such authority. For these reasons, the cause is remanded to the court below, with instructions to enter a decree restraining the board of commissioners of Pierce county from collecting, or attempting to collect, the said taxes, and commanding them to strike said taxes from the tax levy of Pierce county, as to all property and persons taxable within the city of Tacoma. Costs to the appellant.

ANDERS, C. J., and HOYT and DUNBAR, JJ., concur.

SCOTT, J., did not sit.

(2 Wash. St. 1)

MOORE v. PERROT.

(Supreme Court of Washington. Jan. 12, 1891.)

JUSTICES OF THE PEACE—JURISDICTION—SALE—ACCEPTANCE.

1. The article of Const. Wash. relating to superior courts gives them original jurisdiction in all civil cases where the value of the property in controversy amounts to \$100; and it further declares that part of the judicial power of the state shall be vested in justices of the peace, whose jurisdiction shall be fixed by the legislature, but shall not trench on that of the superior courts. Prior to the adoption of the constitution, justices had jurisdiction of civil cases to the amount of \$300. *Held* that, under the constitution, justices have no jurisdiction in excess of \$100.

2. Where a justice has taken jurisdiction of a case involving more than \$100, and an appeal is taken from his judgment, it will be treated as a proper transfer of the case to the superior court.

3. Where one who has employed another to build him a boat for a given sum, takes possession of it when finished, and then refuses to pay for it, but gives no reason for his refusal, the builder is entitled to recover the contract price.

Appeal from superior court, King county.

John Trumbull and F. A. Clark, for appellant. Johnson & Moody, for appellee.

STILES, J. This action was commenced before a justice of the peace on the 9th day of November, 1889. On the 18th day of November the justice rendered judgment against the defendant for the full amount demanded, —\$240. The proclamation of the president declaring the state of Washington admitted into the Union was issued November 11, 1889. From that date the provisions of the constitution were in force, (Const. art. 27, § 16,) and on the following Monday, November

18th, the terms of all officers began. On Monday, November 18th, therefore, when the justice of the peace rendered this judgment, his jurisdiction of the subject-matter—that is, of an action wherein the amount in controversy was \$100 or more—had ceased, and he was powerless to take any further step in the case, except to transfer it to the superior court. *Id.* art. 4, §§ 6, 10; and article 27, § 5. We were strongly urged upon the hearing of this cause to hold that justices of the peace in this state still have jurisdiction of actions at law for the recovery of money or property in the sum of \$300. But this does not seem to be founded in any substantial reason. Before the constitution became operative, there existed in the Territory of Washington, under the organic act, courts of justices of the peace, whose jurisdiction in certain civil cases was fixed at \$300. But upon the admission of the state, as was said in *Benner v. Porter*, 9 How. 235, the territorial government was displaced and abrogated, every part of it, and no jurisdiction thereafter existed within her limits except that derived from state authority. Therefore, except for those portions of the constitution which continue in force those laws of the territory which were not repugnant to the constitution, there would have been, upon the incoming of the state, no justices' courts whatever. The justices courts were thus continued, however, and the only matter to be decided is whether the statute which gave them partial jurisdiction of cases involving \$300 was in any manner repugnant to the constitution. The portion of that instrument relating to superior courts gives them original jurisdiction in all cases in which the demand, or the value of the property in controversy, amounts to \$100, and also jurisdiction in all cases whatever in which jurisdiction shall not have been by law vested exclusively in some other court. Like wise other sections of the same article provide that part of the judicial power of the state shall be vested in justices of the peace, with power in the legislature to determine their number and prescribe their jurisdiction, provided that such jurisdiction shall not trench upon the jurisdiction of the superior or other courts of record. Now, the previously existing statute stands as the action of the legislature, and there are justices of the peace with jurisdiction prescribed, and the question is whether, by continuing to take jurisdiction of cases where the demand or value of the property in controversy is \$100 or more, they will be "trenching" upon the jurisdiction of the superior or other courts of record. The language of the constitution is not that the superior court shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created. Thus justices of the peace may be given exclusive original jurisdiction in cases where the demand or value of property in controversy is not \$100, in cases of misdemeanor, and of other special cases and

proceedings not otherwise provided for or specially enumerated as within the jurisdiction of the superior courts. It is the enumeration of the particular matters which are within the original jurisdiction of the superior courts, which we interpret to mean that those matters pertain to them exclusively. The language is not the clearest that could have been used, but, unless it is so interpreted, there can be no possible force in the restriction placed upon the legislature in its power to confer jurisdiction upon justices of the peace; for, if the minor courts can have concurrent jurisdiction with the superior courts up to \$300, there is not a syllable in the constitution to prevent them from having it to any amount. This is certainly not to be conceded.

What, then, was the effect of the judgment of the justice in this case? We hold it to have been null, void, and of no effect whatever. But the justice transferred the cause to the superior court, and we hold that the transfer thus made was sufficient, although accomplished under the form of an appeal. The cause was then tried in the superior court before a jury upon the issues made before the justice. Appellant complains of the refusal of the court below to grant a nonsuit, on the ground that there was a variance between the allegations of the complaint and the proofs offered. But considering that the action was commenced in a justice court, and giving such a reasonably liberal construction of the pleadings as is allowable, and considering our statute upon the subject of variance, we are constrained to support the judgment. The contract was to build a boat for the defendant, and it was the boat that was to be paid for in the sum of \$240. When completed, the general property in the boat was in the defendant, (*Goddard v. Binney*, 115 Mass. 450,) and the contract price was due from him. The testimony showed the completion of the boat, and a tender of it to him. He seemed pleased with it, and took possession of it far enough to use it on the water, but then refused to take or pay for it without giving any reason. There was no question here that the boat was to be built to the satisfaction of the defendant, and the evidence clearly showed the boat to be a good one, built according to the contract. The judgment is affirmed, with costs to the appellee.

ANDREWS, C. J., and DUNBAR, HOYT, and SCOTT, J.J., concur.

(2 Wash. St. 6)

**PETTYGROVE et al. v. ROTHSCHILD.**

(*Supreme Court of Washington*. Jan. 15, 1891.)

LEASE—FORFEITURE—PLEADING—APPEAL—RECORD—CURE OF ERRORS.

1. In an action to enforce the forfeiture of a lease on the ground of alterations made in the premises by the tenant which violated the terms of the lease unless assented to by the lessor, it is error to strike from the answer an allegation that plaintiff knew of such alterations, but did not object thereto until some time afterwards, and in the mean time accepted the rent accruing, thereby waiving the forfeiture.

2. Where the record shows the motion to strike out such allegation, but fails to show that it was granted, or that any exception was taken thereto, the admission in appellant's brief that the motion was granted will be taken as true, as also the statement that this ruling was duly excepted to.

3. The error in striking out such allegation is not cured by the fact that evidence was incidentally introduced in support of it, when it is not shown that defendant was informed by the court that he might introduce it, or that the matter was fully gone into.

Appeal from superior court, Jefferson county.

*Thos. Fitzgerald and Johnson & Moody*, for appellant. *John Trumbull*, for appellee.

SCOTT, J. This was an action of forcible entry and detainer brought by appellee against appellant upon the ground of forfeiture of a lease by making alterations in the building which was contrary to the terms of the lease unless consented to by the appellee, and which alterations she alleged to have been waste. The superior court found in her favor. Appellant, as a part of his answer, alleged that the plaintiff had full knowledge of the making of said alterations at the time the same were made, and that she continued to receive rent accruing thereafter under the lease, without notifying him until some time subsequently that she intended to claim a forfeiture, and that she had thereby waived any right to take advantage thereof. The record shows that the plaintiff moved to strike the foregoing from the answer, but it fails to show any order of the court thereon. Both parties were apparently under the impression that such an order did appear, as the case was argued and submitted to us upon that theory. But the appellee contended no exception was taken thereto; that, in order to do this, it was necessary to settle a bill of exceptions. Under our practice, however, if an exception was taken and made a part of the order, a transcript of the journal entry, granting the motion and showing the exception, would have been sufficient to raise the question, or it would be sufficient if the statement of facts showed the exception; but, as neither the order nor exception is shown in any way by the record, the case is left in a peculiar attitude. If the motion was in fact not granted, judgment should have been rendered for the defendant, upon the ground that these matters set up in the answer, which amounted to a defense if true, were not denied in the plaintiff's reply, and therefore stood admitted. If stricken out, and not excepted to, the appellant would thereby be prevented from raising the point here. We think appellant's admission in his brief and upon the argument that the motion was granted, and an order made striking said matters from the answer, must be taken as true, but that we should take it coupled with the statement there made, that the order was excepted to, and the point is accordingly raised in this way. Such a course would be less injurious to the appellee, as were

the case reversed upon the ground that judgment should have been rendered for the defendant upon the pleadings,—and this point is substantially raised by the record,—the plaintiff might be precluded from having a retrial.

It was contended by appellee that if it was error to grant the motion the same was subsequently cured by allowing appellant to introduce evidence in support of the allegations stricken from the answer. The record shows that some such proof was introduced, and the court made a finding of fact thereon against the appellant, but the record does not show that these matters were fully gone into, or that appellant was informed that he could offer his evidence in support thereof, nor that the order granting the motion, if made, was ever vacated. The mere fact that some such proof was incidentally made, and that the court found thereon, cannot be held to have cured the error under the circumstances. The judgment is reversed, and the cause remanded for further proceedings.

ANDERS, C. J., and STILES, DUNBAR, and HOYT, JJ., concur.

(2 Wash. St. 30)

TRAVIS *et al.* v. WARD *et al.*

(Supreme Court of Washington. Jan. 26, 1891.)  
PRACTICE IN EQUITY — EXCEPTIONS — COUNTIES —  
UNLAWFUL CONTRACT — ESTOPPEL.

1. When, in an equity case by the tax-payers of a county to enjoin the payment of county warrants, judgment is rendered on the pleadings, there need be no exception in order to bring the questions raised by the pleadings before the court on appeal.

2. Where the board of county commissioners make a contract for the improvement of a county road which involves the expenditure of more money than they have authority to appropriate for that purpose, and issue warrants therefor, the payment of these warrants will not be enjoined at the suit of tax-payers who, with knowledge of all the facts, petitioned that the road be improved, and permitted the work to be completed without objection.

Appeal from superior court, Clallam county; C. H. HANFORD, Judge.

Hays & Plumley, for appellants. John Trumbull, for appellees.

SCOTT, J. It is alleged by the complaint in this case that appellant W. C. Williams entered into a contract with appellants Robert Travis, Alfred Lee, and J. S. Maxfield, the board of county commissioners of Clallam county, and purporting to act in behalf of said county therein, to improve a certain highway or county road; and that said commissioners issued to said Williams county warrants therefor in the sum of \$13,800.95. It is further alleged that the total valuation of the assessable property of said county at that time was but \$501,267, and that there was no money in the county treasury for the purpose of building roads, nor was any thereafter appropriated for such purpose. The appellees brought this action as tax-payers of said county against said Williams and said county commissioners, and also against Smith Troy and W. L. Church, the auditor and treasurer of said

county, to enjoin the payment of the warrants. The defendants answered alleging good faith upon the part of Williams and the commissioners; that they believed they had a lawful right to enter into the contract; and that the same was made by the commissioners in response to numerous signed petitions by the residents and tax-payers of said county, and that the appellees themselves signed one of said petitions, had full knowledge of the contract at the time it was made, and of all the work performed thereunder during the pendency thereof; that they stood by and permitted said work to proceed without objection until the road was completed and warrants issued. No reply was filed to these matters alleged in the answer, and both parties moved the court for judgment on the pleadings,—the plaintiffs on the ground that the matters set up in the answer constituted no defense, and the defendants on the ground that, the plaintiffs having failed to reply, the affirmative defense must be taken as true, and that it was sufficient. The court rendered judgment for the plaintiffs, and the defendants appeal.

The first proposition we are met with is that no exception was taken by appellants to the action of the superior court in the premises. But as this is an equity case, and as it was submitted to the lower court upon the facts as shown by the pleadings, we think an appeal from the judgment on the facts can be maintained, although an exception was not taken. Had these matters been stricken from the answer the case would be different, and an exception would be necessary, but the court simply held them, while true, to be immaterial, and rendered a decree for the plaintiffs. Under the allegations of the complaint, which are taken as true for the purpose of this hearing, the contract in question was illegal, and the issue of the warrants in question, or the greater portion of them at least, was clearly unauthorized.

While the county commissioners have a general supervision over county roads, with power to lay out and establish, etc., as provided by section 2673 of the Code, they must proceed according to law, and as there were no moneys on hand for the purpose of improving highways, and as the commissioners only had authority to appropriate therefor two-tenths of 1 per cent. on the amount of taxable property of such county shown by the last preceding assessment, as provided by an act of the legislature approved February 2, 1888, (see Sess. Laws 1887-88, p. 195,) it follows that any attempted incurring of such indebtedness in excess thereof was without lawful authority. While this is true, however, equity will not permit persons standing in the position of these plaintiffs, if the matters pleaded in the answer hereinbefore stated are true in fact, to directly encourage the commission of an unlawful act of this character, stand by and permit the work to be carried on in pursuance thereof without objection, by which they, in common with the other citizens and property owners of the county, are benefited, to take advantage of their own

wrong in the premises, and enjoin payment of the indebtedness therefor so undertaken to be incurred. See *Brown v. Merrick Co.*, 18 Neb. 356, 25 N. W. Rep. 356; *Sleeper v. Bullen*, 6 Kan. 300; *Weber v. City of San Francisco*, 1 Cal. 455. For this reason the judgment is reversed. But, instead of rendering a final decree, it is thought best, in view of the condition of this case, to send it back, allowing the parties to file amended pleadings, and the plaintiffs to reply, if desired, that there may be an opportunity for a retrial upon the evidence; and it is remanded accordingly.

ANDERS, C. J., and HOYT, DUNBAR, and STILES, J. J., concur.

(2 Wash. St. 34)

KNOX v. PARKER *et al.*

(Supreme Court of Washington. Jan. 26, 1891.)

REAL-ESTATE AGENTS — REVOCATION OF AUTHORITY — INSTRUCTIONS.

In an action by a real-estate agent for a commission, defendant claimed that the agent was employed for three days only, and that on the fifth day she expressly revoked his authority. Plaintiff admitted receiving the note revoking his authority, but denied that his employment was limited as to time by the contract, and it appeared that the property was sold to a purchaser found by plaintiff. Held that, if there was no limit as to time, the owner could at any time revoke the authority, and if, at the time of the revocation, the agent had a negotiation pending for the sale, which the owner afterwards consummates, the agent was entitled to his commission.

Appeal from superior court, Spokane county.

James B. Jones and C. S. Voorhees, for appellant. Griffiths, Moore & Feighan, for appellees.

STILES, J. The appellees brought suit against the appellant for a real-estate agent's commission, alleging that their compensation was to be \$500, payable when they should effect a sale, and that they had not been paid. The answer was a general denial. From a judgment upon a verdict for the full sum demanded, this appeal was taken.

The undisputed facts would appear to be that the appellant was the owner of certain real estate in Spokane Falls, which she was desirous to sell, and on or about the 27th day of March, 1889, Lancaster, who was a member of a firm doing business in that city as real-estate agents, called upon her, and solicited an employment as agent to sell her property. Appellant assented to the proposition, and agreed to pay \$500 as a commission upon the sale. On the 16th day of April following, a sale of the property was made to one Edwards for \$27,000. The disputed matters on the part of the appellant were that she stipulated that the employment should continue but for three days, at the price of \$26,250; that after that she would not sell at that price, but would ask a higher price, and would sell it herself; that at the expiration of about five days, no sale having been made or proposed, she notified appellees in writing that their employment had ceased, and that the sale made was without their assistance, or, if

made through any assistance of theirs, it was without her knowledge, and they did nothing until after the expiration of the three days stipulated, and the service of notice that their employment was terminated. The appellees denied all these claims on the part of the appellant, and insisted that no time was mentioned in which the sale should be made, and no price was fixed; but that Lancaster, on his visit of solicitation, after he had secured appellant's agreement to pay him a commission, told her he had a person in view as a purchaser, Mr. Edwards, a person who was not on speaking terms with appellant, and whom Lancaster did not wish informed that his firm had anything to do with the sale; that appellant agreed to receive a proposition directly from Edwards, and to conduct the entire transaction herself, without Lancaster's apparent interference; that Lancaster proposed the matter to Edwards before the latter had ever had any conference with appellant; and that the subsequent sale was the result of his efforts,—all of which in turn the appellant stoutly combatted. The appellees admitted the receipt of the notice of the termination of their employment, the destruction of the paper, and the substantial purport of its contents, as claimed by appellant, but maintained that it did not reach their hands until after their work was done, viz., the suggestion of the purchase to Edwards, which was followed up by the sale of the property to him. This matter, with the question whether there was a three-days limit to the contract for a commission, constituted the real issues which went to the jury; for the appellant, by her witness Edwards, showed that it was through Lancaster that he received the first suggestion that he might be able to purchase appellant's property, and was urged to see her in reference to it. The matter of the limited time for the sale was fairly submitted to the jury by the court by its instruction on that point. But it is contended that the charge on the subject of the notice contained serious error. It was as follows: "But, if you believe that there was no limit upon this contract as to the time in which the sale should be made, then the plaintiff would have a reasonable time in which to effect a sale, virtually effected the sale, or if, before they had virtually performed the contract, she saw fit not to rescind the contract, because she would have no right to rescind the contract under any circumstances, but she would have a right to break it at any time, taking the lawful consequences, whatever that might be; so I instruct you that if, before they had performed the contract on their part, she sent this note discharging these men from that contract, that that would be a breach of it, and they could not recover in this action, because they have brought this action upon the theory that they performed the contract, that the contract was broken by her in failing to pay the money, and not in discharging or annulling the contract before they performed it. If she annulled the contract by this method I have indicated, before they virtually performed or substantially performed the



contract on their part, why, then, they can recover in this action, although she sent the note because she could not escape her liability after that by sending it." The action was brought upon an express contract to pay \$500, if appellees should be instrumental in effecting a sale of appellant's property, the only difference between this case and one of ordinary real-estate agent's employment being that the amount of the agent's compensation was fixed by the agreement, whereas, usually, the fee of the agent is a percentage or a sum representing the value of the service. In this case, therefore, while the appellees, if there was no limit of time fixed between the parties, had full authority to go on and find a purchaser ready, able, and willing to take the property, appellant could at any time revoke their authority, and put an end to their employment. If, moreover, a reasonable time should not have elapsed between the date of giving the authority and its revocation, the agent could usually recover his reasonable outlay and the value of his services in endeavoring to make a sale. And if, at the time of the revocation, the agent should have a pending treaty with a proposing purchaser, who afterwards, by a continuance of the same negotiations with the principal himself, actually buy the property, the agent would have fully earned his commission, since the principal in such a transaction cannot arbitrarily cut off the agent's authority, in the midst of what would be a successful agency, and then, although himself taking advantage of the agent's services, refuse him compensation. This was the law of the case, but it was not so given to the jury. While the language used, taking it altogether, is perhaps susceptible of a construction similar to the rule laid down above, it is very doubtful whether a jury, hearing it read as pronounced orally by the judge, would get any such idea of the law from it. It deals in very strong expressions, such as: "She would have no right to rescind the contract under any circumstances, but she would have a right to break it any time, taking the lawful consequences," etc. That part of the charge which informs the jury that the plaintiffs must recover upon the theory that they had fully performed the contract, and not that they had been discharged prematurely, the appellant cannot complain of. But the remainder of it, which told the jury that if, when the note was sent, the plaintiffs had "performed the contract on their part," they could recover in this action, was misleading, since nowhere were the jury told the elements necessary to constitute the "performance" of the "contract" by the appellees, unless it is to be found in an earlier part of the charge, where the court said that the doing of "any service, which was the moving or procuring cause in effecting the sale, was sufficient to warrant a recovery." This latter clause is, however, just as objectionable, since there was coupled with it no explanation whatever of what was meant by moving "or procuring cause." The jury should have been told clearly that in order to entitle appellees to recover, if they found a sale had been made,

the purchaser must have been induced to buy through their efforts in calling his attention to the property prior to the note of revocation. The jury would have understood that, but they would have been very likely to misinterpret what was said, especially when informed that the appellant "would have no right to rescind the contract under any circumstances." The error thus committed we consider sufficient ground for reversal.

The appellant, however, further claims that, by numerous turns of expression in the charge, the court transgressed the constitutional rule against charging juries in respect to matters of fact or commenting thereon, and strongly intimated to the jury his opinion that appellees should recover. The latter imputation we do not think sustained, but several unguarded expressions came very near sustaining the former one. As it is not necessary to this decision that we particularize them, we shall only make them a basis for remarking that our constitutional provision on this subject is very strong, and that it behooves the judges, when called upon to charge juries, to exercise very great caution to avoid error in this particular. In an oral charge, the danger is especially great that some chance allusion to a controverted fact, as though it were established by the evidence, may overturn what is really a just verdict. Take the following: "There is some evidence here tending to show that, after the bargain was entered into, Mrs. Knox sent a note to the plaintiffs, upon the terms of which they were discharged from any further service in regard to the matter. There is some dispute about what this note contained. This is matter for your determination alone as to what it did contain." The language used in the first sentence, that there was "some evidence tending to show" the sending of a note, would seem to throw a doubt as to whether a note was sent or not; whereas, both parties agreed that the note had been sent and received. And, again, the words "after the bargain was entered into" leaves it doubtful whether the court meant by "bargain" the employment of appellees as agents, or the agreement of Edwards to buy. The attention of the jury was directed only to the ascertainment of what the note contained, coupled with a statement that, if appellees had performed their contract before it was sent, the appellant could not be allowed to escape liability at that time by any method of that kind. No question was submitted as to when, in relation to the "bargain," the note was sent, unless "bargain" meant the employment of the appellees merely; but a juror might well query whether the court were not assuming the time of sending the note as after the sale to Edwards had been agreed upon, thus telling them his views of that matter. Appellees contend here that the action of the court in allowing the appellant to testify as to the contents of the note, before it appeared that the original could not be produced, was error, and because of that error the court's entire instruction on the subject of the note was

error, and not prejudicial to the appellant; but the matter is disposed of through the incorrectness of the first supposition, since Lancaster, in his testimony in chief for the appellees, not only stated that he had received the note, but gave its contents, and showed that he had destroyed it, thus opening the way to appellant to contradict him as to the time of his reception of the note, and as to its contents, and thus also allowing her to avail herself of the legal effect of the notice as fully as though she had pleaded it in her answer, no objection having been made to the introduction of this as an affirmative matter of defense, although not pleaded. The judgment will be reversed, and a new trial granted, with costs to appellant. It is so ordered.

ANDERS, C. J., and SCOTT and HOYT, JJ., concur.

DUNBAR, J. I concur in the result, for the reasons stated, and for the further reason that the statement of the judge that "there was some evidence tending to show that a certain note has been sent by defendant," etc., was a violation of the rule in regard to judges commenting on the testimony. What the law governing the case is, is for the judge to state. What the evidence shows, or tends to show, is within the exclusive jurisdiction of the jury.

(2 Wash St. 17)

# MCGRAW v. FRANKLIN.

(Supreme Court of Washington. Jan. 23, 1891.)

## STATUTE OF FRAUDS—REPLEVIN—EVIDENCE—VERDICT.

1. Where goods recently sold to plaintiff are attached by a creditor of her vendor, and, in consideration of plaintiff's giving her note for the debt, the vendor promises to pay the note at its maturity, this is not such a promise to pay the debt of another as is required by the statute of frauds to be in writing.

2. A mortgage was given to secure this note, and both were assigned to A., who was the brother of said vendor, and who foreclosed the mortgage. In replevin against the sheriff in possession of the goods under the foreclosure proceedings, plaintiff alleged that the vendor in fact paid the note, but instead of discharging the mortgage he fraudulently procured its transfer to A. It was shown that A. had no money with which to pay the note, and the evidence was conflicting as to whether the money with which it was paid was furnished him by the vendor or another person. Held, that a judgment for plaintiff would not be disturbed.

3. Where it was shown that many of the goods had been sold to third persons, and so could not be returned, a verdict for damages only, and not in the alternative for the value of the goods, is not erroneous, especially where the point was not raised below.

Appeal from superior court, King county.

*Preston, Carr & Preston and W. S. Bush*, for appellant. *Richard Osborn*, for appellee.

SCOTT, J. This was an action to recover possession of a certain stock of merchandise, or its value, brought by appellee against appellant in March, 1885. Appellee alleged in her amended complaint that

she was the owner of the goods, and in the possession thereof; gave a detailed list of them, with the value of each item, and stated the aggregate value to have been \$800; averred a wrongful taking by appellant, and claimed damages in the sum of \$800 for the detention. The complaint also contained a separate cause of action asking for damages occasioned by the suspension of her business. No proof was introduced in support of this, however, and it appears to have been abandoned upon the trial of the cause. The defendant denied that plaintiff owned the goods, and denied that they were of any greater value than a sum set opposite each item, amounting, in the aggregate, to \$375.40, and denied that plaintiff was damaged. A further defense was set up in the answer that the plaintiff gave a chattel mortgage upon said goods in August, 1884, to E. P. Ferry to secure the payment of a note for \$526, executed to him by plaintiff at said time, which became due November 10th following; that plaintiff failed to pay the note, and on March 12, 1885, said Ferry sold the note and assigned the mortgage to one Andrew Merchant, who instituted a statutory foreclosure thereof by notice and sale in the name of the assignor; that the defendant was the sheriff of King county, and took possession of the goods and held them by virtue of said proceedings. Plaintiff, in her reply, admitted giving the note and mortgage, but alleged that the same were given for the benefit of one Robert Merchant and one W. A. Stewart, who were partners doing business under the name of R. Merchant & Co., as an accommodation to them, for which the plaintiff received no consideration. That said Merchant also agreed to pay the note before its maturity, and did pay the same in March, 1885, before the institution of said foreclosure proceedings; but that, for the purpose of defrauding the plaintiff, the said Robert Merchant, W. A. Stewart, and Andrew Merchant conspired together, and, instead of causing the mortgage to be discharged, procured it and the note to be assigned to said Andrew Merchant, of which fraud the defendant had due notice. The parties proceeded to a trial of the issues as thus formed, without objection. Plaintiff recovered a verdict for \$968.75, which, however, upon a motion therefor by defendant, was set aside. At a subsequent trial, in April last, plaintiff obtained a verdict and judgment for \$975, from which this appeal was taken.

Appellant contends that the court erred in permitting proof that Robert Merchant agreed to pay the note and mortgage given by plaintiff to Ferry, on the ground that it was a promise to pay the debt of another, and, not being in writing, was void. That the verdict is not sustained by the evidence, in this: that the amount of the verdict is largely in excess of any proof of the value of the goods. That there was no proof of the payment of plaintiff's note by Robert Merchant, or of any fraud; and that the court erred in permitting evidence as to a statement made by Andrew Merchant, and allowing the same to be contradicted by the deposition of the witness Fenton. He also alleges the verdict to be

erroneous because it is not in the alternative form. Some minor grounds of error were alleged, which were either not saved by the record or are not considered of sufficient importance by the court to discuss. In order to review the grounds stated, it will be necessary to go into the evidence to some extent. The proof shows that in the summer of 1884 Robert Merchant and W. A. Stewart were engaged in a confectionery business, as partners under the firm name of R. Merchant & Co.; that during said summer they borrowed of the plaintiff \$575, and gave her a chattel mortgage upon the goods in question to secure the payment thereof; that they subsequently conveyed the goods to her in payment of said note; that soon thereafter a suit in attachment was brought against said R. Merchant & Co. by other parties, and the goods so conveyed by them were attached in said action. Against the objection of appellant, testimony was introduced by plaintiff to the effect that Robert Merchant made her a parol promise that if she would settle the claim for which R. Merchant & Co. had been sued by giving her note for the amount to said Ferry, with a chattel mortgage upon said goods to secure its payment, he would pay the note at or before its maturity; and that she gave the note and mortgage and settled said suit accordingly. That she supposed the property was attached, because they thought she had no right to it. It is the opinion of the court that it is not necessary such a promise should be in writing, it having been made to the plaintiff direct; that the promise was valid and binding as between the plaintiff and said Merchant. As to the proof of value plaintiff testified that she furnished the list of items and the amount thereof contained in the complaint; that she paid \$775 for the goods; that they were not worth any more than that, and that the list set forth in the complaint was a correct list of the property with the value of each article; that she paid \$10 additional for the counter. Upon cross-examination she admitted that she had no knowledge of the value of some of the articles, and that her knowledge as to the value of any of them was very slight; that she took Robert Merchant's word largely as to the values at the time she bought the goods, and had to do so, the way she was situated, as it was the only way she had to get pay for the amount she had loaned thereon. David Franklin, plaintiff's husband, testified that he knew the property, and made out a list of it, which Mr. Osborn wrote; that he (witness) furnished the list and amounts; that he put the property in at a fair estimation; that the total valuation was in the neighborhood of \$800; and that the property was worth about that amount. Upon cross-examination he testified that they had never been in the candy business before, and that he had never bought or sold any candy machinery. The only other proof in relation to value was introduced by defendant, who testified that he obtained the best prices possible for the goods at a sheriff's sale, and that they brought \$375.55. If the plaintiff was entitled to re-

cover the value of the goods, she could also recover interest thereon from the time of the conversion; there having been no proof of any special damage, and the evidence as to value was sufficient to sustain the verdict found.

The points raised as to the failure of the proof to show any fraud, or payment of plaintiff's note by Robert Merchant, and as to the proof of the statement made by Andrew Merchant, will be considered together. The plaintiff testified Robert Merchant told her, if she would give her note and mortgage to Ferry to pay the claim for which R. Merchant & Co. had been sued, that he would go over in Oregon, and raise the money, pay off the mortgage, and take the business back; that he owned land in Oregon; that he thereafter went to Oregon, and said he would borrow the money of his mother; that Andrew Merchant was poor, and was working around by day's work; that he did not have any money to pay board or room-rent, and did not have any money with which he could buy plaintiff's note and mortgage; that he lived with his family in the back end of her store-room; and that, after the sale of the property by the sheriff, Robert Merchant took it, and went on with the business as before, under the firm name of R. Merchant & Co. David Franklin testified that when the property was attached in the suit against R. Merchant & Co. he said to Robert Merchant: "How is this? You claimed when you got that money and gave the bill of sale that there were no debts against the place. What are you going to do about it?" And that Robert Merchant said: "We will make that all right." I said: "We got this property in good faith, knowing nothing of any indebtedness;" and he said, "I told you there was nothing against the place, and, if you will settle, I will go over to Oregon. I have some property there, and can get the money, and pay it before it is due, if you will settle in that way." That Andrew Merchant told him he was not making money enough to keep himself and pay for his children's board, during the winter of 1884 and 1885. That he was hard up, and had no money, and that Robert Merchant furnished him some money for his support. That prior to the taking of the property under the foreclosure proceedings Andrew Merchant brought suit against R. Merchant & Co. upon a claim originally due to a firm in Chicago from R. Merchant & Co., which he claimed to have paid for them; and that the defendant also attached said property in said suit; and, after its sale under the foreclosure proceedings, Robert Merchant took it and went into business again under the firm name of R. Merchant & Co. That Robert Merchant did most of the buying at the sale. Witness knew that, because he stood by and heard Robert Merchant tell Andrew Merchant what to bid for the property. That Robert and Andrew Merchant were there together most of the time; and that Andrew Merchant, after the sale, went off to carpenter's work again. Upon cross-examination some of the questions asked by appellant's

counsel and answers made thereto by the witness were substantially as follows: "Question. Explain to the jury in what way you obtained your knowledge which enables you to swear positively that Robert Merchant bought this mortgage of Ferry. Answer. My knowledge came right from the court, from Oregon, where he mortgaged his farm for \$1,300, and came right over here with that money. Q. Does that show you that Robert Merchant bought this mortgage? A. It showed me that he gave it to his brother, (Andrew Merchant.) Q. How do you know that he gave it to his brother? A. Because his brother had no money. Q. How do you know that? A. He told me so. Q. Did not he tell you that he was going to get money from an old school-mate? A. Yes sir." Witness admitted that he drew his conclusions largely from these matters. J. H. McGraw, the defendant, testified that the property was demanded of him by the plaintiff before the sale, and that the plaintiff told him the mortgage had in fact been paid, and that the attempt to foreclose it was a fraud between Robert and Andrew Merchant; that he levied the attachment in favor of Andrew Merchant against R. Merchant upon the property, but did not remember whether he first seized it under that writ or under the foreclosure notice, but that he sold it under the foreclosure proceedings, and that the proceeds were not sufficient to pay the note. Charles Brown testified that Robert Merchant told him he went to Oregon, mortgaged his farm for \$1,300, and sent the money to his brother, Andrew, to buy the business up for him, as he could not buy it very well himself. David Franklin was recalled, and the following questions by plaintiff's counsel were asked, objections made thereto by defendant's counsel, and questions answered by the witness: "Question. Did you hear Andrew Merchant testify upon a former trial of this cause? Answer. Yes, sir. Q. What did he swear then as to where he got this money?" Defendant's counsel objected to any testimony by witness detailing any testimony given at the former trial. Plaintiff's counsel said they got out of this witness on cross-examination that Andrew Merchant said that he was going to get some money from an old school-mate; to which defendant's counsel replied: "Mr. Franklin stated that in answer to one of your questions, I questioned him further about it on cross-examination." (This is not sustained by the record. It does not appear that such a question was asked by plaintiff or such previous testimony given by the witness.) Plaintiff's counsel then said he wished to prove Andrew Merchant stated that he got \$600 from Mr. Fenton. The objection was overruled, and exception taken. "Answer. He swore that he got the money from W. D. Fenton of Oregon; that he sent him that much money that he bought the mortgage with." The deposition of W. D. Fenton was then offered in evidence by plaintiff, the same having been taken at McMinnville, Or., March 6, 1888. The defendant objected to it as being incompetent,

irrelevant, and immaterial. The objections were overruled, exception taken, and the deposition admitted, wherein the witness testified that he had never sent Andrew Merchant any money. Appellant now objects to the deposition upon the ground that it was taken under an illegal notice, but as the record fails to show that any objection was made to the notice in the court below, it will not be considered here; and the objections that were made are not tenable. Robert and Andrew Merchant were not either of them called to testify upon this last trial. From the testimony hereinbefore mentioned we think there is sufficient evidence of fraud upon the part of Robert and Andrew Merchant, and of the payment, in effect, at least, of plaintiff's note and mortgage by Robert Merchant, to sustain the verdict upon that ground. No question was raised as to the trial of these matters in an action at law. As to the proof of the statements of Andrew Merchant, the old school-mate, of whom he said he expected to get money, seems to have been understood by the parties at the trial as being Mr. Fenton, of whom he subsequently said he did get it. This inference is strengthened somewhat by Fenton's testimony that he had known Andrew Merchant for fifteen years. It is reasonably apparent from the proceedings that the two statements related to the same thing, first contemplated, and subsequently claimed to have taken place. In this view, there certainly was no error appellant could take advantage of, for in his cross-examination of Mr. Franklin he sought to and did prove the prior statement relating to the ability of said Andrew Merchant to obtain money. This testimony was clearly inadmissible, as such a statement of an interested party in his own favor could not be proven, had it been objected to on that ground. Having drawn out the testimony, appellant could not complain if the plaintiff was allowed to rebut it by showing that said Merchant failed to get the money of the person of whom he said he could get it. But we think the proof was also admissible as tending to prove the fraud which plaintiff claimed said Merchants were seeking to perpetrate. Appellant made no offer to have Andrew Merchant sworn as a witness upon the second trial, nor was it claimed that he was absent, or that his testimony was not obtainable. The fact that he testified, as he did at the first trial, upon a material point, which was contradicted by the deposition of Mr. Fenton, taken before the second trial, with his failure to testify at the second trial without any excuse or reason having been shown therefor, were circumstances entitled to some weight, and were properly admitted in evidence. As to the last ground of error alleged, the form of the verdict is as follows: "We, the jury in the case wherein Carrie Franklin is plaintiff, and John H. McGraw is defendant, do find for the plaintiff, and assess her damage at nine hundred and seventy-five dollars. THOS. W. PROSS, Foreman." In his nineteenth instruction to the jury the court said: "I have prepared a blank

verdict, which you may substantially follow:

"We, the jury in the case wherein Carrie Franklin is plaintiff and J. H. McGraw is defendant, do find for the ———, and assess her damages at ——— dollars.

"—————,  
"Foreman."

—And in his twentieth instruction the court said: "If your finding is in favor of the plaintiff, you will insert in the first blank the word 'plaintiff' and assess her damage at ——— dollars, and insert in the second blank the amount which you find in her favor. The blank over the word 'foreman' should be filled by the signature of your foreman. If you find a verdict in favor of the defendant, in the first blank you will insert the word 'defendant' and erase the words 'and assess her damage at ———'; draw a line through them, and your foreman can sign it." The defendant excepted to the form of the verdict, "for the reason that it requires the jury, in case that they find for the defendant, to erase a part of the form given. The form given tends to give the idea that the court meant to say that the verdict should be for the plaintiff." It is now objected to because it was not in the alternative for a return of the property, or for the value thereof in case a delivery could not be had. The proof showed that, while the property had been largely sold to Andrew Merchant, some of it had been sold to other parties; that Robert Merchant took what Andrew Merchant bought, and went into the business again; and it is fair to infer that the property itself could not have been returned, and that it was so contemplated at the trial. But, in any event, counsel should not be allowed here to urge this as error without having raised the point in the court below. No proof was offered as to any damages for the detention of the goods, nor was the jury instructed to find upon this point. It is apparent the verdict was for the value of the property, and it was sufficient in form against the objection there made. The judgment is affirmed.

STILES and DUNBAR, JJ., concur.

(1 Wash. St. 470)

GATES v. BROWN et al.

(Supreme Court of Washington. Dec. 19, 1890.)

MECHANICS' LIENS—NOTICE—VERIFICATION.

1. Code Wash. § 1881, provides that the notice for a mechanic's lien shall contain a statement of the demand after deducting all just credits, and also a statement of the terms and conditions of the contract, if any. *Held*, that such notice is defective where it states that the material and labor for which the lien is claimed were furnished under a subcontract, but omits to set out the terms of the original contract.

2. The notary must use his seal in certifying the verification of such lien notice, as the notice is not intended primarily for use in court or in judicial proceedings, and hence is not within the exception in Sess. Laws Wash. 1889-90, p. 474, § 5.

Appeal from superior court, King county.  
Chas. F. Fishback, for appellant. Lewis & Gilman, for appellees Gustave and Henrietta Winehill.

SCOTT, J. This was an action to foreclose a mechanic's lien. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The question was as to the sufficiency of the lien notice, which the lower court held to be invalid, and sustained the demurrer. The plaintiff appeals to this court. The notice, a copy of which was set forth in the complaint, is as follows:

"State of Washington, county of King  
—ss. Fred G. Gates, claimant, vs. Isaac Percival and Charles Brown, Debtors, and Gustave Winehill, Owner. Claim for lien. Notice is hereby given that Fred G. Gates performed work and labor for the debtors above named, in the construction of a certain building located on the south-west corner of South Third and Main streets, upon a plat of the town [now city] of Seattle, in King county, Washington, known as the 'Winehill Building,' and furnished material to be used, and which was used, in the construction of said building; that at the time said work and labor was performed, the said Isaac Percival and Charles Brown were in the employ of Gustave Winehill, owner above named, in the capacity of contractors in and about the construction of said building; that the said Fred G. Gates commenced to perform said labor and to furnish said material on said building on or about September 30, 1889, and labored continuously up to January 5, 1890, and that claimant ceased to perform said labor thereon, and to furnish said material, on January 5, 1890; that in the performance of said labor the claimant acted as subcontractor under the said Isaac Percival and Charles Brown, and was to receive, and the said Percival and Brown agreed to pay the claimant, for the labor done and furnished upon said building and material furnished by and used in the construction of said building, the sum of fifteen hundred and ninety-seven dollars; that after deducting all just credits and offsets there remains due and owing to the claimant, for and on account of said labor performed and furnished and the material used and furnished in the construction of the said building, the sum of fifteen hundred and ninety-seven dollars, for which amount the said Fred G. Gates claims a lien upon the building aforesaid. F. G. GATES, Claimant."

"State of Washington, county of King  
—ss. Fred G. Gates, being first duly sworn, deposes and says that he has read the above and foregoing claim for a lien, knows the contents thereof, and that he believes the same to be just. FRED G. GATES. Subscribed and sworn to before me this 11th day of March, 1890. VINCE H. FABER, Notary Public in and for Washington; residing at Seattle, Wash."

It appears by the complaint that the plaintiff's subcontract, upon which his lien was founded, was to perform all the mason and brick work on the building, and furnish all the materials therefor, for the sum of \$10,500; that he furnished the materials and performed the labor accordingly, and was paid thereon \$8,903, leaving a balance due him of \$1,597, for which he filed the lien in question. Code, § 1881,

provides that the lien notice shall contain a statement of the demand after deducting all just credits and offsets, and also a statement of the terms and conditions of the contract, if any. Appellant urges that the notice aforesaid is a sufficient compliance with the statute; that it is only necessary to set out the amount which is claimed to be due. He cites us to *Ainslie v. Kohn*, 16 Or. 363, 19 Pac. Rep. 97, where the Oregon court decided that it was not necessary to set forth an itemized statement, but only the amount remaining unpaid. This decision was founded upon a statute, however, which did not contain the provision that the terms and conditions of the contract should be stated in the notice, and consequently has but little, if any, bearing here. Appellees contend that the notice should not only contain the full amount of contract price and the sum claimed to be unpaid, but that it should also set out an itemized statement of the account, and he cites us to *McWilliams v. Allan*, 45 Mo. 573, which appears to have been founded upon a statute requiring a "just and true account of the demand due after all just credits have been given" to be stated in the lien notice. Our statute uses the word "statement" where the Missouri statute uses the word "account." Appellees maintain that these words express the same thing, and the case cited seems to treat them as synonymous. The notice should certainly contain a statement of the terms and conditions of the contract, if founded upon an express contract, and if upon an implied one then a statement of the full amount, and what for; if for different things, such as labor and materials, then the amount claimed for each, and in all cases a statement of what has been paid to the claimant thereon. We do not decide that it is necessary to give an itemized statement in the notice where the contract or claim can be fairly understood without it. It would be a better and safer practice so to do, however, especially where the lien is claimed by any one other than the original contractor. The lien notice in this case is clearly defective, as it does not purport to contain a statement of the terms and conditions of the contract, while it does state that the work was performed and material furnished under a subcontract. It appears by the complaint that the contract was in fact a very different one from that which would be inferred from the notice. Instead of giving any correct intimation of what the claimant's contract really was, the notice was in effect misleading. Appellees also claim that the notice is invalid for other reasons; but as the determination of the above disposes of the action, it is unnecessary to discuss them. The court deems it advisable, however, to decide one additional matter, and that is with reference to the omission of the notary to attest the verification of the notice by the impression of his official seal thereon. Appellant argues that the notary was not required to use his seal in certifying to such a verification; that it is within the exception provided by section 5 of the act to be found at page 474, Sess. Laws 1889-90. But it appears

to us otherwise. The notice was not primarily intended for use in court or in any judicial proceeding, but to obtain and preserve the lien. The fact that it might be used in court, or was so used subsequently, would not bring it within the exception any more than it would a deed or a mortgage, and consequently the seal should have been impressed, to have given the certification of the oath required any validity. We agree with appellant's contention that the lien laws should receive a liberal construction, and be aided by every reasonable intendment to carry out the purposes for which they were designed; but this rule of construction or interpretation will not justify a court in going to the extent of nullifying plain provisions of the statutes, which presumably the legislature held to be essential, or they would not have been incorporated in the laws. The judgment is affirmed.

ANDERS, C. J., and STILES, HOYT, and DUNBAR, JJ., concur.

(88 Cal. 1)

*In re MOORE'S ESTATE.* (No. 14,062.)

(*Supreme Court of California.* Feb. 10, 1891.)

SPECIAL ADMINISTRATOR—EXPENDITURES—COMPENSATION.

1. The special administratrix of an estate is on the same footing as a receiver in equity, as to expenditures incurred in and about the estate; and the mere fact that she has exceeded a sum fixed by an order of court to be expended in repairing the property of the estate is no ground for disallowing the excess, provided it was a reasonable expenditure, and necessary to keep the property in repair.

2. Since Code Civil Proc. Cal. makes no special provision for the compensation of a special administrator, but leaves it in the discretion of the court, it is not improper for the court to take the rate of compensation fixed by statute for an administrator as the standard in determining such compensation of a special administrator.

Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

*Frank M. Stone*, for appellants. *Charles B. Younger*, for respondent.

HARRISON, J. The special administratrix of William H. Moore, deceased, having filed her final account for settlement, the heirs of the decedent filed objections to the allowance of certain items therein, and the court, after hearing the parties thereto, settled the account by allowing a number of items objected to, and disallowing the remainder. From this order the heirs have appealed to this court.

The chief objection to the action of the court is its allowance for certain expenditures in the repairs of the Pacific Ocean House. Prior to making these repairs the special administratrix had obtained an order from the superior court allowing her to expend a certain sum of money for said repairs, in which was designated the particular repairs to be made, the amount allowed for each, and which also declared, "the above amounts being the full costs of repairs which said administratrix is authorized to make." After obtaining this order she proceeded with the repairs, and completed some at less

expense than she was authorized to make, while in others she expended more than was permitted by the order, and she also made other repairs which were not included within the order, so that the total amount expended by her was in excess of the amount allowed by the order. It is urged by the appellants that the court was not authorized to allow any items in her account for expenditures which were not embraced within its previous order allowing her to make the repairs. The office and duties of a special administratrix are very similar to those of a receiver in equity. Each is appointed by the court to take charge, under its directions, of property in litigation, or which is involved in the proceedings before it, with a view to its care and preservation for the parties to whom the court may ultimately decide that it belongs. The powers and duties of each are special, and limited to such as are defined by statute, or expressed in the order of his appointment, or which he may from time to time receive for the purpose of more effectually preserving the estate intrusted to his charge. If it becomes necessary during his management to make any repairs, his expenditures therefor must be sanctioned by the court appointing him, either by previous order or by subsequent approval, before he can reimburse himself from the funds of the estate. A prudent person would obtain from the court an order therefor before making such repairs, but it is not an indispensable requisite that he should do so. If he is willing to forego such protection, and to rely upon his belief that the court will ratify his acts, there is no rule of law which will deprive the court of the power to reimburse him if his acts and expenditures are approved. In *Tempest v. Ord*, 2 Mer. 55, Lord ELDON said that "formerly the court never permitted a receiver to lay out money without a previous order of the court; but now, when the receiver had laid out money without such previous order, it was usual to refer it to the master, to see if the transactions were beneficial to the parties, and, if found to be so, the receiver was allowed the money so laid out." This rule was followed in *Adams v. Woods*, 15 Cal. 206, where the action of the district court in disallowing certain payments by the receiver on the ground that they had been made without any previous order of the court was reversed. See, also, *High*, Rec. § 180; *Hynes v. McDermott*, 14 Daly, 104. We do not think that the items in the account of the special administratrix for the repairs made by her should be disallowed merely because she had not obtained a previous order to make them, or because she had expended more than she was allowed. It was quite as competent for the court to approve her disbursements for repairs made without a previous order as it was to order in advance that the repairs should be made; and, if it was competent for the court to allow the items in her account without a previous order having been obtained therefor, it was equally competent to allow such repairs as she might have made in

excess of the amount allowed by the order. In either case the court must determine whether, under all the circumstances, the repairs were necessary, and the expenditures reasonable. These matters must of necessity be left to the discretion of the judge in settling the account; and, unless it appears that such discretion has been abused, it is not subject to review. The court in the present case heard testimony offered by the respective parties in reference to the contested items, and, after examining it, we cannot say that it was insufficient to support its order. Neither can we say that the court improperly allowed the items for the expenses of a horse and buggy, which were objected to by the heirs. For aught that appears in the record they were expenses necessarily incurred in her management of the estate. Code Civil Proc. § 1616. Appellants also object to the allowance to the special administratrix of commissions upon the estate that came into her hands. The Code of Civil Procedure does not make any special provision for the compensation of a special administrator, but leaves it to the discretion of the court in the settlement of his account. We cannot say that it was improper for the court to take the rate of compensation fixed by the statute for an administrator as the standard for determining a proper allowance to be allowed the special administratrix in the present case. To the objection that by this course an estate may be subjected to the payment of double commissions, it is sufficient to say that the court having charge of the estate has the power to prevent any improvident diversion of its funds during administration. The order appealed from is affirmed.

I CONCUR: GAROUTTE, J.

PATERSON, J. I concur. Some of the items in the account seem on their face to show an attempt to improve the property, rather than to preserve it; but as the witness Cope testified that all the work done was necessary to put the house in tenantable condition, and as there is no evidence to the contrary, except an inference which may arise from the apparent nature of the work done, it cannot be said that the order of the court is not supported by the evidence. I think the burden of proving the necessity of the expenditures rested upon the administratrix as to all items objected to; and, if all the evidence introduced is in the bill, the court ought to have rejected the item of buggy hire. The bill, however, does not purport to contain all the evidence introduced, and, if it did, the item referred to is so small that counsel for appellant would not desire a reversal or modification on account of an error as to it alone.

(86 Cal. 189.)

PARKS v. DUNLAP. (No. 14,027.)

(Supreme Court of California. Oct. 23, 1890.)

DISMISSAL OF ACTION—EFFECT—RES JUDICATA.

The voluntary dismissal of an action to quiet title as to a mortgage of defendants is not an adjudication in his favor as to the validity of



his mortgage, in the absence of an agreement to that effect, and does not bar plaintiffs, in whose favor judgment was rendered, from asserting, on foreclosure of the mortgage, that the mortgagors had no title to the land.

Department 1. Appeal from superior court, Ventura county.

*Blackstock & Shepherd*, for appellant.  
*J. Hamer and W. H. Wilde*, for respondents.

WORKS, J. This is an action to foreclose a mortgage. There was a judgment in favor of the defendant in the court below, and a new trial was denied. The plaintiff appeals. The only question in the case in this court is whether there has been a prior adjudication between the parties to this appeal of the questions involved in this suit. The respondents in this action brought a suit against the appellant and the parties who executed to him the mortgage sued on herein to quiet title to the property in controversy. In the complaint in that case it was alleged that the respondents were the owners of the land; that the appellant's mortgagors had no title thereto, but were asserting ownership therein adverse to the respondents; that, so claiming to own the land, they had executed the mortgage now in suit to the appellant, but that said mortgage was invalid. In that action the appellant demurred to the complaint, whereupon the respondents voluntarily dismissed the action as to him. His claim to the lands, either as mortgagee of the claimants or otherwise, was not set up or litigated; and the dismissal was not upon any agreement or compromise of the case as to him, so far as the record in this case shows. The respondents proceeded to trial as to the mortgagors of the appellant, and recovered a judgment against them that the respondents were the owners of the land, and that they had no title thereto or interest therein. This judgment was affirmed on appeal to this court. *Snodgrass v. Parks*, 79 Cal. —. The contention of the appellant is that the dismissal as to him in the former action was a *retraxit*, amounted to an adjudication in his favor, as to the validity of his mortgage, and is a bar against the respondents to any defense against it. Conceding, however, that the question in litigation in the former action was the same now presented, it is well settled that the voluntary dismissal of an action, without any agreement of the parties or other circumstances tending to show that such dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action. The authorities cited to the effect that a judgment on demurrer, when the demurrer goes to the merits of the action, may be a bar, are not in point. The judgment rendered was not on the demurrer, but upon a dismissal. The demurrer was not presented or passed upon by the court. Such a dismissal is not a bar. *Merritt v. Campbell*, 47 Cal. 545. It may be otherwise, as we have said, where the dismissal is upon agreement of the parties. *Id.*; *Crossman v. Davis*, 79 Cal.

603, 21 Pac. Rep. 863. Judgment and order affirmed.

Fox and PATERSON, JJ., concurred.

(87 Cal. 613)

HASS v. WHITTIER *et al.* (No. 13,809.)

(*Supreme Court of California*. Feb. 5, 1891.)

INSOLVENCY—PREFERENCE—VALIDITY.

Under Insolvent Act Cal. 1880, § 55, providing that if any person, insolvent or in contemplation of insolvency, makes any payment or transfer within one month before the filing of a petition by or against him, with a view to give a preference to any creditor, and if the person receiving such payment has reasonable cause to believe that it was made to prevent the ratable distribution of the insolvent's assets, the conveyance or payment shall be void, a conveyance by an insolvent of his property to a creditor must be both made and received with the intent to give a preference, and it is not void because received by a creditor intending to obtain a preference, unless the insolvent also had the intention of giving one.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge. *Barclay, Willson & Carpenter*, for appellants. *Chapman & Hendrick and Graves, O'Melveny & Shankland*, for respondent.

VANCLIFF, C. The object of this action is to recover from defendants \$856.99, the value of certain personal property alleged to have been sold and delivered to defendants by the insolvent, in payment of a debt of \$900, within one month before the filing of the petition against him by his creditors, contrary to the provisions of section 55 of the insolvent act of 1880. The judgment of the court below was in favor of plaintiff for the sum demanded, and the defendants appeal on the judgment roll, contending that neither the complaint nor the findings of fact state a cause of action. A general demurrer to the complaint was overruled.

So far as applicable to this case, section 55 of the insolvent act is as follows: "If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, \* \* \* makes any payment, assignment, transfer, or conveyance of any part of his property, \* \* \* the person receiving such payment \* \* \* having reasonable cause to believe that such person is insolvent, and that such \* \* \* payment \* \* \* is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way to hinder, impede, or delay the operation of, or to evade any of the provisions of, this act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor." It is neither alleged in the complaint, nor found as a fact by the court, that the insolvent transferred the property to the defendants "with a view to give a preference to any creditor or person having a claim against

<sup>1</sup> 21 Pac. Rep. 429.

him;" but it is found that the transfer was made to and received by the defendants in satisfaction of a valid debt of \$900, due them from the insolvent. It is further found, however, that the property was received by the defendants "with a view to give said defendants a preference, and to pay said indebtedness to said firm (defendants) before and in preference to all other creditors of said Edgar Sessions, and with a view to prevent the said property, so transferred, from coming to his assignee in insolvency, and to prevent the same from being distributed ratably among his creditors, and to defeat the object of the said insolvent act of 1880; and the said defendants, and each of them, at the time of said assignment and transfer and acceptance of said property, had reasonable cause to believe, and, as the plaintiff is informed and believes, well knew, that the said Edgar Sessions was insolvent, and that the said transfer and assignment was made for the purpose above mentioned,"—this finding being copied from the complaint. Unless the insolvent transferred the property with the view or intention to give preference to some creditor or person having a claim against him, it makes no difference what were the views or motives of the defendants in receiving the property, or what they suspected or believed about the solvency of Sessions. I think the judgment should be reversed and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

(37 Cal. 616)

SOUTHERN CALIFORNIA NAT. BANK OF LOS ANGELES v. WYATT *et al.* (No. 13,725.)

(Supreme Court of California. Feb. 5, 1891.)

NEGOTIABLE INSTRUMENTS — MAKERS — INDORSERS.

Under Civil Code Cal. § 3108, providing that "one who writes his name upon a negotiable instrument otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an 'indorser,'" one who signs as maker, with the addition of the word "surety" to his signature, is liable to the payee as maker.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Graves, O'Melveny & Shankland, for appellant. Barclay, Wilson & Carpenter and Gottschalk & Luckel, for respondent.

BELCHER, C. C. This is an action upon a promissory note, dated December 5, 1888, and payable 90 days after date. The instrument appears to be a joint note, signed by each of the defendants, with the word "surety" written after the name of defendant Busch. The defendants, other than Busch, suffered default. He answered, and alleged that he signed the note neither as maker nor acceptor, and "that he wrote his name upon said negotiable

instrument as a surety, without any consideration whatever, but solely for the accommodation of the makers of said instrument, and delivered it with his name thereon to co-defendant Mitchell, who delivered the same to the plaintiff, all of which facts were known to the plaintiff at the time of said delivery." He further alleged that no notice of the presentment and non-payment of the note was given to him for more than 10 days after its maturity, and that he never waived its presentment or notice of its dishonor. The court below gave judgment against all of the defendants, and the defendant Busch appeals.

It is contended for the appellant, and this is the only point made, that as he wrote "surety" after his name, and was known by the payee to be a surety for the other makers, he became, in legal effect, an indorser, and not a maker, of the note, and was discharged from liability thereon, for the reason that no notice of its presentment and non-payment was given to him within the time prescribed by statute. This position is rested upon section 3108 of the Civil Code, which reads as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an 'indorser,' and his act is called 'indorsement.'" We do not think the judgment can be reversed on this ground. The next two sections of the Code are as follows: "Sec. 3109. One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose. Sec. 3110. When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereon may be made upon a paper annexed thereto." In *Fessenden v. Summers*, 62 Cal. 484, cited by appellant, the note was indorsed in blank by the defendant Thompson before delivery to the payee. The indorsement was for the purpose of adding credit to the note, and plaintiff made a loan upon the strength of the indorsement. The question was whether Thompson was to be treated as an indorser or guarantor of the note. It was held that, under sections 3108 and 3117 of the Civil Code, he was an indorser, and as such entitled to notice of non-payment. That case is not in point, for the reason that here the appellant did not indorse the note, but signed his name to it in the place of a maker. Since the decision of *Aud v. Magruder* in 1858, (10 Cal. 282,) where, as here, it appeared from an *addendum* to the name of one of the makers of the note in suit that he was a surety thereon, it has been uniformly held by the supreme court of this state that, where one subscribes his name to a promissory note in the place of a maker, he will, as between himself and the payee, be treated as a maker, and held liable as such, though he was in fact only a surety for the other makers, and this was known to the payee when he received the note. *Aud v. Magruder*, 10 Cal. 282; *Dane v. Corduan*, 24 Cal. 157; *Damon v. Pardow*,

34 Cal. 278; *Chafoin v. Rich*, 77 Cal. 476, 19 Pac. Rep. 882. This rule has not been changed by the Code, and the appellant was therefore not an indorser of the note, and his liability did not depend upon due notice of demand and non-payment. We think the judgment should be affirmed, and so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 619)

AVERY v. CLARK et al. (No. 13,890.)

(Supreme Court of California. Feb. 6, 1891.)

MORTGAGES—MECHANICS' LIENS—PRIORITIES.

1. Where the purchaser of land sells it before obtaining a conveyance, and puts his vendee in possession, and upon getting a conveyance immediately conveys to his vendee, taking a mortgage in part payment of the price, he waives any previous lien he may have had on the land for the price, and must rely solely on the lien of his mortgage, which accrues from its date.

2. Under Code Civil Proc. Cal. § 1186, providing that mechanics' liens shall be preferred to any lien that may have attached subsequent to the time when the materials were furnished, materials furnished to a person in possession under a contract of sale constitute a prior lien to a mortgage subsequently given the vendor for the price.

3. Where materials are furnished under a contract, and part of them are procured from another, who refuses to deliver them unless paid for by the contractor, the latter, having paid for them, can include their cost in his claim of lien.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

T. J. Carran and Walter Bordwell, for appellant. Wells, Guthrie & Lee, C. McFarland, and Albert Crutcher, for respondents.

HARRISON, J. This is an action for the foreclosure of a mortgage made by the defendants Humeston to one Robbins, and by him assigned to the plaintiff. The defendants, other than the mortgagors, are claimants of mechanics' liens for labor and materials furnished in the construction of a dwelling-house upon the premises described in the mortgage. Judgment was rendered for a sale of the premises, and directing that out of the proceeds of the sale the claims of the respondents (McCarthy, Clark, and Humphreys) should have priority in payment over the mortgage claim of the plaintiff. From this judgment the plaintiff has appealed, upon the ground that his claim was the first lien upon the lands.

The case is here upon the judgment roll alone, and presents the following facts: September 24, 1888, A. S. Robbins, the plaintiff's assignor, being in possession of a lot of land in Los Angeles, under a contract of purchase from one Griffes, who was the owner, made an agreement with the defendant Cassie M. Humeston to sell her the same for the sum of \$2,200, of which she then paid \$200, and took possession of the land. This agreement was never recorded. In the latter part of October of the same year the defendant R.

C. Humeston, husband of said Cassie, with her consent, and at the advice of Robbins, began the construction of a dwelling-house upon the lot, which was completed April 16, 1889. No written contract was made for the construction of the house, and its value or cost exceeded \$1,000. January 5, 1889, Griffes executed to Robbins a deed of the lot, and on the same day Robbins conveyed it to Mrs. Humeston, and at the same time Mrs. Humeston and her husband gave him their four promissory notes for \$500 each, for the unpaid amount of the price thereof, and executed the mortgage in question to secure their payment. Both of the deeds were recorded on the day of their date, and the mortgages two days thereafter. March 19, 1889, the plaintiff purchased the mortgage and notes from Robbins, who on that day "assigned" them to him. Prior to the date of this mortgage, viz., December 3, 1888, the respondents Clark and Humphreys entered into a verbal contract with R. C. Humeston to furnish lumber and other materials as might be required in the construction of the house, and between that day and April 10, 1889, furnished materials which were used in such construction, to the value of \$2,017, for which they afterwards filed their claim of lien. At the time of making this contract they knew that Mrs. Humeston claimed the land under a contract, and was indebted to Robbins for the purchase money to the extent of \$2,000. The court does not find on what day Clark and Humphreys commenced to furnish the materials other than that it was "between the 3d day of December, 1888, and April 10, 1889;" but it is conceded in the brief of counsel for appellant that they commenced to furnish them on the 3d day of December, 1888.

It is contended by the appellant that, by virtue of the contract of sale between Robbins and Mrs. Humeston, there was created in favor of Robbins a vendor's lien for the unpaid portion of the purchase money, which was preserved in the mortgage that was taken at the time Robbins conveyed the property to her, and that the right to enforce this lien passed to the plaintiff by the assignment to him of the notes and mortgage, and has priority over the liens of the respondents. A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by courts for the benefit of the vendor of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor. It does not exist in his favor if he has other security for the land which he has conveyed. It is not assignable, even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase money. It has been uniformly held in this state that this lien is lost by any act on the part of the vendor manifesting any intention on his part not to rely upon the lien, and that, although it is competent for him to take security for the payment of the purchase price of the land, and by an express agreement not lose his right to resort to this lien, yet his taking such security is *prima facie* a waiver

er of the lien; and, in the absence of some agreement to the contrary, the vendee will hold the land discharged from such lien. In *Hunt v. Waterman*, 12 Cal. 301, the vendor had taken a mortgage on the property sold, for the payment of the entire purchase money, but, by reason of some defect, the mortgage was unavailing as a security. He then brought an action to foreclose his vendor's lien. The court says: "The question in this case is directly presented whether in this state a vendor's lien exists when a mortgage security is taken for the purchase money. Decisions of the various courts have been numerous on this branch of jurisprudence, and are not harmonious. The better rule, supported by the weight and number of authorities, is to hold the silent lien of the vendor extinguished whenever the vendor manifests an intention to abandon or not to look to it; and it held that he does this whenever he takes other and independent security upon the same land, or a portion of the sameland, or on otherland. When he looks to other security he loses this tacit lien." In *Baum v. Grigsby*, 21 Cal. 173, Judge FIELD, delivering the opinion of the court, says: "When any other independent security is taken, as a mortgage on the land, or upon other property, or the personal responsibility of a third person, the lien is held to be waived unless there is at the time an express agreement for its retention. The taking of a distinct, independent security is presumptive evidence of the waiver." It is also the established rule in this state that this lien is not assignable, and that the assignee of the right to recover the money for which the land was sold cannot enforce the lien. *Baum v. Grigsby*, supra; *Camden v. Vail*, 23 Cal. 633. In *Baum v. Grigsby*, the court says: "The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable, and to that conclusion we have arrived. \* \* \* The assignee of a note given for the purchase money has not parted with the property which he seeks to reach in consideration of the note he has received. He has never held the property, and has therefore no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another." These principles were afterwards formulated in the Civil Code, which provides, (section 3046:) "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Section 3047: "Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract." Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title he cannot be said to have any implied

lien upon the land. The security which he then has for the purchase money is created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by his assignee. *Taylor v. McKinney*, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves. Whatever was the nature of the security held by Robbins prior to January 5, 1889, by virtue of the contract of sale between him and Mrs. Humeston, whether it was a vendor's lien or a lien in the nature of a mortgage, or whether, inasmuch as he did not himself have the title to the land, it was a security differing from either of these, when he took the promissory notes of Mrs. Humeston and her husband, secured by their mortgage upon the land which he then conveyed to her, he waived whatever lien he had prior to that date, and thereafter had only the lien that existed by virtue of the mortgage. The unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer." In addition to her personal obligation he had the personal obligation of her husband, together with their mortgage on the land to secure the same. By these acts his vendor's lien, if he had any, was extinguished, and his prior security was merged in the mortgage, and became an open, public, and express lien. Nor did the insertion in the mortgage of the clause, "this mortgage is given in part-payment of the purchase money of the within-described property," have the effect to extend the lien by relation to the date of the contract of sale. These words do not constitute or imply any agreement or intention for the preservation of a prior lien. The fact that the mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase money of the land is none the less a waiver of his vendor's lien. The plaintiff in this case has, however, only such rights of lien upon the land as Robbins could transfer, and such as he did transfer, on the 19th of March, 1889, by his assignment of the notes and mortgage. He does not in his complaint allege any assignment to him of any other lien than was created by the mortgage, his allegation being that "on the 19th day of March, 1889, for a valuable and sufficient consideration, said plaintiff purchased said mortgage and notes from said A. S. Robbins, who then and there duly assigned, transferred, set over, and delivered the same to the plaintiff;" and the finding of the court is in accordance with this allegation. We have seen above that as the assignee of Robbins he is not entitled to assert any vendor's lien in his own behalf.

Section 1186, Code Civil Proc., declares that "the liens provided for in this chap-

ter are preferred to any lien, mortgage, or other incumbrances which may have attached subsequent to the time when \* \* \* the materials were commenced to be furnished." Inasmuch as the only lien which the plaintiff has is that of his mortgage, which did not attach to the land until January 5, 1889, and as the respondents commenced to furnish the materials for which their lien was allowed prior to that date, it follows that their lien was preferred to the lien of the plaintiff. Nor do the provisions of section 2898 of the Civil Code give to the plaintiff, under the facts of this case, priority for the lien of his mortgage in disregard of this section. Section 1192, Code Civil Proc., provides that "every building \* \* \* constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner, or person having or claiming an interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter," unless such person shall give notice that he will not be responsible for the same. Not only did Robbins fail to give any such notice, but the court finds that he "consented to and advised the construction of said dwelling-house." Although he was not the "owner" of the lands until January 5, 1889, yet by virtue of his contract with Griffes, he was until that date, and for several months prior to the time when the respondents began to furnish materials, a "person having or claiming an interest therein," and that interest, to its entire extent, became subject to their lien. The principle upon which liens are allowed in favor of mechanics and material-men is that their labor and materials have given value to the buildings upon which they have been expended, and that it is inequitable that the owner of the land, who has contracted with them for such improvement, or who has stood by and seen the improvement in progress without making objection, should have the benefit of their expenditures without making compensation therefor. Even in the absence of the foregoing provisions of the Code, it would be in contravention of well-established rules if, under the facts of this case, the lien of Robbins should have priority over that of the respondents. Having advised the construction of the dwelling-house upon land then owned by him, under the most elementary principles of equity he would not be permitted to avail himself of this increased value for the purpose of enhancing his own security at the expense of those who had themselves given value to the land. There was no error in allowing to Clark and Humphreys, as a portion of their claim, the sum of \$190 for certain glass used in the building. The court found that Clark and Humphreys furnished to the defendant R. C. Humeston materials of the value of \$2,037.84, to be used in the construction of the dwelling-house, and that "of and included in said amount is a claim for glass amounting to \$190, furnished by the firm of Schlesinger & Goldwater," and that Schlesinger & Goldwater refused to deliver

the same until paid for. The court does not find that Schlesinger & Goldwater furnished the glass to Humeston, but does find that the material furnished by Clark and Humphreys to Humeston was of the above value, and that in this amount was this claim for glass which Schlesinger & Goldwater refused to deliver until paid for, and that Clark and Humphreys paid Schlesinger & Goldwater for the glass. These findings are entirely consistent with the fact that Clark and Humphreys agreed with Humeston to furnish the glass for the dwelling-house, and for that purpose bought the same from Schlesinger & Goldwater, but that Schlesinger & Goldwater refused to deliver the glass to them until it was paid for, and that thereupon Clark and Humphreys paid for the glass, and furnished it according to their contract with Humeston. As the appeal is taken upon the judgment roll without any bill of exceptions, we must assume that the evidence was sufficient to support all the findings of the court. The foregoing principles, which give priority to the lien of Clark and Humphreys, are also applicable to the lien of McCarthy. We cannot say that the description of the land in the claim of lien filed by him is not "sufficient for identification." Code Civil Proc. § 1187. The judgment of the court below is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(87 Cal. 629)

SHATTO v. CROCKER. (No. 13,730.)

(Supreme Court of California. Feb. 7, 1891.)

MALICIOUS PROSECUTION—INJURY TO FEELINGS—OBJECTIONS—EVIDENCE.

1. In an action for malicious prosecution, damages for injury to plaintiff's feelings, caused by the arrest, are recoverable under a general allegation of damages.

2. An objection to the admission as a whole of a copy of the record of the proceedings in the criminal trial, which, by Code Crim. Proc. Cal. § 912, is made *prima facie* evidence of the facts therein stated, is properly overruled where the inadmissible portions of the copy are not specified in the objection.

Department 1. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

J. M. Dameron, for appellant. Anderson, Fitzgerald & Anderson, for respondent.

PATERSON, J. This is an action for damages, occasioned by the malicious prosecution of a criminal action against the plaintiff before a justice of the peace of Los Angeles county. The findings of the court were in favor of the plaintiff, and judgment was entered against the defendant for the sum of \$400 and costs. Appellant claims that the court erred in permitting the plaintiff to testify to the injury to his feelings caused by the arrest, the only special damages alleged being \$25, paid an attorney for the defense of the respondent in a criminal action, and \$50 loss on account of detention from business for two days. We think that the evidence was properly allowed under the general allegation as to damages. Bodily pain and suffering come under the head of general damages, because they result naturally and

directly from bodily harm; and injuries to the feelings flow as naturally and as directly from treatment like that complained of herein. 1 *Suth. Dam.* pp. 763-766. Appellant contends, also, that the court erred in overruling his objection to the introduction in evidence of copies of the complaint, warrant of arrest, proceedings, and docket entries in the criminal action tried before the justice of the peace, certified by the latter. The papers were attached together, and were objected to as a whole. They included a certified copy of the entries in the docket. Such copy is made *prima facie* evidence of the facts stated, by the provisions of section 912, Code Crim. Proc. As some of the evidence offered as a whole was admissible, and as appellant failed to specify any particular portion to which he addressed his objection, there was no error in the ruling of the court. *Board v. Keenan*, 55 Cal. 647. Furthermore, it appears from the defendant's own evidence that he prosecuted the case referred to, and that the plaintiff was acquitted. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(57 Cal. 643)

*In re CORKER'S ESTATE.* (No. 13,941.)

CORKER V. CORKER.

(*Supreme Court of California.* Feb. 9, 1891.)

WILLS—REVOCATION BY MARRIAGE—MARRIAGE CONTRACT.

1. Under Civil Code Cal. § 1999, which declares that a will is revoked by the subsequent marriage of testator and the survival of the wife, unless provision has been made for her by "marriage contract," and which provides that no other evidence to rebut the presumption of revocation shall be received, the marriage contract, to rebut such presumption, must purport on its face to make provision for the wife in lieu of testamentary provision, and the court cannot receive any evidence of the intention of the parties, or their relative conditions of wealth at the time it was executed, or the effect which will result from its enforcement.

2. A deed of separation between husband and wife, which refers to a conveyance of land executed to the wife by the husband, in consideration of which she releases him from his marital obligations, and renounces all claim to his property after his death, but which does not indicate that either of the parties had in mind the subject of a will executed by the husband before his marriage, or that the instrument was executed in lieu of testamentary provision for her, is not a "marriage contract," within the meaning of the above section, so as to rebut the presumption of revocation arising from the subsequent marriage; and it is the duty of the probate court to deny the probate of the will, without inquiring into the reasonableness of the consideration for the wife's release of the husband, provided for in the deed of separation.

Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

*Smith & Northrop*, for appellant. *E. Baxter and Wells, Guthrie & Lee*, for respondent.

HARRISON, J. John R. Corker died in the county of Los Angeles, September 12, 1889, leaving a writing purporting to be his last will, which was executed December 12, 1883; and on September 18, 1883, John F. Corker, who was named therein

as executor, presented the same to the superior court of said county, together with his petition for its probate, and the issuance to him of letters testamentary thereon. To this petition the respondent, Aurelia J. Corker, filed written opposition, alleging that the said will had been revoked by reason of the marriage of the decedent to her subsequent to its execution, and that no provision had been made for her either in the will or by marriage contract. To this opposition the petitioner answered, alleging that after such marriage, and prior to the 9th of October, 1888, the decedent and contestant mutually agreed to separate and live apart, and "in pursuance of said agreement the said John R. Corker and Aurelia J. Corker, on said 9th day of October, 1888, entered into a marriage contract, or agreement in writing," under their hands and seals, which was duly acknowledged, and recorded in the office of the county recorder of Los Angeles county; and that in consideration of the covenants in said marriage contract contained, "and as settlement and division of all their property rights, the said John R. Corker, on said 9th day of October, 1888, executed to Aurelia a deed" for certain real estate in Los Angeles county, (describing the same,) of which she thereupon took the possession, and that they then separated, and never after resumed marriage relations. The following is the instrument referred to in his answer as a marriage contract or agreement: "It is agreed by and between Aurelia J. Corker and John R. Corker, husband and wife, of Los Angeles city and county, state of California, as follows: The said Aurelia J. Corker, in consideration of the said John R. Corker conveying to her, by good and sufficient deed this day executed, contemporaneous herewith, the lands therein described, does hereby release and absolve him, the said John R. Corker, from in any manner contributing to her support as his wife or otherwise, during their and each of their natural lives. That she releases and conveys to him all right, claim, or interest that she may have in or to all community property which has been or shall hereafter be acquired by her said husband; all right or claim to alimony, or attorney's fees, costs, or support in any manner during litigation or otherwise, are for the same consideration (in case a proceeding for the dissolution of the marriage between them is instituted by either party hereto) is hereby released, and the said John R. Corker is absolved and discharged therefrom; and for the same consideration she releases all right, claim, or interest that she may have by law or otherwise in or to any property, real or personal, that he may have at the time of his death, or to which he may then be entitled, and all right, claim, and interest in or to his estate after he is dead. In consideration of the foregoing, the said John R. Corker has conveyed, and does hereby again convey, sell, and assign and set over, to the said Aurelia J. Corker, as her own separate property, the lands and premises described in said deed of even date herewith, to have, hold, and convey the same with-

out let or hindrance from him, collect, receive, have, and enjoy the rents and profits therefrom, and discharges, releases, and absolves her and her property now or hereafter acquired by her from any, all, and every right, claim, or interest which he may have therein because the same being in law community property. And it is further mutually agreed between the parties hereto that they will each support and maintain themselves, sell, convey, purchase, mortgage, and do all business regardless of the other, the same as if they were unmarried; the intention being to hereby settle now and forever all property rights and interests and relieve each other of all obligations growing out of or imposed by their marital relations, as far as they can under the law; and they hereby agree that they will immediately separate and live apart from each other. As there are no children born of said marriage, and none have been adopted by them, there are none to be provided for by the parties hereto. In witness whereof the parties to this agreement have hereunto set their hands and seals this 9th day of October, 1888. [Seal.] AURELIA J. CORKER. [Seal.] JOHN R. CORKER." At the hearing upon these issues the contestant, for the purpose of defeating the effect of the instrument of October 9, 1888, offered evidence to show that the property conveyed to her in consideration of its execution was her separate property, and that consequently the agreement made no "provision" for her, and was without consideration. The court, in its decision, took this view of the transaction, and found that the property so conveyed to her had for a long time prior thereto been her separate property; that there was no other consideration for the execution of the agreement; that the agreement itself was not fair and reasonable in its terms; that the release therein by the wife was not founded upon sufficient consideration; and that no provision had been made for her by the decedent, either by marriage contract or in the will; and thereupon denied probate to the will. A motion for a new trial was made by the proponent upon the ground that the evidence was insufficient to justify the findings of the court that the property so conveyed to the wife was her separate property, or that the agreement of October 9, 1888, was without any other consideration, or was not fair and reasonable in its terms; and, also, its finding that no provision had been made for her by marriage contract. The motion for a new trial was denied, and from this order the proponent has appealed to this court.

Section 1299 of the Civil Code is as follows: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received." The term "marriage contract," as found in this section, is not defined in the Code. The section itself is nearly identical with section 12 of the act

concerning wills, passed April 10, 1850. At that time the legislature had before it the bill defining the rights of husband and wife, which became a statute April 17, 1850, (St. 1850, p. 254,) and which contained a chapter headed "Marriage Contracts." An examination of the sections in that chapter will show that the term, as used therein, refers entirely to antenuptial contracts; and it is fairly presumable that the "marriage contract" referred to in section 12 of the act concerning wills (now section 1299 of the Civil Code) is the one referred to in the act of April 17, 1850, defining the rights of husband and wife. When the Civil Code was adopted, this term in the chapter on "Husband and Wife" was changed to "Marriage Settlement" and "Contract for Marriage Settlement," (Civil Code, §§ 177-181;) and, in consideration of the provisions of section 5 of the Civil Code, we must presume that the "marriage settlement" found in these sections is the same as the "marriage contract" found in the act of April 17, 1850, and consequently the same as the "marriage contract" referred to in section 1299 of the Civil Code.

Stewart, in his treatise on Marriage and Divorce, § 32, says: "Contracts or conveyances, in contemplation of marriage, whereby property is promised to or settled on either or both of the parties, by either or both of the parties, or by a third party; and contracts whereby either or each of the parties releases or modifies, or agrees to release or modify, his or her property rights, which would otherwise arise from the marriage,—are called 'marriage settlements' or 'contracts.'" And in the same section he also says: "Marriage settlements made after marriage, unless in pursuance of antenuptial articles or agreement, are simply contracts between husband and wife." It is unnecessary, however, to decide in this case whether the marriage contract referred to in section 1299 is limited to antenuptial contracts, or whether a post-nuptial agreement between husband and wife may be so framed as to constitute such a marriage contract, inasmuch as the instrument here is a post-nuptial agreement, which does not, in terms, purport to be a marriage contract. Section 1299 unequivocally declares that, except in the instances therein specified, "if after making a will the testator marries, and the wife survives the testator, the will is revoked." When the will is offered for probate, the surviving wife, in order to defeat its probate, need only show that she was married to the testator subsequent to its execution. The burden is then cast upon the proponent to show the existence of one of the conditions which except it from this rule. If the wife is not mentioned in the will, he must show that "provision has been made for her" by "marriage contract." And, in order to emphasize the rule that the instrument itself is the only mode of proof, the section further declares: "And no other evidence to rebut the presumption of revocation must be received." The plain meaning of this clause is that, unless the instrument shows upon its face that it is a "marriage contract" within the meaning of the sec-



tion, and that by it "provision" has been made for the wife, and that such provision was intended to take the place of testamentary provision for her, the will is revoked. The wife is not called upon to introduce any further proof, and the proponent is limited in his proof to the marriage contract itself. Nor can the court receive any evidence for the purpose of showing the intention of the parties to the instrument, or their relative conditions of wealth at the time it was executed, or the effect which will result from its enforcement. If the instrument is a "marriage contract," and purports to make "provision" for the wife, the court cannot inquire into the character or extent or reasonableness of such "provision" any more than it can in other contracts between parties who are *sui juris*. If the parties are themselves satisfied with the "provision," it is not for the court to substitute its judgment for theirs as to its sufficiency. So long as the execution of the contract is not impeached, it is as binding upon the parties as would be any other contract. If the instrument does not on its face purport to make provision for the wife in lieu of testamentary provision, the court cannot receive evidence of any character for the purpose of showing that such was the intention of the parties. The provision of the statute forbidding any other evidence than the contract itself is peculiarly appropriate to all post-nuptial agreements. As the husband and wife can enter into any engagement or transaction with each other respecting property, which either might, if unmarried, (Civil Code, § 158,) such an agreement made by them ought not to receive a construction that does not appear upon its face to have been its object, or which will operate a different result from that which is fairly deducible from its terms. If the husband and wife have, each of them, separate property, and they choose to deal with each other respecting it, either by way of exchange or purchase and sale, such dealing should not be made the pretext of asserting some right which does not appear from the terms of the instrument to have been in their minds. If the husband during the marriage makes to his wife a conveyance of certain property, such conveyance ought to be regarded as a gift, rather than a "provision" for her, which would prevent his antenuptial will from being revoked by his marriage.

The instrument executed between Corker and his wife partakes more of the nature of a deed of separation than of a marriage contract. It does not purport to make any "provision" for the wife; nor is there anything in its terms that indicates that either of the parties had in mind the subject of a will, or that the instrument was executed in lieu of making testamentary provision for her. It refers to another instrument executed to her by her husband, in consideration of which she releases him from certain marital obligations. The instrument itself does not contain any of the elements of a "marriage contract." As soon as this instrument was presented to the court, and the court saw from an inspection of it that it was not a mar-

riage contract, its power under the proceedings before it was limited to denying probate to the will. After it had been shown that there was no marriage contract in which provision had been made for the wife, the court was only required to determine the person who had the right to administer upon the estate. Whatever rights of property passed under the contract, or whether it could be enforced, or whether the widow has any right in the estate of her deceased husband, are questions that may arise when distribution of the estate shall be sought, but could not then be investigated. Sitting at that time merely as a court of probate, it had no jurisdiction to inquire into the sufficiency of the consideration for which the deed to the wife was executed, or for the release then executed by her to her husband, or whether the property described in the deed to her was at the time of its execution her separate property, or whether the contract itself was fair or reasonable. Its findings and determinations upon these subjects were without authority, and binding upon no one. These questions could be presented and determined only in a tribunal having jurisdiction to inquire into them, and where the parties who would be affected thereby would have an opportunity to be heard. The court seems to have reached this conclusion, since in its judgment it merely declared that the will was revoked, and therefore denied it probate. Whether the evidence before the court was sufficient to justify its findings upon the other propositions is immaterial. If there was sufficient evidence to justify its finding of the ultimate fact that no provision had been made for the wife by any marriage contract, that decision or finding is not impaired by the fact that there was not sufficient evidence to justify the immaterial findings which it made; and its order denying a new trial was correct, and should be affirmed; and it is so ordered.

We concur: GAROUTTE, J.; PATERSON, J.

(5 N. M. 510)

#### TERRITORY V. KEE.

(Supreme Court of New Mexico. Jan. Term, 1891.)

#### CRIMINAL LAW—DIRECTING VERDICT.

Under the constitutional provision which guaranties to persons accused of crime the right of trial by jury, the court, in a criminal case, has no power to direct the jury to convict, though the evidence of guilt is overwhelming.

Appeal from district court, Bernalillo county.

The case is briefly stated in the stipulation, which is filed in place of and constitutes the entire record, and reads as follows: "In this cause it is stipulated by and between the respective counsel that the defendant, Joe Kee, a Chinaman, was indicted and tried upon a good and sufficient indictment, duly returned by a regularly organized grand jury of Bernalillo Co., New Mexico, for the crime of embezzlement at said term; that the defendant, by a good and sufficient plea, when arraigned on said indictment, pleaded 'not guilty;' that during said trial all the wit-

nesses introduced on the part of the territory were Lizzie McGrath, (who was the principal or prosecuting witness,) James H. Smith, the policeman who made the arrest, and R. B. Myers, the justice who bound the defendant over, and all of whose evidence tended to prove that in about September, 1887, the defendant, at the request of Lizzie McGrath, entered her employ as cook and general servant at Albuquerque, in said county, at a salary of ten dollars a week; that during the course of his employment the defendant, at the request of said Lizzie, several times carried her bank-book and cash to the First National Bank of said Albuquerque, and deposited the cash to her credit; that on the 15th day of September, 1887, again at her request, the defendant took her bank-book and one hundred and sixty dollars in gold and silver coins of the coinage of the United States and in currency, issued under the laws of the United States, and went out to go to the bank as usual, but instead of going to the First National Bank, went to Hope's corner faro-bank, in said Albuquerque, and there proceeded to gamble the aforesaid money against the game and bank until he had but twenty-five dollars of it left, at which time he was arrested; that said sum of twenty-five dollars, together with twenty dollars the said Lizzie owed him for two weeks' wages, left the defendant 'short in his accounts' to the said Lizzie in the sum of one hundred and fifteen dollars, and that said above-named witnesses also testified that the defendant at different times admitted to each of them the above state of facts; that the only defense made was the giving in of the defendant's plea of 'not guilty' and the following testimony by the defendant himself: Joe Kee, the defendant, being duly sworn, testified as follows: 'Question. Will you tell the truth if you talk to the jury now? Answer. No, sir. Q. Will you speak the facts if you talk to the jury now, as they occurred? A. Yes, sir; I talk some. Q. Will you tell right? A. Yes, sir. Q. You won't tell any lie? A. No. Q. Do you know Lizzie McGrath? A. Yes, sir. Q. Where were you during last September? Were you in her house last September, the same as she told here on the stand? A. Yes, sir. Q. What were you doing there in that house? A. Cooking. Q. What kind of a house is that? A. Whore-house. Q. How much did she give you a week for cooking? A. Ten dollars a week. Q. Where have you been for the last seven months? (Objected to by the territory as immaterial. Sustained.)' And this was all the testimony produced or offered or introduced in said cause on the part of either party. And thereupon the defendant, by counsel, moved the court to instruct the jury to find him not guilty, for the reasons—*First*, because the evidence shows that the money was received from the defendant's principal, and not from any other person, in accordance with the words of the statute; *second*, because there is no evidence in the case showing, or tending to show, that the money given to the defendant was the property of Lizzie McGrath; and, *third*, because there is

no evidence in the case to show that the defendant appropriated the money to his own use,—which motion was denied by the court, to which action of the court the defendant, by counsel, then and there duly excepted and still excepts; whereupon the defendant's counsel then asked permission of the court to argue the case to the jury on the testimony, but the court denied him such permission, to which action of the court the defendant then and there excepted and still excepts; whereupon the court, of its own motion, instructed the jury as follows: 'Gentlemen of the jury: There is no conflict in the evidence in this case. Therefore you are instructed to find the defendant guilty as charged, and assess his punishment at a fine not exceeding five thousand dollars, or to imprisonment in the county jail or the territorial penitentiary not more than two years nor less than three months.' And thereupon the jury, by direction of the court, found the defendant guilty as charged in the indictment, and assessed his punishment at imprisonment in the territorial penitentiary for the term of two years, to which action of the court in so instructing the jury to find him guilty the defendant then and there duly excepted and still excepts. That thereafter, in proper time, the defendant, by counsel, filed his motion in arrest of judgment and for the discharge of the defendant from custody, which motion the court overruled; that the grounds of such motion was the action of the court in so refusing to permit counsel for defendant to argue the case to the jury in his behalf, and the action of the court in so instructing the jury to find the defendant guilty, to which action of the court in so overruling the said motion the defendant at the time duly excepted and still excepts; that thereafter, upon the last day of said term, the court sentenced said defendant to the term of two years' penal servitude in the territorial penitentiary; that on said last day of the term the defendant filed his proper affidavit, and prayed an appeal of said cause to the supreme court of the territory of New Mexico, which was duly granted, and the time for settling and filing a bill of exceptions in the cause was then set, and thereafter from time to time, before such time had expired, duly extended to the 1st day of September, A. D. 1888. And now, the respective counsel having agreed upon the foregoing as a bill of exceptions herein, they respectfully ask the court that the same be signed and sealed and made of record herein. In evidence of which agreement the said counsel hereunder sign. CLIFFORD L. JACKSON, District Atty., representing the territory. BERNARD S. RODEY, Atty. for Defendant. Which is hereby done this 21st day of August, 1888. WM. H. BRINKER, Presiding Judge."

LEE, J., (after stating the facts as above.) Several questions are raised by the record, but only one we think it necessary to consider, as, in our opinion, in criminal cases it is not in the province or power of the court trying the case to direct a verdict of guilty, no matter how strong, clear, and unimpeached the evi-

dence may be on the part of the prosecution. Under the constitutional provision which guaranties to persons accused of crime the right of trial by jury, an accused person has in every case where he has pleaded "not guilty" the absolute right to have the question of his innocence or guilt submitted to the jury, no matter what the state of the evidence may be. The right thus granted has been so fully recognized and carefully guarded by the courts that it has been frequently held that it cannot be waived by the prisoner, and that a trial before the court without a jury is erroneous, even where it takes place with the prisoner's consent. The only case of respectable American authority holding the contrary proposition is the ruling of Justice HUNT, in the circuit court of the United States, on the trial of Susan B. Anthony for illegal voting at a federal election. *U. S. v. Anthony*, 11 Blatchf. 200. And the learned judge in that case seems to have come to doubt the correctness of his ruling on the question, as subsequently, when the officers of the election, who were indicted together with Miss Anthony for the same offense, and in which substantially the same testimony was introduced on the trial, he submitted the case to the jury. In the case of *U. S. v. Taylor*, 11 Fed. Rep. 470, Judge McCrary carefully reviews the rulings of Justice HUNT in the Anthony Case, and holds the contrary doctrine. In concluding his opinion he says: "It is now well settled in the federal courts that in civil cases, where the facts are undisputed, and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law, but the authorities which settle this rule have no application to criminal cases. In a civil case the court can set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly. By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. This is so, notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution. In this condition of the testimony it was the right of the jury to pass upon the credibility of the witness, even if impeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused state-

ment, prejudice, and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. And even in civil cases, so far as I know, no judge has ever gone further than to say, when the case was at all dependent upon oral testimony, that if the jury believed all the testimony they should find for the plaintiff or defendant. The present case, in itself considered, is of little consequence, but the question involved is of far-reaching importance; for if the power to direct a verdict of guilty exists in this case, it exists and may be exercised in any criminal case, however important, and even if the punishment be death. In view of this, and especially in view of the opinion above cited of Mr. Justice HUNT, for whose judgment I entertain the highest respect, I have considered the case with great care. I have also consulted Mr. Justice MILLER, who authorizes me to say that he concurs in the conclusion which I have reached." The rule as stated by Justice McCrary is sustained in *U. S. v. Gibert*, 2 Sum. 19, as it is there held that as soon as it judicially appears of record that the party has pleaded not guilty, an issue has arisen which courts are bound to direct to be tried by a jury. While it is a very old, sound, and valuable maxim in law that the court answer to questions of law and the jury to facts, yet every day's experience evinces that in criminal cases juries assume to be judges of the law as well of the facts. And while it is the law and the theory that the court will instruct the jury as to the law in the case, and that it is the duty of the jury to receive the law from the court, yet it has never to our knowledge been claimed that if the jury disregarded the law as laid down by the court, and returned a general verdict of not guilty, the court can set it aside; and as said by McCrary, supra: "If this cannot be done by an order after verdict, how could the court do substantially the same thing by an instruction before verdict?" The action of the court is the same in either case; it is a decision by the court upon the law and facts that the accused is guilty. The court must determine both the law and the facts, whether it directs a verdict of guilty or sets aside a verdict of not guilty. McCrary cites in support of the doctrine laid down by him, and which, we think, is the correct one, the following authorities, some of which go to the full extent, that the jury are exclusive judges of the law and the facts in criminal cases. Several of them are exactly in point, holding that a direction to the jury to convict is erroneous, notwithstanding overwhelming evidence of guilt. *U. S. v. Battiste*, 2 Sum. 243; *Com. v. Porter*, 10 Metc., (Mass.) 263; *Com. v. Van Tuyl*, 1 Metc. (Ky.) 1; *U. S. v. Stockwell*, 4 Cranch, C. C. 671; *Stettinius v. U. S.*, 5 Cranch, C. C. 573; *Montee v. Com.*, 3 J. J. Marsh. 132; *Sims v. State*, 43 Ala. 33; *U. S. v. Hodges*, 2 Wheeler, Crim. Cas. 477; *U. S. v. Wilson*, Baldw. 78; *U. S. v. Fenwick*, 5 Cranch, C. C. 562; *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; 4 Bl. Comm. 361; *Tucker v. State*, 57 Ga. 503; *Huffman v. State*, 29 Ala. 40; *Perkins v. State*, 50 Ala. 154. This court, believing the

law to be as expressed in the authorities referred to and cited, holds that the court below erred in instructing the jury to find the defendant guilty, and in overruling the motion in arrest of judgment. The judgment is therefore reversed, and the cause remanded for such action as may be properly taken in accordance with the views herein expressed.

O'BRIEN, C. J., and MCFIE, SEEDS, and FREEMAN, JJ., concur.

(5 N. M. 548)

SALAZAR v. LONGWILL.

(Supreme Court of New Mexico. Jan. Term, 1891.)

EJECTMENT—EVIDENCE—ANCIENT DEEDS.

1. In ejectment, two ancient deeds, which plaintiff admits were insufficient to pass the title to the grantee because not executed in accordance with the laws of Spain, then in force in New Mexico, are inadmissible to show color of title in plaintiff, who claims under the heirs of the grantee, in the absence of evidence that the grantee or his heirs ever took possession of the land, or exercised acts of ownership over it.

2. An entry on the land by a son of the grantee, nearly 50 years after the execution of the two ancient deeds, and many years after the grantee's death, under an assumption of ownership in himself, is an ouster of the grantee's other heirs; and the title acquired by such entry and possession inures to the son and his heirs, and not to the other heirs of the grantee; and hence such entry and possession do not render admissible the two ancient deeds, as showing color of title in plaintiff, who claims under a quitclaim deed from the other heirs of the grantee.

3. Plaintiff having failed to show any title in the grantee, the exclusion of evidence as to who were his heirs, if error, is immaterial.

Error to district court, Santa Fe county.

*Edward L. Bartlett*, for plaintiff in error. *Catron, Knaebel & Clancy*, for defendant in error.

LEE, J. This is an action of ejectment, brought by Miguel Salazar, the plaintiff in error, against the defendant in error, Robert H. Longwill, to recover possession of certain real estate situated in precinct No. 4 in the county of Santa Fe, known as the "Ranchito Largo," and for damages for the detention of the same. The action being under the statute, the defendant's plea of not guilty put in issue the right of the plaintiff to possession, and all other questions raised and matters charged in the plaintiff's declaration. The issues being thus joined, they proceeded to trial. The plaintiff introduced his evidence, whereupon the defendant's counsel moved the court to instruct the jury to return a verdict for the defendant, which motion was sustained for the reason that the evidence failed to sustain the case, and the jury, by direction of the court, returned a verdict for the defendant. The plaintiff moved for a new trial, which was overruled, and by a writ of error brings the case to this court, and assigns the following grounds of error: (1) That the court erred in excluding from the jury the first document offered in evidence by the plaintiff below; it purporting to be a certificate of conveyance from Maria Casada, widow of Vicente Apodaca, to Tomas Sena, of a portion of the lands in dispute,

and executed on the 30th day of July, A. D. 1821. (2) That the court erred in excluding from the jury the second document offered in evidence by the plaintiff below; it purporting to be a conveyance from Vincente Apodaca and Vicente Martinez to Tomas Sena, of a portion of the lands in dispute, and purporting to have been executed by an alcalde on the 12th day of September, 1807. (3) That the court erred, because at a later stage of the trial and after evidence had been given tending to show possession of the lands in dispute in the ancestors of plaintiff in error's grantors, the court again refused to allow plaintiff in error to give the above-described documents in evidence to the jury, but excluded the same again from the jury. (4) That the court erred in refusing to allow any testimony as to who were the heirs of Tomas Sena, except from absolute personal knowledge, and excluded from the jury testimony as to the general reputation in the family of the descendants of Tomas Sena as to who were his heirs, and refused to allow plaintiff in error to show that certain persons were recognized and treated in the family as such heirs, and excluded such testimony from the jury. (5) That the court erred in refusing to allow testimony to be given to the jury as to the actual occupancy of the land in dispute by permission of Jose D. Sena, after the death of Miguel Sena y Quintana in 1875, and in excluding such testimony from the jury. (6) That the court erred in excluding from the jury the deed offered in evidence, executed July 4, 1887, and recorded July 15, 1887, from persons reciting in said deed that they were the heirs of Tomas Sena to the plaintiff in error, conveying the land in controversy. (7) That the court erred in excluding from the jury other relevant, material, and competent testimony offered by plaintiff in error on the trial in the court below in support of his case, and which should have been allowed in evidence. (8) That the court erred in giving its instructions to the jury to return a verdict for the defendant below over the objections of the plaintiff in error, and in refusing to allow the jury to consider the evidence which it had before it.

The principal question for review arises upon the exclusion of certain documents offered in evidence by the plaintiff as the foundation of or in support of his title. We will consider this ruling more fully than any of the other points made, for we think it is decisive of the case. The documents were ancient documents, and therefore to be considered with the presumptions that come to the support of imperfect instruments of more than 30 years old. The documents thus offered in evidence in this case were evidently attempts to make conveyances under the laws of Spain, in force here at the time. The first one offered was dated in the year 1821, and executed by Don Diego Montoya, a constitutional alcalde. The grantors did not sign the same, for the reason, as the alcalde certifies, that they did not know how. The other document was dated in the year 1807, before Don Jose Miguel Tafuya, acting alcalde for the town of Santa Fe. The

party making the deed was not present, but, as recited in the document, was at home, sick in bed; and the instrument was not signed by the grantor, or by any one for her. Nor was there any authority in writing or power of attorney exhibited or offered in evidence, whereby the alcalde was authorized to execute the document. They were in the Spanish language, and, when translated into the English language, read as follows:

"Document No. 8. At the city of Santa Fe, New Mexico, on the thirtieth day of the month of July, and current year of one thousand eight hundred and twenty-one, before me, Don Diego Montoya, constitutional alcalde of said city, personally appeared Vicente Martin and Don Tomas Sena, both residents of this city, and the former stated that whereas his aunt, Maria Casadas, is sick in bed, and it is impossible for her to come to witness the execution of the present instrument, she has requested him, in the presence of two witnesses, of this same place, to state in her name that her husband, Don Vicente Apodaca, deceased, sold to the said Don Tomas Sena, in the month of April of last year, 1820, a piece of land known as the 'Ranchito Largo,' which is situate in this city, and it consists of one hundred and seventy-seven and a half *varas* from north to south, and from east to west on the north side of eighty-one and a half *varas*, and on the south of sixty-three and a half *varas*; the boundaries of the said land being, on the north, the main road that turns off from the Tenorio's house, which goes by the Martinez house; on the south, the arroyo called 'Los Garambullos,' on the east, lands of the said purchaser; and on the west, lands of Senor Mateo Garcia,—for which land no instrument has been executed to him; and in consideration of the fact that she knows that the said bargain was made, and that in virtue thereof she has received, to her perfect satisfaction and contentment, twenty-one dollars and three reales in cash, desiring to remedy the said defect in the name of her deceased husband, and, on account of her present inability, delegating for that purpose her authority to her said nephew, Vicente Martin, it is her will that it be stated that the bargain made of said land, being true and legal as it is, it is also true that she was contented and satisfied with the said sum, and in virtue thereof, if the said land is or may be worth more, of the excess she makes to him a gift and donation, pure, simple, perfect, and irrevocable, which the law calls '*inter vivos*,' and that she gives it to him free of any annuity, rent, mortgage, or other incumbrance, in order that he may freely use it in the manner that he may choose, without any one interfering with him, neither she, her children, heirs, nor successors; and in case any one should oppose it, she requests the justice of his majesty that they be not heard either in or out of court, binding her children, on the contrary, to this guaranty until they place him in quiet and peaceable possession, concerning which she renounces any and all laws which may operate in her favor, submitting herself to the fulfillment of this instrument as if it

were by definitive sentence pronounced by a competent judge, acquiesced in and not appealed from; and, as she knows it is an act of justice, she desires this to be complied with, and that it be considered as the said sale, without alleging the defect that up to this date the proper instrument had not been executed; to that end, and in order that the present may have the necessary force and validity, requesting the present constitutional alcalde to sanction it by his authority and judicial decree; and I, the said constitutional alcalde, stated that I sanctioned and did sanction it in so far as I am authorized by law. I certify that Maria Casadas is dangerously ill, and that for that reason, with full knowledge, it has been her will that her nephew, Vicente Martin, should appear in her name, who, comparing all that he has stated, and which is here set forth, with that which in the presence of the two witnesses recently and for the sake of due formality the said Casadas has finally stated, it has all been found to be certain and true. In testimony whereof, and in order that the present instrument be entitled to the same credit as if it had been executed by order of the deceased Don Vicente Apodaca, I signed it with the same witnesses, who made a cross, not knowing how to write. The secretary of the municipality of this city signing this document of security, it being noted that use has been made of the present common paper on account of there being none of any stamp in this province. To all of which I certify.

"DIEGO MONTOYA. [Scroll.]

"Witness: VICENTE X GARCIA.

"Witness: JOSE MIGUEL TENORIO.

"Before me, FRANCISCO PEREZ SERRANO, [Scroll.] Secretary of the Municipality."

"Document No. 3. At the town of Santa Fe, on the twelfth day of the month of September, one thousand eight hundred and seven, before me, Don Jose Miguel Tafuya, acting alcalde of this said town, appeared Vicente Apodaca, Vicente Martin, and Tomas de Sena, all three residents of this aforesaid town, whom I certify I know, and the two Vicentes stated that they gave, and in effect they did give, to the said Tomas de Sena, in legal sale, a piece of cultivated land which is at the Ranchito Largo, and [of] this land that which Vicente Apodaca sold consists of fifty *varas*, and that which Vicente Martin sold consists of one hundred and thirty-eight *varas*, both pieces comprising one tract; and its boundaries are, on the north, an arroyo; on the south, the Arroyo de los Garambullos; on the east, the lands of the said Vicente Martin; and on the west, the land of the said Vicente Apodaca,—which lands both vendors sold to him for the price and sum of one hundred and thirty-eight dollars in the currency of the country, which said vendors acknowledge having received from the hand of Tomas de Sena, to their satisfaction and contentment, with which they declare that they are satisfied, and paid for the value of said land; and, if it is or may be worth more, of the excess and greater value they make to him a gift and donation, pure, simple perfect, and irrevocable, which the law

calls, [two words are here erased in the original; they were doubtless the words '*inter vivos*;' ] and that they cede and convey to the said purchaser the right of action and seigniority which they had in said land, in order that as his own he may use it, selling or alienating it, without any suit or claim being brought against him either by them, their children, heirs, successors, either now or at any time; and, in case they should bring it, may they not be heard either in or out of court; and that they will appear in his defense until they leave him in quiet and peaceable possession; to which guaranty they bind their present and future property, real and personal, that they annul [waive] any and all laws that may operate in their favor, and they will not avail themselves thereof, either now or at any time; and they both submit themselves to the royal justices of his majesty, and particularly to those of this town, in order that to the fullest extent they may urge and compel them to the fulfillment of this instrument as if it were by the definitive sentence pronounced by a competent judge, acquiesced in, and not appealed from. All of which they executed before me, and they requested me, for the greater force and validity of this instrument, to sanction it by my authority and judicial decree; and I, said alcalde, state that I did and do sanction it in so far as I am authorized by law. I certify that I know the grantors, who did not sign, as they did not know how. I signed it with those attending me acting by special authority for lack of a public or royal notary, of which there is none of any kind in this province. To all of which I certify.

"JOSE MIGUEL TAFOYA. [Scroll.]"

"Attending: ANTONIO TAFOYA. [Scroll.]"

"Attending: FRANCISCO BACA. [Scroll.]"

These instruments were attempted to be executed under the laws of Spain, then in force in this territory as a province of Mexico, and under the Spanish law a sale of real estate was made before a notary public by what was termed a "public writing," (*en escritura publica*.) A "public writing" is thus defined: "Public writing" is that which is made by a notary public in the presence of the parties who execute it, with the assistance of two witnesses; the parties in interest signing it, or, at their request, either of the witnesses, with the said notary." Escriche, p. 637. "Public Instrument. In general it is every writing authorized by a public functionary in matters pertaining to his office or position, as has been already indicated in the two preceding articles, but more particularly by public instrument or writing, is meant the writing in which is contained a disposition or agreement executed before a notary public in accordance with the law, is understood, and of this kind of instruments we will treat in this article." "(1) In order that the public instrument be held as authentic, and in accordance with the law, the following conditions are required: \* \* \* (7) That, the writing being made, it be read by the notary to the parties and the witnesses, and, the former agreeing to its tenor, they shall sign with their names and surnames; and if they should not

know how to sign, either of the witnesses, or any other person who may know how to write, may sign for him," the notary making mention at the end 'that the witness signed for the party who did not know how to write.'" Law 1, tit. 23, bk. 10, Novissima Recopilacion. Escriche, pp. 886, 888. The civil law in regard to the requirements of a power of attorney is essentially the same as that of the common law, and it would hardly be contended that under the common law a person without a properly executed power could make a valid conveyance of another person's land. Yet these documents might very properly have been admitted in evidence as ancient documents, tending to show color of title, if they were offered alone for that purpose, with an understanding that they were to be followed up with proofs that the grantees took possession thereunder, and maintained the same under claim of title, until ouster by the defendant; and this proposition would have to be sustained by the evidence, as it is an elementary rule in the action of ejectment that the party claiming the right to lands must recover, if at all, on the strength of his own title. The possession of the defendant gives him a right against every person who cannot establish a title. This is a general rule, to which there is no exception, and has been established by a world of authorities. See Tyler, Ej. p. 72, and cases cited. The plaintiff in error does not claim that the documents offered in evidence by him were legal deeds, but invokes for them the ruling of the supreme court of the United States in the case of Stoddard v. Chambers, 2 How. 284. In that case the deed was executed in 1804. It was attested by two witnesses, and purported to have been acknowledged in the presence of a syndic. The deed had been executed 40 years at the date of that decision, and from the time of its execution to the time of the decision the grantees were asserting their claim under it. It was presented to the commissioners in 1811, having been filed with the recorder of land titles in the year 1808; and again it was brought before the commissioners in 1835, having remained on the file until that time. Possession under the deed was for a time held by Stoddard himself, and became so notorious that an elevation on the land was called "Stoddard's Mound." It was held that such a deed, under such a state of facts, was properly admitted in evidence. In this case there is no evidence that Tomas Sena, the grantee, ever had possession of any part of the land, or by any act of his ever asserted or pretended to assert any claim of title to any part of it, unless it is included in a general bequest to his heirs by his first wife, which will was executed in 1835. The will, however, was only offered in evidence to show who the heirs of Tomas Sena were, and not for the purpose of showing that the land was included in his will, or thereby intended to be conveyed to any person or persons. The documents were not recorded during the lifetime of Tomas Sena, or during the lifetime of Miguel Sena y Quintana, his son, who died in the year 1875, he being the party who, it is claimed by the plaintiff, in the

year 1866 or 1867 set up some claim of right to the property. Whether this right was under or by virtue of the documents in question it does not appear. So far as the evidence shows, his claim to the property was that of his own. These documents, together with the will of his father, were found, after his death, in a box which had belonged to him. It does not appear in evidence that before that time any of the other heirs of Tomas Sena knew of their existence. His acts of ownership were to visit the land a few times, have it measured with a rope, to try and sell it, and put it in charge of Maj. Jose D. Sena, to take charge of it for him. Maj. Sena let different persons cultivate different parts of the lands. Some years some parts of the land were cultivated, some years others, and some years it remained idle. There are no buildings of any kind on the land, or other evidences of exclusive possession, except a wire fence around a small part of the land. The evidence does not show when that was constructed or by whom. There is no pretension that it was erected by Miguel Sena y Quintana. In fact the evidence shows the contrary, as Maj. Sena states in his testimony that he does not know who put the fence there, nor does he show that it was there while he had charge of the premises. Then, what was the character or effect of the acts of ownership exercised by Miguel Sena y Quintana to the *locus in quo*? It is admitted by the plaintiff in error that the documents in question are not deeds conveying fee-simple title. Then, in order to give them any legal effect, it would have to be shown that Tomas Sena, the person mentioned in the documents as the grantee, or persons holding under him, had entered under them and occupied the same by claim of right, until such possession ripened into title by prescription. There is no evidence that Tomas Sena ever had or claimed possession of the land, nor is there any evidence that Miguel Sena y Quintana entered or took possession as a tenant in common with the other heirs of Tomas Sena, deceased; but, so far as the evidence goes, his possession was adverse to them. An ouster by a tenant in common of his co-tenants does not differ in its nature from any other ouster. His entry was an ouster of them, and his possession was adverse to them, for his assumption of ownership was in himself, and clearly adverse to them, as well as the rest of the world; and, if any title inured to any person by virtue of his possession, it would be to him, his heirs, or persons holding under him, and not to the heirs of Tomas Sena, deceased.

And this brings us to consider a deed offered in evidence, executed by some 40 persons on the 4th day of July, 1887, in which it is cited that they are the heirs of Tomas Sena, deceased, and in consideration of one dollar and other good considerations quitclaim whatever right or title they may have inherited as heirs of Tomas Sena, deceased; it being thus set forth in the deed: "The property herein conveyed is the same property that the said parties of the first part obtained and inherited from Tomas Sena, deceased, who pur-

chased the said real estate from Vicente Apodaca and Vicente Martin by deeds dated September 12, 1807, and July 30, 1821," etc. And this deed does not purport to convey any other title than that which they may have inherited as heirs of Tomas Sena, deceased, through the attempted conveyances before set out and considered. It is very clear that those documents did not convey to Tomas Sena any title, and therefore his heirs, whoever they may have been, could not convey a title through inheritance from the said Tomas Sena as derived by him through those documents. The court was therefore right in excluding this deed as evidence from the jury.

There are errors assigned upon the rulings of the court in excluding certain testimony from the jury, which was claimed tended to show who the heirs of Tomas Sena were. This testimony could only become material after they had established a title in Tomas Sena, which, according to the view we have taken of the case, the plaintiffs failed to do. Therefore the testimony in that regard was immaterial, and errors, if any were committed, in relation thereto, would be regarded immaterial, and cannot have any effect here.

It is also claimed that the court erred in directing a verdict for defendant. This was practically settled in sustaining the ruling of the court below in excluding from the jury as evidence the title papers offered by the plaintiff in error. Those papers being excluded, there was no evidence to support a verdict, and the court very properly instructed the jury to return a verdict for the defendant, for the reason that the law presumes a person in possession of real estate has a valid title thereto, and this presumption can only be overcome by proving the title out of such party. Finding no substantial error, the judgment will be affirmed.

O'BRIEN, C. J., and MCFIE, FREEMAN, and SEEDS, JJ., concur.

(5 N. M. 590)

*In re SLOAN et al.*

(Supreme Court of New Mexico. Jan. Term, 1891.)

ELECTIONS—CANVASSING RETURNS—MANDAMUS—INJUNCTION.

1. Under Act Feb. 23, 1889, (Sess. Laws N. M. T. 1889, c. 135, § 13, p. 331,) providing that the county commissioners shall canvass the returns and declare the result of an election from the returns, and that, if they fail to canvass any return under any pretense, they may be compelled by *mandamus* to either canvass the returns, and declare the result, or bring before the district judge all the returns to be examined by him, and the result declared by him, the district judge can enjoin the canvassing board from issuing a certificate of election pending a *mandamus* proceeding to compel them to canvass the returns from certain districts which they have refused to consider. O'BRIEN, C. J., dissenting.

2. Under Laws N. M. T. 1889, c. 117, § 1, providing that injunctions may be granted in aid of any suit at law, provided that such suit has been begun, it is competent for a district judge, on whom power to compel by *mandamus* the board of county commissioners to canvass all the returns of any election is conferred by Laws N. M. T. 1889, c. 135, § 13, to enjoin the commissioners from issuing certificates of election pending the proceedings by *mandamus* which have



been instituted when the injunction is granted. O'BRIEN, C. J., dissenting.

3. The fact that in punishing commissioners for disobedience of such injunction the court commits an irregularity, by imposing several different fines for several distinct offenses in one proceeding, does not entitle them to release on *habeas corpus*, as such errors must be cured in the court committing them, or by appeal. O'BRIEN, C. J., dissenting.

4. Under Comp. Laws N. M. § 1829, providing that the courts shall always be open, the judge of the district court at chambers has jurisdiction to grant an injunction in vacation.

#### *Habeas corpus.*

Francis Downs, N. B. Laughlin, Thomas Smith, and Harrison Burns, for petitioners. E. L. Bartlett, Sol. Gen., and John H. Knaebel, for the Territory.

McFIE, J. On the 23d day of January, A. D 1891, on petition of John H. Sloan and Teodoro Martinez, alleging, in substance, that petitioners were unlawfully confined and restrained of their liberty by the sheriff of Santa Fe county, a writ of *habeas corpus* issued out of this court, directing Francisco Chavez, sheriff of Santa Fe county, to bring the petitioners before this court, to show cause why petitioners should not be discharged. The record discloses all of the proceedings had before EDWARD P. SEEDS, associate justice of the supreme court of the territory of New Mexico, and judge of the first judicial district court thereof, of which the county of Santa Fe forms a part, sitting in chambers in the city of Santa Fe, in said county, in a certain *mandamus* proceeding, No. 2,808, filed November 12, 1890, entitled "The Territory of New Mexico, ex rel. Benjamin M. Read, vs. John H. Sloan, George L. Wyllys, and Teodoro Martinez. Board of County Commissioners of Santa Fe county," and a certain proceeding by injunction, No. 2,809, filed November 12, 1890, entitled "Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron vs. John H. Sloan, George L. Wyllys, and Teodoro Martinez." Upon the hearing, January 23, A. D. 1891, no technical objections were raised to the formality of the proceedings, but, on the contrary, counsel for petitioners denied the jurisdiction of the court over the subject-matter, and the power of the court to issue the process by which petitioners were held, and contended that the same was void. The facts out of which this controversy grows are pretty fully stated in the application for injunction, which is as follows:

"Territory of New Mexico, county of Santa Fe. In the district court for the said county of Santa Fe, sitting for the trial of causes arising under the laws of said territory. To the Honorable EDWARD P. SEEDS, associate justice of the supreme court of said territory, and judge of said district court: Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, residents of said county, bring this, their bill of complaint against John H. Sloan, George L. Wyllys, and Teodoro Martinez, also residents of said county, and show unto your honor: Complainants were candidates at the election held in said county on the 4th day of November, 1890, said Read and Mayo for the offices of mem-

bers of the house of representatives of the legislative assembly of New Mexico, and said Catron for the office of member of the council of said legislative assembly, and, as such candidates, were voted for by voters of said county, and, as shown by the election returns, received majorities of the votes cast for said offices, respectively. Defendants are the county commissioners of said county, and, as such, are required by law, within six days after an election, to publicly examine and count the votes polled for each candidate, and to forward to the persons who have received the greatest number of votes polled at any election held for members of the house of representatives the corresponding certificate of election. That defendants have assembled at the court-house in the county of Santa Fe for the purpose aforesaid, but have failed, neglected, and refused to count a portion of the votes polled at said election for these complainants, such portion being the votes cast for complainants in the precincts of said county numbered 1, 2, 8, 11, and 16; the returns of election from said precincts being before said defendants, and in regular and perfect condition. The failure and refusal of defendants to count said votes as shown by said returns will materially affect the result of said count so as to make it appear that persons other than complainants have been elected to said offices, although such is not really the fact; and defendants give out and threaten that they will make and deliver, or cause to be made and delivered, to such other persons, certificates showing their election to the offices aforesaid, and complainants believe that they will certainly do so unless restrained by an order of this court. If such certificates are so made and issued to such other persons, great and irreparable damage may, and probably will, result to complainants, and to each of them, and to the public generally, and the existence of such certificates may, and probably will, be the cause of numerous suits and vexatious and expensive litigation, as has heretofore been the case in this territory under similar circumstances. As soon as the said count by defendants is completed, complainants will institute, or cause to be instituted, in accordance with the statute, proceedings in *mandamus* to compel defendants to canvass all of the returns of said election in said county; but before such proceedings can be made effective, and before the complete canvass can be made, defendants will issue, or cause to be issued, such improper and fraudulent certificates of election as hereinbefore described. Complainants therefore pray that defendants be restrained and enjoined by an injunction of this court from making and delivering, or ordering or causing to be made or delivered, any certificate of election to either of the offices hereinbefore mentioned to any person or persons other than these complainants, and for making, or causing to be made, any record of the result of their canvass of said election returns, until the further order of the court in the premises. May it please your honor to grant unto complainants the writ of subpoena, un-

der the seal of this honorable court, directed to defendants, John H. Sloan, George L. Wyllys, and Teodoro Martinez, commanding them, and each of them, to appear before this court on a day and under a penalty to be therein fixed, then and there to answer unto the premises as fully as if the same were here repeated, and they particularly interrogated thereto, but not under oath, an answer under oath being hereby expressly waived, and to abide the order or decree of the court in the premises. BENJAMIN M. READ."

"Territory of New Mexico, county of Santa Fe. On this 12th day of November, A. D. 1890, personally appeared before me Benjamin M. Read, and made oath that he had read the foregoing bill by him subscribed, and knew the contents thereof, and that the same is true, except as to matters therein alleged upon information and belief, and as to those matters he believes it to be true. Witness my hand, and the seal of the district court of the first judicial district of the territory of New Mexico, the day and year last above written. A. E. WALKER, Clerk Dist. Court. [Seal.]"

The writ of injunction is as follows:

"The territory of New Mexico to John H. Sloan, George L. Wyllys, and Teodoro Martinez, greeting: Whereas, Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron have filed in the district court for Santa Fe county their bill of complaint against you, praying to be relieved touching the matters therein set forth, now, therefore, you, the said John H. Sloan, George L. Wyllys, and Teodoro Martinez, both individually and as members of the board of county commissioners of Santa Fe county, your agents, servants, employes, and advisers, are hereby restrained and enjoined from making or delivering, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of New Mexico, and of member of the council of said legislative assembly, to any person or persons other than said Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, and from making or causing to be made any record of the result of your canvass of the election returns of the election held in said county of Santa Fe on the 4th day of November, 1890, until the further order of said district court in the premises. Witness the Honorable EDWARD P. SEEDS, associate justice of the supreme court of the territory of New Mexico, and judge of the first judicial district court thereof, and the seal of said district court, this 12th day of November, 1890. A. E. WALKER, Clerk. [Seal.]"

The injunction not having been dissolved, but remaining in force, two affidavits were filed in the cause setting forth the disobedience of the writ of injunction by two of the said county commissioners, John H. Sloan and Teodoro Martinez. Thomas B. Catron, one of the complainants, filed his petition setting forth the violation of the injunction by two of the commissioners, Sloan and Martinez, and prayed that they should be pun-

ished for contempt. The court ordered Sloan and Martinez brought before the court by attachment, and upon hearing they were each fined in the sum of \$50 for four distinct acts of contempt, aggregating \$200, and costs, and ordered to be imprisoned in the county jail until fine and costs were paid. The petitioners refused to pay the fine and costs assessed against each of them, and were put in jail by the sheriff. To avoid payment of the fines assessed and costs, and be discharged from imprisonment, petitioners have sued out this writ of *habeas corpus*. The law governing the *mandamus* proceedings in this case is section 13, c. 135. Laws 1889, and took effect February 28, 1889. In compliance with that section, Mr. Read filed his sworn petition on the 12th day of November, 1890, alleging the refusal of John H. Sloan, Teodoro Martinez, and George L. Wyllys, as such canvassing board, to count the returns from certain precincts named; and the court granted an alternative writ of *mandamus* requiring the canvassing board to proceed to either canvass the returns from the precincts named, and declare the result, or to appear in person forthwith before said district court, and bring with them all of such returns, and all of the returns or papers purporting to be returns. The board, accompanied by counsel, appeared before the court on the following day, and filed an answer stating in full their reasons for declining to canvass the returns, and declare the result, as directed by the court, and asked to be discharged. On application of counsel for the relator a peremptory writ of *mandamus*, as to the canvassing of precincts 1, 2, 16, and 8, was issued November 18, 1890, returnable November 19, 1890, but the record shows no further proceedings, nor compliance with said peremptory writ. A bill of exceptions was filed by the respondents on December 5, 1890, and the cause is now in this court.

Having thus fully stated the record, we will now consider the law applicable to this cause. It is insisted on behalf of the petitioners that the court had no jurisdiction of the subject-matter, and therefore the writ of injunction was void; and being void, admitting that the petitioners had disobeyed the writ, there could be no contempt. It may be admitted that, if the court had no jurisdiction of the subject-matter,—that is, an absolute lack of power,—then there could be no contempt in disobeying the order of the court, because the order and process of the court was void. The authorities are abundant in support of this proposition. It is contended on behalf of the officer that the court had complete jurisdiction in the premises; that the petitioners are not illegally restrained, and should be remanded. A large number of authorities have been cited, and a examination of them emphasizes the necessity of keeping in mind the distinction between the entire want of power conferred by jurisdiction and the erroneous exercise of or the propriety of exercising, the power conferred. Courts of equity have very large discretionary powers, and in the exercise of that discretion they have declined to exercise an ex-

lating jurisdiction and power which would have been exercised had a proper case been presented. No positive and inflexible rule can be laid down regulating the jurisdiction of courts of equity, or whether jurisdiction shall be exercised or declined, inasmuch as the circumstances of each case must be taken into consideration in determining these questions. Nor can the authorities of one state be relied upon as settling these questions for another, for the reason that there may be constitutional or statutory limitations or enlargements of jurisdiction not common to all; thereby necessitating a careful examination of the law as applied to the facts of each case. In this case it is insisted that the court had no jurisdiction, because the petitioners were acting as a board of canvassers of an election; that they had discretionary powers; that they constituted an independent political power, and were free from the interference of the judicial power. The case of *Dickey v. Reed*, 78 Ill. 261, is relied upon as conclusive in this case. In that case an election had been held to determine whether the city of Chicago should become incorporated under the general incorporation act, or remain under its charter; or, as the court says, the election was to determine "which of two forms of government it should have." A bill in chancery was filed, alleging fraud and irregularity in the election,—not in the returns,—and prayed an injunction restraining the canvassing board from canvassing the returns of the election then in their possession. This was properly denominated a "bill to contest the election," which courts of chancery usually decline to entertain; but the injunction sought to restrain the board from doing a legal duty which the statute of Illinois imposed upon it,—to canvass the returns. The lower court granted the injunction, but the supreme court held that the court had no jurisdiction of the case. There is a marked distinction between the proceedings in that case and the case here, namely: That was a bill in chancery to contest an election; this was not. The injunction in that case was to prevent the board from performing a legal act and duty; the injunction in this case sought to prevent the board from doing an illegal and fraudulent act. There is also a material difference between the law then in force in Illinois and the laws of this territory, in that in this territory the statute expressly makes it the duty of the courts, when the county commissioners, sitting as a canvassing board, fail or refuse to canvass all of the returns, on its being brought to the attention of the court, to compel the board to canvass all the returns. Section 13 of chapter 135 of the Laws of 1889 is as follows: "That the board of county commissioners, sitting as a canvassing board for the purpose of canvassing the returns of any election hereafter held in this territory, shall not adjourn or become *functus officio* as a canvassing board until such board of commissioners shall have canvassed each and every return of election before them, and shall have declared the result from the face of such returns; and

if any board of county commissioners, sitting as a canvassing board, shall fail, neglect, or refuse to canvass any return of any election before said board under any pretense that such return is irregular, or for any other pretense, it shall be lawful for any qualified voter to present his petition under oath to the judge of the district court having jurisdiction, at his chambers, briefly setting forth the facts and circumstances, and praying that such board of commissioners shall be required by writ of *mandamus* issuing out of said court to count and certify such returns. And thereupon it shall be the duty of the district judge to immediately issue, or cause to be issued, his alternative writ of *mandamus* requiring said commissioners either to canvass such return or returns and to declare the result, or to appear in person forthwith before said court, and bring with them all of such returns; and, if such commissioners shall decline to canvass such return or returns, they shall appear before said court in obedience to such writ, and take with them all of the returns or papers purporting to be returns before them, and thereupon the court shall forthwith proceed to examine said returns, and upon such examination may issue his peremptory writ commanding said board of commissioners to immediately canvass any or all of such returns, and to declare the result."

Evidently, the legislature of this territory, profiting by experience, intended to place it within the power of one voter of a county to invoke the aid of the courts to compel canvassing boards, when canvassing election returns, to do their duty, if they either fail, neglect, or refuse to do it. The object of the law is to ascertain the will of all the people as expressed by them by their ballots, even from an unscrupulous or unwilling board of canvassers, and to preserve the rights of the people, individually and collectively, as well as prevent fraud and injury. Canvassing boards may fail, neglect, or refuse through ignorance; and the court, upon proper application, is required to direct them. Boards of canvassers have a ministerial duty to perform under this law, and that is to canvass "each and every return of election before them, and shall have declared the result from the face of such returns." This law gives the courts power to see that this duty is performed, and the undoubted right to issue the necessary writs of *mandamus* compelling its performance. The record shows that it became necessary to invoke the remedy provided by this law, but that it was unavailing.

The power of the courts to compel boards of canvassers to do their ministerial duty by canvassing the returns and declaring the results in election cases is sustained by numerous authorities without the aid of such an explicit law as the law of this territory. In the case of *State v. Garesche*, 65 Mo. 480, the court says: "Having ascertained what was the true return, and that the canvassing officers had failed or refused to count it, thus leaving their legal duty unfulfilled, the peremptory writ commanded its performance. It will thus be seen that the right to deter-

mine the specific legal duty of ministerial officers, such as defendants are, necessarily results from the very nature of the proceeding by *mandamus*. It simply requires the judicial officer to proceed to do his duty. It not only requires the ministerial officer to proceed to do his duty, but it also indicates what his specific duty is. To assert that the writ of *mandamus* cannot require the performance by a ministerial officer of any act which he does not, with the lights before him, conceive it his duty to perform, is to destroy the efficacy of the writ, and to substitute the conscience of the officer for the command of the law." The supreme court of Wisconsin has decided that a board of canvassers can be compelled to determine, in accordance with law, which one of the candidates at an election in that state for the office of representative in the congress of the United States is entitled to the certificate of election, and that this does not contravene the constitutional power of the house to determine its member's right to the office; the court merely deciding whether the returns made by such board of votes cast in a county should be included in their canvass and statement. *State v. Board of Canvassers*, 36 Wis. 498. Mr. McCrary, in his work on Elections, (section 350,) says: "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature when by the constitution each house is made the judge of the election and qualifications of its own members; but a court may, by *mandamus*, compel the proper certifying officers to discharge their duties, and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal. And inasmuch as canvassing and returning officers act ministerially, and have no power to go behind the returns, or inquire into the legality of votes cast and returned, a court will, by *mandamus*, compel them to declare and certify the result as shown by the returns, because that is a plain duty; but the award of a certificate of election under such mandate will not conclude the legislative body in determining the election." *O'Ferrall v. Colby*, 2 Minn. 180, (Gil. 148.)

These authorities, and many others that might be cited, make clear the duties of these canvassing boards, and the power of the courts to compel them by *mandamus* to do their duty, and the further fact is shown that such proceeding is not an election contest, nor does it try the title to an office. It simply compels a canvass of the returns, and a declaration of the result as shown by the face of the returns, regardless of who is elected or defeated. The numerous authorities in Illinois and elsewhere to the effect that the courts of equity have no jurisdiction in a case of contested election, and that injunction will not restrain the holding of an election, or try the title to an office, are not applicable here, and will be better understood if the above distinctions are kept in mind. As stated in the case in 78 Ill., there are certain political powers pertaining to the co-ordinate departments of government that are independent of judicial power,

and therefore cannot be controlled by the courts, which proposition excludes all courts; but the power of the courts may be invoked in aid of political administration to compel the performance of specific legal duties. Wherever, therefore, the door is open to judicial supervision, as in this territory, then all of the power of the courts necessary to make the remedy effectual is available. If equity is necessary to uphold the common law, it has a clear right to act by reason of the ancillary character of its functions. Under the statute of the territory above referred to, there can be no doubt of the power and jurisdiction of the court in the *mandamus* proceeding, nor can there be any reasonable doubt as to the fact that the legislature, in passing that act, intended to compel county commissioners, when sitting as a canvassing board, to declare the true result of an election from the face of all the returns, and that the judge of the proper district court, if called upon as provided by the law, should compel it to be done in case of failure, neglect, or refusal. It is clear, also, that such board is prohibited from canvassing less than all of the returns, and that they are forbidden to certify to false results, based upon a canvass of part of the returns. Therefore, if the law is obeyed by canvassers, all parties will secure the rights to which they were entitled by the result of any such election and the law.

It was urged in argument on behalf of the petitioners that the court had no power to control the discretion of petitioners when they were acting as canvassers of election returns; but an examination of the statute shows that they had no discretionary powers. The statute commanded them to canvass all of the returns, and declare the result from the face of the returns; therefore the argument fails to point out a want of power in the court in this respect. Counsel for petitioners also contend that petitioners are answerable alone to their consciences and their constituents for failure or refusal to properly discharge their duties as such canvassing officers; but this contention is conclusively answered by the statute on the subject, and need not be further noticed. Sadly defective, indeed, would be a law which placed the rights and interests of the people of a county in the hands of (it might be) an irresponsible and unscrupulous board of canvassers, who were accountable only to their consciences and constituents. Fortunately, the law of this territory is not thus defective. Jurisdiction in regard to election matters having been specifically conferred upon the courts of this territory, it is difficult to see how the case of *Dickey v. Reed*, 78 Ill. 261, becomes authority in this case; for in that case it was held that jurisdiction had not been conferred, and therefore the process was void. The failure to exercise the power conferred does not destroy the power. That is clearly shown by the case of *Neiser v. Thomas*, (Mo.) 12 S. W. Rep. 725, in which the court refuse to take jurisdiction, but say that they do not wish it to be understood that they would not exercise jurisdiction, even in

an election case, upon the presentation of a proper case. That was an injunction case, but was really an attempt to contest an election, and sought to have Mr. Thomas' right to the office of city marshal of St. Louis set aside on the ground that he was disqualified. To determine this question, evidence must be heard; and hence it was simply an attempt to try a contested election case in an equity court, and jurisdiction was properly declined. If we accept the view of the Illinois case contended for by counsel for petitioners,—that canvassing boards, in election matters, are an independent and coordinate political power, absolutely free from the jurisdiction of the courts,—what means this array of decisions of able courts, both of law and equity, in which they have taken and exercised jurisdiction in election cases, and especially as to canvassing boards? It seems to us that the contention is erroneous, and that the Illinois court declined jurisdiction under the law of that particular state as applied to the case presented to the court. The fact that some courts exercise jurisdiction in election cases, while others do not, serves to prove that the courts await the presentation of a proper case before attempting to exercise an existing power; and, further, that while there are election cases of which the courts of equity will refuse to take jurisdiction, owing to the particular phase of the case presented, still there are very many phases of election cases of which courts both of law and equity will take and exercise jurisdiction. Numerous cases are reported showing the power of the courts over canvassing boards, and our statute gives the courts comprehensive jurisdiction over them.

This brings us to the consideration of the injunction proceeding in the light of what has been said. The bill alleged, in substance, that at the election held in Santa Fe county November 4, A. D. 1890, Benjamin M. Read and Joseph B. Mayo were each candidates for the office of member of the house of representatives of the legislative assembly of New Mexico, and that Thomas B. Catron was a candidate for member of the council of said legislative assembly; that they were voted for at said election, and that the returns showed that they had received a majority of the votes cast at said election for such offices; that petitioners and one George L. Wyllys were the commissioners of Santa Fe county, and were by law required to canvass the returns of said election within six days after the election, declare the result, and forward certificates of election to those having received a majority of the votes cast; that the said board had assembled, but that they had failed, neglected, and refused to count the returns from precincts 1, 2, 8, 11, and 16 of said county, although the returns from these precincts were before the board in regular and perfect condition; that the failure of the board to count the returns from those precincts would materially affect the result by showing that other persons than complainants were elected, when in fact complainants had received a majority of

the votes cast; that said commissioners had threatened to declare the result from a partial canvass, and issue certificates to others than complainants for said offices; that, if such certificates were issued, great and irreparable damage will be the result to complainants and the public generally; that it may, and probably will, result in causing numerous suits and expensive and vexatious litigation; that complainants will institute *mandamus* proceedings to compel the board to canvass all of the returns, but that before such proceedings can be made effective the board will issue, or cause to be issued, such fraudulent certificates. Upon this bill a writ of injunction issued, as above set out. This bill brought to the court's attention a case where a board of canvassers had refused to obey the law, and not only that, but that they were about to do a plainly illegal act, and perpetrate a fraud, liable to cause a multiplicity of suits and great injury, which could still be prevented by the prompt action of the court. The court was bound to know the law, and that the act about to be committed was plainly illegal and fraudulent. The bill alleged that the canvassers had refused to canvass the returns from five precincts, although the returns were before them in "regular and perfect condition;" and the court was bound to know that the law commanded this board to canvass all of the returns, and declare the result from a canvass of all the returns, and that it was an illegal act to issue certificates of a result declared from a canvass of part of the returns. While county commissioners have large discretionary powers, this canvassing board had no discretion whatever, under the law as to that particular matter. They had a specific duty to perform. They had refused to perform it, and were about to declare a false result, and issue certificates, the legal effect of which the court was bound to know. Referring to the law of this territory on this subject, we cannot refrain from commending the wisdom of the legislature in enacting it. It strikes directly at the cause of the vexatious litigation and disorder,—the discretionary powers of canvassing boards. This law provides that the county commissioners, when sitting as a canvassing board for the purpose of canvassing the returns of any election held in this territory, shall not adjourn or become *functus officio* as a canvassing board until they "shall have canvassed each and every return of election before them, and shall have declared the result from the face of such returns." The will of all the voters as shown by the returns must be declared by the canvassing board. In case of a candidate for office, he has a legal right to this declaration; and if, by this declaration, a candidate has received a majority of the votes, the certificate must be issued to him, and it is an illegal act to deprive him of this evidence of his title to office. As was said in *O'Ferrall v. Colby*, 2 Minn. 180, (Gil. 148:)" But a court may, by *mandamus*, compel the proper certifying officers to discharge their duties, and arm the parties elected to such legislative body with the credentials necessary to enable them to

assert their rights before the proper tribunal." This does not necessarily give the candidate the office,—indeed, he may never obtain it; but he has a right to have what the law gives him from the canvassing board. The record shows that the *mandamus* proceeding was before the court at the time this bill for injunction was presented, as it bears an earlier number upon the docket; hence the court was informed that it might become the duty of the court to compel the board to declare a different result from that upon which the board was about to issue certificates, so that the court, by refusing to restrain the issuance of illegal certificates, would practically become a party to the transaction. It was the plain duty of the court, and it had full power, to prevent certificates from being issued until such time as, by the remedy pointed out by the statute, it could be definitely ascertained what the result of the election was, and to whom certificates should be issued by the board. The bill in this case sought to restrain the doing of a fraudulent act. It sought to prevent vexatious and expensive litigation, and it pointed out the necessity for prompt relief. But it is urged that there is want of jurisdiction, because there was a remedy at law. That there is a remedy at law is not sufficient. It must be an adequate remedy. Under the law of this territory, the remedy at law was not an adequate remedy in this case. If this had been a bill to contest an election, or try the title to an office, there would be force in the contention; but it is not a case of that kind. The law of this territory clothes the courts expressly with full power, when properly called upon by a tax-payer of the proper county, to grant the writ of *mandamus*, both alternative and peremptory, to compel canvassing boards to do their duty, if they fail, neglect, or refuse to do it. That duty is to canvass each and every return before them, declare the result from the face of the returns, and, under section 1191, they must issue certificates to the persons having the greatest number of votes for the particular office. In other words, the canvassing board must give to the person receiving the greatest number of votes, (at an election for officers,) after they have ascertained from an honest canvass of all the returns, the certificate which is *prima facie* evidence of his title to the office, and it also secures to the people an honest expression of their will. Any other canvass, or the issuing of any other certificate, would be a gross fraud upon both the person voted for and the people. But for the intervention of equity in such a case as this, *prima facie* evidence of title to the same office may be given to more than one person by unscrupulous officials, and if so the very purpose of the law would be defeated. As the law applies equally to all election returns, it follows that the rights acquired by a candidate for election to office at an election in this territory are to be preserved from their inception, and the right of a person elected to office in this territory is to have the legal evidence of that right which the canvassing board are required by law to give him, and, further, that such legal evidence of right to

the office shall not be given to another. The policy of the law is to deprive canvassing boards of their power to do harm, such as the bill shows was about to be done. The court in South Carolina, in the case of *Grier v. Shackelford*, 3 Brev. 491, speaking of the duty of election managers, says: "It is not to be believed that the legislature intended to hang the most important rights of the citizen on the arbitrary decision of such a tribunal. If they are to range through all the vagaries of their capricious fancies, the elective franchise will become an idle mockery."

Is it an adequate remedy for a candidate, having received the greatest number of votes, to be compelled to contest before the legislature a defeated candidate, having *prima facie* evidence of title to the office given him in violation of law? Plainly, it is not. The law commands the board, and, if they refuse, the court must compel the board, to give the successful candidate *prima facie* evidence of his right to the office, and it is for the defeated candidate to resort to *quo warranto* or contest, as the case may be. These remedies may be adequate for the defeated candidate, but they are not for the successful candidate. The legislature of a territory is limited in its sessions to 60 days, and compensation is paid to the sitting member. Suppose a board of canvassers gives a certificate of election to a defeated candidate; he presents it, and takes his seat; contest is brought by a successful candidate, but by delay it is not decided prior to adjournment. Where is the remedy for the candidate who was actually elected? Evidently, such is not an adequate remedy. If the board of canvassers do their duty, the successful candidate will receive *prima facie* evidence of his right to the office. If the unsuccessful candidate desires to question the result, he may resort to the appropriate remedy, go behind the returns, and then the case has reached what is regarded in law as a "contested election case." "Except in cases of special injunction to stay waste or prevent other irreparable injury, the bill should generally show some primary equity in aid of which the injunction is asked, and the relief is granted as ancillary to or in support of the primary equity whose enforcement is thus sought." *Patterson v. Miller*, 4 Jones, Eq. 451; *Washington v. Emery*, Id. 29. "And it is incumbent upon the party seeking relief by interlocutory injunction to show some fair legal or equitable rights, and a well-grounded apprehension of immediate injury to those rights." *High, Inj.* § 7. "Where, however, the parties are at issue upon a question of legal right, and it is necessary to preserve their rights *in statu quo* until the determination of the controversy, an interlocutory injunction may properly be allowed." *Harman v. Jones*, *Craig & P.* 299. In such cases courts of equity do not assume jurisdiction to dispose of the legal rights in the controversy, but confine themselves to protecting those rights as they are, pending an adjudication upon the legal questions involved. In *Kerr v. Trego*, 47 Pa. St. 292, involving elections and offices in the city of Philadelphia, the supreme

court granted an injunction, and said: "The remedy by injunction extends to all acts that are contrary to law, and prejudicial to the interests of the community, and for which there is no adequate remedy at law." The supreme court of Illinois, which decided the case of *Dickey v. Reed*, has frequently granted injunctions in county-seat election cases, holding that, while they had no statutory authority, the authority was implied by the constitution.

If there could still be any doubt of the power of the court of equity over the subject-matter of this injunction proceeding, we think it is at rest by virtue of another statute of this territory, which took effect on the same day the former statute referred to took effect: Section 1, c. 117, Laws 1889, is as follows: "That suits in equity may be begun, injunctions granted, or receivers appointed in aid of any suit at law, whether the same has been prosecuted to a judgment or not: provided, that such suit at law has been begun at the time any such equitable relief is sought." It is objected that the *mandamus* proceeding was not a suit at law; but we are of the opinion that the term "suit at law" is used in its broadest sense, and that it was intended to authorize the aid of equity whenever it was necessary in order to give a more complete and effectual remedy in any pending legal proceeding. The word "suit" is a very comprehensive term. As used in the judiciary act, 1789, § 25, it was construed to mean "any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him." "An application for a prohibition is a suit," *Weston v. City Council*, 2 Pet. 449. "In its most extended sense, the word 'suit' includes not only a civil action, but also a criminal action." Story, Const. § 1719; 1 Chit. Pl. 399. "Suit" applies to proceedings in chancery, as well as law," (1 Smith Ch. Pr.); "and is, therefore, more general than 'action,' which is almost exclusively applied to actions at law," (*Didier v. Davison*, 10 Paige, 516.) The term as used in the statute is to be construed in its comprehensive sense, and comprehends proceedings ancillary to the remedy by *mandamus*, as authorized by section 13, c. 133, Laws 1889. The injunction proceeding is in aid of the *mandamus*, as shown by the record, and, indeed, each refers to the other, and the nature of the remedy sought shows the ancillary character of the proceedings. Can it be contended that a court possessing enlarged jurisdiction, both at law and in equity, will decline to stay an illegal act, and preserve the *status quo* until equal and exact justice can be done? We think not, and therefore hold that upon the case presented the court had complete jurisdiction of the subject-matter and of the person, and properly granted the temporary injunction prayed for. That the command of the writ was disobeyed by the petitioners is not denied by them, and the record also shows the violation of the injunction by setting out in full the certificates which the court had restrained them from issuing. If the court had ju-

risdiction of the person and subject-matter,—which we have already answered in the affirmative,—it follows that the action of the petitioners in disobeying the order of the court was contempt, for which they were liable to punishment. They were properly brought before the court by attachment, and punished by fine, and committed to the county jail until the fine and costs were paid.

It is objected by counsel for petitioners that the court exceeded its authority in the matter of punishment, inasmuch as four different fines were assessed of \$50 each for four distinct offenses in one proceeding. The record shows that these fines were assessed separately, and there being no doubt of the inherent power of the court to punish, as well as by virtue of the statute, there can be no doubt of the legality of the first fine of \$50. But the fact that more fines were assessed would not make the entire punishment void. The petitioners are liable to be held for the valid fine. It is a mere irregularity, that does not warrant discharge on *habeas corpus*. Errors or irregularities are curable in the court from which the process issued, or by appeal; not on *habeas corpus*. *Church, Hab. Corp.* §§ 344, 363, and cases cited. The supreme court of the District of Columbia, in a case where three sentences had been imposed, says: "The relator appears to be imprisoned for three several terms of one hundred and eighty days each, without any specification as to the time of beginning or ending of the last two terms of imprisonment. The sentences pronounced by the court do not provide that the periods of imprisonment under these convictions are to commence at any future period, or after the expiration of the period mentioned in the former judgment. This omission is fatal to any imprisonment which exceeds that of a single sentence." There is nothing before this court to show that either of the petitioners moved the court to remit the fines, or that payment of either of the fines has been made; hence the punishment is not a matter for our consideration. The petitioners were committed to jail until the fine was paid, and properly so. The commitment is not a separate punishment; it is simply an incident to it. In the case of *Fischer v. Hayes*, 6 Fed. Rep. 63, the court said: "It is in this view that it has always been held that where the statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of court or for a defined offense, it is lawful for the court inflicting the fine to direct that the parties stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction." It is not necessary in this case, nor does the court intend, to construe section 665, Comp. Laws, with a view of determining the power of the legislature to limit the courts in assessing a fine for contempt, nor whether the fine provided for would be the extent of punishment. The court in this case observed the limit of the statute in assessing the fine for each contempt; and, while assessing fines in the same action for four dis-



tinct contempt may be irregular except as to the first, as the fines were separate it cannot avail the petitioners prior to the payment of the valid fine and costs.

The objection of want of jurisdiction in vacation is not well taken. By section 1829, Comp. Laws, the courts of this territory are always open, and their jurisdiction is comprehensive enough to include proceedings in contempt. The prayer of the writ of *habeas corpus* will be denied, and the petitioners will be remanded to the custody of the officer.

FREEMAN and LEE, JJ., concur.

FREEMAN, J. I concur in the conclusions reached in this cause by a majority of the court, and, in the main, with the reasons assigned. In view, however, of the importance attached to the questions involved, I have thought it not improper to place on file my own views.

This is an application on the part of the relators to be discharged from what they allege to be an unlawful restraint on their liberty. They incorporate as a part of their petition a part of the record of the proceedings in the district court, which culminated in the commitment from which they seek to be discharged. The other part of the record has been filed by the counsel for the territory. The record as thus made up exhibits, substantially, the following state of facts: The relators, who were on and preceding the 4th day of November, 1890, county commissioners for the county of Santa Fe, territory of New Mexico, were charged by law with the performance of certain duties. They are required to give notice of elections; to appoint for each precinct three persons of "discretion and good character" to act as judges; within six days after the election, public notice having been given, they are required to examine and count the votes polled for each candidate. I shall have occasion hereafter to note the extent of the power conferred by the term "examine and count the vote." They are also required to supply each precinct with a ballot-box, with lock and key; to forward within 10 days to the secretary of the territory a "true extract of the votes polled." The failure through "culpable neglect" to have poll-books forwarded to the election precincts, or a failure to count the votes at a proper time, subjects them to a fine of not more than \$25, nor less than \$10. If they shall give false or fraudulent certificates, or maliciously throw out any returns sufficiently legal, "or shall substitute false returns for true ones, or prevent the popular vote being had, or shall be guilty of such frauds," they shall pay a fine of not exceeding \$500, nor less than \$200. They are to give to the person receiving the greatest number of votes a certificate of election. "Every commissioner who shall knowingly, ignorantly, or maliciously fail to comply with the duties imposed upon him by law and the provisions of this act, and who shall fail to count the votes at the time and place designated by law, or in any manner misrepresent the popular vote, or shall prevent or order the judges of election not to cer-

tify, or refuse to keep open a poll-book for the information of the public, at the courthouse, from the time the said poll-book shall be delivered to them until the day of examination of the same, and for the counting of the votes, or in any other manner shall prevent the obtaining of the legal vote of the people, or shall refuse to allow any candidate or citizen to examine the said poll-book so placed for inspection, or shall give any false or fraudulent certificate, shall on conviction be fined in any sum not less than five hundred dollars, nor more than one thousand dollars, and shall be imprisoned in the county jail for not less than six months, nor more than one year; and, further, he shall be forever disqualified from holding any office of profit or honor in this territory." Comp. Laws § 1205. It is also provided that the district judge may, on the presentation of any one who may desire to do so, make a summary investigation of the charge of misconduct on the part of the commissioner, and, if he shall find him guilty, he shall suspend him from office until final decision at the next term of the district court. Section 1206, Comp. Laws.

Were it not for the disclosure made by the record in this cause, I should deem it unnecessary to say that the sole purpose of the legislature in the enactment of the statutes to which I have adverted was to secure a free, fair, and honest expression of the people at the polls. And aside from the discussion which has grown out of this case, and confining ourselves alone to the provisions of the law, it seems to me that the sole purpose of the legislature in providing for a board of canvassers was to secure that end. Whatever is honestly and intelligently done by a commissioner under the law to secure a free, fair, honest, and full expression of the popular will is done in the line of his duty. Whatever is done either "knowingly, ignorantly, or maliciously," to prevent that end, is a willful, ignorant, or malicious violation of the law, and merits the condemnation of all good citizens, and the punishment prescribed by law. The absolute necessity for the preservation of the freedom of elections and the purity of the ballot is so apparent as to admit of no discussion. It would be an idle waste of time to undertake to demonstrate that, in a government like ours, the line that marks the distinction between law and lawlessness, government and anarchy, is drawn at the ballot-box; and he who undertakes to obstruct a free expression of public sentiment at the polls is an enemy to society and a public criminal. Nor does it palliate the offense that the obstruction is interposed under the color of authority. The desperate revolutionist who by force of arms undertakes to prevent the expression of popular will through the ballot-box may be a bolder man, but he is none the more a criminal, than the man who under color of office seeks to do the same act. There is another point equally well settled, though possibly not so well understood, and that is that in the discharge of the duty imposed upon the commissioners to "examine and count the votes" they act in a purely ministerial capacity.

Whatever judicial function or discretion they may possess is exhausted in the selection of "discreet and honest judges of election." The vote having been cast, they have nothing to do but to examine and count it. When the examination reaches the point of disclosing the fact that the vote under consideration was actually cast, it must be counted. Mr. Associate Justice BRISTOL, in the case of *Bull v. Southwick*, 2 N. M. 353, said: "As such board of canvassers, they assumed judicial power to pass upon the illegality of, and reject, votes, without any other ceremony than because parties and by-standers challenge them as illegal. In this way hundreds of votes were thrown out, and the result of the election thereby arbitrarily changed. This is but another illustration of what experience has long since demonstrated, which is that if such judicial powers should be conferred upon mere canvassing boards, to be exercised at the close of a hotly-contested election, in the absence of the real parties interested, and almost always with the partisan advisers of such boards in the background, their sittings would be marked by the exercise of arbitrary power that would be more aggressive and odious than that of the ancient court of Star Chamber." This case was heard and decided in 1882. It thus appears that, even prior to the passage of the act of the legislature to which I am about to refer, the doctrine that the county commissioners sitting as a board of canvassers were mere ministerial officers, clothed with no judicial discretion, was firmly settled by judicial construction in this territory. In order, however, to remove any doubt that might exist, and to put at rest any and all vexatious questions that might arise before such boards of canvassers, the legislature, at its twenty-eighth session, passed an act, the thirteenth section of which is as follows: "Sec. 13. That the board of county commissioners, sitting as a canvassing board for the purpose of canvassing the returns of any election hereafter held in this territory, shall not adjourn or become *functus officio* as a canvassing board until such board of commissioners shall have canvassed each and every return of election before them, and shall have declared the result from the face of such returns; and if any board of county commissioners, sitting as a canvassing board, shall fail, neglect, or refuse to canvass any return of any election before said board under any pretense that such return is irregular, or for any other pretense, it shall be lawful for any qualified voter to present his petition under oath to the judge of the district court having jurisdiction, at his chambers, briefly setting forth the facts and circumstances, and praying that such board of commissioners shall be required by a writ of *mandamus*, issuing out of such court, to count and certify such returns; and therefore it shall be the duty of the district judge to immediately issue, or cause to be issued, his alternative writ of *mandamus* requiring such commissioners either to canvass such return or returns and to declare the result, or to appear in person forthwith before such court, and bring with them

all of such returns; and, if such commissioners shall decline to canvass such return or returns, they shall appear before said court in obedience to such writ, and take with them all of the returns, or papers purporting to be returns, before them; and thereupon the court shall forthwith proceed to examine said returns, and upon such examination may issue his peremptory writ commanding said board of commissioners to immediately canvass any or all of such returns, and to declare the result." Sess. Laws 1889, p. 321. This law went into effect February 28, 1889. The section of the statute which I have quoted seems to me to be too plain to admit of construction. Let us analyze it, for a moment, in order to see if it contains any provision that can by any possibility be misunderstood. *First*. The board shall not adjourn until it has canvassed each and every return before it, and shall have declared the result. *Second*. If it shall fail, neglect, or refuse to canvass any return under any pretense that such return is irregular, or for any other pretense, any qualified voter may present his petition to the district judge praying that such board may be required by writ of *mandamus* to count and certify such returns. What returns? Why, the returns that said board, under some pretense, have failed or refused to canvass. *Third*. The district judge is then required immediately to issue his alternative writ requiring the board to either canvass such returns and declare the result, or to appear before him in person forthwith, and bring with them all such returns. The judge is to issue his *mandamus* immediately, and the commissioners are to appear forthwith. No provision is made for waiting for the regular term of the court. *Fourth*. If the commissioners decline to canvass such returns, they shall, in obedience to the writ, *i. e.*, forthwith, appear before the judge, and bring with them—what? Bring with them what they in their judgment regard as the proper, legal, and regular returns? No. This is not what they are to be ordered to do, but to bring with them all the returns, "or papers purporting to be returns." *Fifth*. Having done this,—having, in obedience to the writ, appeared in person before the judge, and having produced not only all the returns, but each and every paper purporting to be a return,—their power, authority, and responsibility practically cease. For, *sixth*, immediately on the production of such papers, the judge himself shall proceed to examine them; and his judgment, so far as the commissioners are concerned, is absolutely conclusive. For, *seventh*, the judge is required, as a result of his examination, to issue a peremptory writ commanding said board to canvass any or all of such returns, and declare the result. That is to say, the judge is required to examine all of the papers, and to declare what are and what are not proper returns, and to direct the board to declare the result.

The express provision of this statute makes the judge *quo ad hoc* a revisory canvassing board, and nothing is left for the commissioners except to obey his mandate. Hence I repeat that whatever dis-

cretion, ministerial, judicial, or otherwise, vested in the commissioners as a board of canvassers ceases the moment they appear before the judge in response to the alternative writ. They are not merely his subordinates. They no longer constitute any part of the board, so far as relates to any question growing out of the validity or invalidity of the papers filed with them as returns, or as papers purporting to be returns. Any effort on their part thereafter to impress their views upon the result is not merely contempt of court, but a plain and culpable usurpation of authority. It is no answer to say that a mandate of a judge directing the board to canvass certain returns, thereby declaring the election of a particular candidate, is an unwarranted invasion of the legislative by the judicial branch of the government. This is not true in fact, and for three reasons. In the first place, the legislature is the sole judge of the election, qualification, and return of its own members. It may seat a member with or without a certificate of election. If it should appear to that body that a member having a certificate issued to him by the board of canvassers, as a result either of their own examination or that of the judge, was not in fact elected, it would be its duty to deny him the privileges of a member. In the second place, the relation of county commissioners is as foreign to the legislature as that of the judge. The district judge belongs to the judiciary, and the county commissioners to the executive or administrative, branch of the government. Each, to a certain extent, is independent of the other, and the legislative branch is absolutely independent of both. In the third place, the legislative branch of the government, being independent of both the judiciary and administrative branches, has a perfect right to vest the power of canvassing the returns of an election in any officer it may choose, either executive or judicial, or to create an office especially clothed with that power. As we have seen, it has clothed certain administrative officers, to-wit, county commissioners, with this power, to be exercised in the first instance, and, following the usual line of remedial jurisdiction in other matters, it has vested in the judiciary a supervising or controlling power. Such being the law as I understand it, I shall endeavor to apply it to the facts in this case.

On the 12th day of November, 1890, there was issued out of the district court of the county of Santa Fe a writ of *mandamus* directed to the county commissioners, the relators in this case. This alternative writ, after reciting that it was issued on the petition of Benjamin M. Read, "a resident and qualified voter of said county," proceeds to set out the charges, which are substantially as follows: That the board of commissioners had failed, neglected, and refused to canvass the returns from precincts numbered 1, 2, 16, and 8, and also that they had refused to canvass four votes cast for petitioner at precinct No. 11. The writ concluded as follows. "Now, therefore, you are hereby required either to canvass such returns, including said certificate from precinct number eight of said

county, and also to canvass and count the said four votes polled in precinct number 11 of said county, which are marked 'Not registered' upon the poll-books of said precinct, and declare the result, or to appear in person forthwith before said district court, and bring with you all of said returns, and all of the returns, or papers purporting to be returns, before you." On the 13th day of the same month the respondents appeared and filed their answer, which, after setting out in detail the alleged irregularities which, in the opinion of the board, required them to reject and to refuse to canvass certain returns therein described, concludes as follows: "Your respondents, therefore, in obedience to the requirements of said alternative writ of *mandamus*, appear before your honor all such returns or papers purporting to be returns before you." It is not pretended that the proceedings thus far were not in strict accord with the act of the legislature already quoted. On the issue thus joined, the cause was heard by the district judge, and a peremptory writ of *mandamus* awarded. To this ruling of the court respondents tendered a bill of exceptions, which was duly signed and sealed. On the same day that the alternative writ of *mandamus* was issued a petition was filed on the equity side of said court by the said Benjamin M. Read and by Joseph B. Mayo and Thomas B. Catron against the said commissioners, averring, substantially, that complainants were, at the election held on the 4th of said month, candidates for seats in the legislative assembly of said territory; that defendants constituted the board of canvassers, whose duty it was to canvass the votes polled at said election in said county of Santa Fe; that said commissioners had assembled at the court-house in said county, "but have failed, neglected, and refused to count a portion of the votes polled at said election for these complainants," etc.; that said refusal would materially affect the result of said election, and would make it appear that persons other than complainants had been elected; that said commissioners were threatening to give certificates of election to other parties, etc. They asked that an injunction issue restraining the commissioners from issuing certificates of election to others than complainants. An injunction was issued in accordance with the prayer of the bill. On the 5th of December, 1890, defendants answered. They admit that complainants were candidates at said election, but deny that they received a majority of the votes cast. They then set out what they deemed various irregularities in the returns of precincts 1, 2, 8, 11, and 16; that these returns were not in regular and perfect condition, etc.; that they met, and proceeded to canvass the returns; that, while so doing, "the complainants, well knowing the irregularities, fraud, and deceit appearing in some precincts, and the illegal and insufficient manner and condition of the pretended and alleged returns before said defendants as such canvassing

board, and that the said pretended and alleged returns were so irregular and insufficient that the said board could not receive and count them, they, (the complainants,) in anticipation of their decision as such board of canvassers, filed a bill in chancery, and obtained an injunction issued out of this honorable court, by which they were restrained and enjoined from making and completing the count and canvass of all the votes cast in said election, according to the returns made to them as such board. And these defendants deny that the pretended returns made to them as a canvassing board of precincts in said county numbered 1, 2, 8, 11, and 16 were in regular and perfect condition, but they aver and state to the court here that the alleged returns before them from precincts 1, 2, and 16 were irregular, and contrary to law and the statutes in such case made and provided; and that the face of the returns from precinct 11 was regular, and was so counted, when reached by the board in the regular order. But there was never at any time any poll-book, ballot-box, or returns of any kind before these defendants, as a canvassing board or otherwise, from said precinct numbered 8 in said county; that there was not at any time evidence before them that an election had been held at precinct number eight on the 4th day of November, 1890," etc. They deny that they had failed to count any votes "properly returned;" deny that they threaten to give certificates to persons "who did not receive the greatest number of votes," etc. They admit that "a certain paper purporting to be a certificate of election returns signed by four persons, two of whom signed as judges of election, and two as secretaries or clerks of election, in precinct numbered 8 in said county, was presented to the defendants while sitting as a board of canvassers by one of the complainants, Benjamin M. Read, who was a candidate as aforesaid, and an interested party in the result of the canvass and count, and who was not authorized by law to act as messenger or custodian of the election returns; and they aver that the said purported certificate or paper is irregular in form, insufficient in law, does not contain a true and correct statement of the votes cast and polled at said precinct No. 8 on the 4th day of November, 1890, and that said alleged certificate, if canvassed and counted, would change the election returns, and would have the effect of giving majorities to persons who were not elected by a majority of the votes cast at said election; that said alleged certificate gives majorities from four to eleven greater than the actual vote as it was cast, polled, and counted, and certified by the judges of election, as these defendants are informed and believe." They then allege on information and belief that said certificate was made at Santa Fe, and under the supervision of interested parties, etc., and by parties who never saw the original certificate made out and signed by the judges of election, if any such original certificate was ever so made out and signed. "That one of the persons who signed said paper as an election judge did so at the request

of some person who came from Santa Fe, with the paper already filled out to be signed, and seven days after his official position as judge of the election had expired." The contradictory statements contained in this answer, of themselves convict the board of an attempt to suppress the popular vote and defeat the will of the people; for while, in one part of the answer, they charge that there was not at any time evidence before them of any election at precinct No. 8, they nevertheless admit in another portion of the answer that a paper purporting to be a return from said precinct, signed by two judges of election and two clerks, had been filed with them; but they allege that said "purported certificate" did not contain a true and correct statement of the votes polled at said precinct. How did they know that "purported certificate" did not contain a true statement of the votes polled, if they had never had before them any evidence that any such election had been had? Having answered, they demurred to the bill, setting out six causes of demurrer, substantially as follows; *First*, the court has no jurisdiction of the parties; *second*, because the court has no jurisdiction of the subject-matter in controversy; *third*, because the court has no jurisdiction of the subject-matters and the persons; *fourth*, the bill does not state facts sufficient upon which to base an action; *fifth*, complainants have no common interest; *sixth*, that the bill is multifarious. This answer, in the nature of a demurrer, was filed on December 5th, and on the same day a motion was filed to dissolve the injunction. On the 17th day of January, 1891, one of the complainants filed in the cause an affidavit reciting that defendants, in violation of the injunction; had on the 5th day of December, 1890, issued certificates, etc.; and thereupon a writ of attachment was issued. The parties were arrested, and on January 19th appeared and filed a motion to quash the attachment. The grounds of this motion were substantially as follows: *First*, the judge had no power in vacation to issue the attachment; *second*, because the judge had no power, jurisdiction, nor authority to institute proceedings for contempt; *third*, the judge had no power to issue an injunction to prevent the board of canvassers from issuing certificates; *fourth*, the judge had no power to issue an injunction, which was therefore void; *fifth*, because no order to show cause had preceded the writ of attachment; *sixth*, because the rules and regulations of the chancery court were not observed in the issuance of the writ of attachment. On the 20th of January, an order was entered by the district judge reciting that upon a hearing of the parties, and upon the full consideration of the cause, he had found the parties guilty of four several acts of contempt, and imposing a fine of \$50 upon them for each of the alleged acts of contempt. They were adjudged guilty of contempt, and an order of commitment was entered against them in the event that the fines were not promptly paid.

That we may have a proper conception of the relation sustained to each other by

the two proceedings of *mandamus* and injunction, it may not be improper to note the order in which the several steps were taken. Both writs were applied for and issued on the same day, to-wit, November 12, 1890. On the 13th of the same month defendants answered the alternative writ of *mandamus*, and on the 18th a peremptory writ was issued. On the 5th of December defendants filed their answer to the bill for injunction, and also moved to dissolve the same, and on the same day they proceeded, in direct violation of its terms, to issue certificates of election.

I shall not consume time in discussing the question as to the jurisdiction of the court to issue the writ of *mandamus*. The act of February 28, 1889, confers the power in express terms. Not only so, but the facts in this case, in their minutest detail, bring it within the express terms of the statute. Every requirement of the statute, save one, was met. The complaint was made; the alternative writ was issued; the respondents appeared and produced the returns; the judge examined them; the peremptory writ was issued. At this point, however, obedience to law was abandoned. The respondents, the relators here, thinking, no doubt honestly, that they were better qualified to take care of the public interests than the legislature, determined to defy the law. It is trifling with the occasion to treat the conduct of these relators as a contempt of court. It was a contempt of law. It would be an unwarrantable reflection upon their intelligence to say that they did not understand their duty in the premises. It was not a matter of mistake. It would be a reflection on the voters of the county to suggest that three men too ignorant to understand the thirteenth section of the act of February 28, 1889, could be elected to the office of county commissioner. But, conceding the jurisdiction to issue the *mandamus*, it is insisted that the court had no authority to issue the injunction; that the act of 1889, imposing on the judge the duty of issuing the *mandamus*, is an implied denial of his authority to proceed by any other method; and the familiar doctrine that *expressio unius est exclusio alterius* is invoked to sustain this view. Opposed to this, however, is the equally familiar doctrine that, when power is conferred on a court to do any particular thing, there is, in the absence of express provision to the contrary, an implied grant of power to issue such process as may be necessary to carry into execution the power conferred. This is especially true of courts of common-law and chancery jurisdiction; and section 1868 of the organic act provides that "the supreme court and district courts, respectively, of every territory, shall possess chancery, as well as common-law, jurisdiction."

But there is another reason that to my mind is conclusive of this question. It is well settled that the two processes, *mandamus* and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by *mandamus* to compel the performance of a

duty, it will exercise its restraining power to prevent a corresponding violation of duty. The supreme court of the United States has declared: "But it has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who has sustained personal injury by such refusal may have a *mandamus* to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which an adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other." Board of Liquidation v. McComb, 92 U. S. 541; High, Extr. Rem. § 6. Even under the common law as it existed in England at a time when the writ of *mandamus* issued only as a prerogative writ, and before it became what it now is,—a writ of right, issuing *ex debito iustitiæ*,—it exercised a restraining, as well as a coercive, power. Ex parte Crane, 5 Pet. 192. The injunction was purely ancillary to the *mandamus*. The relation which the former writ sustained to the latter was precisely that of an attachment sued out in aid of a common-law action of debt. The purpose, and only purpose, was to preserve the *status quo* pending the determination of the question raised by the proceeding by *mandamus*. There was, in fact, but one cause of action, and, in law, practically but one suit. If the petitioners were not entitled to an injunction, they were unquestionably not entitled to *mandamus*. The purpose of the *mandamus* was to compel the commissioners to do that which could be done only as a prerequisite to the issuance of a certificate of election. Under the law, they were first to canvass the vote and declare the result, and afterwards to issue a certificate of election. To say that, while they might be compelled by *mandamus* to canvass the return, they could not be restrained from issuing a certificate, predicated upon a result reached in defiance of the *mandamus*, is to announce a solecism. In the view that I have taken of the matter, the proceeding by injunction was unnecessary. Pending the proceeding by *mandamus*, the board had no authority to issue a certificate of election. A peremptory writ of *mandamus* commanding the commissioners to canvass the votes cast at an election is, *ex vi termini*, a command to them to do nothing that will defeat the purposes of the writ. It was the duty of the board to obey the writ, not alone in its substance, but in its spirit. High, Extr. Rem. § 566. Hence it follows that the issuance of the certificate pending the operation of the writ of *mandamus* was a violation of its terms, and warranted the imposition of a fine for contempt. Granting, however, that an injunction was unnecessary, it does not rest with the relators in this proceeding to say that the court was unnecessarily specific in its directions to them. If, in good faith, they had obeyed the *mandamus*, I am inclined

to the opinion that they would have been entitled to their costs as to the injunction; but the effort to escape the penalty incurred by gross and willful violation of law, by showing that the proceedings of the court were irregular, or that its processes were unnecessarily specific, does not commend itself to the favorable consideration of the court.

It is further insisted, however, that the whole proceeding before the district judge was void for the reasons—*First*, that the rival candidates for the legislature should have been remitted to their right of contest; and, *second*, because the interposition of the court was unwarranted interference on the part of the judicial with the legislative branch of the government. This proposition has been urged with commendable zeal, and with great ability. The learned counsel for the relators have exhibited great research in the production of authorities to sustain their views. They have insisted that, if the courts can interpose by *mandamus* or injunction to control elections, they may curtail, if not destroy, the powers vested in the other branches of the government; and numerous authorities have been cited to sustain this view. The case of relators does not raise this question. So far from being enjoined against the discharge of their duty, they were required by the *mandamus* to perform their duty. So far from the action of the judge being an infringement on the prerogatives of the legislature, he was himself acting under the mandate of an act of the legislature. I should not deem it necessary or proper, in view of the act of the legislature I have already quoted, to discuss the question as to the authority of the court to interpose its *mandamus*, but for the earnestness with which the counsel for the relators have insisted that the action of the judge was a usurpation, and therefore void. I shall briefly review some of the authorities cited as sustaining the position of relators' counsel.

In the case of *Railroad Co. v. De Graff*, 27 Minn. 1, 6 N. W. Rep. 341, it was sought to enjoin the governor of the state from the performance of certain duties imposed upon him by the legislature. It was held that this could not be done. It is true that the judge, in rendering the opinion of the court, states very broadly that under the constitution of that state the courts are powerless to interfere with the operations of any officer of the executive department, whether the action sought to be controlled was ministerial merely, or one involving the exercise of "discretion and judgment alone." Whether the general principle stated be correct or otherwise, the facts in the case warranted the conclusion reached. No such authority was sought to be exercised in the case at bar. In the case of *Walton v. Develing*, 61 Ill. 201, the syllabus is as follows: "Where the law authorizes an election to be called in a township, to determine whether a majority are in favor of subscribing to the stock of a railroad company, when the election is called in pursuance of the requirements of the law, a court of equity has no power to restrain the officers from

holding, or the people from voting at, such election. A writ of injunction issued in such case is void, and the officers and people are not bound to obey it, as the court has no jurisdiction." In the case of *Harris v. Schryock*, 82 Ill. 119, it was said: "But, according to repeated decisions of this court, the power to hold an election is political, and not judicial; hence a court of equity has no power to restrain officers from the exercise of such powers." In the same state, in the case of *Dickey v. Reed*, 78 Ill. 271, the court repeats the same doctrine, declaring that "elections belong to the political branch of the government, and are beyond the control of the judicial power." \* \* \* And the political power of the state may organize municipal bodies, and put them into operation, by force of enactment, or by election of the people to be thus governed, and they can provide the modes of reviewing the returns of election to ascertain whether they are in accordance with the expressed will of the people, and, until the courts are empowered by the constitution or legislative enactment, they must refrain from interference."

I have thus referred to what seemed to the counsel for relators as the most direct authorities in support of their position for the purpose of showing that they are not either directly or by implication assailed by the views that I have advanced. In the case at bar, the election had been held, the vote had been cast, and the alleged interference on the part of the judge was in the exercise of a duty imposed on him by the very authority that created the board of commissioners. In the language of the decision last quoted, he was empowered to act by "legislative enactment." It was not, therefore, a case of interference on the part of the judiciary with the right of election, but of open and avowed revolt on the part of the commissioners against the organized government of the territory. The true doctrine, under our form of government, is this: Every qualified voter has the right to cast his vote and have it counted. When the legislative power has appointed an election, and provided the proper officers for holding it and declaring the result, the courts have no power to interpose by way of preventing the exercise of such function. But no such officer has authority, under color of his office, to defeat the will of the people as expressed at the polls, and, if he undertakes to do so, it is the duty of the courts, on proper application, and within the rules prescribed by the legislature, to interfere by such remedial process as may be necessary to attain the proper remedy. In respect of their purely ministerial duties, election officers are not beyond the control of the courts. *Cooley, Const. Lim.* 621; *High, Extr. Rem.* § 56.

A question was raised in the argument as to the right of the judge to enter the judgment complained of at chambers. The authority to do so is conferred in such specific terms by section 1829 of the Compiled Laws that the mere reference to that section is regarded as sufficient answer to this objection. It was also insisted on the argument that under the provisions of

section 665 of the Compiled Laws the judge had no authority to impose a fine in excess of \$50 without a trial by jury. The several acts and omissions on the part of the relators constituted, in my opinion, but one offense. I think the mode adopted in fixing the amount of the fine was irregular, but it is an irregularity that cannot be taken advantage of in this proceeding. But I do not agree with the learned counsel for the relators that the section referred to was intended to operate as a limitation upon the right of a judge to impose a fine for a contempt of court committed in a refusal to obey one of its mandates. On the contrary, I am satisfied that this statute relates alone to the preservation of order and decorum in the presence of the court.

I must say that, in the view I take of this cause, the discussion has taken a much wider range than was pertinent to what I conceive to be the only issue involved. Section 13 of the act of February 28, 1889, unquestionably gives the district judge jurisdiction of the controversy out of which the proceedings for contempt arose. Section 2027 of the Compiled Laws of 1884 requires this court to forthwith remand the relators, if it should appear that they are detained in custody for any contempt, specially and plainly charged in the commitment, by some court, officer, or body having the authority to so commit for the contempt so charged. All of this appears on the face of the petition, and I think, therefore, that the motion to dismiss the writ, and remand the relators, is well taken, and should be allowed.

O'BRIEN, C. J., (*dissenting*.) To my mind, it is clear that two errors, at least, fatal to the validity of the commitment of the relators, appear upon the record of these proceedings. *First*, that the court had no jurisdiction, in the first instance, to issue the writ of injunction; *second*, that the judgment upon the hearing, touching the violation of the injunctive order, imposing a fine of \$200 on each of the relators, and ordering their imprisonment until such fine be paid, is illegal and of no binding validity. For the purpose of a proper understanding of the case, the bill of complaint, the writ of injunction, judgment on attachment, and commitment are set out *in extenso*:

"In the district court of Santa Fe county. Bill for injunction. Territory of New Mexico, county of Santa Fe—ss.: In the district court for the said county of Santa Fe, sitting for the trial of causes arising under the laws of said territory. To the Honorable EDWARD P. SEEDS, associate justice of the supreme court of said territory, and judge of the said district court: Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, residents of said county, bring this, their bill of complaint against John H. Sloan, George L. Wylls, and Teodoro Martinez, also residents of said county, and show unto your honor: Complainants were candidates at the election held in said county on the fourth day of November, 1890, said Read and Mayo for the offices of members of the house of representatives of the legislative assembly of

New Mexico, and said Catron for the office of member of the council of said legislative assembly, and, as such candidates, were voted for by voters of said county, and, as shown by the election returns, received majorities of the votes cast for said offices, respectively. Defendants are the county commissioners of said county, and, as such, are required by law, within six days after an election, to publicly examine and count the votes polled for each candidate, and to forward to the persons who have received the greatest number of votes polled at any election held for members of the house of representatives, the corresponding certificate of election. That defendants have assembled in the courthouse in the county of Santa Fe for the purpose aforesaid, but have failed, neglected, and refused to count a portion of the votes polled at said election for these complainants, such portion being the votes cast for complainants in the precincts of said county numbered 1, 2, 8, 11, and 16; the returns of election from said precincts being before said defendants, and in regular and perfect condition. The failure and refusal of defendants to count said votes as shown by said returns will materially affect the result of said count so as to make it appear that persons other than complainants have been elected to said offices, although such is not really the fact; and defendants give out and threaten that they will make and deliver, or cause to be made and delivered, to such other persons, certificates showing their election to the offices aforesaid, and complainants believe that they will certainly do so, unless restrained by an order of the court. If such certificates are so made and issued to such other persons, great and irreparable damage may and probably will result to complainants, and each of them, and to the public generally; and the existence of such certificates may and probably will be the cause of numerous suits, and vexatious and expensive litigation, as has heretofore been the case in this territory under similar circumstances. As soon as the said count by the said defendants is completed, complainants will institute, or cause to be instituted, in accordance with the statute, proceedings in *mandamus* to compel defendants to canvass all of the returns of said election in said county; but before such proceedings can be made effective, and before a complete canvass can be made, defendants will issue, or cause to be issued, such improper and fraudulent certificates of election as hereinbefore described. Complainants therefore pray that defendants be restrained and enjoined by an injunction of this court from making and delivering, or ordering or causing to be made or delivered, any certificate of election to either of the offices hereinbefore mentioned to any person or persons other than these complainants, and from making, or causing to be made, any record of the result of their canvass of said election returns until the further order of the court in the premises. May it please your honor to grant unto complainants the writ of subpoena, under the seal of this honorable court, directed to defendants, John H. Sloan, George L. Wylls, and



Teodoro Martinez, commanding them, and each of them, to appear before this court on a day and under a penalty to be therein fixed, then and there to answer unto the premises as fully as if the same were here repeated, and they particularly interrogated thereunto, but not under oath, an answer under oath being hereby expressly waived, and to abide the order or decree of the court in the premises. BENJAMIN M. READ."

"Territory of New Mexico, county of Santa Fe. On this 12th day of November, 1890, personally appeared before me Benjamin M. Read, and made oath that he had read the foregoing bill by him subscribed, and knew the contents thereof, and that the same is true, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true. Witness my hand, and the seal of the district court of the first judicial district of the territory of New Mexico, the day and year last above written. A. E. WALKER, Clerk of the District Court. [Seal.]"

"The territory of New Mexico to John H. Sloan, George L. Wyllys, and Teodoro Martinez, greeting: Whereas, Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron have filed in the district court for Santa Fe county their bill of complaint against you, praying to be relieved touching the matters therein set forth, now, therefore, you, the said John H. Sloan, George L. Wyllys, and Teodoro Martinez, both individually and as members of the board of county commissioners of Santa Fe county, your agents, servants, employes, and advisers, are hereby restrained and enjoined from making and delivering, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of New Mexico, and of member of the council of said legislative assembly, to any person or persons, other than said Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, and from making, or causing to be made, any record of the result of your canvass of the election returns of the election held in said county of Santa Fe on the 4th day of November, 1890, until the further order of the said district court in the premises. Witness the Honorable EDWARD P. SEEDS, associate justice of the supreme court of the territory of New Mexico, and judge of the first judicial district court thereof, and the seal of said district court, this 12th day of November, 1890. A. E. WALKER, Clerk. [Seal.]"

"The territory of New Mexico to the sheriff of Santa Fe county, greeting: You are hereby commanded to arrest and take the body of John H. Sloan, and him safely keep, so that you have his body before the district court within and for the county of Santa Fe, sitting at chambers at the federal building in said county, on Monday, January 19, 1891, at nine o'clock A. M., then and there to answer for a charge of contempt. Witness the Honorable EDWARD P. SEEDS, associate justice of the supreme court of the territory of New Mexico, and judge of the first judicial district court thereof, and the seal of

said district court, this 17th day of January, 1891. A. E. WALKER, Clerk. [Seal.]"

The attachment for Teodoro Martinez is in the same words.

"The territory of New Mexico to Francisco Chavez, sheriff of the county of Santa Fe, greeting: Whereas, on the 12th day of November, 1890, an injunction was issued out of the district court of Santa Fe county enjoining and restraining John H. Sloan, George L. Wyllys, and Teodoro Martinez, both individually and as members of the board of county commissioners of said Santa Fe county, their agents, servants, employes, and advisers, from making or delivering, or ordering or causing to be made or delivered, any certificate of election to the offices of members of the house of representatives of the legislative assembly of the territory of New Mexico, and of member of the council of said legislative assembly, to any person or persons other than Benjamin M. Read, Joseph B. Mayo, and Thomas B. Catron, and from making, or causing to be made, any record of the result of their canvass of the election returns of the election held in said county of Santa Fe on the 4th day of November, 1890, until the further order of said district court in the premises. And whereas, on the 17th day of January, 1891, there was filed in the office of the clerk of said court the petition of the said Thomas B. Catron, setting forth that the said John H. Sloan and Teodoro Martinez, two of the defendants in said injunction proceeding, wholly disregarding the injunction so issued as aforesaid, did, on the 5th day of December, 1890, sitting as a board of canvassers of said county, canvass the returns of the general election held in said county on the 4th day of November, 1890, and did on said 5th day of December, 1890, make, order, and deliver a certificate of election to the offices of members of the house of representatives of the legislative assembly to persons other than the said Benjamin M. Read, the said Joseph B. Mayo, and the said Thomas B. Catron, to-wit, to one Charles F. Easley, to one Thomas P. Gable, and to one Romulo Martinez; the said Easley and the said Gable receiving certificates of election to the office of member of the house of representatives of the legislative assembly, and the said Romulo Martinez receiving a certificate to the office of member of the council of said legislative assembly; and praying that that court cause attachments to issue for the arrest of the said John H. Sloan and Teodoro Martinez for contempt. Whereupon such proceedings were had by the said court that on January 20, 1891, after attachments had been issued by said court against the said John H. Sloan and Teodoro Martinez, and after the bodies of the said Sloan and the said Martinez had been presented before the said court by you, the said sheriff, they being accompanied by counsel, and after a full hearing of counsel, the said John H. Sloan and Teodoro Martinez were adjudged guilty of contempt of this court in issuing and delivering a certificate of election to Charles F. Easley, in issuing and delivering a certificate of election to Romulo Martinez, and in making,

or causing to be made, a record of the result of their canvass of the returns of the election held in said county of Santa Fe on the 4th day of November, 1890, and the punishment of each of said defendants was assessed to a fine of fifty dollars for each of the said several contempts, making a total of two hundred dollars against each of said defendants: Now, therefore, you, the said sheriff of Santa Fe county, are hereby commanded that of the lands and tenements, goods and chattels, of John H. Sloan, in your county, you cause to be made the sum of two hundred dollars fine, and seventeen dollars and forty-five cents costs of suit, which, by the said judgment of the said district court on the 20th day of January, 1891, the territory recovered against the said John H. Sloan, and in default of the prompt payment of the said sum by the said John H. Sloan that you confine the body of the said John H. Sloan in the common jail of said county until said fine and costs are fully paid and satisfied, and due return made of this writ, with your proceedings thereon. Witness the Honorable EDWARD P. SEEDS, associate justice of the supreme court of the territory of New Mexico, and judge of the first judicial district court thereof, and the seal of said district court, this 20th day of January, 1891. A. E. WALKER, Clerk. [Seal.]

It appears, then, that the writ was granted at the suit of T. B. Catron, who claimed to be elected member of the council, and Benjamin M. Read and J. B. Mayo, who claimed to be elected members of the house, in the present general assembly of this territory. They filed their bill before the completion of the official canvass of the votes by the board of county commissioners. Irregularities in returns from some of the precincts may have occurred, or the petitioners may have had reasons to suspect that the board of county commissioners would not make a full and impartial canvass of the votes returned. It may not be amiss to remark, in passing, that the three petitioners, Catron, Read, and Mayo, are, or claim to be, Republicans, and that two of the three county commissioners are Democrats. Partisan zeal may be at the bottom of the trouble. The important question to determine is, had petitioners a right to invoke the aid of a court of chancery to protect them by writ of injunction against the consequences of the possible, probable, or actual dishonesty of the county commissioners in making the official canvass and issuing certificates of election? Plainly, no such right existed if the law intrusted to another tribunal power to apply the proper remedy and offered complete relief. Each house of the legislative assembly is the exclusive judge of the election and qualification of its members. No decree, interlocutory or final, of a court of chancery can affect or impair this power. The judgment or discretion of the legislature cannot be controlled by such decree. Its action in the premises is independent, final, and unassailable. Before it all contests must be decided. We cite the appropriate sections of the Compiled Laws of 1884, as amended by Laws of 1889: "Sec. 1172, (as

amended Session Laws 1889, p. 318.) If any candidate from any county or district in this territory contest the seat of any representative or member of the council, said person shall give written notice to the contestee within thirty days after the returns of the election are received by the secretary of the territory. Said notice of contest shall specify as nearly as may be the grounds upon which the contestant relies, and it shall also give the name of some justice of the peace or notary public before whom it is purposed to take proofs in support of the grounds alleged and set forth in such notice, and also the time and place of the taking thereof. Sec. 1173, (as amended Session Laws 1889, p. 318.) The contestees, at the time and place of taking such proofs, may select another justice of the peace or notary public to assist in taking of such proof as he desires; but a failure to do so shall not affect the right of contestant to proceed with his testimony under his notice. Sec. 1174. To reject any illegal votes that may be polled at any election in this territory, it shall not be necessary to contest or question them at the polls, but they may be rejected by the authorities authorized by law to determine the validity of said elections, on being proved, after due notice is given by the party contesting said election to the opposing party. Said notice in any county election shall not be less than eight days, and shall in all cases be within thirty days thereafter. Sec. 1175. If the person whose seat is contested in either branch of the assembly intends to question the illegality of any votes given to the contesting candidates, he shall, within eight days after said contest, give equal notice to the opposite party in the manner prescribed in section 1172. Secs. 1176, 1177, 1178, (as amended Session Laws 1889, p. 318.) If the justice or justices of the peace, notary or notaries, appointed, or any of them, should fall, on account of sickness or other just cause, to be present at the taking of the testimony in such contests, another justice of the peace or justices, notary or notaries, may be chosen by the contestant parties, and the taking of such testimony shall commence within thirty days after the election, and the said justice or justices of the peace, or notary or notaries, shall issue subpoena (s) to all persons required by either party to appear and testify. Said justice or justices of the peace, notary or notaries, shall hear all the testimony, and certify the same to the president of the council, if the seat contested shall be that of a councilman, and to the speaker of the house of representatives, if it be that of a representative, on or before the first day of the session of the legislative assembly. Sec. 1179. No testimony shall be received by the justices, or either branch of the territorial legislature, from either the contesting or opposing parties, unless it refers to the points specified in the notice. The justices of the peace shall forward to the general assembly a certificate, together with the depositions taken by them, and no others, and the legislative assembly shall not receive any other testimony than that already specified."

The foregoing sections are unmistakably

intended to furnish legislative candidates with adequate means to protect their rights and prevent injustice. The forum therein recognized as adequate to grant complete relief, to detect mistakes and frauds in all stages of the election, from the opening of the polls to the issuing of the certificates, is either house of the general assembly. Why should a court of chancery assume jurisdiction in a proceeding wherein it would be powerless to enforce obedience to its decrees? It has no right to decide who is or who is not elected. The legislature alone has the exclusive power to determine that fact. But, it may be said, it may regulate the intermediate procedure. Why should it? Does not the written law amply provide for the redress of any wrong that may be committed in the course of such procedure? Who has constituted the chancellor's court a more reliable or less partisan tribunal than the council or the house of the general assembly for the rectification and settlement of the frauds or errors incident to popular elections? Once concede to the courts the right to interfere in such proceedings, and who can define the limits of such assumption? In the present case, each of the three petitioners received a certificate of election in accordance with the will of the chancellor, as expressed in the preliminary writ of injunction; but the two members of the house, upon contest had before that body, within a few days after their admission, were expelled, and their seats awarded to other parties. If wrong, can any order or decree entered or to be entered by the chancellor afford a remedy? Will courts take jurisdiction of causes wherein they are powerless to enforce their judgments? It may be said, in answer to this, that the present suit by injunction was simultaneous with and ancillary to *mandamus* proceedings instituted to compel the county commissioners to receive and canvass the election returns. How does that relieve the matter of its objectionable features, as long as each house of the general assembly has legal power to ignore the adjudications in either case, and to approve or disapprove the alleged misconduct of the commissioners, by awarding seats to the candidates who, in its opinion, were elected and qualified, regardless of the orders and judgments of the court? Are the judicial and legislative departments of the territorial government to be thus encouraged to wage war upon each other's dignity, and bring odium and discredit upon both? Case law, so called, may be found in support of almost any proposition that the vagaries of counsel may advance or invent. But I doubt if the history of legal proceedings furnishes any precedent at all similar to the one under consideration. Some of the facts found in, and many of the legal principles applied to, an authoritative case in Illinois, (*Dickey v. Reed*, 78 Ill. 261,) ought, in my opinion, to have a controlling influence in the decision in this case. All of the wrongful acts charged to the county commissioners in the bill are properly reviewable in a statutory contest before the council or the house of the general assembly. The law presumes that

the decision rendered therein will be just, and hence has made it conclusive. "When the law furnishes," says the supreme court of Illinois in the case cited, "a mode for contesting any election, that mode must be followed." Again: "Courts of equity have no inherent power to try contested elections, and they have never exercised such power except in cases where it has been conferred by express enactment or necessary implication." And: "Injunctions, when issued by a court not having power, need not be obeyed." It is useless to urge that this suit was not instituted to contest an election. The bare perusal of the bill shows that such was its main object, and that the complainants were unwilling to take the requisite statutory steps, and submit their claims to the arbitrament of the only tribunal authorized by law to hear, try, and determine the same. It follows, in my judgment, that the proceedings were *coram non Judge* and void, and that the relators may not be punished for contempt in disobeying the injunctive order.

The commitment of the relators appears to me to be illegal, also, because the court had no power to inflict as punishment for disobedience of the writ a fine in excess of that prescribed by the statute. Section 665 of the Compiled Laws of New Mexico of 1884 reads as follows: "No judge of the district court shall fine any person for contempt for a want of respect for the court in a sum exceeding fifty dollars without a trial by jury." There is no pretense of a jury trial in this case, and still each of the relators was fined \$200 for the violation of this injunction, and ordered to prison until the payment thereof. The trial judge, recognizing the binding force of the statute, discovered that there were four distinct mandates in the writ, and, multiplying the \$50 by four,—the number of the acts covered by the restraining *agis* of the injunction,—he pronounced the multiplied sentence as the judgment of the law. Plainly this was error. The writ must be regarded as a single, indivisible, judicial act, and punishment for its violation ought not to exceed the maximum amount fixed by the statute. Had the judgment ended in the fine alone, perhaps it would be void for the excess only; but, when it consigned the alleged transgressors to the county jail until such fine was fully paid, it deprived the citizen of his liberty, because, perhaps, unable to pay an illegal exaction, and thereby became oppressive and void *in toto*. The relators might have been able and willing to pay the statutory amount, but unable, though ever so willing, to pay the excessive ransom.

The foregoing remarks embody my views as to the merits of this painful controversy. It follows, in my judgment, as the injunction proceedings were void *ab initio*, and as the judgment pronounced upon relators in the attachment proceedings to punish them for contempt in violating the commands of the writ was equally void, because rendered in violation of the plain provision of the statute, that the relators are unlawfully restrained of their liberty, and should be unconditionally discharged from imprisonment.

(5 N. M. 646)

DELGADO v. CHAVEZ, Sheriff.

(Supreme Court of New Mexico. Jan. Term, 1891.)

## DISOBEYING MANDAMUS—CONTEMPT—HABEAS CORPUS.

A peremptory writ of *mandamus* commanding the probate clerk, in his official capacity, to recognize one of two rival sets of claimants for the office of county commissioners, and to refuse recognition to the other, is not void because it incidentally involves the title set up by the rival claimants; and, as the court had jurisdiction of the subject-matter and of the parties, the probate clerk, who was imprisoned for contempt in refusing obedience to the mandate, cannot be liberated on *habeas corpus*. O'BRIEN, C. J., dissenting.

*Habeas corpus.*

N. F. Laughlin, Francis Downs, H. Burns, and Thomas Smith, for petitioner. John H. Knaebel and E. L. Bartlett, for respondent.

FREEMAN, J. This is an application for a writ of *habeas corpus* to be discharged from the custody of the sheriff of Santa Fe county, N. M. The petition is very voluminous, and sets out in full a certain proceeding in *mandamus* instituted against the relator by Abraham Staab, Juan Garcia, and William H. Nesbitt, on the 13th of January, 1891, seeking to compel the relator, as probate clerk of the county of Santa Fe and *ex officio* clerk of the board of county commissioners, to perform certain official duties. This is one of the unfortunate proceedings that grew out of the closely-contested election held in the county of Santa Fe on the 4th of November, 1890. Rival sets of county commissioners claim to have been elected. Candidates of both parties held what they claimed to be valid and proper certificates of election. An alternative writ of *mandamus* was issued against the relator, commanding him to recognize the petitioners to that writ as the legally elected board. In his answer to the writ the relator admitted that he had declined to recognize the petitioners, and sets out at length his views as to who were entitled to exercise the functions of county commissioners. The cause having been heard by the district judge, a peremptory writ was issued. The relator refusing to obey the writ, an attachment was issued, and on the hearing he was committed to jail until he should purge himself of the contempt.

In the case of John H. Sloan and Teodoro Martinez, ante, 930, (heard and determined at the present term of this court,) we have discussed at some length the power of the district judge to issue the writs of *mandamus* and injunction, and to punish for contempts. Much of what has been said in that case finds appropriate application to this. The case at bar, however, differs from the case of Sloan and Martinez in this: that the latter case involved the right of the district judge to direct the canvassers to canvass the votes cast at the election, while in the present case the question involved is as to the jurisdiction of the court to issue the writ to the probate clerk, directing him which of the two rival boards he should recognize as the lawful body. We have no doubt but that the judge had jurisdic-

tion of the subject-matter and of the parties; and this conclusion settles, as we think, the whole question raised by this proceeding.

The writ of *mandamus* long since ceased to be a prerogative writ. It is no longer an extraordinary proceeding, except in the sense that an injunction, attachment, or other like process is extraordinary. "It is equally well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ." Com. v. Dennison, 24 How. 97. It would be a vain and needless exhibition of research to undertake to point out the almost innumerable instances in which this writ has been successfully invoked. The following cases will serve to illustrate the general purposes for which the writ will lie: To compel the allowance of an appeal, (Ex parte Cutting, 94 U. S. 14;) to allow a pension, (Decatur v. Paulding, 14 Pet. 497;) to compel district judge to issue execution, (Postmaster General v. Trigg, 11 Pet. 173;) to compel railroad company to deliver rolling stock, (Ex parte Milwaukee R. Co., 5 Wall. 825;) to compel counties to pay judgments, (Supervisors v. U. S., 4 Wall. 435;) to enforce mandates, (U. S. v. Fossatt, 21 How. 445;) to reinstate cause, (Ex parte Bradstreet, 6 Pet. 774;) to compel levy of tax to pay judgment, (U. S. v. Council of Keokuk, 6 Wall. 514;) to compel court to enter judgment, (Insurance Co. v. Adams, 9 Pet. 573;) to compel court to sign bill of exceptions, (Ex parte Crane, 5 Pet. 190;) to compel postmaster general to perform ministerial duty, (Kendall v. U. S., 12 Pet. 524;) to compel register of land-office to enter application for land, (McCluny v. Silliman, 2 Wheat. 369;) to compel court of claims to entertain motion for new trial, (Ex parte Russell, 13 Wall. 664;) to restore an attorney disbarred by court having no jurisdiction, (Ex parte Bradley, 7 Wall. 364;) to compel town officers to audit charges against the town, (Lower v. U. S., 91 U. S. 536.) In Ohio, Alabama, California, Maryland, North Carolina, Indiana, and Montana the writ will lie to compel the governor of the state to perform a merely ministerial duty. High. Extr. Rem. § 119. It has been also successfully invoked to compel an old officer to deliver records which concern justice to the new one; to compel the clerk of a company to deliver up books, etc.; or the steward of a borough to attend with the books at the next corporate assembly, etc. 5 Com. Dig. 34. In the case of Railway Frog Co. v. Haven, 101 Mass. 403, it was said: "It is well settled that it can be granted, for instance, to compel a town-clerk or clerk of the public corporation, whose office has expired, to deliver over to his successor his common seal, books," etc. In the case of Conlin v. Aldrich, 98 Mass. 557, the following facts appeared: The town-meeting had been held at which Conlin was chosen as a member of the school committee for the term of three years; but the polls were open and the election was made after sunset. This election was treated as invalid, and another meeting called, at which Burditt was elected to the same office. The town-clerk gave to Conlin a certificate of his

election, but Aldrich and Start, who were the two other members of the committee, refused to recognize him as their associate, or to permit him to act as such; they recognizing Burditt as properly elected. The application of Conlin for a writ of *mandamus* was allowed; HOAR, J., declaring: "It is not very strongly contested by the respondents that the appropriate remedy for the petitioner, if he is entitled to any relief, is the writ of *mandamus*. That point is substantially settled by the case of *In re Strong*, 20 Pick. 484." This case, like the one at bar, presents the condition of rival claimants for the same position. So, also, of the case just cited from 101 Mass., where it was said: "The respondents insist, however, that inasmuch as they are in actual possession of the offices in question under a claim of right, and exercising the functions annexed to them, the only mode of controverting their title is by writ of *quo warranto*. The fact that the officers are *de facto* filled and occupied by rival claimants is by no means decisive, and not very material upon this point. It has been so decided in the case of conflicting claims to the office of county commissioner, (*In re Strong*, 20 Pick. 484;) also in the case of members of a school committee, (*Conlin v. Aldrich*, 98 Mass. 557.)" In the case of *Jennings v. Fisher*, 7 Cush. 239, it was said: "This writ, no doubt, is more freely and frequently granted at the present time than it was formerly. It lies to a former town-clerk or clerk of a company to deliver to his successor the common seal, books, papers, and records of the corporation, which belong to his custody. Indeed, it lies to any person who happens to have the books of a corporation in his possession, and refuses to deliver them up. In the case of *Kimball v. Lamprey*, 19 N. H. 220, GILCHRIST, C. J., said: "There are numerous authorities tending to show in what case a writ of *mandamus* is the appropriate remedy. In the case of *Com. v. Athearn*, 3 Mass. 285, it is estimated by PARSONS, C. J., that the proper mode is for the successor of the town-clerk to take the oath of office, and to demand of the former clerk the records, and, if they are refused, then to move for a *mandamus* to command him to deliver over the records. It was alleged in that case that the defendant was in possession of the office, but was not so legally. In the *First Parish in Sudbury v. Stearns*, 21 Pick. 148, trover was brought against the defendant for the book of record of the parish. His defense was that he was the clerk, and, as such, had a right to the possession of the records. MORTON, J., says: 'A *mandamus* would doubtless be a more appropriate and effectual remedy to compel the delivery of the records to the legal officer;' and he cites the case of *Com. v. Athearn*. The rights of persons acting *colore officii* can be tried only in an information in the nature of a *quo warranto* or on a writ of *mandamus*." To the same effect is the doctrine laid down by the supreme court of Vermont in the case of *Stone v. Small*, 54 Vt. 498, the syllabus of which is as follows: "(1) *Mandamus* is the proper remedy to compel the old trustees of an incorporated village, attempting

to hold over, to deliver to the new board the books, papers, and articles of personal property in their possession belonging to the village, and to prevent their interfering with the new trustees in the exercise of their office. (2) When an act incorporating a village imperatively declares that its trustees shall be annually elected on a certain day, the majority of a meeting called for the purpose of electing such officers has no power to adjourn the meeting without day, in fraud of the law and the minority; and if a legal minority, immediately following such adjournment, reorganizes the meeting and elects trustees, they are entitled to hold their office."

These authorities, we think, demonstrate the fact that although the proceeding by *mandamus* against the relator involved incidentally, if not directly, the title set up by the rival set of commissioners, the *mandamus* was not for that reason void. It was resisted, however, by the relator on the ground that it could not be used as a means of contesting the right of the rival claimants to the office. There might be much force in the reasons assigned in support of this doctrine if alleged against the propriety of the proceedings by *mandamus*; but the mistake of the relator lay in supposing that this objection could be successfully interposed as a justification for a refusal to obey the mandate of the court. There is a marked difference between the utter want of jurisdiction, and an erroneous exercise thereof. The former may be pleaded as a justification for a refusal to obey the order of the court, but the latter cannot. In *re Cohen*, 5 Cal. 495; *Church, Hab. Corp.* § 317. In the case of *People v. Railroad Co.*, 76 N. Y. 298, it was said: "The question of the propriety of that order is not now before us; the present appeal being only from the order adjudging the appellants guilty of contempt in not having obeyed the writ." "It is insisted, however, that the *mandamus* was void for the reason that it was vague and uncertain in its command; that it required the relator, not only to recognize certain parties as entitled to exercise the functions of the office, but that he was also commanded, among other impracticable things, to enter all the past, as well as the future, orders of said board; that the writ, in effect, commanded him to do what was not then, and might never become, his duty." This writ did not, as we understand it, seek to impose on the relator any impracticable or difficult duty. It simply required him to perform his usual and ordinary duties as *ex officio* clerk to the board. Whatever this board had already done that had not been recorded was to be recorded, and he was to attend from time to time, in the future, to perform his usual functions in the usual way. It is not pretended that it was not in his power to obey the leading and all-important command laid upon him. It is not possible that he could have misapprehended the principal purpose of the writ, which was to direct him to recognize in his official capacity one of the rival sets of claimants, and to refuse to recognize the other. He seems to have misapprehended entirely

the functions of his office. He was not authorized by law to determine who were, and who were not, the legally-elected commissioners. That question had already been determined, so far, at least, as to bring his ministerial duties within the jurisdiction of the court. It does not follow, because the court ordered him to do that which in part he could not do, that therefore the writ was void. In the case of *U. S. v. Labette Co.*, 2 McCrary, 27, 7 Fed. Rep. 318, a writ of *mandamus* was issued to compel the supervisors to levy, collect, and pay over certain taxes. The respondents levied the tax, but returned that they had no power, process, or authority by which they could collect it. A writ of attachment having been issued, they were discharged for the reason that, having done all in their power to obey the writ, they were not guilty of contempt. This question was discussed at some length in *People v. Nostrand*, 46 N. Y. 378. In that case it was said: "It was also urged upon the argument that the order should be reversed because the precise amount is not specified in the peremptory writ. This position is not tenable. All that is necessary is that the thing to be done should be described with reasonable certainty,—with such certainty that the defendant will know what is required of him. This rule is peculiarly applicable to public officers who are commanded to perform a public duty, and especially where the facts constituting the act are within their personal knowledge." After citing many authorities in support of this view, the court proceeds to say: "These and other authorities establish that it is sufficient to inform public officers in a general way what their duty is, and to command its performance, unless they can justify or excuse the neglect. They cannot shield themselves behind technical objections to the descriptive part of the act to be done."

Numerous other authorities might be cited in support of the general proposition that on an application for a writ of *habeas corpus* to be discharged from commitment for contempt, it cannot be shown that the proceedings out of which the action for contempt proceeded were irregular. *Cooley*, Const. Lim. 348, and cases cited. And in support of the proposition that a proceeding by *mandamus* is not void by reason of mere irregularity, but that it may be good as to part, and bad as to part, we cite: *Ex parte Parks*, 93 U. S. 18; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Clark*, 100 U. S. 399; and *Ex parte Siebold*, Id. 371. Assuming, however, for the purpose of the argument, that the relator did not properly comprehend the terms of the mandate addressed to him; assuming that, in the presence of rival claimants for the office, he was at a loss to know how he should proceed; assuming that he honestly believed that the petitioners in the *mandamus* proceeding had not been elected, and were not therefore entitled to exercise the functions of the office,—what, then, was his plain and unmistakable duty? Was it his province to make an issue with a court of competent jurisdiction, and, after having the

questions thus presented decided against him, to defy the power of the court? Can he escape now the rightful consequences of his contumacy by pretending that he did not understand what was required of him? On this point the case already referred to in 46 N. Y. is instructive. It was there said, (page 378:) "If he desired in good faith to comply with the writ, but was unable to do so from the uncertainty of the mandate, the court would doubtless relieve him. But in this case there was no room for doubt. The act to be performed was specifically described, and there is no pretense that the appellant did not know what was required, or that he was unable to perform it." In view of these considerations, and in view of the opinion of this court already expressed in the case referred to of *Sloan and Martinez*, we are of the opinion that the writ must be dismissed, and the relator remanded to the custody of the sheriff to be confined in the county jail until he purges himself of the contempt for which he was committed; and it is so ordered.

O'BRIEN, C. J., (*dissenting*.) I regret my inability to agree with the disposition made of this case as announced in the foregoing opinion. It would serve no useful purpose to repeat the facts in the brief statement of the reasons that compel me to dissent. In the alternative writ the relator is required to act as follows: "Now, therefore, you, the said Pedro Delgado, probate clerk of the county of Santa Fe, and *ex officio* clerk of the board of county commissioners of said county, are hereby commanded that, immediately after the receipt of this writ, you produce the books in which are kept the records of meetings and proceedings of the board of county commissioners of Santa Fe county, and to record therein the records of the meetings of said board and the proceedings thereof held on the 2d day of January, 1891, and record in said record of minutes and proceedings the record of minutes and proceedings of all other meetings heretofore had by the board of county commissioners which may not have been recorded in said records, and also record all the proceedings of said board which hereafter may be had, and that in doing so you act as the *ex officio* clerk of the board of county commissioners, of which said board said Abraham Staab, Juan Garcia, and William H. Nesbitt are members, and that you act with no other persons whatever pretending or claiming to act as a board of county commissioners of the county of Santa Fe, and that you make regular entries of all their resolutions and decisions in all questions concerning the raising of money, and that you record the vote of each commissioner on any question submitted to the board, if required by any member; that you sign all orders issued by the said board for the payment of money, and record in a book printed for that purpose the receipts of the county treasurer of the receipts and expenditures of the county, and that you do and perform all acts required of you by law as *ex officio* clerk of the board of county commissioners of Santa Fe county,

in connection with said Abraham Staab, Juan Garcia, and William H. Nesbitt, as the proper and only persons composing the board of county commissioners of Santa Fe county, and that you do recognize the said Abraham Staab, Juan Garcia, and William H. Nesbitt as the only lawful county commissioners of Santa Fe county, and as composing the only lawful board of county commissioners of said county, and that you do furnish to said board all the books, records, files, and papers of your said office for their use, inspection, information, and government in the discharge of their duties as the board of county commissioners of said county, and that you do not furnish them to any other person or persons except as the law may require you to do for the inspection and information of private individuals, or that you show cause, before the first judicial district court of the territory of New Mexico in and for the county of Santa Fe, at chambers, in the federal building in the city of Santa Fe, N. M., on Wednesday, January 14, 1891, at 9 o'clock A. M., why you have not done so," etc.

On the return-day of the writ, the relator, Delgado, appeared and filed his answer thereto, as follows: "Territory of New Mexico, county of Santa Fe. In the district court of Santa Fe county. The territory of New Mexico, on the relation of Abraham Staab and others v. Pedro Delgado. *Mandamus*. No. 2,838. The above-named defendant, Pedro Delgado, now and at all times hereafter reserving unto himself all manner of objections and exceptions to the many uncertainties, imperfections, and insufficiencies in the alternative writ of *mandamus* issued in the above-named cause, for answer thereto, or so much thereof as he is informed and advised that is necessary for him to make answer unto, answers and says that he admits that at the general election held in the said county of Santa Fe on the 4th day of November, 1890, he, the said defendant, was duly elected clerk of the probate court of the said county, and that on the 1st day of January, 1891, he duly qualified as such clerk, and entered upon the discharge of the duties of such office, and that he has continuously since said last-mentioned date been in the possession of such office, and has been *ex officio* clerk of the board of county commissioners of said county, and has had and held possession of the records and books, which by law he is made the custodian of. Said defendant admits that in the month of November, 1890, and for a long time prior thereto, and until the 1st day of January, 1891, George L. Wyllys, Teodoro Martinez, and John H. Sloan were the legally-elected and lawfully-acting members of the board of county commissioners of the county of Santa Fe, in said territory; but he denies that the said Wyllys and Martinez, or either of them, were ever removed from their said offices, or that the office held by either of said persons became vacant prior to the expiration of their terms, to-wit, on the 1st day of January, 1891; and he denies that either of the said persons abandoned their said offices, or that they, or either of them, refused to perform the

duties and functions thereof; and he denies that George W. North and Frederic Grace, or any other persons, were ever legally appointed by the acting governor of the territory of New Mexico, or any other person, as members of the board of county commissioners of said county; and he denies that said George W. North and Frederic Grace, or either of them, were ever members of the board of county commissioners of said county, or that they, or either of them, ever had any power or authority to perform the duties or exercise the functions of said offices. And this defendant avers the fact to be that on the 4th day of November, 1890, and for many months prior thereto, and continuously until the 1st day of January, 1891, John H. Sloan, George L. Wyllys, and Teodoro Martinez were the duly elected and qualified members of the board of county commissioners in and for the county of Santa Fe, in said territory, and that they, each and all of them, continued to hold such office, and were in the actual possession thereof, and performing all the duties and functions of such offices, during all of the year 1890, and until the 1st day of January, 1891. This defendant denies that at the election held in the county of Santa Fe on the 4th day of November, 1890, Abraham Staab, Juan Garcia, and William H. Nesbitt, or either of them, were elected as members of the board of county commissioners of said Santa Fe county; and he denies that the said Staab, Garcia, and Nesbitt ever obtained, or that they now have or hold, any certificates showing that they, or either of them, was at said election elected as members of the board of commissioners of said county; and said defendant also denies that the said Abraham Staab, Juan Garcia, and William H. Nesbitt, or either of them, have ever qualified as members of said board of commissioners; and he denies that the said Staab, Garcia, and Nesbitt, or either of them, have, by virtue of any such election, had or held possession of the office of a member of the board of county commissioners of said county, or that they, or either of them, have held any session as members of said board of county commissioners by virtue of such election, nor have they, or either of them, by virtue of such election performed any of the duties pertaining to such office; but he alleges the fact to be that at the general election held in and for said county of Santa Fe, in said territory, on the 4th day of November, 1890, George L. Wyllys, Charles M. Creamer, and Eugenio Martinez were each duly elected as members of the board of commissioners in and for the county of Santa Fe, and territory of New Mexico, the said Wyllys, Creamer, and Martinez receiving at said election the greatest number of legal votes cast at said election in said county for said offices of county commissioners for said county, and after said election returns thereof were made as required by law, and the board of county commissioners then in office for said county met as a canvassing board of election for said county, and duly counted and canvassed all the votes cast in the several precincts in said county at said election,



returns of which were before said board, and after counting and canvassing said votes and returns, the said board of commissioners, as such canvassing board, ascertained that the said George L. Wylls, Charles M. Creamer, and Eugenio Martinez had been and were duly elected as members of the board of county commissioners for said county of Santa Fe at said election, all of which was duly entered of record; and thereupon said board of commissioners, as such canvassing board, issued under their hands and the seal of said board certificates to said Wylls, Creamer, and Martinez, setting forth that they had been duly elected at said election as members of the board of county commissioners of said county of Santa Fe, which said certificates were duly attested by the probate clerk of said county; and afterwards, to-wit, on the 1st day of January, 1891, the said Charles M. Creamer and Eugenio Martinez, each having duly qualified as members of the board of county commissioners of said county of Santa Fe, they entered into possession of, and assumed the duties of, their said offices, and met together in the courthouse of said county, in the city of Santa Fe, as the board of county commissioners of said county, and proceeded to transact business as such, and the said Creamer and Martinez have continuously from said 1st day of January, 1891, had and held possession of said offices, and at the present time, and at the date of the issuing of the alternative writ of *mandamus* in this action, the said Creamer and Martinez were and are holding and are in the possession of said offices, and are now, and have at all times since the 1st day of January, 1891, been, the legal, acting members of the board for the said county of Santa Fe, and have during all of said time been transacting the public business of said county as such commissioners. Said defendant states that he is not informed as to what acts or proceedings were done or had by one Frederic Grace and one George W. North, pretending to act as members of the board of county commissioners in reference to the counting and canvassing the returns of election of the general election held in said county on the 4th day of November, 1890, but he states whatever they may have done in that respect was wholly illegal, and of no effect, for said Grace and North were not, at the time of their said pretended action and the counting and canvassing of said votes, members of the board of commissioners of said county of Santa Fe. Said defendant admits that he has refused to recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as members of the board of commissioners of said Santa Fe county, for the reason that they have never been elected and qualified as such officers, and because they have not been in the possession of said offices, and have never acted as members of such board, and denies that said Staab, Garcia, and Nesbitt have ever met as such board, or held any session as such, as set forth in the alternative writ of *mandamus* herein, but he says that since the 1st day of January, 1891, Charles M. Creamer and Eugenio Martinez

have been the legal and acting board of commissioners of said county. As to all the allegations and statements set forth in said alternative writ, not herein expressly admitted or denied, the said defendant states that he has not sufficient information upon which to form a belief, and he therefore denies all of said allegations. PEDRO DELGADO." "Pedro Delgado, being duly sworn, on his oath states that the facts set forth in the foregoing answer are true to his best knowledge, information, and belief. PEDRO DELGADO. Subscribed and sworn to before me this 15th day of January, 1891. N. B. LAUGHLIN, Notary Public."

Thereupon, on the motion of Staab, Garcia, and Nesbitt, the three alleged county commissioners before mentioned, without further hearing or proceedings, the alternative writ was made peremptory; and thereafter, on the affidavit of said William H. Nesbitt, filed January 19, 1891, the following order was entered: "It being shown to the court by the petition and affidavit of William H. Nesbitt, filed this 19th day of January, 1891, in the cause lately pending in said district court, in which Abraham Staab, Juan Garcia, and William H. Nesbitt were relators, and Pedro Delgado was respondent, that the said defendant, Pedro Delgado, has refused, and still does refuse, to obey the peremptory writ of *mandamus* issued out of this court in said *mandamus* proceeding on the 15th day of January, 1891, it is ordered by the court that an attachment for contempt, returnable at five o'clock this afternoon, issue for the arrest of said defendant, Pedro Delgado. EDWARD P. SEEDS, Associate Justice, &c. Santa Fe, New Mexico, January 19, 1891." Thereafter, on January 20, 1891, the following final judgment was entered: "It is considered and adjudged by the court that said defendant, Pedro Delgado, is guilty of contempt of this court in refusing to obey and in disobeying the command of said writ of *mandamus*; and it is further adjudged by the court that said Pedro Delgado stand committed to the common jail of Santa Fe county until he purge himself of such contempt, and that a warrant of commitment issue against him. EDWARD P. SEEDS, Associate Justice, &c. Santa Fe, New Mexico, January 20, 1891." In pursuance of this judgment, a commitment issued, and Delgado was imprisoned in the county jail. To be relieved of such imprisonment, he instituted his present *habeas corpus* proceeding before this court.

In this connection, I cite chapter 60, Laws 1887, § 1: "That in all cases of proceedings by *mandamus* in any district court of this territory, the final judgment of the court thereon shall be reviewable by appeal or writ of error, in the same manner as now provided by law in other civil cases, except that such appeal or writ of error shall not operate as a *supersedeas* of any judgment of the district court." The judgment of the district court was the imprisonment of Delgado until he obeyed the commands of the peremptory writ; and, according to the provisions of the statute above cited, no appeal or writ of error could release him from such im-

prisonment, no matter how erroneous or illegal the judgment authorizing it might be, until the final determination of the appeal or writ of error in this court. The gist of all the orders contained in the alternative and peremptory writs of *mandamus* is that Delgado recognize Abraham Staab, Juan Garcia, and William H. Nesbitt as the only persons composing the lawful board of county commissioners of Santa Fe county. All other acts commanded are the mere incidents of this recognition. The answer of Delgado to the alternative writ showed in apt terms why he did not so recognize them. Without admitting or denying the validity of this writ, I am clearly of the opinion that Delgado's answer thereto raised a material issue of fact. The motion of the county commissioners to make the writ peremptory, notwithstanding the answer, was in the nature of a demurrer to its sufficiency; and the judgment of the court, in granting that motion, was, in effect, an order sustaining such demurrer. This, in my judgment, was substantial error, from the consequences of which Delgado cannot be relieved by appeal or writ of error. He is in jail, and has no adequate remedy against such illegal imprisonment unless it may be afforded him in this proceeding. I do not overlook the provisions of section 2013, Comp. Laws 1884. It must not be forgotten, however, that that section contains the following qualification: "But no order of commitment for any alleged contempt, or upon proceedings as for contempt to enforce the rights or remedies of any party, shall be deemed a judgment, conviction, or decree, within the meaning of this section; nor shall any attachment or other process issue upon any such order be deemed an execution, within the meaning of this section." I hold, then, if substantial error, prejudicial to the rights and liberty of the petitioner herein, appears upon the record of these proceedings, that the same are reviewable, although contained in the final judgment, declaring him in contempt. Believing, then, that such judgment was entered in violation of law, and that the relator is deprived of his liberty in consequence thereof, I hold that he is entitled to his discharge from this illegal imprisonment. The record in this case contains, in my opinion, other errors especially fatal to the legality of the petitioner's confinement, but it would answer no useful purpose to consider them in connection with this opinion. A labored citation of authorities from states each having peculiar statutes regulating the procedure of the courts, and the rights of the parties seeking relief from restraint deemed illegal, might show a great deal of legal research, but would throw little or no light upon the case under consideration. I cannot close this hastily written opinion more appropriately than by citing the language of the court of appeals in the state of New York in the historic case of *People v. Liscomb*, 60 N. Y. 539: "Jurisdiction of the person of the prisoner and of the subject-matter are not alone conclusive, but the jurisdiction of the court to render a particular judgment is a proper subject of

inquiry; and while the court cannot, upon a return of the writ, go behind the judgment, and inquire into alleged error and irregularities preceding it, the question is presented, and must be determined, whether, upon the whole record, the judgment was warranted by law, and was within the jurisdiction of the court.'

(10 Mont. 340)

RANDALL *et al.* v. AMERICAN FIRE INS. CO.  
OF PHILADELPHIA.

(*Supreme Court of Montana.* Jan. 26, 1891.)

FIRE INSURANCE—ARBITRATION—ACTIONS—PROOFS  
OF LOSS—INTEREST.

1. Though a fire policy stipulates that in case of a failure to agree upon the amount of damage it shall be ascertained by appraisers, and that until the required proofs are produced and appraisals are permitted the loss shall not be payable, the assured, having offered proofs of loss that are rejected by the company, which does not demand an appraisal nor dispute the amount of damage as shown in the proofs, may sue for the loss without himself first offering to have the property appraised, or requesting the appointment of appraisers.

2. The retention by the company of proofs of loss containing a statement that the loss was estimated by persons selected by agreement between the agent and the assured would in no way prejudice the company's rights, whether the statement were true or false.

3. Where by its terms a policy is payable 60 days after proof of loss, the insured, who has delivered proofs of loss that are rejected by the company because they contain a clause stating that the estimate of value was made by persons agreed upon, can recover interest from the date of the delivery of the proofs.

Appeal from district court, Lewis and Clarke county; THOMAS J. GALBRAITH, Judge.

*Bach & Buck* and *B. P. Carpenter*, for appellant. *Toole & Wallace*, for respondents.

HARWOOD, J. The cause of action herein is founded upon an insurance policy, whereby appellant insured and agreed to indemnify respondents against loss which might happen by the destruction or damage of appellant's building, situate at Moreland, Gallatin county, Mont., known as the "Moreland Hotel," and certain furniture therein contained, by fire, to the extent of \$1,500; the sum of \$1,125 being placed upon said building, and the sum of \$375 upon the said furniture. There were also in force during the same period three other policies of concurrent insurance issued by certain other companies in favor of plaintiffs upon the same property, each in the sum of \$1,500, and distributed in like amounts on said building and furniture as aforesaid. While said insurance contracts were in force, all of said property, except a small portion of the furniture, was destroyed by fire. This action was brought to enforce payment of said \$1,500 indemnity, and the trial resulted in a judgment for plaintiffs in said sum, with interest and costs; whereupon defendant moved for a new trial upon a statement of the case, on the ground of insufficiency of the evidence to justify the verdict, and that the same is against law; and also errors of law occurring at the trial, and excepted to by the moving

party. Said motion being overruled, the case is brought up by appeal from the order overruling the same, as well as appeal from the judgment.

The insurance policy involved provides, among other conditions, as follows: "The amount of loss or damage to be estimated according to the actual value of the property at the time of the loss, and to be paid within sixty days after the loss shall have been ascertained in accordance with and within the terms and conditions of this policy, and proof of the same, satisfactory to the said company, shall have been made by the assured, and received at the office of the company in Philadelphia. It shall be, however, optional with the company to repair, rebuild, or replace the property destroyed or damaged with other of like kind and quality, within a reasonable time, giving notice of its intention so to do within sixty days after receipt of proofs herein required; and, in case the company elects to rebuild, the assured shall, if required, furnish plans and specifications of the building herein described. The assured sustaining loss by fire under this policy shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular account, by separate items, and proof thereof, signed and sworn to by the assured, setting forth: (1) A copy of the written portion of this policy, and all indorsements hereon; (2) other insurance, if any, on same property, or any portion thereof, with copies of written portions of each policy, and indorsements thereon; (3) the actual cash value of the property described at the time immediately preceding the fire; (4) the ownership of the property described, and the interest of assured in same; (5) for what purposes, and by whom, the building herein described, or containing the property herein specified, and the several parts thereof, were used at the time of the fire; (6) the date of the loss, and the amount thereof; (7) how the fire originated, as far as the assured knows or believes." The amount of sound value and of damage to the property may be determined by mutual agreement between the company and the assured; or, if they fail to agree, the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property, or by an estimate in detail, if a building, by competent and impartial appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of disagreement; and if the said appraisers fail to agree they shall refer their differences to such umpire; and the award of any two, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not decide the validity of the contract, or any other question except the amount of such loss or damage. It is further provided in said policy that "the company shall have the right to take any of the articles damaged at their appraised value; and, until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable." The

plaintiffs, in their complaint, set up the contract of insurance, alleged the destruction of the property by fire, and "that plaintiffs' loss thereby was \$6,164 on said Moreland Hotel, and \$1,851.14 on said furniture and fixtures contained in said hotel." Plaintiffs further allege that they furnished defendant notice of said loss, and that "defendant, by its adjusting agent, made a personal examination into the circumstances of said loss and fire, and made a request of plaintiffs that the value of said building be ascertained by arbitrators to be mutually chosen." That on the 10th day of September, 1887, plaintiffs and defendants did so refer the question of value of said building to arbitrators mutually agreed upon, John Ketchum and R. W. De Noille, of Helena, aforesaid, who reported and decided the value of said building at the time of said fire to be \$7,179. "That on the 14th day of September, 1887, the plaintiffs furnished the defendant with proofs of said loss, and of their interest in said property, and otherwise fully performed all the conditions of said policy on their part. That on the 15th day of September, 1887, the defendant returned said proofs of loss to plaintiffs, and declined to pay said loss, assigning as the single ground therefor that said proofs were not satisfactory, for the reason that they referred to the estimate made by said arbitrators. That no demand has been made by defendant for a further or any other reference of said loss on building or furniture, since said proofs of loss were so furnished; nor has defendant requested any further proofs of loss; nor did the defendant, within sixty days after receipt of proofs, give notice of their intention to rebuild or restore any of said property." Defendant, by answer, denied the value of said building to be the sum alleged by plaintiffs, or any sum exceeding \$3,250; and denied the value of said furniture to be the sum alleged by plaintiffs, or any sum exceeding \$900; and said answer further put in issue all the allegations of plaintiffs' complaint except the existence of said insurance policy, the destruction of said property by fire, save a small portion of the furniture, and some other allegations not necessary to notice at this time. In addition to the specific denials of plaintiffs' allegations, defendant alleged by way of new matter of defense that the plaintiffs left at the office of defendant's agent in the city of Helena, while said agent was absent therefrom, on or about September 15, 1887, "some paper, which falsely stated that arbitrators had been agreed upon by plaintiffs and defendant;" that plaintiffs' attention was called to this fact by defendant's agent on the same day, and thereupon plaintiff asked permission to retain said paper, stating that said paper should not be regarded or treated as having been tendered to defendant, to which defendant by its agent assented. The answer further averred that plaintiffs on or about September 14, 1887, "fraudulently, and with intent to deceive and obtain an unfair advantage over defendant in the settlement of said claim, falsely represented to defendant's agent that two certain per-

sons had been agreed upon by plaintiffs and defendant as arbitrators to determine and decide upon the value of said building and the cost of rebuilding the same, and that such arbitrators had determined and decided that the value of said building was at the time of the fire \$7,179; whereas in truth and in fact, as plaintiffs well knew, such persons had never been agreed upon or selected as arbitrators, and, as plaintiffs well knew, such persons had never determined, as arbitrators or otherwise, that said building was of the value of \$7,179, or that it would cost said sum, or any other particular sum, to rebuild the same." The answer further averred that defendant requested plaintiffs to furnish it with plans and specifications of said building so destroyed by fire, but that plaintiffs neglected and refused to furnish the same; and that no proofs, plans, and specifications, declarations or certificates have been furnished, and no examination or arbitration has been permitted or furnished by plaintiffs, or had, as required by the conditions of said policy of insurance. This new matter of defense was controverted by plaintiffs' replication.

The first and main point insisted upon by appellant is that this action is brought upon an alleged award by arbitrators, and that no evidence of value of the property destroyed, except to establish an award, was admissible. This point was raised by defendant in the lower court at the trial, and objection was made to the introduction of any evidence as to the value of the property or the amount of said loss, except to establish an award. This objection was overruled, and the court admitted, over the objection and exception of defendant, evidence offered by plaintiffs tending to prove the allegations of the complaint as to the value of the property destroyed and the loss sustained by plaintiffs, independent of the appraisal or award of arbitrators as alleged in the complaint. Proof was also admitted on behalf of plaintiff in respect to the alleged submission of the question of the value of said building and plaintiffs' loss by the destruction thereof to arbitrators, and the alleged award by them made. Appellant's objection and exception aforesaid is based upon the terms of the policy and the clause which provides that "until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable." Appellant's position is that, until such appraisal and award is made by arbitrators or appraisers chosen and acting as provided by the terms of the policy, the claim of plaintiffs is not matured for action, unless plaintiffs allege and prove that they demanded such arbitration or appraisal, and the failure to arbitrate was without the fault of plaintiffs. Appellant further contends that plaintiffs failed to prove the selection of arbitrators or appraisers, and the appraisal by them and award of the value of the property destroyed, in the manner provided by said policy. We think, without doubt, plaintiffs failed in this particular, for the evidence does not show a compliance with the terms of the policy as to

the selection of appraisers, or a compliance with its terms by them in appraising the property, and making an award of value. For a proper understanding of the case and the application of our conclusion herein it is necessary to make a brief summary of the conduct of the parties from the time the loss occurred until the action was brought. The evidence shows that immediately after said property was destroyed by fire plaintiffs notified defendant's agent thereof by telegram. Soon after this, defendant's agent visited the place of fire, inspected and listed the furniture saved, took rough measurements of the foundation of the building, and then proceeded to Bozeman, where he was joined by Flowers, one of the plaintiffs, who brought with him the manager who was in charge of said hotel at and previous to the time of said fire. There the plaintiff Flowers, with said agent, obtained from stores certain lists and prices of furniture bought to furnish said hotel. The manager of said hotel assisted in giving said agent information of the articles in said hotel at the time of the fire. The agent says in his testimony: "We had Barrett [the manager of said hotel] take the rooms, one by one, and had him designate all articles of furniture in each room, and, by means of invoices which we had, put the prices of the articles. This list of articles here was obtained from Barrett, and the prices were obtained from the invoices, and these invoices were obtained at the stores in Bozeman where the goods were bought." Said agent of defendant also testified that while Barrett was thus giving a list of the furniture in said hotel "Flowers was occupied giving particulars of the building, and the construction of it, to Mr. Crook and a builder we had secured at Bozeman to make an estimate." After such inquiries, estimates, and lists were made at Bozeman, defendant's agent returned to Helena, and on the following day met said Flowers at Helena, and handed him a letter, in which said agent informed Flowers that he would "understand that the inquiries made do not in any respect supersede or waive any of the conditions or requirements of the policies; but they have the same force, and call for the same full compliance, as if nothing whatever had been done by us in the premises." A few days thereafter two of the assured came to the office of the said agent, and one of them delivered to the agent a paper intended as a proof of loss. Thereupon said agent called the assured's attention to some particulars in which said paper did not comply with the terms of the policy as a "proof of loss." One of the assured then asked said agent for a blank used for the purpose of making proof of loss, which was furnished. Then one of said assured commenced to fill up such blank, when said agent informed assured that it would be necessary to have a builder "make an estimate on the building;" and, in reply to an inquiry by the assured as to names of some builders who would be competent to make such an estimate, said agent named three different builders or firms of builders as "reliable builders" for the assured to apply

to, and engage some of them to make an estimate on the said hotel, among whom was the firm of Ketchum & De Noille. The evidence on the part of plaintiffs is to the effect that, when said agent named said builders, Mr. Lounds, one of the assured, said to the agent: "Before we go further in this matter, is it understood that estimates furnished by either of these firms will be satisfactory to you?" to which the agent replied: "Yes, certainly; we have done business with all three of them." On the part of defendant said agent testifies to the effect that he does not think Mr. Lounds asked such a question; that most of his conversation was with Mr. Flowers, that Mr. Flowers asked "a similar question" to which said agent replied that "the builders named were all reliable men, and had made estimates for us before on buildings." The assured then engaged Ketchum & De Noille, one of the firms of builders named by said agent, to make an estimate of said hotel building. Such estimate was made from details and specifications furnished by assured, and was designated as "an estimate of the cost of replacing the hotel building at Moreland." Said estimate was delivered to defendant's agent; and said agent, not being satisfied therewith, required of said builders a more detailed estimate, which was furnished. Said builders took no account of and made no estimate upon the furniture destroyed in said hotel. It appears by the testimony of De Noille that the estimate of said building was made principally by Ketchum, and that it was not understood by said builders that they were to act as arbitrators, and he did not understand that they acted as such. It does not appear that any "umpire" was chosen, and the record shows that said estimate was not returned "on oath." At the time said estimate was being made by said builders the assured had prepared what they termed "proofs of loss," and the same was served on said agent. It appears that one proof of loss was made for each company having a policy in force on said property, and the four were delivered to said agent in one package. Upon examining one of said papers defendant's agent found that it contained a "clause referring to the loss of the building, as estimated by Ketchum & De Noille & Co., builders, selected by agreement between the agent of the company and assured to make estimates." Thereupon the agent returned all of said proofs of loss to the attorney who had delivered them for the assured. The next day said agent explained to said attorney his objection to said proofs of loss, which was that said proofs contained said clause in reference to Ketchum & De Noille having been "agreed upon." That appears to have been the only objection to said proofs asserted. Defendant's agent insisted that said clause should be stricken out, and assured refused to strike the same out.

The foregoing facts were proved without any essential conflict, and are taken principally from testimony introduced on behalf of defendant. There is a dispute between the parties to the action as to an arrangement made between the attorney of plaintiffs, who delivered said proofs of

loss, and defendant's agent, whereby the same were retained by said attorney with the understanding that such proofs were to be considered as not having been delivered to defendant's agent. The evidence is conflicting upon that point, therefore it is not open for any consideration now. Counsel for appellant contends that defendant would have been prejudiced and injured by the retention of said proof of loss with said objectionable clause therein; that it was justified in returning the same to assured; that the refusal of assured to strike out said objectionable clause and return said proofs was a failure to make proof of loss, as required by the policy. Appellant construes said clause as an attempt on the part of the assured to involve defendant in an implied admission of a material statement of fact which in truth never occurred, and which statement was false. We do not gather such impression from the evidence. The evidence introduced on the part of defendant alone shows a state of facts from which the assured could in good faith have presumed that Ketchum & De Noille were chosen by agreement to make the required estimates on said hotel building, although they were not chosen as appraisers in the manner provided by the policy; nor did they proceed to make appraisal and return award strictly in the manner provided by the policy. The proof of loss in question, as shown by the record, contained no statement to the effect that Ketchum & De Noille were chosen as arbitrators or appraisers by agreement between the company and the assured, or that they made or pretended to make an appraisal or award, as required by the policy. The proof contains the following statement: "Loss on building, as estimated by Ketchum, De Noille & Co., builders, selected by agreement between agent of Cos. and assured." Under the circumstances of the selection of said builders and the making of an estimate by them we see no evidence of fraud, trick, or deceit in the insertion of that statement in the proof of loss. Moreover, had said statement been absolutely false in fact, we do not agree with the proposition of defendant's counsel, that the retaining of said proofs of loss would have bound defendant by an implied admission of the truth of such statement, under the circumstances shown in the case. No such implied admission could arise against defendant by merely retaining such paper after denouncing such objectionable statement as untrue, and demanding its elimination from said proof.

We return to the main question raised upon this appeal, *i. e.* that "plaintiffs must recover on an award by arbitrators or appraisers, if at all." The question as to how far courts will be governed by a provision in a contract requiring that controversies arising as to the rights and liabilities of parties thereunder be submitted to arbitration has engaged the profound consideration of both American and English courts of last resort. The conclusion reached, and probably settled beyond further controversy, is that a provision in a contract requiring all differences or con-

controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration, will not be allowed to interfere with or bar the litigation of such controversies when brought into court. To enforce such provisions would be to allow parties to barter away the jurisdiction of courts to determine the rights of parties and redress their wrongs. Therefore such provision is disregarded, as against public policy. But many of the same eminent authorities hold that a provision in a contract requiring that the value or quantity of a thing which might be involved in a controversy thereunder be ascertained and determined by arbitration, or in some other possible and reasonable manner, does not oust the jurisdiction of the courts, but only requires a certain character of evidence of a fact in controversy. Therefore a provision in a contract like the one under consideration in the case at bar, requiring that the value of the assured property, under certain conditions, shall be ascertained by appraisal, is not disregarded as against public policy, but is upheld as valid. *Scott v. Avery*, 5 H. L. Cas. 811; *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. Rep. 945; *U. S. v. Robeson*, 9 Pet. 325; *Insurance Co. v. Clancy*, 71 Tex. 5, 8 S. W. Rep. 630; *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. Rep. 561; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. Rep. 252; *Old Saucelito L. & D. D. Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. Rep. 232; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, (Nev.) 7 Pac. Rep. 271; *Holmes v. Richet*, 56 Cal. 307. The policy in the case at bar requires that, if the parties fail to agree upon the amount of damage, "the same shall then, at the written request of either party, be ascertained by an appraisal" by "competent and impartial appraisers," one to be selected by each party, and the two to select an umpire, etc. It is insisted by counsel for appellant that said clause, viewed in connection with the other provisions of the policy, and especially the clause that provides that "until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable," makes it obligatory upon the assured in this action to prove the amount of loss or damage by an appraisal obtained in the manner required by the policy, or show a fair endeavor and failure without plaintiff's fault to get such an appraisal; otherwise plaintiffs' suit in court is premature, and must fail. This is claimed by defendant's counsel to be an imperative requirement of the plaintiffs, whether defendant requests such appraisal or not. There is no showing that either party requested such an appraisal. The defendant, by answer, expressly denies that it "made a request of plaintiffs that the value of said building be ascertained by arbitrators to be mutually chosen, or to be chosen in any other manner." The plaintiffs alleged in their complaint "that no demand has been made by the defendant for a further or any other reference of said loss on building or furniture or fixtures since said proofs of loss were so furnished." This allegation is not denied.

In support of their position counsel for defendant cites certain authorities, which we will now briefly review. In the case of *Old Saucelito L. & D. D. Co. v. Commercial Union Assur. Co.*, supra, it appears from the opinion of the court that the complaint stated "facts showing that a difference arose as to the amount of loss;" "that plaintiff thereupon, and on request of defendant, chose" arbitrators, to whom was submitted "all differences of opinion as to the amount of said loss." The plaintiff further averred that the arbitrators so selected failed to agree on the amount of loss or damage, and failed to select a third person to act with them in case of disagreement, and also failed to make an award; and the plaintiff, after waiting a reasonable time, withdrew from such arbitration. But the court found on the trial that no arbitrators were chosen, and no differences as to the amount of damages were submitted to arbitrators, "and that the failure to submit such differences of opinion to arbitration was in no manner the fault or result of any action suffered or taken by defendant, but, on the contrary, defendant had always been willing to submit such differences." Upon that state of facts and the authorities it was held that plaintiff could not recover. It should be remembered that in this case the complaint alleged that differences arose as to the amount of the loss, and that defendant demanded arbitration. In the case of *Adams v. Insurance Cos.*, 70 Cal. 198, 11 Pac. Rep. 627, it appears that differences arose between the companies and the assured as to the amount of loss, and no demand was made by either party for an arbitration, as provided in the policies. The court, referring to the case reported in 66 Cal., supra, held that until adjustment of the claim by mutual agreement or by arbitration, or a fair effort was made by the assured to obtain such arbitration, no action could be maintained. In the case of *Carroll v. Insurance Co.*, 72 Cal. 299, 13 Pac. Rep. 863, it appears that an arbitration was required by the policy to determine the amount of loss in case of differences as to the same, and that such arbitration was had; but when the plaintiff brought suit he declared upon the policy generally, ignoring the award, and made no mention of the fact that an award had been obtained. It was held that the award was a necessary element of plaintiff's cause of action. The facts involved in these California cases distinguish them from the case at bar, but in the main appellant's position is supported by them. The case of *Lovejoy v. Insurance Co.*, 11 Fed. Rep. 63, (U. S. C. C.) is also cited by appellant's counsel. But that was an action by creditors of the assured to enforce payment of the loss to them. It was found that no preliminary proofs of loss had been made, as required by the policies. Nor was there satisfactory evidence of waiver of such proofs. So it was held by Judge BLODGETT that the claims were not in such condition that the assured could maintain an action thereon; and, of course, it followed that creditors of assured could not compel payment of these claims by garnishment pro-

cess. In his opinion the learned judge, after finding that the preliminary proofs had neither been made nor waived, also mentions the provision in some of the policies before him, requiring the amount of the loss or damage to be fixed by arbitration in case of dispute, and remarks that he has no doubt that courts will enforce the provision in the future as in the past. It is plain that in this case the decision did not turn upon the question as to whether the amount of loss had been fixed by arbitration, because no preliminary proofs had been made, as required by the policies, so as to reach the question of difference as to the amount of loss. The case of *U. S. v. Robeson*, supra, is also cited by appellant. This case affirms the general rule that, where a contract provides that a certain fact—as that the transportation of certain additional freight over and above a certain quantity shall be paid for at a given rate, on producing the certificate of the commanding officer, showing the quantity of such additional freight transported—such fact must be proved by the kind of evidence required by the terms of the contract, or the party seeking to recover must show that he has made all reasonable effort to obtain such proof before he can be allowed to introduce other evidence of such fact. In such a case the contract does not contemplate that anything is to be done by the person obligated to pay, except to await the certificate of the party previously designated by both parties to ascertain and certify the quantity. The contract does not contemplate that the paying party shall do anything towards obtaining such certificate; nor is there any alternative contemplated whereby the parties may, under certain circumstances, dispense altogether with the necessity for such certificate; nor that it shall only be required in case of "differences" of opinion as to the amount in question, and then can only be brought into existence by the joint action of both parties in selecting arbitrators to ascertain the value, as in the case at bar. As remarked in the case last cited, supra: "The principles involved \* \* \* are connected with the fiscal action of the government." If the paying agent of the government disbursed money on certificates or evidence other than such as the contract provided for, he did so at his own risk, for he was required to produce such certificates as the contract called for in accounting for his disbursements. Appellant's counsel cite, as sustaining their position upon the point under consideration, *Flaherty v. Insurance Co.*, 7 Ins. Law J. 226, (Pa. 1878.) We have not been able to examine this case, as the report cited is not at hand. Nor do we find such case in the Pennsylvania State Reports. But the holding of the supreme court of Pennsylvania, as announced by Mr. Justice SHARSWOOD in *Mentz v. Insurance Co.*, 79 Pa. St. 478, appears to be opposed to appellant's position. In that case it appears that the policy in question contained a provision for arbitration of differences as to the amount of loss, and that no action should be maintained on the policy unless the amount of loss "shall

be first thus ascertained." "The defendants moved for a nonsuit, 'because section 8 requires the parties to the policy to submit to a reference,' etc. Plaintiff objected to the motion because no reference was offered or asked for. By direction of the court judgment of nonsuit was entered. This was assigned for error on the removal of the record to the supreme court by plaintiff by writ of error." The judgment was reversed. In the case of *Hamilton v. Insurance Co.*, supra, it appears there was contention as to "whether defendant had duly requested and plaintiff had unreasonably refused to submit to such an appraisal and award as the policy called for." But it is remarked by Mr. Justice GRAY, in delivering the opinion of the court, that the evidence upon that question does not depend in any degree "on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties. \* \* \* That correspondence clearly shows that the defendant repeatedly and explicitly in writing requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy; and that plaintiff as often peremptorily refused to do this, unless defendant would consent in advance to define the legal powers and duties of the appraisers, (which defendant was under no legal obligation to do.)" It was held that "the court rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that plaintiff, therefore, could not maintain this action." So in the case of *Gasser v. Sun Fire Office*, supra, differences arose as to the amount of loss, and "the defendant duly and seasonably made a written request of said plaintiff that the amount of such damage be ascertained by an appraisal, according to the terms of the contract, and demanded that the plaintiff select and name an appraiser to act for him; and that plaintiff wholly neglected and refused to comply with such request, or to enter upon any appraisal." Under such a state of facts it was held that plaintiff must comply with defendant's request for appraisement before action could be maintained for recovery of the loss. In the recent case of *Insurance Co. v. Pulver*, 126 Ill. 329, 18 N. E. Rep. 804, the usual arbitration clause was under consideration. Mr. Justice BAILEY, in delivering the opinion of the court, says: "The instructions given enumerate, among the defenses of which the defendant was seeking to avail itself, the failure of plaintiff to submit her differences with the defendant in respect to her loss or damage to arbitration in accordance with the conditions of the policy; and on that question the jury were instructed as follows: 'As to the question of arbitration you are instructed that under the provisions of the policy, if there was a dispute as to the amount of loss, then either party could demand an arbitration to determine the amount of such loss, by serving a notice in writing on the opposite party; and before you can find against the plaintiff on this point you must believe from the evi-



dence that there was a dispute between the parties as to the amount of the loss, and that notice in writing was served on her, or some one authorized to act for her, demanding such arbitration in accordance with the provisions of the policy, and that she, in person or by attorney, without sufficient cause, refused to submit to such arbitration.' It is insisted that this instruction, though holding the law substantially in accordance with the defendant's theory, is erroneous in not conforming in its hypothesis to the evidence as it was actually given,—the evidence being, as is claimed, in accordance with the hypothesis of an instruction asked by the defendant." The court held that said instruction was not erroneous. In the case of *Gere v. Insurance Co.*, 67 Iowa, 272, 23 N. W. Rep. 137, 25 N. W. Rep. 159, after suit was brought to recover the loss the insurance company demanded arbitration, under a clause in the policy providing therefor, and urged said clause and demand for arbitration as a defense. The suit was commenced five months after the loss occurred. It was held that demand for arbitration came too late, and plaintiff was allowed to proceed. In a comparatively recent case before the supreme court of Michigan, (*Nurney v. Insurance Co.*, 63 Mich. 638, 30 N. W. Rep. 352,) it appears that differences had arisen between the parties as to the amount of loss. The policy in question contained an arbitration clause very much like the one in the case at bar; and, although such differences had existed, as to the amount of loss, for some five months prior to the suit, no request for arbitration had been made by either party. At the trial the defendant invoked the clause in the policy requiring arbitration, as well as another clause providing that no suit should be brought until after such arbitration was had. The trial court instructed the jury "that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration, or he had given notice to the defendant of his desire to have the same so determined, and the defendant had neglected or refused to comply with the request; and thereupon further instructed the jury to return their verdict for the defendant." On appeal this was held to be error, and the judgment was reversed. See other cases upon this subject: *Gibbs v. Insurance Co.*, 13 Hun, 611; *Mark v. Insurance Co.*, 24 Hun, 565, affirmed in New York court of appeals, 91 N. Y. 663; *Hurst v. Litchfield*, 39 N. Y. 377; *Wallace v. Insurance Co.*, 1 McCrary, 335, 2 Fed. Rep. 658; *Id.*, 4 McCrary, 123, 41 Fed. Rep. 742; *Stephenson v. Insurance Co.*, 54 Me. 69; *Wolff v. Insurance Co.*, supra; *Insurance Co. v. Putnam*, 20 Neb. 331, 30 N. W. Rep. 246; *Insurance Co. v. Badger*, 53 Wis. 283, 10 N. W. Rep. 504; *Reed v. Insurance Co.*, 138 Mass. 572; *Insurance Co. v. Steiger*, 109 Ill. 254; *Lasher v. Insurance Co.*, 55 How. Pr. 318; *Crossley v. Insurance Co.*, 27 Fed. Rep. 30; *Robinson v. Insurance Co.*, 17 Me. 131.

Without further reviewing authorities, we conclude from the number examined bearing upon this important subject that

the tendency now is to construe the provision found in contracts like the one before us, providing for arbitration as to differences respecting the amount of loss or damage, to mean, in contemplation of the parties, that the party desiring arbitration shall request the same. In view of the numerous terms and conditions of the contract, and the position occupied by the parties, we believe this is the manifest intention. Under the terms of the policy, when a loss occurs, the time for payment is fixed. Notice and verified proofs of loss are required to be presented by the assured, with other conditions as to proofs and examinations, if the insurer request them. The proofs of loss certify under oath the amount of loss as claimed by the assured. The insurer may accept this estimate, or proceed to negotiate for an adjustment or a "mutual agreement" with the assured as to the amount he will take in satisfaction of the contract; or the insurer may give notice within the required time of intention to restore the property. All these alternatives for the insurer are provided in the policy, and it is contemplated that the assured must await the movements of the insurer upon some of these lines of action. The assured cannot know which will be adopted until notified by the insurer. The insurer may also, if a difference of opinion as to the fair amount of the loss is entertained, notify the assured thereof, and request arbitration. The insurer has the amount of loss claimed by assured, stated under oath; and the suggestion of "differences" in that respect must come from the insurer, and such differences ought to be certain, and would probably involve the admission of liability to pay a stated amount. (*Lasher v. Insurance Co.*, 55 How. Pr. 318,) so that an issue would be stated to submit to arbitration. The insurer, under such a contract, is the only party who can effectually demand and bring about arbitration or gain a defense by reason of the other party's default in failing to comply therewith, but, if the assured fails to request arbitration, this deprives the insurer of no right whatever. If the insurer is deprived of the right of arbitration, it happens by his own laches. Nor by demanding arbitration can the assured bring that remedy into action, for the insurer may simply ignore such demand, and lose no defense thereby when the cause of action is taken into court. Therefore, under the peculiar conditions of the contract, it depends on the will of the insurer alone as to whether he will have arbitration or not. If he demands it in season, according to the conditions of the policy, and the conditions are shown to exist, which the policy provides shall be submitted to arbitration, then the assured must accede to the request, for the courts will afford him no remedy until he submits to arbitration. (*Hamilton v. Insurance Co.*, supra. But, on the other hand, if the insurer is unwilling to arbitrate, he may ignore the request made by assured therefor, and, under such conditions, to require the assured to make the request, and plead and prove the fact, is to require a vain and useless act, and the

ceremony of proving it, which is always against the policy of the law. An important circumstance in the case at bar is that, so far as the record shows, defendant did not at any time signify to plaintiffs a difference of opinion as to the value of said destroyed property, or the amount of damage, as claimed by plaintiffs; or that its neglect to pay said claim was on the ground of a difference of opinion from that expressed in the plaintiffs' proof of loss as to the value of said property. As appears by the record, that point was entirely lost sight of by defendant in its contention that said clause in the proof of loss referring to Ketchum & De Nolle as agreed upon to estimate the value of said building should be stricken out. Upon a careful review of the record it is found that the only expressions by defendant of dissatisfaction as to the stated value of said property was a remark by defendant's agent to one of the assured "that the figures seemed rather high," referring to the estimate by Ketchum & De Nolle. That was before proofs of loss were made and delivered, and the evidence is produced by plaintiffs. The defendant produced no evidence of having signified to plaintiffs a difference of opinion as to the value of the property destroyed from that expressed in plaintiffs' proof of loss. We therefore hold that plaintiffs were not bound to show an appraisal or an award as to the amount of damages sustained; nor were plaintiffs bound to show that they had requested arbitration, and that failure to arbitrate was not through their default.

It is contended by counsel for the appellant that the court erred in instructing the jury to the effect that, if the jury found that plaintiffs were entitled to recover any sum, they were also entitled to interest thereon at the rate of 10 per cent. per annum from and after the expiration of 60 days after proof of the loss was delivered. By the terms of the policy the loss was payable 60 days after proof thereof. At that time the amount of loss became due. We think interest was legally allowable, under our statute, as well as the authorities in such cases. *Comp. St. div. 5, § 1237; Albion Lead Works v. Citizens' Ins. Co.*, 3 Fed. Rep. 197; *Hastings v. Insurance Co.*, 73 N. Y. 141; *Field v. Insurance Co.*, 6 Biss. 121; *Insurance Co. v. Gould*, 80 Ill. 388; *Insurance Co. v. Myer*, 93 Ill. 271.

The further assignments of error by appellant's counsel have been carefully considered; but none of them are sustained. The assignments of error not specifically treated appear to be based upon the theory of defense set up by defendant, which we have not sustained. It is ordered that the judgment of the trial court be affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 362)

RANDALL *et al.* v. PHOENIX INS. CO. OF BROOKLYN.

(Supreme Court of Montana. Jan. 29, 1891.)

FIRE INSURANCE—PROOFS OF LOSS—ARBITRATION—ACTIONS—PLEADING.

1. Though a fire policy provides for arbitration in case of disagreement as to the loss, and

that no action shall be sustainable until an award shall have been obtained, the insured who has furnished proofs of loss which are rejected by the company not because there is a disagreement as to the amount of loss, but simply because the proofs contain a statement that the loss was estimated by persons selected by agreement between the assured and the company,—a fact that the company denies,—can sue for the loss without first requesting the appointment of arbitrators.

2. Where the policy provides that it is agreed that an award by arbitrators shall be a condition precedent to the right to sue for the loss, the insured may recover on a petition alleging both an award and also a proof of loss without an award, as the two averments are not inconsistent, since, if the conditions rendering arbitration necessary did not arise, there may be a recovery of the loss though it was not ascertained by an award.

Appeal from district court, Lewis and Clarke county; THOMAS J. GALBRAITH, Judge.

*Bach & Buck* and *B. P. Carpenter*, for appellant. *Toole & Wallace*, for respondents.

HARWOOD, J. This action was brought to recover \$1,500 insurance, upon one of the policies mentioned in the case of *Randall v. Insurance Co.*, ante, 953. That case is referred to for a statement of the pleadings, evidence, and points relied upon by appellant in this case. This cause was tried before the court without a jury; and, by stipulation, the same evidence introduced on the trial of the cause above referred to, by the respective parties, was submitted and considered in this cause, except that the policy of insurance, issued by the Phoenix Insurance Company, was introduced herein. There are no material differences in the two policies as to the provisions requiring proofs of loss. The clause of the Phoenix policy, providing for arbitration to determine the amount of loss, reads as follows: "10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or failing to agree, the same shall then be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select an umpire to whom they shall refer each subject of difference, and the award of any two of them, in writing under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this company, nor any other question, except only the amount of such loss or damage." This policy also contains a clause to the effect that no action against the company, "for the recovery of any claim by virtue of this policy, shall be sustainable until after an award shall have been obtained fixing the amount of such claim in the manner above provided, which is agreed to be a condition precedent." If this latter clause should be given literal effect, it amounts to an agreement that the assured who suffers a loss covered by the policy will not resort to court to compel payment unless defendant consents; for if the assured cannot maintain an action "until an award shall have been obtained, fixing

the amount of such claim in the manner provided," and the company does not join in choosing an arbitrator, etc., then the assured could not obtain an award; hence, according to the literal terms of the policy, he could not in that case maintain his action in the court at all. The contract cannot be construed thus, for such a construction makes the clause void. We must, if possible, give this provision such an interpretation as to make it reasonable and not void in law. We therefore construe the provision as to arbitration to mean that the provision shall be brought into action when the insurer asserts a difference as to the amount of value of the property destroyed or damaged, from that stated in the verified proofs of loss, and the clause forbidding the maintenance of an action for recovery of the loss, until after an award shall have been obtained, must be read and applied in connection with the arbitration clause, and it will come into action to bar plaintiff's recovery where he has refused to arbitrate, after the matter for arbitration arose, and the same was seasonably sought in conformity with the terms of the policy, as was the case in *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. Rep. 945, and other cases cited in *Randall v. Insurance Co.*, supra. As will be seen by reference to the case last mentioned, the contention on the part of the respondent was not as to the amount of loss, as stated in the verified proofs of loss, but the contention was that the statement that "loss on building, as estimated by Ketchum & De Nolle & Co., builders, selected by agreement between agent of Cos. and assured," was false, and must be stricken out. Without asserting any other objection or any dissent from the statement of value of the property destroyed as contained in the proofs of loss, the respondent returned said proofs, and declined to receive them on the ground that said statement was made therein. Plaintiffs refused to expunge said statement from the proofs of loss, and, with that contention, it appears negotiations ceased. No offer was made by respondent to pay any sum in settlement of its obligation on said policy, and, no difference of opinion being raised as to the value of the property destroyed, we think the court rightly held that it was not essential for plaintiffs to prove an award, or an attempt to get one, before recovery could be had in this action.

Another point insisted upon by appellant is that the court erred "in trying the case as to the loss of the hotel upon two different and distinct theories, each being incompatible with the other; that is to say, in assuming that under the pleadings the plaintiffs could establish their case on an award or finding by Ketchum & De Nolle, of the value of the hotel at the time of its destruction,—a proceeding on an adjusted loss,—and also on a compliance by the plaintiffs with the terms of the policy, and proof of actual value of the property at the time of its destruction,—a proceeding on an unadjusted loss." The main elements which constituted plaintiffs' cause of action were (1) the contract, *i. e.*, defendant's obligation to pay a certain portion

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of the value of the property destroyed; (2) the happening of the events which made the obligation payable; (3) the failure to make payment. The obligation on the part of defendant is to pay according to the value of the property, and the contract provides that under certain conditions the value shall be ascertained in a certain manner. This latter provision is incidental to the obligation. The plaintiffs alleged the value of the destroyed property, and also alleged that the value of the hotel had been ascertained by arbitration. This was not an averment of two causes of action, nor was it an averment of two facts "incompatible with each other." It was only alleging the value, and that the same had been ascertained in a manner required by the contract under certain conditions. The fact of ascertaining the value by arbitration would be essential to recovery under certain conditions. Under other conditions it would not. *Randall v. Insurance Co.*, supra. If the conditions were such that the ascertainment of the value by arbitration was not essential, that allegation in the complaint was surplusage, and the proof thereof was not essential to plaintiffs' right to recover. In receiving proofs under such a state of facts offered to establish a liability under a contract comprising these alternative conditions, it was proper for the court to receive proof of the value, as well as proof relating to the ascertainment of that value by arbitration.

The question as to whether arbitration is vital to plaintiffs' right of recovery depends upon whether the conditions arose requiring arbitration. If such conditions did not arise, then arbitration was not essential, and proof of value would be pertinent. If the conditions requiring arbitration arose, and the same failed by the default or misconduct of plaintiffs, their right of recovery in the action would fail, even though they had proved the value of the property otherwise. The observations in this case should be read in connection with the case of *Randall v. Insurance Co.*, supra. On the facts and reasons therein set forth, the judgment and order overruling defendant's motion for new trial herein are affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 367)

RANDALL *et al.* v. LANCASHIRE INS. CO.

(*Supreme Court of Montana.* Jan. 29, 1891.)

Appeal from district court, Lewis and Clarke county; THOMAS J. GALBRAITH, Judge.

*Back & Burk* and *B. P. Carpenter*, for appellant. *Toole & Wallace*, for respondents.

HARWOOD, J. This action was brought to recover the sum of \$1,500 insurance upon one of the policies of insurance mentioned in the case of *Randall v. American Fire Ins. Co.*, ante, 953. The pleadings, proofs, and points relied upon by appellant in this case are practically the same as those considered and determined in said case above mentioned, and the case of *Randall v. Phoenix Ins. Co.*, ante, 960, (just decided by this court.) On the authority of those cases, and the conclusions therein reached, it is here ordered that the judgment and the order of the trial court, overruling defendant's motion for new trial in

the above-entitled cause, be and the same are hereby affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 368)

RANDALL *et al.* v. LIVERPOOL & LONDON & GLOBE INS. CO.

(*Supreme Court of Montana*. Jan. 29, 1891.)

Appeal from district court, Lewis and Clarke county; THOMAS J. GALBRAITH, Judge.

*Bach & Buck* and *B. P. Carpenter*, for appellants. *Toole & Wallace*, for respondents.

HARWOOD, J. This action was brought to recover \$1,500 insurance upon one of the policies mentioned in the case of *Randall v. American Fire Ins. Co.*, ante, 953. The pleadings, proofs, and points presented on appeal are practically the same in this case as those considered in the case above mentioned, and the case of *Randall v. Phoenix Ins. Co.*, ante, 960, (just determined by this court.) On the authority of those cases, and the conclusions therein reached, it is hereby ordered that the judgment, and the order of the lower court overruling defendant's motion for new trial, be and the same are hereby affirmed, with costs.

BLAKE, C. J., and DE WITT, J., concur.

(88 Cal. 110)

THOMPSON v. THOMPSON *et al.* (No. 13,386.)

(*Supreme Court of California*. Feb. 21, 1891.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial is properly refused, where the newly-discovered evidence is argumentative, and a mere repetition of the testimony at the trial, and the documentary evidence relied on is not shown to be relevant, and where the affidavit filed with the application is contradicted by the affidavits of the other party.

Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

*J. C. Black*, for appellants. *D. W. Burchard*, for respondent.

HARRISON, J. The appeal in this action is without merit. The evidence introduced at the trial justified the finding of the court that the respondent was the owner and entitled to the possession of the premises described in the complaint, and that they were unlawfully withheld from her by the defendants. Although a portion of the testimony in behalf of the plaintiff was in some particulars contradicted by the testimony of the appellant, yet the version given by the witness for the plaintiff of the transaction which resulted in her purchase of the premises was so fully corroborated by other uncontradicted portions of his testimony that the court would not have been justified in disregarding it, either in its decision upon the trial, or upon the appellant's motion for a new trial. The newly-discovered evidence set forth in the affidavit of appellant, upon which she sought a new trial, consisted chiefly of a repetition of her testimony at the trial, and is more of an argumentative character than a statement of facts. The documentary evidence referred to in the affidavit is of a date long subsequent to the purchase by the plaintiff of the lands in controversy; and no fact is stated in her affidavit which in any way connected this documentary evidence with such purchase. Moreover, this affi-

davit of the appellant was so directly contradicted by the affidavits on behalf of the respondent that the court was not bound to accept it as true. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

(88 Cal. 79)

POIRIER v. GRAVEL. (No. 13,734.)

(*Supreme Court of California*. Feb. 16, 1891.)

ACTION ON NOTE—PLEADING—CONSIDERATION—VACATING JUDGMENT.

1. Civil Code Cal. § 1614, provides that "a written instrument is presumptive evidence of a consideration." Section 1615 places the burden of showing want of consideration with the party seeking to avoid it. *Held* that, in pleading upon a note, it is unnecessary to aver a consideration.

2. A complaint set out a contract whereby defendant agreed to pay money in installments when realized from the products of certain land which she owned, and then alleged that she had sold and conveyed to other persons the land and the products thereof, and had not paid the money as agreed. *Held* a sufficient statement of a breach of the contract.

3. Upon a motion to vacate a default judgment, the proofs were conflicting, but plaintiff's affidavits showed clearly that defendant's failure to answer in time did not arise from mistake, inadvertence, or excusable neglect. *Held*, that the motion was properly overruled.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

*Brousseau & Hatch*, for appellant. *H. H. Appel*, for respondent.

BELCHER, C. The plaintiff brought this action in April, 1889, to recover the sum of \$1,500 on a written instrument, which reads as follows: "Los Angeles, Cal., February 9, 1888. \$1,700. I hereby promise to pay to Godfrey Poirier the sum of seventeen hundred dollars out of the net proceeds of the products, whether mineral, timber, wood, or any other thing, raised or taken from section 3 of township 11 north, range 15 west of the San Bernardino meridian, in Kern county, state of California; the said sum to be so paid in installments, in such amounts and at such times as I shall realize each month from such products, after payment of all costs and expenses of the gathering or obtaining and selling such products. The said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation. MARY PAULINE GRAVEL." It is alleged in the complaint that the defendant, being the owner of an undivided one-half interest of the land described, and being indebted to the plaintiff in the sum of \$1,700, executed and delivered to plaintiff the instrument on the day of its date, and the plaintiff then and there accepted the same; "that, since the making and delivery of said instrument by defendant to plaintiff, the said defendant has sold, disposed of, and conveyed away to other persons the said land and premises in said agreement described, and all mineral, timber, and wood products thereof, and everything that could and might be gathered and raised from land, and said defendant is no longer the owner thereof; that said

defendant has not paid the said sum of seventeen hundred dollars, save and except the sum of two hundred dollars, or thereabouts; and there is due, owing, and unpaid, from defendant to plaintiff, the sum of about fifteen hundred dollars." Wherefore judgment is asked for the sum of fifteen hundred dollars, and costs of suit. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on the 6th of May the demurrer was overruled, and 10 days allowed to answer. Four days later notice of the ruling on the demurrer was served on defendant's attorneys, and on the 31st of the same month, no answer having been filed, judgment by default was entered against the defendant by the clerk for the amount prayed for and costs. On the 7th of June an execution on the judgment was issued and levied on defendant's property, and notice of the time and place of sale was published. On the 2d of July defendant served on plaintiff a notice that on the 8th of that month she would move the court for an order vacating the judgment and setting aside the default taken, upon the ground that the default was entered against her by mistake and inadvertence, and also upon the ground that the judgment was irregular and void, because the complaint did not state facts sufficient to constitute a cause of action. This motion was subsequently heard by the court upon affidavits introduced on both sides, and denied. The defendant then appealed from the judgment, and the order denying her motion.

1. It is contended for appellant that her demurrer to the complaint should have been sustained, but we think the ruling proper. The written instrument imported a consideration for its execution, and the burden of showing a want of consideration sufficient to support it was upon the defendant. Civil Code, §§ 1614, 1615. The recital that the defendant, "being indebted," executed the instrument, was not necessary, and may be rejected as surplusage. It is true that a complaint for breach of contract must state the breach in unequivocal language. We think the complaint here fully complied with this rule. It set out the contract whereby the defendant agreed to pay a sum of money in installments, when realized by her from the products of certain land which she owned, and then alleged that she had sold and conveyed to other persons the land and the products thereof, and had not paid a part of the money which she had agreed to pay. This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof. The case in this respect is like that of *Wolf v. Marsh*, 54 Cal. 228. There the defendant executed to the plaintiff a written agreement whereby he promised to pay a sum of money when realized from the profits of certain coal mines in which he owned an interest. Before the mines had yielded any profits to the defendant he sold and conveyed his interest in them to a stranger. "By so doing," it was said by this court, "he voluntarily put it out of his power ever

to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary that, 'if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived.' Bishop, Cont. § 1426." See, also, *Love v. Mabury*, 59 Cal. 484.

2. We cannot say that the court below erred in refusing to vacate and set aside the judgment on the ground that it was taken against defendant through her mistake and inadvertence. The affidavits introduced on the hearing of the motion were conflicting in their statements. Those read by the plaintiff very clearly showed that defendant's failure to answer in time did not arise from mistake, inadvertence, or excusable neglect. The learned judge who heard the motion must have thought that the plaintiff's affidavits stated the facts truly, and in this we are unable to see that he was mistaken. In our opinion the judgment and orders should be affirmed, and we so advise.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(87 Cal. 581.)

BROCK v. PEARSON *et al.* (No. 13,369.)

(*Supreme Court of California*. Feb. 2, 1891.)

VENDOR AND VENDEE—ASSIGNMENT OF CONTRACT—AUTHORITY OF AGENT—EVIDENCE—LIS PENDENS.

1. Where the holder of a contract of sale of land transfers it to another in consideration of a conveyance to himself of an undivided fourth interest in the land when a conveyance shall be obtained from the vendor, and the purchaser, by his agent, makes a quitclaim deed of this fourth interest immediately on securing the contract, it operates as an assignment of a one-fourth interest in the contract.

2. This deed was afterwards destroyed at the instance of the purchaser (defendant) of the contract of sale, in order, as he testified, that he might have a clear title to the property, so that he could "handle" it, the seller of the contract to have an interest in the profits arising from the land. Plaintiff's testimony was that the deed was destroyed so that defendant might acquire a clear title to the entire property, a fourth interest in which he was then to convey to plaintiff. Defendant's agent did in fact execute to plaintiff's agent a written assignment of a fourth interest to plaintiff, when the deed was destroyed. Plaintiff also testified that he was to be interested in the profits of a corporation to be formed to take the land, and not in the property itself. *Held*, the quitclaim deed was destroyed with the single intention of giving defendant a clear title, and not "with intent to extinguish the obligation thereof," within Civil Code Cal. § 1699.

3. The fact that plaintiff's own testimony relative to the intention of the parties in destroying the deed is conflicting, he having testified at one time that he was only to be interested in the profits of a corporation to be formed to take the land, does not bind him to its least favorable aspect for himself, but, it being shown by a preponderance of evidence that he in fact was to have a fourth interest in the land, he is entitled to that.

4. Defendant's agent negotiated the transac-

tion, under verbal instructions "to make the best terms he could to get hold of the property," but he was instructed by letter, which was shown to plaintiff, to "sign nothing to any one," as defendant would "give the contract to carry the various interests" in the land. *Held*, that the agent had authority to assign plaintiff a fourth interest in the land, in consideration of plaintiff's transferring to defendant his contract of sale.

5. Plaintiff having filed a *lis pendens* before defendant conveyed to third parties, these latter are charged with notice of his rights.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

*King & Sautley, Houghton, Silent & Campbell*, and *John D. Bicknell*, for appellants. *Stephens, Appel & Stephens, E. L. Campbell*, and *Brosseau & Hatch*, for respondent.

HAYNE, C. This was a suit to compel the conveyance of an undivided one-fourth interest in a tract of 704 acres of land in the county of Los Angeles. The trial court decreed the conveyance of a one-eighth interest, and the defendants appealed. The general features of the case are as follows: On the 9th of June, 1887, the owner of the land, one A. W. Timms, gave the plaintiff a contract of sale thereof for the sum of \$25,000. The defendant Pearson was desirous of acquiring the property, and instructed one H. V. Burner to negotiate for its purchase. The latter effected an arrangement with plaintiff whereby he was to give up his bargain upon certain terms, which are considered below. The contract of sale, however, was not transferred directly to Pearson or to Burner. By Burner's direction it was transferred to one Weller, who acted in obedience to his instructions. As soon as Weller received the contract of sale, he (by direction of Burner) gave to plaintiff a quitclaim deed purporting to convey a one-fourth interest in the land. On being informed of this, Pearson (who seems at that time, at least, to have supposed that the deed conveyed some title to plaintiff) insisted that it should be destroyed; and under instructions to this general effect Burner induced plaintiff to destroy the deed, under an arrangement which will be considered below. A few days after this (viz., on July 9, 1887) Weller transferred the contract of sale to Burner, who, on the same day, made the first payment to the owner, received a deed from him, executed a mortgage back, and then conveyed the property to Pearson. On the 20th of the same month the plaintiff commenced the present suit, and recorded a notice of *lis pendens*. Subsequently, Pearson transferred certain interests in the property to third persons, and on October 20th of the same year joined with them in a conveyance of the property to the San Pedro Harbor, Dock & Land Improvement Company. On April 23d of the following year, this corporation conveyed 92 acres of the property to the defendant, the Southern Pacific Railroad Extension Company. The plaintiff subsequently parted with one-half of his one-fourth interest.

The main questions discussed are the following, viz.: What was the agreement which Burner made with the plaintiff for

the transfer of the contract of purchase, and what was its effect? what was the effect of the destruction of the "deed" from Weller to Burner? and what was the authority of Burner in the premises?

1. The court finds, in substance, that the agreement made by Burner with the plaintiff was that, if the latter would give up his contract with the owner of the property, Pearson would purchase the property in accordance with such contract, "and would then and there, in consideration of the transfer of such agreement, convey to plaintiff an undivided one-fourth interest in and to said premises, free from all liens and incumbrances." This agreement was not in writing. But there is not the slightest doubt that it was made. Burner so swears, plaintiff so swears, Weller so swears, and there is no evidence to the contrary. The court further finds that, in pursuance of this agreement, the plaintiff transferred the contract of purchase to Weller, who immediately gave to plaintiff a deed purporting to convey an undivided one-fourth interest in the land; and the evidence in support of this finding is uncontradicted. Now, inasmuch as Weller had no title to the land, he could convey none to the plaintiff. But the parties seem to have regarded the "deed" as sufficient to protect the plaintiff's rights. And we think that it operated as an assignment of a one-fourth interest in the contract of sale. *Heinlin v. Martin*, 53 Cal. 321; *Hilton v. Young*, 73 Cal. 196, 14 Pac. Rep. 684. It is possible that as against the owner of the property the contract could not be split up in this manner. But no such question can arise between the parties here. It results that after this arrangement the plaintiff had a one-fourth interest in the contract.

2. What was the effect of the destruction of the deed above mentioned? The defendants contend that such destruction was in pursuance of an arrangement made for the purpose of placing the title to the whole property in Pearson, so that he could "handle" it, and that the intention was to extinguish the obligation held by plaintiff, as provided in section 1699 of the Civil Code, and to substitute an arrangement by which the plaintiff was not to have any right to the land, but was only to be interested in the profits to arise from the "handling" of Pearson. The findings, however, distinctly negative any such idea. The court finds that the deed was destroyed under an agreement that when defendant should obtain the legal title he "would immediately better and fully secure plaintiff to an undivided one-fourth interest in and to the same;" that the arrangement was not that plaintiff should be interested only in profits to arise from the acts of Pearson, but that the original agreement "was never modified or changed." These findings are sustained by the testimony of Burner, by the testimony of Weller, and by the testimony of one Barber. And, what is more to the purpose, it was proven that a writing was in fact executed by Weller, (who still held the contract of sale,) whereby a one-fourth interest in such contract was assigned to one Stratton, who was the agent and at-

torney for plaintiff. In this regard Stratton testified that he was the attorney for plaintiff, and that the arrangement was that, "in lieu of that deed, an assignment should be taken by me to hold for Brock as trustee temporarily until the purchase should be finally consummated, and Pearson should execute proper documents to secure Mr. Brock in his interest." As against this overwhelming evidence, the defendants rely upon the testimony of the plaintiff himself, and insist that he should be bound by it. It is undeniable that the plaintiff (who does not seem to be a very clear-headed man) testified, in a suit by a third party against Pearson, that he was to be interested in the profits of a corporation to be formed, and not in the property itself; and he testified to something like that in the present suit. But he also gave testimony going to show that the corporation was to be a thing of the future, and was not to operate as a present extinguishment of his interest. Thus he says: "I did not understand that he was to sell the property, because I claimed one-fourth in it, and should be consulted, but simply to enable him to carry out a certain scheme of a corporation that was eventually to take this property." And the other witnesses testify that, while there was some talk about a corporation nothing definite was concluded in relation to it.

We cannot agree to the proposition that the plaintiff is bound by such of his testimony as was favorable to the defendants. At the very most, it only amounted to a conflict in the evidence; and it has been said that a conflict is "all the more fatal for being intestine." *Crook v. Forsyth*, 30 Cal. 662; *Bernal v. Wade*, 46 Cal. 666. But we go further than this. We think it clear upon the evidence that the right of the plaintiff to an interest in the land was not intended to be extinguished, and that the talk about profits related merely to future action, which was that the property should be put in the hands of Pearson, so that he could "handle" it for the benefit of those interested in it. Such an arrangement could be no stronger than a power of attorney to Pearson. This could be revoked at any time, and whatever arrangement was made was undoubtedly revoked by the commencement of the present suit, and the recording of the notice of *lis pendens*. One of the learned counsel for the appellants urges in this regard that the plaintiff "cannot place the title unincumbered in Pearson for the purpose of a trade, obtain the money of the corporations, and then be heard to claim that the property was incumbered by some secret trust in favor of himself." And the others say: "Brock permits Pearson to have a clear title for the very purpose of conveying the property to a corporation clear of all incumbrances, and then, when Pearson has so conveyed to such corporation, Brock jumps up to ask that the corporation deed back a part of the property to him," with more in the same strain. The counsel overlook the fact that the present suit was commenced, and the notice of *lis pendens* recorded, on July 20, 1887, and that the conveyance to the first corpora-

tion was not made until October 20, 1887, and to the second not until April 23, 1888. Furthermore, there is not a syllable of evidence in the record to the effect that Pearson ever paid, or offered to pay, any portion of the profits to the plaintiff. On the contrary, he denied that plaintiff had any right to the land, and after the suit was commenced said that he should never get a cent.

3. What was the authority of Burner in the premises? The court finds that Burner "at all times was the duly-authorized agent of the defendant Pearson, with general power to purchase said property." There is evidence in support of this finding. Burner testifies that he "received verbal instructions from the defendant John W. Pearson to purchase the property;" that such instructions "were simply verbal, to get hold of the property as best I could,—that is, to make the best terms I could to get hold of the property;" and that he was not simply to ascertain what the property could be bought for, but to "get hold" of it. We do not see any evidence contradicting these statements. The argument for the appellants is founded on what occurred subsequently. In this regard Burner testifies that after the arrangement was made by which the plaintiff transferred his contract to Weller, and the latter gave back a deed to plaintiff, he (Burner) went to San Francisco, and told Pearson what had been done; whereupon the latter said that "the transaction was satisfactory, except that he did not want that deed out. He said he wanted that deed destroyed. He said he would assign the various interests himself." Pearson's account is somewhat different from this. But he wrote a letter to Burner, in which he said: "There must be no lien or obligation on the 700 acres except the \$15,000. I will give the contract to carry the various interests to you and your friend, and for the man from whom you get the bond; so sign nothing to any one," etc. This letter was shown to the plaintiff, and Burner testified that "the transaction would never have went through if I hadn't got the letter then that he would agree to carry those interests satisfactorily to all parties." Upon this evidence the only argument that can be made with any semblance of merit is that Burner had no authority to sign anything; that the culminating act was to be done by Pearson himself; and that the plaintiff knew this, because the letter was shown to him.

But the answer is that there was no need for him to sign anything. As shown under the first head of this opinion, the giving of the deed from Weller to the plaintiff operated as an assignment of a one fourth interest in the contract. The giving up by plaintiff of his bargain was sufficient consideration for this assignment. And Burner had ample authority to make the arrangement, because, as above shown, he was sent with general instructions to "make the best terms I could to get hold of the property." This shown a right in the plaintiff. It devolved upon the defendants to show that such right was destroyed. And in order to do this they



are driven to rely, and do rely, upon the destruction of the deed with the consent of the plaintiff. But, in order to sustain this, it was necessary to show that the deed was destroyed "with intent to extinguish the obligation thereof." Civil Code, § 1699. And we think we have shown conclusively, under the second head of this opinion, that there was no intent to "extinguish" the right of plaintiff to a one-fourth interest in the land. It was evidently destroyed under a belief that it conveyed title to the land, and the object was to have the title in the name of Pearson. But the oral evidence clearly shows that there was no intent to extinguish plaintiff's right to a conveyance, which was the only obligation the "deed" could have; and this is further manifest from the fact that a writing evidencing such right was actually given. The intent with which the deed was destroyed is the material thing; and in relation to this it is of no consequence whether Burner or Weller had authority to sign anything or not.

4. The defendants, other than Pearson, had notice of the plaintiff's right when they purchased the property. This is found by the court, and it seems plain that the notice of *lis pendens* was sufficient to charge them with notice. *Randall v. Duff*, 79 Cal. 116, 19 Pac. Rep. 532, and 21 Pac. Rep. 610. The amendment to the complaint did not destroy the effect of the notice of *lis pendens*. The other matters do not require special mention. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; BELCHER, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(88 Cal. 12)

SHAIN v. EIKERENKOTLER. (No. 13,019.)

(Supreme Court of California. Feb. 12, 1891.)

APPEAL—DISMISSAL—INSUFFICIENCY OF TRANSCRIPT.

An appeal from an order vacating the levy of an execution will be dismissed when it does not appear that all the papers used on the hearing were contained in the transcript.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Vincent Neale, for appellant. Geo. W. Fox, for respondent.

PATERSON, J. This is an appeal from an order granting a motion to vacate the levy of an execution. The transcript contains a copy of the notice of the motion, indorsed, "Read on hearing of motion to vacate levy of execution, November 16, 1888. JAMES G. MAGUIRE, Judge." Also a copy of the affidavit used, indorsed in the same manner, a copy of the order granting the motion, of the notice of appeal, and the affidavit of service thereof. When the cause was called for argument to-day, (February 11th,) the respondent moved to dismiss the appeal, on the ground that there was nothing in the record to show that the court below acted upon the papers referred to in the transcript, and the

motion was granted. It is claimed by appellant that the indorsement made by the judge is a sufficient authentication of the papers used, and that no other certificate is necessary to identify them, and that a bill of exceptions is unnecessary. There is nothing to show that all of the papers used on the hearing in the court below are before us in this transcript. The judge may have granted the motion on account of the invalidity of the judgment; the execution itself may have been void. It is claimed by appellant that these things will not be presumed, because the notice of motion states that the application will be made on the ground that the property upon which the execution was levied is exempt from execution sale. This may be granted, although as a matter of fact the notice states that the motion will be based on all the papers in the case, and still the order will be sustained upon the presumption that counter-affidavits were filed and used by the respondent. There is nothing to show that counter-affidavits were not filed, and every presumption is in favor of the validity of the judgment. We do not hold that a bill of exceptions is necessary in cases of this kind. The papers may be properly authenticated by the certificate of the judge; but it must be made to appear in some manner that all of the papers used on the hearing are contained in the transcript. In this case it appears simply that the papers referred to and copied in the transcript were indorsed as having been used on the hearing, and placed on file in the court below; whether or not any other papers were used on the hearing, as stated before, does not appear. For the reasons above stated the order dismissing the appeal will stand as entered herein.

We concur: HARRISON, J.; GAROUTTE, J.

(88 Cal. 84)

*Ex parte* BAKER. (No. 20,795.)

(Supreme Court of California. Feb. 16, 1891.)

CRIMINAL LAW—QUASHING INFORMATION—ILLEGAL COMMITMENT.

Pen. Code Cal. § 995, subd. 1, provides that an information may be set aside where the accused was not legally committed before the filing thereof. Held that, when information is quashed thereunder, the prisoner cannot be held for the filing of a new information without another examination before a committing magistrate.

Department 1. *Habeas corpus*.

Carroll Cook and J. E. Foulds, for petitioner. William S. Barnes, Dist. Atty., for the People.

GAROUTTE, J. This is an application for the discharge of the prisoner, under a writ of *habeas corpus*. He is confined in the county jail of the city and county of San Francisco awaiting trial, under an information charging the offense of embezzlement. One of the grounds relied upon by the petitioner for his discharge is that the information upon which he is about to be tried is void by reason of the fact that he has never been legally committed by a magistrate. It appears that the court, upon motion of the defendant, set aside the first information filed against him,

upon the ground that he had not been legally committed by a magistrate, and ordered that the district attorney file another information, and it is upon this second information that the defendant is about to be tried. An information can only be set aside upon the grounds: (1) That before filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county. Section 995, Pen. Code. The phrase "legally committed," as used in the foregoing section, refers to the examination of the case, and the holding of the defendant to answer as prescribed by title 3, c. 7, Pen. Code. Section 997, Pen. Code, which prescribes the course to be pursued after an information has been set aside upon motion of the defendant, is vague and unsatisfactory; yet it appears therefrom that the court can only order a new information to be filed when the one in the first instance has been set aside by reason of the failure of the district attorney to subscribe his name thereto, and that when the information is set aside, because the defendant has not been "legally committed," then he must be taken before a committing magistrate for another examination, if the district attorney desires to further prosecute the case. After the magistrate has decided that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, it is his duty to return to the superior court the warrant, depositions, indorsements thereon, undertaking, etc.; and it is upon these depositions and indorsements that the information is based. And, if the information is set aside upon the ground that the defendant has not been legally committed, it can readily be seen that it would be idle for the court to order another information to be filed, for the same fatal defects would necessarily be present at any future hearing. The prisoner is entitled to his discharge, and it is so ordered.

We concur: PATERSON, J.; HARRISON, J.

(87 Cal. 638)

*Ex parte* CLARK. (No. 20,190.)

(Supreme Court of California. Feb. 9, 1891.)

ADOPTION—PROCEEDINGS—RIGHTS OF PARENT—ESTOPPEL.

1. Where the answer to a petition for a writ of *habeas corpus* by a parent for possession of her child is signed by "John D. R.," who claims the child under an agreement to adopt signed by "David R.," and an order of adoption to "Jacob R.," the child must be surrendered to petitioner, as the order shows no right in "John D. R."

2. Civil Code Cal. § 226, provides that persons interested in the proceedings on adoption must appear "before the judge of the superior court of the county where the person adopting resides." *Held*, that an order of adoption is invalid unless it appears from the record that the person adopting resided in the county under the jurisdiction of the superior court before which proceedings were had.

3. Where the order of adoption is invalid on the face of the record, the child must be surrendered, though proceedings are pending to amend the record and make the order valid.

4. Acquiescence for several years by a parent in the claim of adoption does not estop her

from claiming the child on the ground that the order of adoption is invalid.

In bank. *Habeas corpus*.

M. Cooney, for petitioner. Henry I. Kowalsky, for respondents.

PATERSON, J. Petitioner is the mother of Charles Henry Clark, a minor, and the respondents, who are husband and wife, claim that he has become their child by adoption. This claim is based upon an order made November 16, 1888, by Hon. JOHN F. FINN, one of the judges of the superior court of the city and county of San Francisco. Attached to the order is a written consent signed by James P. Clark and Annie E. Clark, the parents of the child, consenting that "said Charles Henry Clark may be adopted by Jacob Reulein." Following this is a written agreement and consent signed by David Reulein and Mrs. Katie Reulein, in which the latter consents that David Reulein might adopt the child, and in which David Reulein agrees to adopt the child, and treat him thereafter in all respects as his own lawful child. The order of the judge recites that the parents, James P. and Annie E. Clark, and Jacob Reulein and Katie Reulein, his wife, appeared before him, bringing with them said Charles Henry Clark, aged two years and eleven months; that he examined each of said persons separately, and from such examination found that Jacob Reulein was desirous of adopting said Charles; that his wife, Katie, consented to such adoption, and that it was for the best interests of the child that such adoption should take place; that the parents having signed the necessary consent, and said Jacob Reulein having executed the proper agreement, it was therefore ordered that said Charles Henry Clark should thenceforth be regarded and treated in all respects as the child of said Jacob Reulein. The petitioner herein alleges that the child is restrained of his liberty by John D. Reulein and Katie Reulein. The writ was addressed to them, and an answer has been filed signed by John D. Reulein and Katie Reulein, admitting that they hold the custody of the child, and claiming the right to do so under the order above referred to. It will be observed that the parents consented to the adoption of their child by Jacob Reulein; that the agreement to adopt is signed by David Reulein; and that the order of the court gives the child to Jacob Reulein. There is nothing in the record of the proceeding to show that the names of Jacob Reulein, David Reulein, and John D. Reulein indicate one and the same person. In our opinion, the order is void, and affords respondents no warrant for the detention of the child. It confers no right upon them, and is manifestly too uncertain, when read in connection with the agreements and consents upon which it was based, to render any one liable as the parent by adoption,—especially one whose name does not appear in the record at all.

There is another objection which is fatal to the validity of the proceeding. Section 226, Civil Code, provides that all the persons interested must appear before the judge of the superior court of the county

where the person adopting resides. There is nothing in the order, or in any of the papers referred to, showing that Jacob Reulein or David Reulein was a resident of the city and county of San Francisco. It has been held—and we think correctly—that in cases of this kind, the power of the court being special, and not exercised according to the course of the common law, its decisions must be regarded and treated like those of courts of limited and special jurisdiction; and that jurisdiction in such cases, although the court be one of general jurisdiction, must appear by the record, as to both subject-matter and the person. *Ferguson v. Jones*, 17 Or. 204, 20 Pac. Rep. 842. We have held that our law of adoption is not unconstitutional, (*Estate of Stevens*, 83 Cal. 322, 23 Pac. Rep. 379;) but to acquire any right under it its provisions must be strictly followed, and all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former. A child by adoption cannot inherit from the adopting parent unless the act of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and, as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law; and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another. *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. Rep. 902; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. Rep. 907.

It was stated on the argument that proceedings were pending before Judge FINN to amend the record so as to show that the respondent John D. Reulein is the same person referred to in the proceedings as Jacob Reulein and David Reulein. Assuming that the power to amend the record as suggested exists,—a matter upon which we express no opinion,—we must on *habeas corpus* take the record as we find it, and determine the rights of the parties accordingly.

Counsel for respondents earnestly urge the court to consider that the claim of respondents has been acquiesced in for several years by the petitioner; that respondents have treated the child well; that a warm affection has sprung up between him and themselves; that petitioner practically abandoned her child when she consented that the order of adoption might be made; and asks permission to prove that respondents are in every sense more worthy to have the custody of the child than the petitioner is. But there can be no estoppel in such a case, and the fitness relatively of the respective parties to care for the child is not a proper subject of inquiry in this proceeding. It is conceded

that both parties are competent and fit persons to care for the child. It is doubtless true, as claimed by respondents, that a parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation; but there is no basis for any such claim in this case. The minor is a young child, incapable of caring for himself, and there is no pretense that the respondents have any authority over him other than such as is conferred by the order referred to. It is ordered that the respondents, John D. Reulein and Katie Reulein, forthwith restore to the petitioner herein the care, custody, and control of said Charles Henry Clark.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; SHARPSTEIN, J.; MO-FARLAND, J.; GAROUTTE, J.

(87 Cal. 631)

WINN V. SHAW. (No. 13,909.)

(Supreme Court of California. Feb. 9, 1891.)

COUNTY BOARD—PURCHASE OF LAND—NOTICE—INJUNCTION.

1. The California "County Government Act," § 25, subd. 8, confers authority on the board of supervisors to purchase real estate, but provides that no such purchase shall be made unless a notice of such intention is published for at least three weeks in a newspaper of general circulation published in the county, describing the property, and naming the vendor, the price, and the time for completing the purchase. *Held*, that this is mandatory, and without such publication the board has no authority to make the purchase.

2. A tax-payer may maintain a suit to enjoin the drawing of a warrant for the price of land purchased without the publication of the prescribed notice.

3. To warrant the granting of such injunction, it is not necessary that it be alleged or shown that the county or plaintiff will be damaged if the purchase is completed, or that the value of the land is less than the price to be paid.

In bank. On rehearing. For former report, see ante, 244.

DE HAVEN, J. This is an appeal by the defendant, Shaw, who is the auditor of the county of San Benito, from a judgment enjoining him, as such auditor, from drawing a warrant of said county in favor of one Hodges. The court found that the plaintiff is a resident elector and tax-payer in the county of San Benito; that the board of supervisors of said county made an order declaring their intention to purchase from one Hodges, for the sum of \$550, a certain described piece of land for the use of the county, and directed the clerk to give notice of said intention, as required by law; that there were at all times two newspapers of general circulation published in said county, but said notice of intention was not published in any newspaper in said county; that, without such publication, the board of supervisors, at the time fixed in said notice of intention, passed an order to purchase said real estate, and directed the appellant, as auditor, to draw his warrant on the county treasurer for the sum of \$550, in favor of said Hodges, upon the delivery of a deed conveying the title to said land, to be approved by the district attorney, and

that defendant threatens, and will, unless restrained, draw said warrant, in accordance with said order. The findings further show that in January, 1890, the board of supervisors of said county fixed the price of all county advertising for the ensuing year at 75 cents per square for the first insertion, and 25 cents for each subsequent insertion. In March following the plaintiff and one Shaw, who were the proprietors of the two only newspapers published in the county, entered into an agreement, adopting a uniform schedule of prices to be charged by them for advertising and printing, stipulating that the same should "extend to all county work, and, where possible and necessary, said county work shall be divided as equally between the two offices as possible, each receiving a profit proportionate to the work done." By this agreement said newspaper proprietors were to charge for county printing \$1.50 per square, first insertion, and 75 cents per square for each subsequent insertion. The court further finds that neither of said newspapers was "willing" to publish said notice of intention for the price fixed by the board of supervisors, "but they were at all times willing and able to publish the same at the rate fixed by their agreement." It is also averred in the complaint, and not denied in the answer, "that the said sum of money will be paid by the treasurer of the said county of San Benito to said J. I. Hodges, upon receipt of said warrant and the delivery of said deed." The foregoing constitute all the material facts necessary to be considered in giving judgment on this appeal.

1. The county government act provides as follows: "Sec. 25. The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law: \* \* \* (8) To purchase \* \* \* any real or personal property necessary for the use of the county, \* \* \* but no purchase of real property must be made unless a notice of the intention of the board to make such purchase, describing the property to be purchased, the price to be paid therefor, from whom it is proposed to be purchased, and fixing the time when the board will meet to consummate such purchase, shall be published for at least three weeks in some newspaper of general circulation published in the county, or, if none be published in the county, then by posting such notice," etc. This provision of the statute, prescribing the manner in which the board shall proceed in making a purchase of real property, cannot be construed as simply directory, but such provision operates as a limitation upon the power of that body to make any purchase of real property, and unless the publication is made as directed the board has no jurisdiction to act at all. The manifest design of the law is that notice of such proposed action shall be given to the tax-payers of the county whose property may be affected by such a purchase, so that by remonstrance or petition they may be able to prevent it, or at least be afforded the opportunity to be heard in the matter, and we have no

doubt that a compliance with the statute in this respect is essential to the validity of any such contract of purchase. It is urged, however, that to hold this provision of the statute mandatory is to place in the power of newspaper publishers to enter into illegal combinations, which in effect deprive the board of supervisors of any voice in the matter of determining what shall be paid by the county for such publications, or of exercising any judgment in relation to such subject. And it is argued that this case affords an illustration of the manner in which a county may be subjected to the payment of exorbitant charges, or else cease to perform such governmental functions as, in order to be legally exercised, require published notice at some stage of the proceeding, one instance of which is to be found in the section of the county government act relating to the enactment of ordinances. This is an argument, however, which could more properly be addressed to the legislature. The language of the statute under consideration is plain, and the court must give effect to it as it is written, and, if the evils suggested are likely to flow from this construction, the remedy must be by legislative action. Doubtless the law could be amended so as not to destroy its efficiency, by providing that the publication may be made in any paper circulating in the county, or giving the board a discretion in selecting a paper likely to give notice.

2. The appellant contends that a taxpayer cannot maintain an action in this class of cases, and as authority for this position refers to the cases of *Linden v. Case*, 46 Cal. 174; *McCoy v. Briant*, 53 Cal. 249; and *Merriam v. Supervisors*, 72 Cal. 519, 14 Pac. Rep. 137. While there is some general language in each of these cases which lends support to the contention of the appellant on this point, still they are on the facts distinguishable from this, as in neither of them did it appear that the remedy of injunction was necessary in order to keep the county money from being illegally drawn from the treasury. But be that as it may, we are of opinion that a tax-payer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county. The weight of authority seems to be in harmony with this view. *Crampton v. Zabriskie*, 101 U. S. 601; 2 Dill. Mun. Corp. (4th Ed.) §§ 914, 922. In *Foster v. Coleman*, 10 Cal. 279, the right of the tax-payer to maintain such an action seems to have been assumed; and in the later case of *Shakespeare v. Smith*, 77 Cal. 638, 20 Pac. Rep. 294, it was held that a tax-payer of a school-district could compel the cancellation of an illegal warrant drawn upon the superintendent of streets, and that such officer could, in the same action, be restrained from drawing a requisition on the county auditor, as directed by such illegal order.

3. It is further urged that there is no allegation or finding that the county or plaintiff will suffer any damage if the

land of Hodges is accepted and paid for; that it does not appear that its value is any less than the price agreed to be paid for it. But the question here is not whether the county will profit or lose by the transaction. If the law forbids the making of such a contract, unless preceded by publication of the notice of intention to make it, that must be the end of the matter, as in such case there can be no legal liability upon the part of the county to pay, and the object of this action is to prevent an illegal payment of public money. This principle was applied in *Shakespear v. Smith*, supra. In that case it was not denied that the school district was justly indebted to the payee in the order named, and the court said: "The only vice in the transaction consists in its allowance by a party in interest, which raises an implication of fraud, and renders the order void." The vice of the contract in this case is that it was made without authority of law, and, this appearing, it is void. There are other matters discussed in the brief of counsel, but we have not thought it necessary to discuss them. The question as to the validity of the contract made between the proprietors of the newspapers is not involved in this case. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; HARRISON, J.; PATERSON, J.; SHARFSTEIN, J.; GAROUTTE, J.

(91 Cal. 129)

PICO v. COHN *et al.* (No. 13,892.)<sup>\*</sup>

(*Supreme Court of California*. Feb. 11, 1891.)

VACATION OF DECREE—FRAUD—BRIBING WITNESS.

A decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge. *Anderson, Fitzgerald & Anderson and Del Valle & Munday*, for appellants. *A. Brunson and Stephen M. White*, for respondents.

BEATTY, C. J. This is a suit in equity to vacate and annul a final decree in another action between the same parties on the ground that it was procured by fraud. The superior court sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, from which the plaintiff appeals. The principal question presented by the appeal, and the only question we find it necessary to consider, is whether the complaint, taken as true, presents a case entitling the plaintiff to the relief demanded, or to any relief. It is alleged that in April, 1883, the plaintiff was owner of several parcels of real estate in Los Angeles, then worth over \$200,000, and of still greater value now. That one parcel of the land had been sold under decree of foreclosure, and the time for redemption was about to expire. That there were other pressing liens resting upon the whole property, amounting, with the sum necessary to redeem the parcel sold, to about \$62,000 as then estimated. That plaintiff was anxiously endeavoring to raise money to effect such re-

demption and save his property from sacrifice. That one B. Cohn, since deceased, whose administrator is the principal defendant herein, offered to loan, and did loan, him the necessary sum, taking for security a grant absolute in terms of the incumbered property. The consideration expressed in the deed was the exact sum at which the liens and incumbrances on the land were estimated,—\$62,000. The value of the land was, as above stated, over \$200,000. Within a month or two after the execution of his deed, plaintiff tendered Cohn \$65,000, and demanded a reconveyance, which was refused, whereupon he commenced an action to compel a reconveyance, alleging in his complaint that his grant to Cohn was, in fact, a mortgage to secure a loan. Cohn answered, alleging that the transaction was an absolute sale. Upon a trial of this issue the superior court found for the plaintiff, and decreed a reconveyance upon payment of \$103,000, this being the amount of the sum originally advanced by Cohn, and certain additional sums which he was found to have expended subsequently in the compromise and settlement of other claims against the property. But on motion of the defendants in that action the superior court ordered a new trial unless the plaintiff would consent to a modification of the findings and decree, adding \$35,000 to the amount to be paid defendants upon reconveyance of the land; and, the plaintiff failing to consent to such modification, the order for a new trial was made absolute, and, upon appeal of the plaintiff, was affirmed by this court. 67 Cal. 258, 7 Pac. Rep. 680. Thereupon a new trial was had in the superior court, but before a different judge, who found upon the principal issue in favor of the defendants, and decreed against the right of redemption. From that decree, and an order denying his motion for a new trial, the plaintiff again appealed to this court, where the decree and order were affirmed, (78 Cal. 384, 20 Pac. Rep. 706.) upon the ground that, the evidence being conflicting, the findings of the lower court could not be disturbed. It is to annul the decree so affirmed that the present action is brought, and the fraud by which it was procured is shown by allegations in substance as follows: At the date of the original transaction with Cohn, Pico was an old man over 80 years of age, unable to speak or understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in Cohn, relied upon him implicitly, and at his solicitation abstained from consulting his usual legal advisers. In the conduct of the negotiations with Cohn the only other person present was one Pancho Johnson, who knew everything that took place, and well knew that the transaction was a loan and security, and not a purchase and conveyance absolute; and, shortly after the execution of the deed, so stated in the presence of Pico's attorneys and numerous other persons. Relying on Johnson's knowledge of the transaction, and his statements concerning it, Pico

<sup>1</sup> Rehearing granted.

called him as a witness on the first trial of the action to redeem, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance; but, in spite of his adverse testimony, the court, as above shown, found for the plaintiff. Before the cause came on for trial a second time, Johnson was dead; but his testimony, as given on the first trial, had been reduced to writing, and was on file among the papers in the case. Plaintiff and his counsel knew that this testimony was false in its general statement to the effect that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify; but they had no evidence of such bribery, although they had used the utmost diligence to discover it. Upon mature consideration, they decided at the second trial to put in evidence the written transcript of Johnson's testimony at the first trial. Among their reasons for doing so were the following: Other testimony in the case showed that Johnson was present during the negotiations between Pico and Cohn, not only as interpreter, but as the particular friend and adviser of the former; and counsel for plaintiff feared that by omitting to offer Johnson's testimony they would incur the odium of suppressing evidence known to exist, whereas by putting it before the court they would have the advantage of some facts that they could prove by no other witness. They would have his admission of other facts inconsistent with the theory of a sale. The court would see that he was hostile to Pico, and he could be contradicted by proof of his statements made in the presence of others. Without going more fully into the reasons which induced counsel for plaintiff to submit the testimony of Johnson to the consideration of the court on the second trial of the former action, we content ourselves with saying that the allegations of the complaint show that the course pursued by them was, under the circumstances, wise and proper, if not absolutely necessary. But, contrary to their expectations, the court believed his false testimony, and for that reason alone decided against the plaintiff. In support of this conclusion, the complaint sets out the substance of all the testimony of Cohn and Pico, and in detail the material portions of Johnson's testimony, from which, with other averments, it appears that but for Johnson's positive perjury and suppression of the truth the judgment here in question would not have been given. This being shown, it is next alleged that, after the final affirmance of that judgment by this court, plaintiff made the discovery that Cohn had paid Johnson \$2,000 to testify falsely. The particulars of this bribery and its discovery are detailed in the complaint, and show that on the very morning that Johnson gave his testimony Cohn placed \$2,000 in the hands of one Forbes, with directions given in Johnson's presence to pay it to him if he testified to an absolute sale, and that, immediately after he had so testified, he demanded and received the money.

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would upon another trial gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest. *U. S. v. Throckmorton*, 98 U. S. 65, 66, and authorities cited. In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischief far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured

testimony; for, if this could be done once, it could be done again and again, *ad infinitum*. But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not, and could not have been, the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident. It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes. The evil and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from *U. S. v. Throckmorton*, supra. The decision in that case has been approved by this court as recently as *In re Griffith*, 84 Cal. 113, 23 Pac. Rep. 528 and 24 Pac. Rep. 381. The following decisions of this court are also in point: *Allen v. Currey*, 41 Cal. 321; *Mining Co. v. Mitchell*, 59 Cal. 176. Many other authorities to the same effect are cited in the brief for respondents. On the other hand, the case of *Laithe v. McDonald*, 7 Kan. 254, 12 Kan. 340, directly supports the position of appellant, as does the case of *Fabrilus v. Cock*, 3 Burrows, 1771. The cases of *Verplanck v. Van Buren*, 76 N. Y. 247, and *Dringer v. Railway Co.*, 42 N. J. Eq. 573, 8 Atl. Rep. 811, contain expressions which seem to imply the same doctrine, but they do not directly support it. Other cases cited by appellant are less in point. We think, on the whole, that it is settled by the great weight of authority that the plaintiff's action cannot be maintained, and that the judgment of the superior court must be affirmed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

(88 Cal. 6)

LIND *et al.* v. CLOSS. (No. 13,379.)

(Supreme Court of California. Feb. 11, 1891.)

RAPE—CIVIL ACTION—EVIDENCE.

The complaint in an action by husband and wife alleged that defendant forcibly assaulted the wife, and had sexual intercourse with her against her will. She testified that defendant forcibly got into bed with her, and assaulted her, but did not have connection with her, and that she was made sick and so remained for more than a month, but she did not tell her husband of the occurrence until 10 days after it. Defendant testified that he had connection with her on that occasion and subsequently, but each time with her

consent. He also testified, without being contradicted, that two days afterwards he took her to the railroad station at her request, and that she asked him to call on her at S., whither she was going. He further testified that afterwards, in the presence of a third person, he stated to her that he had had connection with her with her consent, and that she did not deny it. This third person was in court, but did not testify, and the wife did not contradict defendant on this point. Held, that the evidence would not sustain a verdict for plaintiffs.

In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

F. P. Tuttle, (Grove L. Johnson, of counsel,) for appellant. J. D. Sullivan and J. M. Tulweiler, for respondents.

PER CURIAM. When this cause was in department 1 the following opinion was prepared by Commissioner BELCHER. It is hereby adopted by the court in bank, and for the reasons therein stated the judgment and order of the superior court are reversed, and the cause remanded.

"The facts stated in the complaint are these: The plaintiffs were husband and wife, and on or about the 26th day of October, 1887, at their residence in the town of Auburn, Placer county, the defendant wickedly, maliciously, and violently assaulted said Johanna Lind, one of the plaintiffs herein, by jumping upon her while she was in bed, and holding her down, and, willfully contriving and intending to injure plaintiffs, defendant did then and there ravish and carnally know said Johanna Lind, without her consent and against her will, whereby she was made sick and sore in body, etc., to the plaintiffs' damage in the sum of \$50,000. The answer denies that defendant, at the time named in the complaint, or at any time, violently or wickedly or maliciously or at all assaulted the plaintiff Johanna, or that he jumped upon her or held her down, or that he ravished her or carnally knew her against her consent or against her will, and denies that she was made sick or sore in body, or that by reason of the premises plaintiffs had suffered damages in the sum of \$50,000, or in any other sum. The case was tried before a jury, and a verdict returned for \$2,500 damages, for which judgment was entered. The defendant moved for a new trial upon the ground, among others, that the verdict was not justified by the evidence, and his motion was denied. The appeal is from the judgment and order.

"The plaintiff Johanna was called as a witness, and testified that she was born in Germany and had been married about six years; that she was married in Connecticut, and about a year thereafter came to California; that in April, 1887, she and her husband went to defendant's place, and worked for him for one month; that they then left, but after about three months the husband again worked for defendant for one month; that in September, 1887, they went to live in a house known as the 'Collins House,' and about fifteen minutes' walk from defendant's house; and that on the morning of October 18th the husband went to San Francisco, leaving the witness alone with her two children. What afterwards occurred



the witness relates as follows: 'When evening came I put the children to sleep, and I locked my door, and then I sat down to write a letter. Before I went to bed I went again to see if the doors and windows were fastened tight. I then went to bed. I could not sleep. I was afraid, and very near midnight I heard somebody knock. Somebody came then to the house and knocked several times, and asked if Mr. Lind was at home. I didn't answer the first, but then he knocked again and said, "Mrs. Lind, open the door. I want to come in to you;" and I could hear then right away it was Mr. Closs, and I said, "No, sir, Mr. Closs;" I was not going to open the door. "If you want to see me, come to-morrow,"—I would be at home; and he went, and it was only a minute and I heard something at the back door, and in a minute he stood in my sleeping-room where I was lying with my children, and he said that I should make room for him in the bed, so he might come into bed to me, and I told him I would not let him come in the bed; and he said I should not be particular, and that I was such a funny woman. I was not like other women he had ever known in his life. And so in that time he had his clothes off, and he jumped right into bed, and I put my little baby on the side, because I wanted and needed both my hands; and he took off the quilt, and he tried to do several things. He took hold of me, and was trying to do what he wanted. I struggled with him fifteen or twenty minutes. I told him he should leave me, and that I should make it hot for him, and so at last he got out of the bed, and dressed himself, and went away. I didn't rest any that night, and in the morning was sick, and remained sick two or three days. My husband came home the next day, and I was sitting there sick when he came home, and the next day after that we packed up, and the third day we went to San Francisco, and I got sicker and sicker. Was sick a month after that. I had pains all over, and brain fever; pains in my head.' And on cross-examination the witness said: 'I went to bed on this night about 9 or 10 o'clock. My bedroom is a front room. To get into my bedroom a person coming in the back door would have to pass through two rooms. Before Closs came in he knocked at the bedroom window several times. I heard a noise at the back door, and in a moment Closs was in the room. The door opened with very little noise. I heard no crashing sound. I examined the lock afterwards, and there was nothing broken. There was a light in the bedroom. I had my two children in bed with me, one on each side of me. When Closs came in I said to him, "You have no business here," and that he should walk right out. He commenced talking to me, and while he was talking he was taking his clothes off. He disrobed entirely down to his undershirt. I remained in bed all the time. As quick as he had his clothes off he jumped into the bed, threw the bedclothes over, and lifted up my clothes. We did not wake the children up. I was pushing him away from

me. He did not beat or strike me. He did not accomplish his purpose. He then got up, dressed, and went away. He didn't hurt me, but tried to keep me down. In the latter part of October, about ten days after it occurred, I told my husband. I told my husband just as I have stated here. After talking with my husband he said he would fix Closs, and he would demand \$1,000 from Closs; and I sat down and wrote a letter to Closs demanding \$1,000. I first went to a lawyer about it in January, 1888. Closs called on me while I was in San Francisco, about three weeks after this trouble. He called again between Christmas and New Year's, and saw my husband and myself. He called on me and my husband at those times in San Francisco to try to settle.'

"The defendant was a witness in his own behalf, and testified that he had a ranch of eighty acres, about one mile from the town of Auburn, on which he had resided for about four years; that in February, 1887, he desired help on his ranch, and advertised for it; that in answer to the advertisement the plaintiffs came to his ranch, and the wife went to doing household work and the husband outside work for him; that they then left and moved into the 'Collins House,' which was about ten minutes' walk from his house. He then says: 'In October she told me her husband was going to San Francisco. I went to her house about half-past ten or eleven o'clock. I did not know whether Lind had returned or not. I knocked at the window, and asked if Lind was there, and I asked her to let me come in, and she told me first to go away and come to-morrow. Mrs. Lind told me that he was not there, and then I went around, and went in by the open back door. \* \* \* The door was not locked. I was not obliged to put my shoulder to the door, and made no unusual effort to get in. When I lifted the thumb-latch the door opened readily. I went in the bedroom, and Mrs. Lind picked up a child which was in the bed, and put it in an adjoining bed. I undressed myself and stayed there a couple of hours. Mrs. Lind asked me to come back the following day. I saw her next day and the day after, and she was not sick at all. Mrs. Lind asked me for the use of my buggy to go to the station, and I myself took Mrs. Lind to the depot in the buggy the second day after this night. She gave me her address in San Francisco, and invited me to call when I went down. I went to see her in San Francisco, and she there told me that her husband had suspected something, and she had told him only of this one night when he was away, and that her husband was mad, and I should give him a few dollars. I saw Mrs. Lind in the presence of Mr. Sullivan, and there told her that she knew I never had used any violence, and that it was all done with her will. She admitted that. She then said she wouldn't like to go to Auburn, and if I would pay \$500 she would not. I never used any violence on her, and never made any assault upon her. Everything was done with her will and consent.'

"The husband was called as a witness

in rebuttal and testified: 'Had a conversation with Closs about Christmas, 1887, and he told me about having connection with her on the night of October 18, 1887, and that he had never done so before.'

"This was substantially all the testimony in the case, and the question is, did it justify the verdict? The court instructed the jury that the complaint charged a violent assault made by defendant upon the person of Mrs. Lind, and that she was debauched against her consent and will; that the case turned upon the question of violence, and that if violence was used, as charged, then they should find for the plaintiffs; but that if no violence was used, the connection being with her consent, then the verdict should be for defendant. The instructions were the law of the case, so far as the jurors were concerned, and they were bound to follow them, whether they deemed them correct or not. As to whether violence was used or not, the testimony was conflicting. Mrs. Lind stated positively that violence was used, and the defendant stated equally positively that it was not. If the case had been rested on this conflict alone, the judgment, under a well-settled rule, would have to be affirmed. But other facts and circumstances appeared which seem to us to militate strongly against the truthfulness of Mrs. Lind's statements. The following examples may be noted: She testified that defendant did not accomplish his purpose, and that she told her husband about the matter as she had told it in court, and yet the complaint, which was verified by the husband and filed in February following, charges that he did accomplish his purpose, and this defendant in effect admitted both in his answer and testimony. How is this discrepancy to be accounted for? She further testified that she did not tell her husband of the outrage which she had suffered for ten days, though she was made sick by it, and so continued for a considerable time. Is it probable that a woman would, under such circumstances, remain silent so long in the presence of her husband? The defendant testified that two or three days after the alleged offense, when Mrs. Lind was about to leave for San Francisco, she asked him for the use of his buggy to go to the station, and that he took her to the depot in his buggy; and this is not denied. Now, is it conceivable that a woman, who had been treated as it is claimed she had been, would so soon ask or accept such favors from the man who had committed the wrongs against her? Defendant further testified that Mrs. Lind gave him her address in San Francisco, and invited him to call on her there; and this is not denied. Now, is it possible that she would have done so if she had been assaulted, as stated, two days before? Again, defendant testified that on one occasion, when he saw Mrs. Lind in San Francisco, he told her, in the presence of Mr. Sullivan, that she knew he had never used any violence, and she so admitted. Now this statement was either true or false. If true, it shows that the plaintiffs, under the instructions of the court, were not entitled to recover. But it was not denied, though she and Sullivan

must have been in court, and if untrue presumably would have denied it. It has been several times held in this state, where the accused parties had been convicted of rape on the testimony of the complainant alone, and under circumstances tending to throw discredit upon her testimony, that the judgments should be reversed; the court saying that 'a conviction upon such evidence would be a blot upon the jurisprudence of the country and a libel upon jury trials,' and that 'the ends of justice demand that the cause shall be tried anew.' *People v. Benson*, 6 Cal. 221; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371. We think these cases in point here, and that the ends of justice require that this case be tried anew. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

"I concur: FOOTE, C."

(88 Cal. 99)

*In re AH YOU.* (No. 20,760.)

(*Supreme Court of California.* Feb. 18, 1891.)

POWERS OF SUPERVISORS—VISITING DISORDERLY HOUSE—EXCESSIVE PUNISHMENT.

1. Where the legislature confers upon the board of supervisors the power to determine the penalties, specifying a maximum limit, which shall be incurred for the breach of its regulations, the board must itself designate the penalty for each offense, and not leave it to the discretion of the judge.

2. St. Cal. 1861, p. 552, giving the board of supervisors of the city and county of San Francisco power to determine the penalties for breach of its regulations, with the maximum limit of \$1,000, or six months' imprisonment, or both, does not authorize the maximum penalty for violation of every regulation. The penalty must be reasonable, with reference to the offense, and section 33 of order 1587, as amended by order 1955, of the board of supervisors, leaving it to the discretion of the judge to fix the punishment for visiting a house of ill fame, with a maximum limit of \$1,000 fine, or imprisonment not exceeding six months, or both, since it gives the judge power to fix an unreasonable punishment for the offense, is void.

In bank. *Habeas corpus.*

*L. E. Phillips*, for petitioner. *William S. Barnes*, Dist. Atty., for respondent.

HARRISON, J. The petitioner was convicted in the police court of the city and county of San Francisco of a misdemeanor, for visiting a house of ill fame, and on the 7th day of March, 1890, was sentenced "to pay a fine of four hundred dollars, and, in default of payment thereof, that he be imprisoned in the county jail of said city and county at the rate of one day for each one dollar of fine until said fine is satisfied." Under a commitment issued upon this judgment he was immediately taken into the custody of the sheriff, and has since that day been confined in the county jail of San Francisco. Section 33 of order No. 1587, as amended by order No. 1955, of the board of supervisors of the city and county of San Francisco, under which his conviction was had, is as follows: "It shall be unlawful for any person in the city and county of San Francisco to keep or maintain, or become an

inmate of, or a visitor to, or in any manner to contribute to the support of, any disorderly house, or houses of ill fame, or place for the practice of gambling, or knowingly let or underlet, or transfer the possession of, any premises for use by any person for any of said purposes. Every person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not less than twenty dollars, or imprisonment not less than ten days." The maximum amount of the punishment for this offense is not defined, but is left to the discretion of the court, except as it is qualified by the provisions of section 1 of order 1587, which reads as follows: "Any person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." Construing these two sections together as defining the extent of the punishment of the offense, it results that the ordinance provides that the penalty for visiting a house of ill fame shall not be less than \$20, nor more than \$1,000. Municipal ordinances must be reasonable, and the penalties prescribed for their violation must also be reasonable as well as definite. It is not essential, however, that the precise amount of the penalty for each offense shall be designated in the ordinance. It is sufficient if it be left to the discretion of the court, within fixed, reasonable limits. The maximum limit must, however, be reasonable. Dill. Mun. Corp. §§ 333, 341. The legislature (St. 1861, p. 552) has given to the city and county of San Francisco power "to determine the fines, forfeitures, and penalties that shall be incurred for the breach of regulations established by its board of supervisors," with the maximum limit of \$1,000, or six months' imprisonment, or both. But it does not follow that the city is authorized to affix this maximum penalty for the violation of every regulation that it may establish under its general power to define offenses and prescribe penalties therefor. It is not justified in prescribing the same penalty for each offense which it may define. Penalties should be prescribed with reference to the offenses which are committed, rather than to the power under which they may be prescribed. This power to "determine" the penalties which shall be incurred for the breach of its regulations has been conferred upon the city, and must be exercised by its board of supervisors, and not left to the discretion of the judge before whom the offense is tried. In re Frazee, 63 Mich. 408, 30 N. W. Rep. 72. The board of supervisors must itself fix, within limits which are reasonable, the penalty to be incurred for the violation of each ordinance. If, however, the board of supervisors does not determine the penalty in any other terms than that it shall not be less than \$20, but leaves to the judge the power to affix the maximum amount of punishment which the legislature has authorized to be affixed for the

violation of any ordinance, instead of fixing the penalty within reasonable limits, it gives to the judge the discretion of determining what the penalty shall be for each offense. This has the same effect as if it had itself fixed the maximum limit of the penalty at \$1,000. But a municipal ordinance which shall prescribe a fine of \$1,000, as the penalty for visiting a house of ill fame, would be not only unreasonable, as imposing a punishment greatly disproportionate to the offense, but would also be inconsistent with the general principles of the Penal Code upon kindred topics. In the exercise of the power conferred upon it to "regulate all practices which are contrary to public order and decency," by virtue of which this ordinance was adopted, (St. 1863, p. 540,) it was incumbent upon the city to frame the ordinance, so far as practicable, in harmony with the general laws of the state. Ex parte Kearny, 55 Cal. 225; Dill. Mun. Corp. § 319. The act of which the petitioner was convicted is not enumerated among the crimes which are defined in the Penal Code, but is made an offense solely by virtue of the ordinance. The legislature has not deemed it necessary to prescribe any punishment therefor, and, from the statutes which it has adopted upon kindred topics, the penalty allowed by the ordinance in question must be held to be not in harmony with its general policy. By the provisions of section 647 of the Penal Code, a person "who lives in and about houses of ill fame" is punishable only by imprisonment in the county jail not exceeding 90 days, and, by section 315 of that Code, the extent of punishment to be inflicted upon the person who "keeps" a house of ill fame is limited to imprisonment in a county jail not exceeding six months, or a fine not exceeding \$500, or both. We are of the opinion that so much of the ordinance in question as permits a fine of \$1,000 to be imposed as the penalty for visiting a house of ill fame is unreasonable, and not in harmony with the laws of the state, and therefore void. The petitioner must therefore be discharged from custody. It is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTTE, J.

McFARLAND, J. I concur in the order discharging the petitioner, upon the ground that under a penal statute or ordinance, imposing imprisonment not exceeding a certain term, or fine, or both, a defendant cannot be kept in jail, under the pretense of enforcing the fine, for a term longer than the maximum term of imprisonment prescribed by the statute. This has always been my opinion. In this case the petitioner should have been discharged at the end of six months, which is the maximum term of imprisonment prescribed. Under the other view (if the ordinance be valid) the petitioner could have been fined \$1,000, and, in default of payment, sent to jail for a thousand days, which, under the circumstances, would have been still more cruel and absurd.

(88 Cal. 20)

**GIANT-POWDER CO. v. SAN DIEGO FLUME CO. (No. 13,906.)**

(Supreme Court of California. Feb. 12, 1891.)

**MECHANIC'S LIEN—COMPLETION OF WORK.**

A contractor engaged in preparing a flume-bed, surface ditch, and terminal approaches for a water-works company abandoned the contract, with the consent of the company. *Held*, that the company, by releasing the contractor, and taking control of the work for the purpose of completing it, "occupied" and "accepted" it, within the meaning of Code Civil Proc. Cal. § 1187, (Amend. Laws Cal. 1887,) which requires a material-man furnishing material to a contractor to file his lien claim within 30 days after the completion of the structure, and which provides that the "occupation" of the structure by the owner, or its "acceptance" by him, shall be deemed conclusive evidence of completion; and a material-man who files his lien within 30 days after the company assumed control of the work acquires a valid lien for material furnished the contractor.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

J. F. Cowdery, for appellant. *Shaw & Holland*, for respondent.

FOOTE, C. This action was brought against Joseph Johndrew, "an original contractor," for the San Diego Flume Company, and that corporation, to recover a judgment for the value of materials furnished the contractor, which were used in his work upon the structure for the flume company, and to enforce a material-man's lien upon the structure, under section 1183 of the Code of Civil Procedure. The evidence and the findings indicate that, after the 6th day of June, A. D. 1887, there existed a valid contract between the contractor and the owner, so that, as to all materials furnished after that date, the plaintiff could file its lien claim, by virtue of the existence of the contract. The court below seems to have proceeded under this impression, and to have based its decision, which was against the plaintiff, so far as the right to enforce its lien was concerned, or any other claim against the flume company, upon the theory that its claim of lien had been filed before the acceptance, completion, use, or occupation of the structure, according to the terms of section 1187 of the Code of Civil Procedure, as amended in 1887. The plaintiff appeals from the judgment against it in favor of the flume company, and from an order refusing a new trial.

Does the evidence sustain the finding that the plaintiff filed its lien claim before the defendant had accepted, used, or occupied the work which the contractor had left in an uncompleted state? The work which the contractor was to perform was the grading of a flume-bed, surface ditches, and tunnel approaches, from the defendant's diverting dam on the San Diego river to its proposed city reservoir near San Diego, and the excavation of about 3,000 lineal feet of tunnels, and lining the same with masonry, and also timbering same, in accordance with the plans and specifications. Thus it will be observed the contractor was not to complete the flume, or to make complete the proposed water-works of the defendant, but only to prepare the place upon which the flume was

to be thereafter placed. He was to lay the foundation, as it were, on which the flume was to rest. In this respect the work to be done was somewhat similar to the laying of a foundation on which to erect a house. It appears that about August 9, 1887, the contractor abandoned his contract, and ceased all work thereunder; that two or three days after that the flume company took possession of the flume line upon which the contractor had been working, and proceeded to complete the work which he had left unfinished. But the court finds that it neither used nor occupied the tunneling, grading, and work which Johndrew had agreed to do. "Nor did it on or about the 10th of August, 1887, or at any time, or at all, ever accept the structure which Johndrew had been engaged in constructing for it, or accept the uncompleted part thereof." The part of section 1187, Code Civil Proc., here involved reads: " \* \* \* And in case of contracts, the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, shall be deemed conclusive evidence of completion." The provision seems to have been enacted in the interest of and for the better protection of lien claimants like the plaintiff. The words of the statute "occupy or use" or "accept" have reference not only to the occupation, use, or acceptance of a dwelling or other house, but to any kind of structure, building, or improvement in which the materials of a lien claimant have been used. What, then, is to be deemed their meaning, with regard to the matter in hand? The facts appear to be that the contractor, on or about the 9th of August, 1887, was unable to go on with his work. Then, or a day or two thereafter, the defendant made an arrangement by which the contractor was to be absolved from his obligation under the contract, which was to be abrogated, and the defendant was to pay a certain proportion of his debts, on conditions, not including that of the plaintiff, and to have and retain certain property belonging to the contractor. It thereupon took control and possession of the work, and proceeded to complete it. The defendant, having gotten rid of the contractor by this arrangement, dominated, controlled, and applied to its uses the uncompleted work of the contractor, in the prosecution of which the materials of the plaintiff had been used. It occupied the work, so far as could be done, in its then state. But it used and occupied his work after the rescission of its contract with the contractor, making this work subservient to its purposes in completing the structure. It took from the contractor what he had done of the work, and also certain property of his, released him from his contract, and agreed to settle some of his debts. If it released the contractor, took his work, and some of his property, and agreed to pay some of his debts, this would appear to be, in a certain sense, an acceptance of his work. It did not occupy and use the work in the sense that it was complete according to the terms of the contract,

but, after the contractor was released, it used and occupied it as the contractor had done before. His responsibility on the contract to the defendant was ended. The latter took his work and other property, and proceeded under this agreement to use and occupy the work, agreeing at the same time to pay a certain proportion of the contractor's debts; that is, it took and used, under agreement with him, what he had left, and absolved him from his contract. The lien claim was filed on the 5th of September, 1887, within 30 days after the acceptance, use, and occupation above stated. Under our view of the statute this was sufficient. The contractor's connection with the defendant was completed and ended. The defendant accepted the work he had done, and used and occupied it so far as it was capable of being so used or occupied. The findings are not supported by the evidence. We think the judgment and order should be reversed, and so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

McFARLAND, J. I concur in the judgment of reversal solely upon the ground that, in my opinion, the main points in controversy were settled against respondent on the former appeal, (78 Cal. 193, 20 Pac. Rep. 419,) and the law of the case applies; otherwise I would hold that the lien of appellant was premature. And, where the question is open, I could not concur in the doctrine that there can be a lien for powder exploded in blasting for the foundation of a house or a flume. "Materials used in the construction," as employed in the mechanic's lien law, means, in my opinion, only such material things as go in, and become part of, the building or structure. In the eye of justice, a merchant who deals in lumber or hardware has no more right to a lien than a merchant who deals in potatoes, or flour, or sugar; and the former have a lien only as a legislative privilege. The language should not be strained for the purpose of enlarging the privileged class. The appellant has no powder in the structure, and never had. It merely exploded some there.

DE HAVEN, J. I concur in the judgment, and in the foregoing opinion of Commissioner FOOTE. The question whether powder exploded in the work of constructing a flume or tunnel may be regarded as a part of the "materials used in the construction" is not involved in the disposition of this appeal.

(88 Cal. 50)

SAN DIEGO LAND & TOWN CO. v. NEALE  
*et al.* (No. 13,674.)

(Supreme Court of California. Feb. 14, 1891.)

EMINENT DOMAIN—COMPENSATION—ELEMENTS OF  
VALUE—EVIDENCE.

1. On condemnation of land for public use, the present market value, and not the value to the owner or to the person seeking to condemn it, is the basis of compensation.

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2. In condemnation of land for reservoir purposes, estimates of value based on the cost of the proposed water-works, the increase of population, extension of the water system, and the probable income and profit from the works are not admissible.

3. It is proper to consider any facts showing the nature of the land, and its adaptability for reservoir purposes; such as the area of the watershed, and amount of water, the amount of surrounding irrigable land, and the cities and towns being supplied with water from wells.

4. A witness' opinion as to the value of land should be rejected if it is based entirely on incompetent matters.

5. The introduction of irrelevant evidence on one side without objection does not justify the admission of evidence of the same character on the other side.

6. It is proper to show that a witness, who gives his opinion as to the value of the land, formerly entertained a different opinion.

7. The opinion of witnesses who have never seen the land until after the right to compensation and damages accrued should not be received.

In bank. Appeal from superior court, San Diego county; JOHN R. AIKEN, Judge. *Hunsaker & Britt and J. E. Deakin*, for appellants. *Luce, McDonald & Torrance*, (Wm. F. Herrin, of counsel,) for respondent.

PATERSON, J. This is a proceeding to condemn land for reservoir purposes. On the former appeal (78 Cal. 63, 20 Pac. Rep. 372) the judgment was affirmed as to all the issues except the issue as to the value of the land. The cause was remanded for a new trial of that issue, a trial was had, and a judgment on a verdict for \$122,657.50 and costs of suit was entered in favor of defendants; but the plaintiffs moved for a new trial, which motion was granted, and the defendants have appealed.

It would be sufficient for us to say that as the order appealed from is one granting a new trial, and as the evidence as to the value of the land condemned is conflicting, the decision of the court below, in the absence of a showing of an abuse of discretion, will not be reversed. This rule has been so many times announced, it would be a work of supererogation to cite authorities in support of it. As some of the rulings of the court below at the trial, in our opinion, were erroneous, however, we deem it advisable to refer to them for the guidance of the court at the next trial.

When the motion for a new trial was called for hearing, the defendants objected to the same being heard, on the ground that the court had no jurisdiction to hear or determine a question of fact as to value. The same objection, although somewhat different in form, was presented on the former appeal, and overruled. 78 Cal. 65, 20 Pac. Rep. 372. The burden of proof as to value was on the defendants. *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 63, 7 Pac. Rep. 123; *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. Rep. 700. It was their duty to allege and prove the value. Both parties assumed at the trial that there was an issue as to value, the case proceeded to trial and judgment upon that assumption, and the defendants cannot now complain.

The nature of defendant's land, and its situation with respect to the reservoir of

plaintiff, is shown in the opinion filed on the former appeal. 78 Cal. 66, 20 Pac. Rep. 372. It was there held that the court erred in allowing defendants to introduce evidence of value based on the fact that plaintiff's dam was already in course of construction, or upon "the circumstance that the land susceptible of irrigation from the reservoir would be enhanced in value \* \* \* by having irrigation facilities afforded to it. \* \* \* Where there is no actual current rate of price, and where, in consequence, the court must arrive at the value from a consideration of the uses to which the property may be put, it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." This court held that the present value of the property for prospective purposes might be given, and that it was proper, therefore, to show the value of the property for reservoir purposes, although it had never been used for such purposes. The court below, however, in its rulings and instructions at the last trial, seems to have entirely misconceived the scope and effect of our former decision. Instructions were given based upon facts so remote from the real issue in the case as to mislead the jury on the question of damages. As stated before, it was decided on the former appeal, and is the law of the case, that the value of the land for any special purpose may be taken into account as one of the elements tending to show its market value. The fact that the land is suitable for such a purpose, and a chance exists that it may some time bring an enhanced value therefor, has a tendency to increase its market value, and may properly be considered in determining what its present market value is. In this connection, it is proper to say that the learned judge who wrote the opinion in *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S. W. Rep. 123, evidently misapprehended our decision in this case on the former appeal. We did not hold that the value of the land for reservoir purposes was a measure of damages, independent of any other consideration or element of value. On the contrary, the opinion distinctly states that the market value is to be the measure of damages, and that evidence of value for a special purpose is only to be considered as an element of the question. Neither the value in use to the plaintiff nor to the owner is to govern. Indeed, to guard against misapprehension, the court was careful to say: "The word 'value' is used in different senses. \* \* \* For the purposes of the law of eminent domain, however, the term has reference to the value in exchange or market value. There are some cases which seem to hold that the value in use to the owner is to be taken, if it exceeds the market value. But it will generally be found, on careful examination, that such cases either relate to the damage accruing to the owner from the taking, and not to the value of the property itself, or overlook the distinction between the two things. The *consensus* of the best considered cases is that, for the purposes in hand, the value to be

taken is the market value. \* \* \* The problem, then, is to ascertain what is the market value. \* \* \* From the necessity of the case, the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. \* \* \* What is done is merely to take into consideration the purposes for which the property is suitable, as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it; which, in a general sense, may be said to be the market value." In the *Tennessee* case, the court, not having the record in this case before it, fell into the error of saying that "in that case it was held that it was competent to prove the value of the land for a reservoir site, and to make that value the measure of damages, independent of any other consideration or element of value." The market value is the ultimate fact to be determined by the jury. If the land has a value for any particular purpose, its market value may be thereby enhanced. If its value for one purpose is to be excluded, why not for another? A vacant lot in a city cannot be condemned and taken at its value for agricultural purposes. If land which has been used only for pasturage contains valuable mineral deposits, it cannot be taken for public use without reference to what reasonable purchasers would, in the opinion of experts, be willing to give for it, taking into consideration the character of such deposits. The fact that the plaintiff wants the land for a particular purpose should not defeat the defendant in his efforts to show its market value by showing as an element its value for that particular purpose; and the fact that the plaintiff is the only person who has thus far offered to purchase is immaterial. The true distinction is that the demand of the plaintiff alone is not to be considered exclusive of other considerations. It goes to make up the aggregate of demands, or probable demands, which is one of the elements of the inquiry. There is nothing in what we have said inconsistent with what was decided in *Gilmer v. Lime Point*, 19 Cal. 47, or *Railroad Co. v. Pearson*, 35 Cal. 247. In the former case the defendant offered to show what the land was worth to the government as a site for fortification. As the government was the only possible purchaser for such a purpose, it was apparent that the attempt to show what it was worth for a fortification was an attempt to prove what was its peculiar value to the government. In *Railroad Co. v. Pearson* the defendant attempted to show what the land would be worth to the owner, provided the state should thereafter grant him a wharf franchise; and the court simply held that such a fact was too remote and speculative.

An attempt is made to distinguish a case where the owner of the land sought to be condemned occupies a commanding position from one where the land is remote from the dam-site. This contention was disposed of adversely to the appellants in the decision on the former appeal. Land which is remote from the dam-site may have a less value than land at the

dam-site, but the rule governing the admissibility of evidence must necessarily be the same in each case. The question in each case is, what is its market value? and is determined by the same rules. It will not do to say that land sought to be condemned for a reservoir purpose has no value for such purpose because it is too remote from the dam-site. The very fact that this land is sought to be condemned for such a purpose is an admission of its adaptability therefor. But at the last trial the evidence was not confined to the question of the adaptability and value of the property as a reservoir-site, considered as an element in the determination of its actual or market value. Witnesses were allowed to give estimates of value based upon speculative improvements, increase of population, extension of water systems, and profits which would result from the distribution and sale of the water; thus permitting the defendants to show, practically, what plaintiff, or another in its situation, could afford to pay for the land, rather than go without it. It was admitted at the trial that "it was not practicable to have constructed a reservoir upon the 350.45 acres of land in controversy in this action except in connection with the adjoining land of the plaintiff below it, and lying between the defendant's land and the dam-site." The plaintiff had constructed a dam by which water was impounded, covering all the land below defendant's land, and, in fact, at the time of the trial, a portion of the lands in controversy. One of the witnesses (Sproul) testified on behalf of defendants that it would cost \$960,000 to construct a dam, system of mains, and distributing pipes, in order to utilize the reservoir to its utmost capacity over the territory tributary to it; and that, estimating the market value of water to be \$100 per acre for irrigation, and 10 cents per 1,000 gallons for domestic purposes, the value of the land in controversy was \$841 per acre on January 13, 1887. He stated that in arriving at that conclusion he estimated the cost of construction of a suitable dam and mains through the lands to be irrigated; assumed that National City had a population of 2,000, and that its increase in the next 10 years would amount to 6,500; that the quantity of water would irrigate 20,000 acres of land; that it would take 10 years to complete the system, and dispose of the entire volume of water, at the rate of 2,000 acres per year; allowed \$15,000 for running expenses, taxes, etc., and a sinking fund of \$11,000 to renew the system at the end of 20 years; credited the reservoir for the sale of water-rights and water-rates received from National City; charged the reservoir interest at the rate of 10 per cent.; and carried the same system of debits and credits through a term of 10 years, showing a balance at the end of the tenth year of \$1,623,064 after all the indebtedness had been paid. This balance he considered as the amount that would be due to the land at the end of 10 years. "The present worth of that amount, discounted at ten per cent., or if that amount had been paid at the beginning of the ten

years instead of at the end, it should have been \$624,225, which, divided between 742 acres of land, amounts to \$841 an acre. The testimony was objected to, the objection was overruled, and plaintiff excepted. After it was admitted, the plaintiff moved the court to strike it out, on the ground that it was based upon considerations and contingencies so remote, uncertain, and speculative as to be wholly inadmissible and incompetent as a basis for fixing the market value of the land in question on the 13th day of June, 1887, or at any other time. The court denied the motion, and plaintiff excepted. Another witness (Ryan) estimated the land to be worth \$600 per acre, basing his conclusion upon similar calculations and contingencies, and upon the assumption that it was to be used in connection with plaintiff's reservoir.

It is contended by appellants that the testimony of these witnesses, and other testimony of a similar nature, was admissible, because there were no similar properties in the market, by a comparison with which the market value of the property in controversy could be arrived at; that the method pursued was simply fixing the actual value by calculation,—by considering the necessary expenditure in putting it in condition for certain purposes, and the probable income and profit which would result from its use. Many cases are cited in support of this contention; among them *Boom Co. v. Patterson*, 98 U. S. 403; *Railroad Co. v. McGhee*, 41 Ark. 202; and *Railroad Co. v. Woodruff*, (Ark.) 5 S. W. Rep. 792. But none of the cases cited go to the extent claimed for them. In *Boom Co. v. Patterson* the court said that, as a general rule, compensation to the owner is to be estimated by reference to the uses for which the lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future, and that the adaptability of the land for a certain purpose is a proper element for consideration in estimating the value of the lands when appropriated for public use. There is nothing in the report of that case to show that the defendant was permitted to prove the cost of constructing the boom, and the profits which would result to the company from the use thereof. In *Railroad Co. v. Woodruff*, supra, the court said: "If the market value is the price for which the property could be sold on the market, we will next be led to inquire, how is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. \* \* \* When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages, and surroundings, though ordinarily this would be uncalled for, unless his estimate was attacked on his cross-examination, in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. \* \* \* We



deem it proper, however, to say that the presiding judge should not suffer collateral issues to spring up and multiply, or the jury be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property." In the case at bar the opinion of some of the witnesses was based on speculative and conjectural calculations of expenditure and profit for a period of five years', and others on a basis of ten years', use of the property in controversy, in connection with the property owned by plaintiff. The facts and figures relied on in support of these opinions not only threw no light on the question, but must have operated to confuse and mislead the minds of the jury. Of course, as was said in *Boom Co. v. Patterson*, it is perhaps impossible to formulate a rule to govern the appraisement of property in all cases; but it is easy and safe to pursue the course pointed out by the court in *Railroad Co. v. Woodruff*. Let the witnesses in direct examination state their opinion as to the market value of the property, "having regard to the existing business wants of the community, or such as may be reasonably expected in the immediate future," and support their estimates by a description of the property, giving its location, surroundings, and advantages for any particular use, if it have any. Opposing counsel should then be "allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make," and for the information of the jury, and to test the value of the opinion given, be permitted the widest latitude in cross-examination. The following authorities establish the proposition that the compensation to be awarded the owner of the land condemned cannot be based upon the value of the property to the person or company in charge of the public use, nor by its necessities, and that it is not proper to take into consideration the profits which may result from the use of the land, especially where the profits depend upon the expenditure of large sums of money in carrying out the contemplated enterprise: *Canal Co. v. Archer*, 9 Gill. & J. 481; *Gardner v. Inhabitants of Brookline*, 127 Mass. 358; *Burt v. Wigglesworth*, 117 Mass. 302; *Railroad Co. v. Balthasar*, (Pa.) 17 Atl. Rep. 518; *Dorian v. Railroad Co.*, 46 Pa. St. 520; *Railroad Co. v. Galgiani*, 49 Cal. 139.

Appellants contend that the court did not err in refusing to strike out the testimony objected to, because the witnesses were competent to express an opinion as to value, and the reasons for such opinion can only affect the weight to be given to their testimony; but we think that where a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether. *Railroad Co. v. Balthasar*, (Pa.) 13 Atl. Rep. 294. It clearly appears that the witnesses referred to based their estimate of the value of the property upon an anticipated investment of a large

amount of money in an extensive system of water-works, and founded their opinion largely upon hypothetical expenditures and receipts of money, and an increased demand for water. The court, too, adopted the same erroneous rules, and under its instructions the jury must have found such price as in the opinion of the witnesses the land might bring, or probably would bring, at some future period, if plaintiff or another in its situation should extend the works as contemplated by the witnesses.

It is claimed by the appellants that the plaintiff ought not to be heard to complain of the ruling of the court in admitting the testimony referred to, because its own witnesses had given testimony of the same character; but, as was said when the case was here before, "the introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence upon the other side." See, also, *Walkup v. Pratt*, 5 Har. & J. 58. But, if the ruling of the court could be sustained for the reasons urged, the court in some of its instructions to the jury, as stated before, adopted the same rules as those followed by the witnesses in their testimony. The court instructed the jury, at the request of defendant, that, in considering the weight to be given to the opinions of witnesses as to the value of the land for reservoir purposes, they might take into consideration, among other things, the character and capacity of the works necessary and proper for the utilization of the defendants' land for reservoir purposes; the quality and condition of the lands irrigable from the reservoir; the need of such lands for irrigation in order to make them habitable and productive, together with the needs of the inhabitants of cities and towns within reach of this system of water-works, and appearing on the 13th of June, 1887, to be dependent upon it for water; the proportion which the defendants' land bears to the remainder of the plaintiff's reservoir; the quantity of water, the storage of which is secured by the use of the defendants' land in connection with the adjoining land of plaintiff or other persons, and the value of such water as a salable commodity in the neighborhood tributary to this reservoir on the 13th day of June, 1887; also, that in considering the value of the land for reservoir purposes, as a guide to ascertaining its market value, the question was not what it was worth to plaintiff, as owner of the remainder of the reservoir and dam-site, in June, 1887, doing business as they proposed to do, but it is, what was it worth to any reasonable person, able and willing to buy, and intending to acquire by purchase for condemnation the dam-site and the remainder of the reservoir, and to use the whole for supplying water for public use over the territory tributary to this system? that the jury had a right to consider, if it be a fact, the proximity of the land to an eligible dam-site, and its availability for reservoir purposes, in connection with such dam-site and other adjacent lands.

The court had fairly and fully instructed

the jury, at the request of plaintiff, on the subject of value; but these instructions, given at the request of the defendants, were erroneous, because they, in effect, indorsed the methods of calculation employed by the defendants' witnesses, and informed the jury—at least the jury undoubtedly so understood it—that they might find the value to be what the land was worth to the plaintiff, or another in its situation, and that this might be determined by a calculation of the probable profits from sales of water and water-rights at prospective prices. The cost of works necessary for the utilization of the land for reservoir purposes was an element in the calculation as conjectural and speculative as would be the cost of a railroad, and rolling stock necessary for the operation thereof, in fixing the value of land condemned for railroad purposes. The quality and condition of the lands to be affected was as foreign to a legitimate estimate of the market value of the land as the size and growth of a city on the line of the railroad would be in fixing the value of land taken for railroad purposes. The necessities of the public are never taken into consideration in fixing the value. They are an element which must be proved before the land can be taken, but are never an element of the question as to compensation. The proportion which the defendants' land bore to the remainder of the plaintiff's reservoir, and the quantity of water which would be stored by use of the defendants' land in connection with the land of plaintiff, and the value of the water as a salable commodity, were clearly improper elements to be considered. *Canal Co. v. Archer*, and other cases, *supra*. The question was not what the property was worth to a person intending to acquire it and the dam-site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself; in other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with *bona fide* purchasers generally, but its necessities cannot be taken advantage of. So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir, or as a part of the entire reservoir-site, such fact should be considered; but the value of the land when used in connection with the plaintiff's land cannot be taken as a criterion, for this would be taking the value to the plaintiff as the measure of compensation. The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam-site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property; but for the reasons stated its adaptability for reservoir purposes should not have been con-

sidered "in connection with such dam-site and other adjacent lands."

Respondent has requested a decision on every one of the 17 assignments of error in the statement; but, in view of what we have said regarding the rulings of the court and the instructions, it seems unnecessary to do so. It is sufficient to say that any facts showing the nature of the land in controversy, and its adaptability for reservoir purposes, may be shown. The area of the water-shed and amount of water were matters proper to be considered; for a reservoir would be useless without water. That there was land irrigable from the reservoir, and cities and towns which were being supplied with water from wells, were matters not only tending to show that it was a practical reservoir-site, but bearing directly upon its value. The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the lands, (*Boom Co. v. Patterson*, *supra*;) but to attempt to ascertain the value by estimating the cost of works necessary for its use for a particular purpose, the cost of operation, prospective sales, and estimated profits, increased demands through growth of population, etc., requires "a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. \* \* \* The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful." *Searle v. Railroad Co.*, 33 Pa. St. 64.

The court did not err in overruling plaintiff's objection to the question asked Mr. Schuyler during his cross-examination. It was proper to show that he had at some prior time entertained a different opinion as to the value of the property.

Some of the witnesses on both sides never saw the land in controversy until several years after the date of the summons, at which time the right to compensation and damages accrued. We think their opinions ought not to have been received.

We think that the company should pay the costs of this proceeding, on account of the manner in which it opened and proved its case at the last trial. Section 1255 of the Code of Civil Procedure provides that "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." Mr. Lewis, in his work on Eminent Domain, (section 559,) in speaking of the question of costs, says: "It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution, the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before the property is taken or his possession disturbed. If the parties cannot agree upon the

amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property; and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void. \* \* \* If the statute gives the condemning party a right of appeal, it cannot cast the costs upon the owner, even if the assessment is reduced." See, also, *In re New York, W. S. & B. R. Co.*, 94 N. Y. 287. Whatever may be the constitutional rights of the parties, we think in this case, under section 1255, that it will be a proper exercise of discretion to require the company to pay costs. The order is affirmed, and the court below is directed to tax the costs of the last trial and of this appeal against the plaintiff.

We concur: MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; SHARPSTEIN, J.

BEATTY, C. J. I concur in the judgment on the ground that there was such a conflict of evidence on the question of value as to warrant the order directing a new trial, but I do not think the superior court erred in ruling upon the motions to strike out testimony, or in its instructions to the jury.

(88 Cal. 16)

HARRON v. CITY OF LONDON FIRE INS. CO.  
(No. 13,754.)

(Supreme Court of California. Feb. 12, 1891.)

INSURANCE COMPANIES—AGENT'S AUTHORITY—  
VERBAL CONTRACT OF INSURANCE.

An insurance agent's commission certified that he had full power to receive proposals for insurance, fix rates of premiums, and receive money, subject to the company's rules and regulations, and such instructions as might be given from time to time by its general agent. The lessee of an hotel made a verbal agreement of insurance with the agent, who stated that a formal application was not necessary. The company, prior thereto, had written policies on the building, and its general manager had written the agent that he would give his attention to any insurance required on the hotel and contents, and upon another occasion that he would take the whole line, and place it in such companies as was specially desired. *Held*, that this was sufficient to support a finding that the agent was authorized to make the contract.

Department 2. Appeal from superior court, Kern county; R. E. ARICK, Judge.

*Jarhoe, Harrison & Goodfellow*, for appellant. *Haggin & Van Ness*, for respondent.

MCFARLAND, J. This is an action to recover \$5,000 upon an alleged verbal contract for the insurance of furniture, etc., in the Southern Hotel, at Bakersfield, in Kern county. The verdict and judgment were for plaintiff, and defendant appeals. The defendant is a corporation organized under the laws of Great Britain, and does business in the Pacific states and territories under the management of W. J. Callingham, and its head office under his charge is in San Francisco. It has local

agents in various cities and towns, and on July 6, 1889, its agent at Bakersfield was, and for a long time had been, H. A. Blodget. On that date a small fire occurred in the Southern Hotel, of which plaintiff was lessee, and in which she had a large amount of furniture and other personal property. The hotel was conducted and managed by her brother, W. H. Harron, who was her general agent for that purpose. Being alarmed at the occurrence of the fire her said agent went to said Blodget in the afternoon of said July 6th, and told him that he wanted an insurance on said furniture, etc., to take effect immediately, and that if he could not obtain it from him he would go elsewhere; and it is clear that the jury were warranted by the evidence in finding that a contract of insurance on said property for one year for \$5,000 was then and there made by defendant with plaintiff, to take effect immediately, provided Blodget had the authority to make such contract for defendant. On the next day, July 7th, a general conflagration, not originating in said hotel, destroyed nearly the entire town, including plaintiff's said property, which was of a value exceeding \$5,000. The real question in the case is, was the jury authorized by the evidence to find that Blodget had power to bind the defendant? There are some minor points made about certain rulings of the court, but we do not think that in such rulings any material error was committed.

Blodget had a written commission from defendant, which certifies that he is appointed agent of defendant "with full power to receive proposals for insurance against loss or damage by fire in Bakersfield and vicinity, to fix rates of premium, and to receive moneys, on behalf of the City of London Fire Insurance Company, Limited, of London, Eng., subject to the rules and regulations of said company, and such instructions as may be given from time to time by the general agents of the western department of the United States." The foregoing words in quotation marks are the only words in the instrument which either grant or restrict the powers of Blodget. Appellant contends that Blodget's powers must be determined by the commission, and that it does not include the power to accept applications, or to make any insurance contracts; while counsel for respondent contends that such power is fairly included in the language of the instrument. We do not think it necessary to determine whether the general scope of the commission, properly construed, includes the authority here questioned, because we think that in this particular case there were "such instructions \* \* \* given \* \* \* by the general agents" of defendant as authorized Blodget to make the contract sued on. Harron testified that at the time of the contract he asked Blodget, "Don't I want to make a written application?" and was answered, "No; you are not asking for this insurance. You are giving it to Mr. Callingham upon his asking for it. \* \* \* I have letters from Mr. Callingham asking for that insurance; consequently it is not necessary for you to

make a written application." Blodget testified that "I told him [Harron] that I could furnish him insurance; that Mr. Callingham had asked for the insurance on the furniture of the hotel; that I had promised to give it to him, and that I would send it to him; and that it would cover from then." Furthermore, it appears in evidence that defendant had taken policies on the Southern Hotel; that on April 11, 1889, in a letter to Blodget about those policies, Callingham wrote as follows: "I dropped you a line yesterday asking if there would be some insurance required on the hotel furniture and other contents of the building. \* \* \* If any insurance is required as suggested, I shall be very glad to give my attention to it;" and that on April 10th he had written to Blodget as follows: "If the furniture of the Southern Hotel is to be insured, I could take care of the whole line for you, and would place it in any companies that you specially desire." We think that this testimony and evidence was sufficient to justify the jury in finding that Blodget had authority to make the contract with plaintiff, and that he did make it on behalf of defendant. There is no pretense that a written policy embracing the oral contract would not have been made, of the date of July 6th, if the fire had not taken place before it could have been done. Callingham, when on the witness stand, did not pretend that there was any other reason for rejecting the policy. There is nothing in the point that the plaintiff's brother and manager of the hotel, W. H. Harron, had no authority to act for plaintiff. Judgment and order denying the motion for a new trial affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

(38 Cal. 26)

LUCO v. TORO. (No. 12,566.)

(Supreme Court of California. Feb. 12, 1891.)

APPEAL—DIVIDED COURT—AFFIRMANCE.

Const. Cal. art. 6, § 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary. On motion to affirm a judgment it appeared that the cause had been several times heard and submitted, in which no decision was reached owing to the change in the *personnel* of the court, and an equal division of opinion among the judges qualified to act; but before an opinion was written three new judges qualified to hear the case were selected. *Held*, that the cause should be presented on its merits before the newly constituted court, and the motion will be denied.

In bank. Appeal from superior court, San Diego county; THOMAS H. BUSH, Judge.

Const. Cal. Jud. Dept. § 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but if four justices so present do not concur in a judgment,

then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary.

*I. N. Thorne* and *E. W. McKinstry*, (*Oliver P. Evans*, of counsel,) for appellant. *Harry L. Titus* and *Henry M. Smith*, (*George H. Smith*, of counsel,) for respondent.

PATERSON, J. When this cause was first submitted the judgment of the court below was affirmed, four justices concurring. One of the justices who participated in the decision was not present at the argument, but it was understood by the members of the court at the time of the decision referred to that counsel for both parties had stipulated at the hearing—as counsel had in nearly every other case on the calendar for the term at which this case was heard—that any justice not present at the argument might participate in the decision. Upon a representation made by counsel for appellant, after the decision, that no such stipulation had been entered into, and upon their motion, based on the ground that only three of the justices who heard the argument had participated in the decision, the judgment was set aside. Since that time the cause has been heard and submitted several times, but no decision has been reached, owing to a change in the *personnel* of the court, and an equal division of opinion among the six justices qualified to act. At the last October term counsel for respondent moved that the judgment be affirmed, it appearing that the justices qualified to act were equally divided in opinion. It is admitted that a mere failure to agree cannot have the effect, *ipso facto*, of an affirmance, for the constitution requires the concurrence of four justices to pronounce judgment; but it is claimed that it then becomes the duty of the justices who voted for a reversal to unite with their associates in affirming the judgment. The reason given for this contention is an argument *ab inconvenienti*. It is said that if this rule is not followed the case might be continued for four years, until a change in the membership in the court occurs; "and, then again, the same condition of things might still continue, and this would require a further continuance; and thus it might happen that the case would never be decided." Many English and American authorities are cited in support of the motion, and no cases to the contrary have been found by respondent; but the decisions must be read in the light of the circumstances under which they were rendered. Some of the cases referred to went off on the authority of statutes providing that in cases of equal division among the judges the judgment should be affirmed, others upon a rule following the practice of the English courts, and the others upon the ground of expediency. The case of *Ayers v. Bensley*, 32 Cal. 632, is hardly in point. There a judgment had been rendered by a constitutional quorum, and it was only on petition for rehearing that a division occurred. The rule has always been with respect to petitions for rehearings that as many justices as are necessary to pro-

nounce the judgment must concur in granting a rehearing, or the petition will be denied. In jurisdictions presided over by judges holding for life, or for terms so great as to make the probability of a change in the membership of the court remote, the judgment of affirmance follows a division *ex necessitate rei*. In such a case the decree does not import a division as to the nature of the judgment, but as to the questions of law and fact involved in it. While the decree is a bar to any subsequent action for the same cause, no matters of law are decided, and it therefore possesses no dignity as a judicial precedent, but carries upon its face a badge which precludes any application of it in future under the doctrine of *stare decisis*. The judges simply agree that it is expedient to finish the litigation. It is a public expediency, and is often expedient also with respect to the interests of the parties. Supported by these considerations, and the presumption of correctness which always attaches to the judgment of the court below, it is proper and right that the judges who were in favor of a reversal should waive any insistence of opinion, and unite with their associates in an affirmance of the judgment. This they do without in any way relinquishing their convictions upon the questions of law or fact involved in the case. But here there are no such considerations as induced the decisions in the cases referred to. At the time the motion was made it was evident that before the time for the next term of court at which the cause would be heard, three, at least,—including the justice disqualified to act,—and possibly four, of the justices, would be succeeded by others on the bench. Within a month after the motion was made, and before an opinion was written, an election occurred, which resulted in the choice of three new justices, all of whom are qualified to assist in deciding the cause on its merits. Under these circumstances, we thought at the time the motion was submitted, and still think, that the cause should be presented on its merits before the court as now constituted. The motion is therefore denied.

We concur BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J

HARRISON, DE HAVEN, and GAROUTTE, JJ. Although we were not present at the argument of the motion, which was afterwards submitted on briefs, counsel for appellant not being present at the time the motion was made, we have considered the point made by respondent, and concur in the views expressed in the opinion of Justice PATERSON.

(45 Kan. 351)

STATE *ex rel.* KELLOGG, Attorney General,  
v. KANSAS MERCANTILE ASS'N *et al.*

(Supreme Court of Kansas. Feb. 7, 1891.)

LOTTERIES—PLAYING POLICY.

1. A scheme for the distribution of prizes by chance is a "lottery."

2. A scheme, generally known as "playing policy," whereby an association sells for five cents, or any other specific sum of money, certificates or tickets which entitle the purchaser to a

lead-pencil of trifling value, and also permits such purchaser to select certain numbers, say 3-9-13, which, if all drawn by a blindfolded boy from a revolving wheel in which several numbers are placed, entitle the person purchasing the certificate or ticket to a prize of money much larger in amount than he has paid for his certificate or ticket, is a "lottery."

(Syllabus by the Court.)

Original proceeding in *quo warranto*.

L. B. Kellogg, Atty. Gen., *in pro. per.*  
S. B. Bradford, for defendant.

HORTON, C. J. This action is brought under subdivisions 3 and 4 of paragraph 4767 of the General Statutes of 1889. It has for its object the forfeiture of the charter of the Kansas Mercantile Association, and the prevention of the individual defendants from acting as a corporation or exercising corporate rights. The charter states that the purpose for which the corporation was formed is to sell various articles of merchandise, with premium numbers attached, the premium numbers entitling purchasers holding the same to a selection of other articles. The testimony of P. W. Kline, the general manager of the association, shows that the object in obtaining the charter was to enable the association to carry on the identical business which the evidence discloses is carried on by the association. The testimony of witnesses shows that the association has on hand a number of lead-pencils, probably of the value of a small fraction of a cent; that a five-cent investment or a dollar investment in the purchase of one of the "vendor's certificates," as the defendants are pleased to call their tickets, entitles the purchaser to one of these lead-pencils; that the purchaser of a certificate or ticket selects certain numbers, say 3-9-13, and hands these numbers into the office of the association, and, if all the same numbers come out in the next drawing, the purchaser gets a prize, ranging from 45 cents to \$2,500; if the numbers selected do not come out, the purchaser gets no prize; that twice a day 78 numbers are placed in a wheel on the stage of Hanson's Opera-House at Kansas City, in this state; that the wheel is revolved for half an hour; that a blindfolded boy draws out 12 numbers at a noon drawing, and 13 numbers at an evening drawing; that such persons as choose to be present at these drawings attend and make up the audience; that the numbers drawn are posted on a black-board, and are sent to the various agencies in Atchison, Wichita, Leavenworth, St. Joseph, Mo., and two or three points in Texas, where the association has agencies established for the purpose of assisting in carrying on its business. The business of the association is called, and generally known, as, "playing policy."

Section 3, art. 15, of the constitution of the state, ordains that "lotteries and the sale of lottery tickets are forever prohibited." Of course, there is no provision in the statute concerning private corporations authorizing the formation of any corporation or association in this state to carry on lotteries or to sell lottery tickets. Paragraph 4767, Gen. St. 1889, reads:

"Such action [in the nature of *quo warranto*] may be brought in the supreme court or in the district court in the following cases: \* \* \* *Third*, when any association or number of persons shall act within the state as a corporation without being legally incorporated; *fourth*, when any corporation do or admit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when any corporation abuses its power, or exercises powers not conferred by law." Upon the pleadings and evidence, the sole question is whether the business carried on by the Kansas Mercantile Association is a lottery. The word "lottery" must be construed in the popular sense, with a view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the mischief. A "gift-sale" of books is a lottery. *State v. Clarke*, 33 N. H. 329. A "prize-candy" business is a lottery. *Hull v. Ruggles*, 56 N. Y. 424; *Holoman v. State*, 2 Tex. App. 610. "Prize-concerts" are lotteries. *Com. v. Thacher*, 97 Mass. 583; *State v. Overton*, 16 Nev. 136; *Nexley v. Devlin*, 12 Abb. Pr. (N. S.) 210. "Prize-tickets" to induce subscriptions to a newspaper constitute a lottery. *State v. Mumford*, 73 Mo. 647. "Raffles" at fairs are lotteries. *Com. v. Manderfield*, 8 Phila. 459. "Drawing works of art" constitutes a lottery. *Governors of Alms-House v. Art Union*, 7 N. Y. 228. "A public exhibition during which, and as a part of the advertised proceedings, presents were distributed among such of the audience as held tickets which answered to the numbers called at will by the exhibitor, held to be a lottery." *State v. Shorts*, 32 N. J. Law, 398. "When a city or a government, in order to make an inducement for people to buy their bonds, holds out large prizes to be drawn by chance, or determined by lot in the manner in which prizes are usually determined in honestly conducted lotteries, the mailing of circulars concerning such drawings, past and future, is a mailing of lottery circulars." *U. S. v. Zeisler*, 30 Fed. Rep. 499. "A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a 'lottery.'" *U. S. v. Olney*, 1 Abb. (U. S.) 275. "Playing policy" has also been decided in New York to be a "lottery." *Wilkinson v. Gill*, 74 N. Y. 63. In that case, *Church, C. J.*, said that "a 'lottery' is defined by Webster, 'a scheme for the distribution of prizes by chance, or the distribution itself,' and he defines 'lot' as 'that which causes, falls, or happens; that which in human speech is called chance, fortune, hazard;'" and "to draw lots" is "to determine an event by drawing one thing from a number, whose marks are concealed from the drawer, and thus determining an event." *Worcester* defines "lottery" as "a hazard in which sums are ventured for a chance of obtaining a greater value." The language of *FOLGER, J.*, in

*Hull v. Ruggles*, 56 N. Y. 424, may be adopted as a result of the accepted definitions: "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." Clearly, the business in which the association is engaged is "a scheme for the distribution of prizes by chance." It has all the essential features of a lottery, and should be so construed. A purchaser of a certificate or ticket from the association does so with the hope or expectation of drawing a prize. His purpose is to try his luck at "Fortune's Wheel," and not to get a lead-pencil. Within the definition of Webster and the authorities cited, the purpose of the association and its officers and agents is to establish and carry on a lottery. The purpose expressed in the charter of the association shows that purchasers of merchandise from the association, with premium numbers, were to be entitled to the selection of other articles; that is, prizes. Therefore it is evident that the parties filing the charter and organizing the association intended to carry on "a scheme for the distribution of prizes by chance;" that is, to establish "a lottery." This is unlawful. Such a scheme or business has no warrant of authority from any statute, and is in direct violation of the constitution of the state. Even if there is no statute prescribing fines or penalties to be inflicted upon persons engaged in carrying on lotteries in the state, yet the constitution is so far self-executing that no charter can be granted or corporation organized in the state for lottery business or the sale of lottery tickets. The alleged charter of the defendant will therefore be declared null and void, and all of the defendants are hereby prohibited from transacting or carrying on the business or "lottery" described in the petition. Judgment will be entered accordingly against the defendants, with costs. All the justices concurring.

(15 Colo. 543)

PATRICK v. CROWE et al.

(Supreme Court of Colorado. Feb. 6, 1891.)

JUDGE—DISQUALIFICATION—BENEFIT OF COMPLAINT—COMPROMISE.

1. The part ownership of a mine by the brother of the judge before whom an action involving a lease of part of the property is about to be tried does not of itself disqualify the judge, where there is nothing to show that the brother's interest was covered by the lease, or in any way affected thereby; and, where the judge is of opinion that he will not be influenced by that fact, his order overruling plaintiff's application for a change of venue will not be disturbed.

2. Neither is the judge disqualified by the fact that his brother is an attorney for one of the parties in the case, and that the judge himself was an unsuccessful bidder for a lease of the mine.

3. Where the complaint in the action is based on the theory that an assignment of the lease to plaintiff correctly expresses the contract of the parties, and that defendants have wrongfully availed themselves of a clause of forfeiture therein contained, the refusal of the court to permit an amended complaint to be filed on the day before the cause was set for hearing, which disaffirms the correctness of the assignment as writ-

ten, and which prays that it be so reformed as to omit entirely the forfeiture clause, is not such an abuse of discretion as will warrant a reversal.

4. A party cannot be compelled, against his will, to testify as to the details of an offer of compromise made by him during the pendency of the litigation.

5. A written offer of compromise, made by one of defendants, and rejected by plaintiff, is not rendered admissible against the latter by the fact that he read it without specifically objecting to matters therein prejudicial to his case.

6. Where defendant testifies to a conversation with plaintiff, which discredits the latter's testimony, the refusal to permit defendant to be fully cross-examined as to such conversation is error.

Appeal from district court, Pitkin county. This action was instituted by appellant Lucien L. Patrick, as plaintiff below, against appellees, George W. Crowe et al., to procure a decree declaring plaintiff to be the owner of a half interest in a lease upon an eleven-twelfths interest in the "Celeste" lode, a mining claim situate in Pitkin county, Colo. In the month of April, 1888, the Celeste claim was owned by the following parties, to-wit: Charles H. Graham, Meyer Guggenheim, John A. Ewing, and A. W. Rucker; the latter being one of the attorneys of record for appellees in this cause. About this date the aforesaid parties, with the exception of said Rucker, they then owning eleven-twelfths of the property, being desirous of having the same worked under lease, advertised for bids for a lease upon the property. In response to such advertisement bids were put in by a number of parties, among whom were George W. Crowe, one of the present appellees, Hon. T. A. Rucker, the judge who afterwards presided at the trial of the cause in the court below, E. R. Holden and Benjamin Guggenheim, jointly, and others. E. R. Holden and Benjamin Guggenheim were the successful bidders, and a lease was thereafter duly executed to them. It is unnecessary to state the terms of this lease further than to say that it provided for the working of the mine under the royalty system for the period of 18 months, and that it required the lessees to keep at least two men at work upon the property, and that a failure so to do for a period of 10 days would entitle the lessors to declare the lease forfeited. Shortly thereafter Holden and Guggenheim executed to George W. Crowe, one of the appellees herein, a sublease upon a three-fourths interest in the property. A few days after the execution of this sublease the following written contract was entered into in relation thereto between appellee Crowe, as party of the first part, and L. L. Patrick and Mrs. William F. Patrick, parties of the second part, viz.: "This deed of assignment and agreement, combined, made this 23d day of April, 1888, by George W. Crowe, of the county of Arapahoe and state of Colorado, of the first part, and Lucien L. Patrick and Mrs. William F. Patrick, of the county of Lake and state of Colorado, parties of the second part, witnesseth: That for and in consideration of the sum of one hundred and sixty-six dollars, sixty-six and two-thirds cents, lawful money, to the party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby

confessed, and in further consideration of the sum of money hereinafter mentioned, to be paid and expended as hereinafter expressed, and in further consideration of each and all the covenants and agreements hereinafter expressed, to be kept and performed by the parties of the second part, the party of the first part has sold, assigned, transferred, and set over, and by these presents does sell, assign, transfer, and set over, unto Lucien L. Patrick an undivided  $\frac{1}{2}$ , and unto the said Mrs. William F. Patrick an undivided  $\frac{1}{2}$  interest in a certain lease of the Celeste lode mining claim, situate in the Roaring Fork mining district, in Pitkin county, and state of Colorado; the said indenture of lease bearing date the first day of April, A. D. 1888, and being for the term of eighteen months from the date thereof; said lease being originally executed to Benjamin Guggenheim and E. R. Holden; to have and to hold the same unto them, their heirs, executors, and assigns, with the privilege thereunto belonging. The parties of the second part, in consideration of the foregoing assignment and transfer, agree to expend within the period of sixty days from the date hereof, in working said mine and developing the same for ore and ore bodies, the sum of one thousand dollars: provided, however, that the proceeds of all ore taken from said mine and sold during the said period of sixty days, shall be applied to the payment of the expenses incurred in working the same; and if, on account of the application of the proceeds of the sales of ore taken and sold from said mine during said period of sixty days, the sum of one thousand dollars shall not have been wholly expended as aforesaid during said period, then the parties of the second part agree to refund to the party of the first part the one-third of such unexpended balance of said sum of one thousand dollars on request of the party of the first part. It is further agreed that in case the said sum of one thousand dollars shall be wholly expended within the mine without the mine producing enough ore to pay the expenses thereof, then the parties of the second part agree to be responsible for and pay the two-thirds part of all expenses of every kind incurred in working said mine, over and above the proceeds of ore taken therefrom, it being understood that the proceeds of ore taken from said mine shall be first used in paying the expenses of working the same. The party of the first part hereby reserves to himself equal authority and voice in the management of said property with the parties of the second part. It is further agreed between the parties hereto that no salary or salaries shall be paid for superintending or managing the working of said property until the same is on a paying basis. The parties of the second part hereby agree to keep, abide by, and perform all the conditions, covenants, and agreements expressed in said lease of said mine, to the full extent of their respective interests therein; and in case of the failure of the parties of the second part, or either of them, to keep and perform each and all the agreements and covenants herein expressed, he, she, or they, as the case may be, shall forfeit his,



her, or their interest in said lease, and the same shall immediately revert to the party of the first part. In witness whereof, the parties have hereto set their hands and seals the day and year first above written. [Signed] GEO. W. CROWE. L. L. PATRICK. MRS. WILLIAM F. PATRICK." The foregoing is the instrument set forth and relied upon in the original complaint, in which pleading it is further alleged that the contract was entered into by L. L. Patrick on his own behalf and as agent for Mrs. W. F. Patrick, and that, Mrs. Patrick failing to take the portion assigned to her, plaintiff succeeded to said interest. Continuing, the plaintiff alleges that he had expended and become liable for the sum of \$1,000 prior to the 10th day of July, 1888, in prosecuting the work under the written agreement, and the letting of the contract for the sinking of a shaft upon said property to the depth of 100 feet at a cost of \$9.50 per foot, the sinking of the shaft to the depth of 50 feet, and the suspension of further work on account of water, and Crowe's acquiescence in such suspension, the keeping of two men at work thereafter to prevent forfeiture of lien. The familiarity of Ellis with these arrangements is also alleged, and he is made a party defendant. It is also stated that Crowe and Ellis conspired together to bring about a forfeiture of the contract, and that they did take possession of the mine, and work the same at a large profit. So far as the answer to this complaint need be noticed, it consists of a specific denial of each allegation of the complaint, except the agreement of the 23d of April, and as to such agreement it alleges failure on the part of the plaintiff to carry out its terms, and his abandonment of the enterprise; also the subsequent declaration and claim of forfeiture and transfer of a three-eighths interest in the contract by Crowe to defendant Gilbert.

The action was originally commenced in the district court of Arapahoe county. The defendants, however, asked for a change of venue to Pitkin county, resting their motion for that purpose upon the ground that the subject-matter of the controversy was situated there. This motion was resisted by plaintiff on the alleged ground that A. W. Rucker was an owner in the Celeste lode, and that Thomas A. Rucker, the judge of the district court of Pitkin county, was also interested in said property. To these allegations the defendants replied, with affidavits of G. W. Crowe and A. W. Rucker, showing that the latter had never leased his interest in the mine, had no interest in the lease, and that Thomas A. Rucker had neither an interest in the property or lease. The venue was changed in accordance with the motion. A. W. Rucker had not, however, up to this time entered his appearance as an attorney for the defendant in the cause. On the 18th of March, 1888, in the district court of Pitkin county, plaintiff in turn petitioned for a change of venue. This petition, in addition to the claim of interest of the Ruckers, asserted, among other things, that the judge would be influenced against plaintiff on account of A. W. Rucker be-

ing one of the attorneys for defendants; that said attorney, in conversation with T. J. O'Donnell, attorney for plaintiff, had expressed a strong interest in the controversy prior to his being employed in the case; that the judge had been a bidder for a lease on the Celeste, and that his failure to secure the same was in part caused by plaintiff, that one Balderson, a brother-in-law of Crowe, and editor of the Aspen Times, had published an article in said paper about the matters in controversy in the suit, for the purpose of influencing the decision. In reply, an affidavit was made and filed by A. W. Rucker, again stating his relation to the property, and averring that he had no interest in the subject-matter of the suit; and also accounting for the interest he may have exhibited in the conversation with O'Donnell, by the claim that he had ascertained that Crowe was looking for him on the day of the conversation, and that he expected to be employed by Crowe, and he had so informed O'Donnell. The petition for change of venue was denied. The cause was set for hearing on the 11th of July following. On the 8th of July, notice was given by plaintiff of his intention to move for leave to file an amended complaint. On the 10th of July a motion was made by plaintiff to be allowed to file an amended complaint. The motion was supported by the affidavit of his attorney, setting forth certain reasons why the complaint, as amended, setting up the alleged true cause of action, was not filed in the first instance. The reasons given, in substance, were that at the time of preparing the original complaint the attorney for the plaintiff had not seen the original correspondence between plaintiff and Crowe, and did not know that the same was in existence at the time. Affiant further stated that on account of other pressing business he did not prepare the original complaint as carefully as the importance of the case demanded; that he was compelled to dictate the complaint direct to a type-writer; that he "supposed, as a matter of law, and so advised plaintiff, that all that had occurred between himself and plaintiff was in law merged in said paper of April 23d; that he, at the time, had not given said question of law the same consideration he had since," and on account of press of business, and sickness followed by a death in his family, he was prevented from preparing the amended complaint at an earlier date. The amended complaint tendered, in substance, alleges that plaintiff and defendant Crowe, about the 1st of March, 1888, entered into an agreement by which Crowe was to attempt to get this lease for their joint and equal benefit; that the lease was awarded to Holden and Guggenheim, and, before the lease was actually made, Crowe entered into negotiations with Holden and Guggenheim for the assignment, and about the 22d of March, plaintiff and Crowe agreed to take the assignment from Holden and Guggenheim of three-fourths interest in the lease; that such assignment was made to Crowe, but for the joint and equal benefit of plaintiff and himself; that afterwards, Crowe, be-

ing in embarrassed circumstances, proposed selling plaintiff an additional one-eighth interest for \$500; that plaintiff was inexperienced, and without any considerable money, but, being desirous of assisting Crowe, offered to negotiate the sale of the one-eighth interest to Mrs. W. F. Patrick; that the negotiations resulted in the sale to her; that "they undertook to have their agreement reduced to writing;" that the result was the agreement of the 23d of April, which did not express the true relations of the parties, etc.; the commencement and subsequent suspension of work because of water was alleged, and the acquiescence of Crowe in such suspension; the keeping of men at work by plaintiff thereafter in response to requirements of the lease; and the expenditure of \$1,000 by him under the lease. In this pleading plaintiff also states that he attempted to make arrangements with the owners of the adjoining claims, the Lottie and the Justice, to work the Celeste through their shafts. Plaintiff further alleges that he was called to Denver on the 8th of July, leaving the defendant Ellis to act for him in his absence; that Ellis, instead of doing this, conspired with Crowe to bring about a declaration of forfeiture, well knowing plaintiff's rights in the lease; and the taking of possession by Ellis and Crowe of the mine after the 10th of July, and the profitable working thereafter of the mine by them under the lease. The court refused to allow the amended complaint to be filed, and the cause was tried upon the original complaint and answer. When the case was reached for trial the court, on its own motion, and against appellant's protest, called a jury to determine certain questions of fact. The jury, however, returned answers favorable to the plaintiff. Notwithstanding this, a judgment was given in the defendants' favor, the findings of the jury having been first set aside by the court.

*T. J. O'Donnell, T. M. S. Rhetts, and Hugh Butler, for appellant. A. W. Rucker, G. W. Titcomb, and L. S. Smith, for appellees.*

HAYT, J., (*after stating the facts as above.*) The first question to be considered under the assignments of error relates to the refusal of the district judge of Pitkin county to change the venue upon appellant's petition and affidavit. The application is based upon the alleged prejudice of the presiding judge, the Hon. T. A. RUCKER, against the appellant. As grounds for such prejudice it is alleged, in substance: (1) That A. W. Rucker, a brother of said judge, is one of the owners of the Celeste lode. (2) That said A. W. Rucker is one of the attorneys of record for the defendants in this cause, and is interested in defeating plaintiff's claim. (3) That the feelings and interest of A. W. Rucker, and his appearance in the case as counsel, will have an influence upon the said Judge Rucker's judgment, to the prejudice of plaintiff's rights. (4) That the judge was himself an unsuccessful bidder for the lease under which both claim in this action. (5) The recent publication

of an article in a certain newspaper published at the place where the court was being held, for the purpose, as it is said, of influencing the decision of the judge in this cause. Upon this showing plaintiff was not entitled to a change of venue as a matter of right; for, although it is alleged that A. W. Rucker was at the time one of the owners of the Celeste, it is not shown that his interest was covered by the lease in controversy, or in any way affected thereby. That he was an attorney in this case did not, of itself, render his brother, the judge, incompetent to try the action. That as such attorney he might have an influence upon the determination of the case, may be admitted; and yet this influence might arise entirely from his skill in conducting the defense as an attorney, and be wholly proper. And the fact that the judge was an unsuccessful bidder for a lease upon the property would not entitle plaintiff to a change of venue. As to the newspaper article, it is not at all probable that the judge could have been influenced thereby. We cannot, therefore, say that the matters alleged, singly or together, show that Judge RUCKER was disqualified from presiding at the trial. He was the person called upon to decide as to whether or not for any reason his judgment might be unduly influenced by the matters set forth in the petition; and, he being of the opinion that he would not be influenced by the matters stated, we cannot disturb the order overruling plaintiff's application for a change of venue. A large discretion is lodged in the judge to whom such applications are made; and, while it cannot be said upon this record that there was error in overruling the petition for a change of venue in the case, the circumstances are such as might lead the plaintiff, and perhaps others, to question the propriety of Judge RUCKER's retaining the cause for trial before himself. As the judgment must be reversed for other reasons, we take the liberty of suggesting the advisability of calling in a judge of some other district to preside at the next trial, should one be had, unless a change of venue shall be granted in the mean time. We feel that all parties would be relieved from much embarrassment should this course be followed.

The next assignment of error is based upon the refusal of the court to permit the amended complaint to be filed. The original complaint is based upon the written contract of April 23, 1888. The amended complaint covers 27 pages of the printed abstract of record, and is composed largely of evidentiary matters that have no proper place in any pleading. Discarding the probative facts as surplusage, and we find that by this pleading the written contract of April 23, 1888, is sought to be set aside, and an interest in the Crowe lease established, on the theory of a contract of partnership between Crowe and Patrick antedating the lease, and by the terms of which the lease was to be procured in the name of Crowe for the benefit of the firm. The permitting of proper amendments is a matter within the sound discretion of the trial court, the exercise

of which will only be controlled in case of abuse. If the change proposed by the amended pleading in this case could have been properly allowed at any stage in the proceeding, (a point we are not called upon to decide,) the refusal at the time offered was certainly not an abuse of discretion. The cause had already been set for trial upon the following day, it having been at issue for several months. The complaint on file affirmed the written contract, and asked for its enforcement. The amended complaint expressly disaffirms the written contract, and sets up a prior verbal agreement contrary thereto. The pleadings are not only inconsistent one with the other, but they are diametrically opposed to each other in all essential particulars. In the original complaint the interest of Patrick with Crowe in the lease is stated subject to the forfeiture, and the plaintiff asks for relief from the forfeiture claimed by Crowe and Ellis. In the amended complaint the written instrument is sought to be set aside or reformed, so as to relieve plaintiff entirely from the forfeiture clause. By it the pleading attempts to set up a cause of action that would, if properly pleaded, have required a new answer, and other and different evidence from that necessary, or even proper, under the issues as framed. Notwithstanding the great liberality enjoined by the Code in reference thereto, in practice the indulgence as to amendments must necessarily have some limit. In our opinion, the rejection of the amended complaint, under the circumstances, was not an abuse of discretion on the part of the trial court, and the assignment of error based thereon cannot, therefore, be sustained.

It is claimed that many errors were committed by the court to the prejudice of the plaintiff in admitting incompetent testimony, against his objection, as well as in excluding competent testimony offered by him, upon the defendants' objection. The first item that merits consideration relates to testimony admitted in reference to a compromise attempted between plaintiff and defendants after the dispute had arisen out of which the suit arose. A compromise was talked over between the parties, but not finally consummated. In reference to this attempted compromise the plaintiff, while upon the witness stand, was asked by defendant this question, "What was your proposition?" to which question his counsel duly objected. This objection was overruled, and the plaintiff was compelled to give in detail his proposition to Mr. Crowe, made for the purpose of bringing about a settlement of the matters here in suit. This was clearly error. The law favors compromises. If parties can be compelled against their will, as in this case, to detail offers made for the purpose of settling matters in dispute to avoid litigation, certainly no prudent person would feel safe in offering any concessions for the purpose of bringing about a compromise. The ruling of the court below, if upheld, would have the tendency of preventing all negotiations looking to that end. If either party had in the course of these negotiations ad-

mitted any independent fact, such admission, under some circumstances, might have been proper evidence against the party making the same to establish such fact, if material; but the testimony was not offered for such purpose in this instance, and should not have been admitted. 2 Whart. Ev. § 1090; Houghton v. Houghton, 15 Beav. 321; Perkins v. Concord Railroad, 44 N. H. 223; Gay v. Bates, 99 Mass. 263; Durgin v. Somers, 117 Mass. 55; Draper v. Hatfield, 124 Mass. 53. Pending the negotiations for a compromise, and as a part thereof, the defendant Crowe caused to be drawn up a writing providing for the adjustment of the matters in dispute. This instrument was admitted in evidence against plaintiff's objection, although it was never signed by either of the parties. In fact the plaintiff absolutely refused to sign or agree to it. Inserted in this writing, which is quite long, are matters very prejudicial to plaintiff's case. In support of the rule admitting this paper, it is claimed that, as it is shown to have been either read by or to plaintiff, he must therefore be held to have acquiesced in those matters contained therein to which he did not specifically object. As we have seen, this instrument was a part of the negotiations for a compromise. It is not shown that it was presented to the plaintiff under circumstances calling for a denial from him other than that to be implied from his withholding his signature. It was at most but an offer of compromise made by the defendant Crowe and rejected by the plaintiff. Had it emanated from the plaintiff, its admissibility as evidence might well be doubted. Originating, as it did, with the defendant, it should not, under the circumstances, have been admitted as evidence against the plaintiff. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

The court also erred in sustaining defendants' objection to the request of plaintiff to be allowed to cross-examine the defendant Crowe as to the conversation in which defendant states that the plaintiff made the representation that his sister-in-law was his partner for the purpose of strengthening his financial ability. The witness had previously testified that the plaintiff had represented that his sister-in-law was in partnership with him for the purpose of strengthening his financial ability; and, as it was shown that Mrs. Patrick, the person referred to as the sister-in-law, was not in partnership with the witness, the evident effect of the testimony was to cast discredit upon the plaintiff, who was a witness in his own behalf, and the plaintiff should have been permitted to have examined the witness fully in reference thereto.

The next objection to be considered is in reference to the question based upon the sworn answer of Crowe. In this answer the defendant Crowe denied under oath that he advised the plaintiff that the volume of water in said shaft was surface water. The question was objected to for the reason that it did not embody the entire paragraph of the complaint in which the language used occurs. After some discussion of counsel the court sustained this

objection. This was error. As to whether or not the defendant Crowe advised plaintiff that the water in the shaft was surface water, and for this reason work should be discontinued until it disappeared, was a material question in the case. No good reason is perceived why the witness should not have been allowed to answer the question. The statement is complete in itself, without reference to other matters that appear in the same paragraph.

Upon the whole case the evidence is quite evenly balanced, as is shown by the fact that the jury decided for the plaintiff, while the findings of the court upon the same evidence are favorable to the defendants. An examination of the record convinces us that the plaintiff did not have a full opportunity to present his case in the court below. The force of his testimony was greatly broken, on the one hand, by objections that were improperly sustained; while, on the other, the force of his cross-examination of Crowe was weakened, if not entirely destroyed in some instances, by objections without merit, that were also sustained. Under the circumstances, we are of opinion that the judgment ought not to be allowed to stand. It is therefore reversed, and a new trial ordered.

(15 Colo. 539)

#### STEWART V. KINDEL.

(Supreme Court of Colorado. Jan. 30, 1891.)

##### EVIDENCE—PAYMENT—MUTUAL MISTAKE.

1. In an action to recover money alleged to have been paid by mistake, the existence of a written contract between the parties does not render incompetent oral evidence of prior negotiations showing that the payment was no part of the transaction evidenced by the writing, and that it was wholly without consideration, and resulted from a mutual mistake.

2. An instruction that plaintiff is entitled to recover if, by reason of excitement or forgetfulness, he made a payment when nothing was owing to defendant, is not misleading when taken in connection with other portions of the charge, to the effect that, to warrant a recovery, the mistake must have been mutual.

3. Where the parties to the action and one of the attorneys of record are sworn as witnesses, in weighing the testimony the jury are at liberty to take into consideration the interest of each in the result of the action, so far as such interest is disclosed by the evidence.

4. The admission by defendant, while testifying as a witness in the case, of the existence of prejudice against plaintiff, does not preclude an inquiry into the extent of such ill feeling, nor a cross-examination as to the character of such prejudice.

Appeal from district court, Arapahoe county.

In this action appellee, Kindel, as plaintiff below, instituted this suit to recover money alleged to have been paid by him and received by appellant without consideration, by the mutual mistake of the parties. The defendant, in his answer, admits the payment of the money, but denies that the same was paid or received by mistake, or without consideration, and avers that the amount was paid in satisfaction of a just claim against the plaintiff. A trial to a jury resulted in a verdict for the plaintiff.

W. W. Cover, for appellant. John L. Jerome, for appellee.

HAYT, J., (after stating the facts as above.) The first four assignments of error, so far as they are urged in this court, relate to the admission of certain evidence upon the trial against the appellant's objections. The testimony thus admitted relates to certain conversations which took place between the parties upon March 24, 1887. A written contract having been subsequently entered into by the parties, it is contended that oral evidence of the prior negotiations was not proper for the consideration of the jury. We do not think this objection well taken. The money sought to be recovered was paid to the defendant by a check upon a certain Denver bank. Had the giving of this check been a part of the agreement evidenced by the written contract, there would be some basis for defendant's objection; but whether or not it was intended as a part of that transaction was the vital point in issue between the parties upon which the jury were called upon to pass. The evidence tended to show that the payment was no part of the transaction evidenced by the writings; that it was wholly without consideration, and resulted from a mutual mistake. Under these circumstances, the testimony was competent.

The appellant, a witness in his own behalf in the court below, was required, against objection, upon cross-examination, to answer certain questions tending to show the existence of an unfriendly feeling between the parties, and this is assigned for error. It is one of the objects of cross-examination to show the relation existing between the witness and the party against whom, as well as the party for whom, he is called. And it can make no difference if the witness himself happens to be a party; anything tending to show either bias or prejudice, or to throw light upon the motives and inclinations of the witness, may be permitted, in order that the jury may be assisted in determining the weight that should be given the testimony of the witness. No doubt the extent of the inquiry rests somewhat in the discretion of the trial court. An investigation into particulars beyond what appears to be necessary to ascertain the nature and extent of the hostile feeling should not, of course, be permitted. In this case counsel were allowed to go to some extent into the details and particulars of such ill will, and, we think, rightfully so. The fact that the witness admitted the existence of ill feeling or prejudice against the plaintiff, did not preclude an inquiry into the extent or intensity of such ill feeling, nor a cross-examination as to the character and degree of such prejudice. *State v. Collins*, 33 Kan. 77, 5 Pac. Rep. 368; *State v. Dee*, 14 Minn. 35, (Gil. 27;) *Batdorff v. Bank*, 61 Pa. St. 179; *McFarlin v. State*, 41 Tex. 23; *Thomp. Trials*, §§ 450, 451. In *State v. Dee*, supra, it is said: "The object of this kind of testimony is to show bias and prejudice on the part of the witness, for the purpose of leading the jury to scrutinize, and perhaps to discred-

it, the testimony. If testimony of this character is to be received, it should be received in its most effective form, so that the purposes for which it is introduced may be best accomplished. A mere vague and general statement that hostile feeling existed would possess little force. It certainly must be proper to ask what the expression of hostility was, for the purpose of informing the jury of the extent and nature of the hostile feeling, so that they may determine how much allowance is to be made for it."

Several errors are assigned upon the instructions given by the court. By the first instruction the jury were told, in substance, that if they believed from the evidence that the payment was made when nothing was owing under the contract between the parties, and that it was made because Kindel did not, by reason of excitement or forgetfulness, appreciate the terms of the contract, then he was entitled to recover. This instruction is criticised by appellant because it leaves out, as it is said, the necessity of showing that the mistake was mutual. If considered by itself, it is possible the jury may have drawn such conclusion, although, if the amount was paid by the mistake of appellee and received by appellant when nothing was owing, it would seem to follow as a logical sequence that it must have also been received as well as paid by mistake; otherwise, appellant was guilty of fraud in receiving that to which he had no claim. We are not compelled to rely upon this, however, as in the instruction immediately following, as well as in other portions of the charge, the jury are told that to warrant a recovery the money must have been received, as well as paid, by mistake; i. e., to warrant a recovery, the mistake must have been mutual. Under the circumstances, we do not think it possible for the jury to have been misled as to the law upon this point. In construing a charge to a jury each instruction should be considered in connection with the entire charge, and if, considering the instructions as a whole, it appears that the jury were correctly advised by the court upon all material points in the case, this is sufficient. *McClelland v. Burns*, 5 Colo. 390; *Thatcher v. Rockwell*, 4 Colo. 375; *Dozenback v. Raymer*, 13 Colo. 451, 22 Pac. Rep. 787.

Upon the trial the parties to the action were each sworn, and testified, as did, also, one of the attorneys of record in the case. In reference to such testimony, the jury were told that in weighing the testimony of such witnesses they were at liberty to take into consideration the interests of each in the result of the action, so far as such interest was disclosed by the evidence. There was no error in this. The degree of credit to be given to each and all witnesses is a question exclusively for the jury; and if an attorney of record in a cause goes upon the stand as a witness, his testimony is to be weighed by the jury in view of all the surrounding circumstances appearing on the trial, including his professional connection with the case.

There is some conflict in the testimony in this case, but it was the peculiar prov-

ince of the jury to decide upon which side lay the preponderance of the evidence. The verdict was against appellant. The cause appears to have been fairly submitted to the jury under proper instructions, and the verdict cannot be disturbed. The judgment is accordingly affirmed.

(15 Colo. 535)

GARBANATI v. FASSBINDER.

(*Supreme Court of Colorado. Jan. 30, 1891.*)

SALE OF LAND—FRAUD OF VENDOR—STATUTE OF FRAUDS.

1. No mere oral representation, made at the time of executing a contract for the sale of land, as to the quantity of land to be conveyed, unless of such a character as to amount to a fraud, is competent evidence to charge the vendor with liability, even if the land actually conveyed does not contain the full quantity orally represented.

2. The statute of frauds furnishes a rule of evidence, but not of pleading.

(*Syllabus by the Court.*)

Error to district court, La Plata county.

In May, 1881, the parties to this action entered into a written contract, whereby Fassbinder agreed to sell and convey to Garbanati "lots Nos. 20 and 21, in block No. 6, in the town of North Durango, in La Plata county, state of Colorado, as surveyed, staked, and platted by C. M. Perin, civil engineer," etc. The lots thus described fronted on a street called "Grand Avenue." At the time of executing the written contract there was no street or alley in the rear of the lots. They abutted in the rear upon other lands belonging to Fassbinder. After the execution of the contract certain negotiations were had between the parties for the opening of an alley or narrow street in the rear of the lots. There is some conflict of evidence as to the result of these negotiations. But as a matter of fact Fassbinder did thereafter open a new street, called "Mesa Street," to the rear of these lots, giving a portion from his own land, and taking a portion from the rear of the lots sold to Garbanati, making the new street 40 feet in width. He also opened a cross street through block 6, connecting Mesa street with Grand avenue. Thus block 6 was divided, and the part in which Garbanati's lots were situated was called "Block 26," and his lots were numbered 4 and 5, respectively. A map was also filed in the office of the recorder of La Plata county, showing the new streets and new numberings; and in November, 1885, Fassbinder executed and delivered to Garbanati a warranty deed for "lots numbered four (4) and five, (5,) in block numbered 26, in the town of North Durango, as per map duly filed in the recorder's office," etc. It is conceded that the lots described in the deed, though differently numbered, are identically the same as those described in the contract except as they have been shortened by the opening of the new street. The plaintiff, Garbanati, by his complaint, claims to recover damages upon the ground that the defendant, Fassbinder, at the time of selling the lots represented them to be each of the size of 50 feet front by 200 feet deep, and that defendant did not convey to him the whole of the lots contracted for; that is, he com-

plaints that he did not acquire by the deed the full quantity of land called for by the contract and by the representations made at the time of executing the contract. He makes no complaint of the change of the numbering of the lots, or of the opening of the streets, except as the size of his lots has been thereby diminished. To this complaint the defendant, Fassbinder, made defense, *inter alia*, to the effect that, subsequent to the execution of the written contract to convey, plaintiff agreed with defendant to the opening of the street in the rear of his lots, and to the taking of 20 feet off the rear end thereof for the purpose of said street, in consideration that defendant would give a like quantity of his land for said street; that the lots were accordingly so replatted, and the street so opened, at great expense by defendant; that the survey and plat by which the contract was entered into showed the lots to be each 50 feet front by 180 feet deep, and that the map by which they were deeded showed them to be each 50 feet front by 160 feet deep; and so the deed was executed and delivered in pursuance of the subsequent agreement. The plaintiff's reply, *inter alia*, denies that he agreed to give a portion of his lots for the street. The trial resulted in a verdict and judgment for the defendant. The plaintiff brings the case to this court by writ of error.

*Henry Garbanati, pro se. Russell & McCloskey, for defendant in error.*

ELLIOTT, J., (after stating the facts as above.) From the record before us it does not appear that any objection was made in the district court to the sufficiency of the pleadings by demurrer or otherwise; nor is any such objection interposed in this court. The assignments of error relate to the evidence and instructions of the court. The bill of exceptions is evidently imperfect. It does not purport to contain all the evidence, either oral or documentary. No errors in relation to the admission or exclusion of testimony appear in the record. Neither the written contract to convey nor the deed of warranty states the length or breadth of the lots, nor the quantity of land they contain. The contract describes the lots with reference to a particular survey, stakes, and platting; the deed describes them with reference to a particular map. No mere oral representation which may have been made at the time of executing either of the writings, as to the size of the lots, unless of such a character as to amount to a fraud, was competent evidence to charge defendant with liability in the action, even if the lots actually conveyed did not contain the full amount of land orally represented; and, in the absence of fraud, the purchaser, as well as the seller, was bound by the description referred to in the written contract, except as the same may have been changed by the subsequent agreement as alleged. 1 Greenl. Ev. § 275; 3 Washb. Real Prop. p. 401 et seq.; Cabot v. Christie, 42 Vt. 121; Canal Co. v. Emmett, 9 Paige, 168. By certain requests to instruct the jury the plaintiff sought to present the question whether defendant could prove the agreement averred in his

answer in reference to taking a portion of plaintiff's lots for the street by evidence not in writing. The answer does not and need not disclose whether the alleged agreement was in writing or by parol. It is unnecessary, therefore, to determine whether or not the statute of frauds is applicable to the alleged agreement in this case; for the statute furnishes a rule of evidence, not of pleading, and the record does not purport to contain all the evidence. Tucker v. Edwards, 7 Colo. 209, 3 Pac. Rep. 233. Plaintiff's remaining requests to charge were either unnecessary, by reason of the matters contained in the charge as given, or were improper under the issues as framed. It is impossible to determine to what portion of the charge, as given, the assignments of error relate. From the whole charge, however, the case seems to have been fairly submitted to the jury upon the issues as framed by the parties. Among other matters, the trial court correctly charged the jury to the effect that the written contract must control as to the land agreed to be conveyed; and that, in case of a variance between the plat and the stakes, the latter must control, inasmuch as plaintiff had admitted that he examined the stakes before purchasing. The court further charged the jury, in substance, that if they should find from the evidence that a portion of the premises included in the contract to convey was not included in the deed as executed, then plaintiff was entitled to damages for the loss of the premises not thus included in the deed, unless they should also find from the evidence that he subsequently agreed with defendant or his agent to surrender a portion of said premises for the street which was afterwards laid out; but that, if plaintiff did subsequently agree to surrender such portion for the street, then he could not recover. As far as we can judge from the evidence in the record, there appears to be no reason for disturbing the verdict. The judgment of the district court is affirmed.

HAYT, J., having presided at the trial in the court below, took no part in the consideration of this cause.

(5 N. M. 487)

LYNCH *et al.* v. GRAYSON *et al.*

(Supreme Court of New Mexico. Jan. Term, 1891.)

LIVE-STOCK—TEXAS FEVER—ACTION FOR COMMUNICATING DISEASE—PLEADING—EVIDENCE—APPEAL.

1. In New Mexico, when trial by jury is waived, the verdict of the court may be reviewed on appeal the same as a verdict of the jury.

2. It is within the discretion of the court to say whether a witness is competent to testify as an expert.

3. In an action for damages for transporting cattle infected with "Texas fever," and communicating the disease to plaintiffs' cattle, one of the defendants testified that before he brought his cattle from Texas he had heard of the disease, and that it came from the south, but that he did not believe in it. Another defendant testified that he had heard of the disease, and that plaintiff had protested against their transporting the cattle for fear of it. Act Cong. May 29, 1884, recognizes the existence of "Texas fever." *Held*, that defendants were fully informed and warned as to the danger of communicating the disease.

4. To render one liable under Act Cong. May 30, 1884, prohibiting the transporting from one state or territory to another of live-stock infected with a contagious disease, actual knowledge of infection is not necessary; it is sufficient if the locality from which they are shipped is known to be infected.

5. Under this act it is immaterial where the disease was communicated.

6. On a trial by the court admission of incompetent evidence is not ground for reversal if it does not appear that the court relied on it.

Appeal from district court, Dona Ana county.

This is an action of trespass on the case, brought by plaintiffs and appellees against the defendants and appellants in the district court in and for the county of Dona Ana, to recover damages occasioned to plaintiffs' herd of cattle by the communication to them, as alleged, of a certain contagious disease alleged to be commonly called "Texas cattle fever," by defendants' cattle, whereby it is claimed that a large number of cattle died, and a large number of the remainder thereof became sick and were deteriorated in value, and the plaintiffs were compelled to lay out and expend large sums of money for medicines and for nursing and caring for their said cattle, for all of which they claim damage in the sum of \$20,000. There are two counts in the declaration,—one alleging that the disease was communicated to plaintiffs' cattle in the county of Dona Ana; the other, that the disease was communicated to plaintiffs' cattle in the county of Sierra. In every other respect the two counts are exactly alike. The declaration, in substance, alleges that at the time of the grievances complained of the plaintiffs were in the lawful, quiet, and peaceable possession of certain lands and premises in the county of Sierra, to-wit, a cattle ranch, range, and pasture lands, with certain watering places thereon, suitable for pasturing, grazing, watering, and raising neat cattle and stock, and which were then and there free from any contagion or infection, dangerous, noxious, or fatal to neat cattle or stock; and that they then had, kept, pastured, and grazed on said lands and premises a large number of neat cattle, which were entirely healthy, and free from any contagion or infection, dangerous, noxious, or fatal to neat cattle; and that said cattle were especially free from a certain contagious, noxious, dangerous, infectious, and fatal disease, commonly known as the "Texas cattle fever," all of which the said defendants then and there knew. That the said defendants, while the plaintiffs were in peaceable possession of, and keeping, pasturing, and grazing their cattle upon said lands and premises, wrongfully, negligently, carelessly, and willfully, contriving to injure plaintiffs, against the wishes, protests, and remonstrances of the plaintiffs, turned in upon, drove, watered, herded, pastured, and kept on, said lands and premises, and among and with the said neat cattle of plaintiffs thereon pastured, kept, and grazed, a large number of other neat cattle, to-wit, 1,000 neat cattle, sick, diseased, and then and there infected with a noxious, dangerous, contagious, and fatal disease commonly known as the

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"Texas cattle fever." That said defendants well knew that said neat cattle so turned in upon, driven, watered, herded, pastured, and kept upon said lands and premises had shortly before then been imported and introduced by defendants into said county from a certain place or district in the state of Texas infected with said contagious disease known as the "Texas cattle fever." That said defendants then and there well knew that said cattle were then and there infected with said Texas cattle fever, and had shortly before then been exposed to the infection of Texas cattle fever. That said defendants well knew that said cattle were liable to communicate the said contagious disease to the cattle of the plaintiffs; by reason whereof, and through the carelessness and negligence and willfulness of defendants in the premises, said contagious disease was by the cattle of said defendants communicated to the cattle of said plaintiffs, so that 500 head of plaintiffs' cattle, of the value of \$15,000, became infected, sick, and disordered with said contagious disease; and that 400 thereof, of the value of \$12,000, died thereby; and the rest thereof, to-wit, 100 head, of the value of \$3,000, were rendered worthless to plaintiffs in consequence of said disease so communicated to them; and that plaintiffs wholly lost the use and benefit and profit thereof, and were compelled to pay out large sums of money, to-wit, \$5,000, for medicine, nursing, and care of said cattle so sick and diseased. Wherefore they pray judgment, etc. To which said declaration said defendants pleaded (1) not guilty; (2) a plea traversing all the allegations in the said declaration, upon both of which said pleas issue was joined by said plaintiffs. Said case was tried by the court, a jury being waived by an agreement in writing, at the March term, A. D. 1886, of the district court for the county of Dona Ana. The court found for the plaintiffs generally on the second count of the declaration, refusing to make any special findings, or any findings whatever other than the general finding for plaintiffs on said count, and assessed their damages at \$5,200.

*Catron, Knaebel & Clancy and Elliott & Pickett*, for appellants. *S. B. Newcomb and E. C. Wade*, for appellees.

LEE, J., (after stating the facts as above.) The defendants, in their supplementary brief, submit for our consideration the question: Has this court authority to review on bill of exceptions questions as to the improper admission or rejection of evidence, or the ruling of the court below on matters of law, where the case was submitted to the court for trial without the intervention of a jury? And in their brief cite the case of *Martinton v. Fairbanks*, 112 U. S. 675, 5 Sup. Ct. Rep. 321, in which the court say that prior to the passage of the act of congress of March 3, 1865, "when the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee, by consent of the parties, and no bill of exceptions will lie to his reception or rejection of evidence, nor to his judgment on the law;" citing *Weems v. George*, 13 How. 190, as fully sustaining the proposition. The statute of the territory of New Mex-



leo, in force at the time of the trial, was as follows: "Trial by jury may be waived by the several parties to any issue of fact in the following cases: (1) By suffering default, or by failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk. Comp. Laws N. M. § 2060. By section 4 of the act of congress of March 3, 1865, it is provided that parties may submit the issues of fact in civil cases to be tried and determined by the court without the intervention of a jury. The act continues: "The finding of the court upon the facts, which finding shall be general or special, shall have the same effect as the verdict of the jury. The rulings of the court in the progress of the trial, when excepted to at the time, may be reviewed by the supreme court of the United States upon a writ of error or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the sufficiency of the facts found to support the judgment." Though the act of congress is much more specific and clear as to intent than that of the legislature of this territory, yet, in order to give force and effect to the act of the legislature, we think the court may clearly imply the intent of the legislature to the full extent of the provisions of the act of congress; and in fact we might have come to the same conclusion if that act of congress had not been passed, as was held in *Insurance Co. v. Folsom*, 18 Wall. 249: "That none of these rules are new, as they were established by numerous decisions of this court long before the act of congress in question was enacted." In this view of the question, we have but to consider the act of the legislature, in the light of the decisions of the supreme court of the United States in construing the act of congress referred to, and to apply their rulings under it to this case. At the time this case was tried below, the statutes of New Mexico did not require the judge in cases tried before him to make special findings. He could make either special or general findings, and in this respect it would be in accord with the provisions of the act of congress. Under that act the supreme court held in *Insurance Co. v. Folsom*, supra: "Where a jury is waived, and the issues of fact submitted to the court, the findings could be either special or general, as in cases where issues of fact are tried by a jury; but where the finding is general the parties are concluded by the determination of the court, except where exceptions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even if the findings are general; but the findings of the court of the facts cannot be reviewed in this court on a bill of exceptions, or in any other manner, for the seventh amendment to the constitution of the United States declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'" The only methods known to the common law for the re-examination of the facts found by a jury are either by a new trial granted by the court in which the issues had been tried or by

the award of a *venire facias de novo* by the appellate court for some error of law. And, having decided to give effect to the act of the legislature before referred to, we must hold the finding of the court, where the jury is waived, to be, in effect, the same as the verdict of a jury. Nothing, therefore, is open to re-examination in this case except such of the rulings of the court, made during the progress of the trial, as are duly presented by the bill of exceptions. The weight of evidence and the inferences of fact must be drawn by the court below, as it was the judge of that court, and not the supreme court, that was substituted, by the agreement of the parties, in the stead of the jury; and where a jury is waived, and the case tried by the court, the bill of exceptions brings up nothing for revision but what it would have brought had there been a jury trial. Tested by the considerations already given, and from the fact of the absence of any then existing statute or rule of law requiring the court to make special findings, it is clear that the exceptions of the defendants to the rulings of the court refusing to make special findings, as requested by their counsel, must be overruled. This ruling is directly sustained in *Clark v. Fredericks*, 105 U. S. 4, where, as here, it was assigned as one of the errors, and the court said: "The findings are conclusive as to the facts, and they cover all the issues. Whether the distinct facts set forth in the requests for findings presented by the plaintiffs in error were proven or not we need not inquire. As the court declined to find them, we must presume they were not established by the evidence." To the same effect, see, also, *Tloga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 143.

This brings us to the consideration of the bill of exceptions as to exceptions taken to the rulings of the court, during the progress of the trial, and the errors assigned thereon. In the motion for a new trial the defendants below set up that the judgment is contrary to, and not sustained by, the evidence in the following particular statement of facts: (1) It is not proven that the plaintiffs' cattle died from a contagious or infectious disease, called "Texas cattle fever," or from any infectious or contagious disease whatever. (2) It is not proven that Texas cattle fever exists, and, if it does exist, that it is a contagious and infectious disease. (3) That if the defendants' cattle, at the time of introducing them into New Mexico, and driving them over the road across the land where plaintiffs' cattle ranged, were possessed of or infected with the Texas cattle fever, or any germ thereof. (The evidence clearly shows that the defendants, prior to and at the time of bringing their Texas cattle through the plaintiffs' and onto their own range, had no knowledge whatever that said cattle were infected with any contagious or infectious disease known as "Texas cattle fever," or with any disease.) (4) It is not proven that the defendants had any knowledge whatever that the district or section of country from which they drove their cattle in Texas was infected with the Texas cattle fever, or any germ or principle thereof. (5) It is not proven that the dis-

tract or section of country in Texas where the defendants' cattle were brought from, or any other district or section of country in Texas that may be claimed to be infected with Texas cattle fever, was so infected, and that said cattle were brought from such section or district of country in Texas within a period in which they might directly or indirectly communicate such disease to other cattle. (6) It is proven that the defendants drove their cattle along the public highway, across the land where the plaintiffs were pasturing, and in so doing handled and managed said cattle in as careful, cautious, and prudent a manner as a prudent man would have done in reference to his own property. (7) It is proven that the defendants, in driving said cattle along said highway, across the land where plaintiffs' cattle ranged, prevented plaintiffs' cattle from mixing or mingling with them, so far as it was possible to do. (8) It is proven that the defendants kept their cattle on their own range, so far as it was possible so to do, using reasonable and ordinary care and caution in so doing. (9) It is proven that the defendants used as much or more care and caution in handling their cattle on their range and keeping them there as it was the custom of the country to use in such cases. (10) It is proven that if the defendants had any knowledge that their cattle were infected with any contagious disease the plaintiffs had equal knowledge of that fact. (11) It is proven that the plaintiffs permitted large bodies of their cattle to range on the range of the defendants after the defendants' cattle were brought there in July, 1884, which cattle went back and forth from plaintiffs' range to defendants' range, and carried with them onto the plaintiffs' range portions of defendants' cattle. (12) It is proven that if defendants' cattle communicated any disease to plaintiffs' cattle it was done either from the road which passed over plaintiffs' range or on defendants' range to plaintiffs' cattle, which grazed upon defendants' range, or by defendants' cattle that drifted down into plaintiffs' range; but it is not possible to determine in which manner it was done, if done at all. (13) It is proven that the road over which the defendants drove their cattle through the plaintiff's range passes over public land, and the defendants, in driving said cattle, did not pass over any land owned, possessed, or claimed by the plaintiffs. (14) It is proven that the defendants, in driving their said cattle, kept them on the public highway, and did not permit them to scatter any more than was absolutely necessary to do in driving such cattle. (15) That there is no proof that the plaintiffs owned or possessed or had the right to the possession of any land further than the immediate spots on which their houses and corrals are situated. (16) That there is no legal proof of any title, or claim of title, legal or equitable, or possession, actual or constructive, on the part of the said plaintiffs, of, in, and to any land where the defendants' cattle passed or grazed. (17) That the proofs are indefinite and uncertain as to where the plaintiffs' cattle

contracted their disease. (18) That the proofs are indefinite and uncertain as to the disease from which the plaintiffs' cattle died. (19) It is proven that the plaintiffs did not exercise due care and prudence in managing their own cattle, and in permitting said cattle to range on defendants' land.

It appears to have been the theory of the plaintiffs in error that the general findings in the case include both questions of law and of fact, and that by excepting to the general findings they excepted to such conclusions of law as the general findings imply; but we have given to the findings of the court the full effect of a general verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may have been saved by some exception which may have been taken to the ruling of the court upon some question of law. *Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. Rep. 321. It is not the intention or policy of the law in the United States that an appellate court should reverse a case for an error of fact; and the congress of the United States, by a direct provision in the twenty-second section of the judiciary act, (1 St. at Large, 85,) positively prohibits the supreme court of the United States from reversing any case "for error in fact." And, say the supreme court of the United States in *Martinton v. Fairbanks*, supra: "Upon the issues of fact raised by the pleadings in this case there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding; but, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011, Rev. St. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff he should have presented that question by a request for a definite ruling upon that point." We think, taking all the grounds set forth in the motion for a new trial, that the attention of the court was called to the sufficiency of the evidence in such a manner as to be a direct request for a definite ruling thereon; and this necessitates an examination of the evidence in order to determine whether it is sufficient to support the findings for the plaintiff, which testimony must be considered in connection with an act of congress which, at the time of the alleged shipment of the cattle from the state of Texas to the territory of New Mexico, was enforced, an extract of which is as follows: "Sec. 6. \* \* \* Nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live-stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot and transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the district into any state, any live-stock, knowing them to be affected with any contagious, infectious, or communicable

disease, and especially the disease known as 'pleuro-pneumonia:' provided that the so-called 'splenetic' or 'Texas fever' shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six, and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto." 23, U. S. St. at Large, 32, approved May 23, 1884. The penalty for the violation of the above provision is a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both fine and imprisonment. There is no pretension that the said cattle were being transported for slaughter, or that they were unloaded only to be fed. If the cattle were affected with any contagious, infectious, or communicable disease, and the defendants were aware of that fact at or during the time of the shipment, then such transportation was in violation of the statute. Congress, by the above act, fully recognizes the existence of a disease called "splenetic" or "Texas" fever, a disease of a contagious, infectious, or communicable character, to which cattle are subject; and in legal effect the act conveys direct information to the defendants of the existence of the so-called disease. And whether the cattle shipped by the said defendant from San Antonio, Tex., to Hatch Station, in New Mexico, and driven across the plaintiffs' range to that of the defendants, in said territory, during the month of July, 1884, were infected with a contagious, infectious, or communicable disease, and, if so infected, whether the defendants knew, or had any reason to know of such infection, must be determined from all the evidence and circumstances in the case.

As is usually the case, the testimony is conflicting where experts are examined as to matters of professional opinion; and, while such testimony is admissible, it is not always satisfactory. It is frequently based upon a theory which is incorrect in its premises, and which, therefore, must fall when it comes in contact with more enlightened investigation. For that reason that which may have been regarded as an established fact one day may be overthrown and regarded as preposterous at another. For instance, some creditable historian computes the number of persons executed as witches during the Christian epoch at nine millions; and throughout the middle ages it is doubted if one person could be found who doubted the reality of witchcraft. Though the delusion continued in strong force down to the beginning of the present century, yet to-day a belief in it would be admitted on the question of a person's sanity. Dr. Don-alson, an expert witness in the celebrated trial of Mrs. Elizabeth Wharton for the murder, by poisoning, of Gen. W. S. Ketchum, tried at Annapolis, Md., in 1872, said: "The medical science is progressive, and we have no security that all the theories now in vogue will not be upset in thirty years." Pamphlet of Trial, p. 58. Yet the uncertainty that may attach to the theories of experts cannot impair or

do away with the necessity of that class of testimony on questions of science, skill, trade, and the like. Persons conversant with the subject-matter, termed "experts," are permitted to give their opinion in evidence whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. Persons that have devoted their lives to the scientific investigation of the subject are better prepared to give an opinion than those persons who have given the subject no investigation; and thus experts are allowed to give an opinion, not on the case in question, unless they have heard all the evidence, but on the state of facts hypothetically stated, and such opinions must of necessity be received as evidence, and it is about the only way facts of a scientific character can be proved. It would not be easy to overrate the value of evidence given in many difficult and delicate inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade. But it is impossible to measure the integrity of every witness, or to determine the exact amount of skill which a person following a particular science, art, or trade may possess. The court is under the necessity of listening to the testimony of all such persons, and it is sometimes very difficult for the court to determine whether their opinions should be admitted as evidence. Perhaps the rule as established in France would be the better. There experts are officially delegated by the court to inquire into facts and report upon them, and they stand on much higher footing than do either ordinary or scientific witnesses with us.

Objections were made in this case to portions of the testimony of certain witnesses for the reason that proper predicate had not been shown as to their skill as experts. What standard of skill they claim should be shown is not set forth, and the standards to be gathered from the adjudicated cases are almost as varied as the cases themselves; and no definite rule, that we can find, is, or, as we think, can be, laid down. Thus it is said in *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 151: "An 'expert' as the word imports, is one having had experience. No clearly-defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question asked. While undoubtedly it must appear that the witness has enjoyed some means of special knowledge or experience, yet no rule can be laid down, in the nature of things, as to the extent of it." The same court, in *Sorg v. First German, etc., Congregation*, Id. 161, held: "The preliminary question of fact as to whether a witness is an expert qualified to pronounce an opinion must, in a great measure, be confided to the discretion of the court below trying the case, and we will not reverse either on account of the admission or rejection of such evidence, unless in a clear and strong case." In *State v. Wood*, 53 N. H. 484, it was held that a physician may testify as an expert to his opinion formed by reading and study

alone. Also the same court, in an action for communicating foot-rot to sheep, permitted the editor of a stock journal, who had read extensively on the subject, to testify as an expert. *Dole v. Johnson*, 50 N. H. 452: "An expert may testify to general facts which are the result of general knowledge or scientific skill." In *Emerson v. Gas-Light Co.*, 6 Allen, 148, and in *Morse v. Crawford*, 17 Vt. 499, it was held that a witness, not a professional man, may give his opinion in evidence in connection with facts upon which it is founded, and as derived from them. The supreme court of the United States has extended the rule far beyond a point that we would be willing to have gone, had not a court of such eminent authority so ruled. In the case of *Spring Co. v. Edgar*, 99 U. S. 645,—a suit for damages for injuries inflicted on a party from an attack by a pet deer in a park,—a witness for the plaintiff, introduced as an expert, testified that he was a dentist, and resided in Albany; that he was to some extent acquainted with the habits and nature of the deer, and had hunted them; that in his opinion the buck deer are not generally considered as dangerous, but that in the fall they are more dangerous than at other seasons. Another expert testified that he was a taxidermist, and had made natural history a study, and had read the standard authors in regard to the general characteristics of deer; that from his reading he was of opinion that the male deer, after they had attained their growth and become matured, are dangerous; and that during the rutting season, from the middle of September to the middle of December, the buck deer are generally vicious. The defendant objected to all of the testimony of the experts, on the ground that the witnesses had not shown themselves competent as experts, and that it was improper, immaterial, and incompetent; but the court overruled the objection, and the defendant excepted. The supreme court, sustaining the ruling, say: "Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined, in the first place, by the court; and the rule is that, if the court admits the testimony, then it is for the jury to decide whether any, and, if any, what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous;" and cites in support thereof *Tow-Boat Co. v. Starrs*, 69 Pa. St. 36; *Page v. Parker*, 40 N. H. 48; *Tucker v. Railroad Co.*, 118 Mass. 546.

The substantial portion of the experts' testimony objected to is, first, that of Prof. Salmon, professor of veterinary medicine, and for years chief of the United States bureau of animal industry, who testified: "Healthy cattle cannot disseminate a contagion of which they are not infected or possessed of; but they may be infected of a contagion, and disseminate and communicate it, though they themselves are insusceptible to its effects, and show no symptoms of the disease; in

other words, they may carry contagion without being visibly affected by it. To illustrate this: A person who has been vaccinated may go into a small-pox hospital without contracting the disease, and, coming away, he might carry the contagion, and infect non-vaccinated persons." And also that of Prof. Detmar, a veterinary surgeon, for many years in the employment of the United States in capacity of veterinarian in connection with the agricultural department, whose testimony fully corroborates that of Prof. Salmon. They refer, in illustration of their testimony, to the reports of investigations made by them to the bureau of animal industry while under the employment of the government; and, briefly, their testimony tends to establish the following facts: (1) That a disease called "splenetic" or "Texas" fever does exist. (2) That it is caused from a diseased germ of a parasite of fungus nature, growing or attached to grasses in tide-water sections of the Southern states. (3) Where these germs grow, or are reproduced from year to year, are called the "infected districts." (4) While cattle raised in the permanently infected districts become inured to the disease, and are not thereby violently attacked by it themselves, they nevertheless carry the disease germs in their systems, and deposit them with their excrement, and thus infect the trails and pastures over which they pass; and that this is the only way they communicate or impart the disease. (5) That cattle from non-infected districts, sick with the fever, do not impart the disease to other stock, nor do they infect the lands over which they graze. (6) Cattle from the infected districts expel the disease germs in a certain length of time, varying from 70 to 90 days, after leaving the infected districts; and after that they are incapable of infecting the roads, pastures, or lands over which they pass. (7) Frost destroys the disease germ, and puts a stop to its infection. (8) That the greater part of Texas, including the southern part, (from which the defendant's cattle were shipped,) is in the infected district. (9) The diagnosis of the disease called "splenetic" or "Texas" fever by the experts would appear to be the same and identical with that detailed by the witnesses that attended to and doctored the plaintiffs' sick cattle. If the showing on the part of the witnesses in the deer case, above referred to, is all that is required, the question is not so much as to who will be allowed to testify and give their opinions as experts, but rather who will not be; at any rate, there can be no question of the correctness of the admission of the testimony of Profs. Salmon, Detmar, and other experts in the case.

It is contended by the defendants that, even if such a disease exists, and if the said cattle were infected with it, yet there is no evidence that the defendants had any knowledge of the infection, and therefore are not liable. One of the defendants, William Hopewell, testified: "I heard of Texas cattle fever. I heard before we brought these cattle from Texas. Heard of a large number of cattle dying on the Membras river. Heard that Texas cat-

the fever came from the southern country,"—but added: "I don't believe there is any such thing as Texas cattle fever." There does not appear to have been any lack of knowledge on his part, but he appears to have relied on his disbelief of the existence of such a disease. His opinion, in that respect, was immaterial. The statute had recognized the existence of a so-called disease as an infectious and communicable disease, and he was bound to take notice of it, and observe it. Nathan Grayson, another defendant, testified that he had heard of Texas cattle fever; and also that he had a talk with George Lynch, one of the plaintiffs, before the cattle were brought, and that Lynch protested against his unloading his cattle at Hatch Station, for the reason that their (Lynch's) cattle might contract some disease from them. Considering this testimony with that on the part of the plaintiffs in the same connection, this defendant must be regarded as having been fully informed and warned as to the danger of communicating said disease. It would not be required, on the part of the plaintiffs, to prove that the defendants knew as an absolute fact that their cattle, when being shipped, were carrying the disease germs with them; but, if they were shipping from a locality known to be infected and liable to communicate the disease, they would come under the provisions of the statute before referred to, and it would devolve upon them to take such precautionary steps as would prevent their cattle from communicating any infectious or communicable disease to other cattle; and in such case it would be immaterial where such disease was communicated, whether it was on the public commons, in the public roads, or on the lands of the plaintiffs. Taking this view of the case disposes of the principal grounds set forth in the defendants' motion for a new trial, and makes it possible for this court to find that the evidence in the case sustains the general findings of the court below.

The defendant took exceptions to some 50 different rulings of the court in the progress of the trial of the case on the admission in evidence by the court of certain statements or testimony of witnesses, and to the admission in evidence of certain written documents on the ground that they were improper, incompetent, and immaterial. The rule in cases where the trial is by the court is entirely different from that where the trial is by a jury. Cases are often reversed where improper or incompetent evidence has been admitted before a jury, for the reason that they may have been misled by it, but such a reason does not exist where the trial was by the court. And in a trial by a court "the admission of incompetent evidence at a trial below is no cause for reversal, if it could not possibly have prejudiced the other party." *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. Rep. 990. Thus it has been held: The fact that incompetent testimony has been admitted is not sufficient ground for reversing the judgment where the cause has been tried by the court without a

jury. "In such case the appellate court will give no weight to such testimony in the determination of the appeal, but will not reverse the judgment because it was admitted." *Frisk v. Reigelman*, (Wis.) 43 N. W. Rep. 1119. Also in the supreme court of California, (*White v. White*): "When the court tries the case this court never reverses for the admission of irrelevant evidence, unless it appears that the court in making the decision relied on such irrelevant evidence." 23 Pac. Rep. 284. "A finding of fact in a case at law tried without a jury is conclusive where there is any evidence to found it on, even though the evidence is conflicting." *Hathaway v. Bank*, 134 U. S. 494, 10 Sup. Ct. Rep. 608; *Zanz v. Stover*, 2 N. M. 29; *Kundinger v. Railway Co.*, 51 Mich. 185, 16 N. W. Rep. 330. The principle as expressed in the preceding cases is fully recognized and authoritatively established as the law by the supreme court of the United States. In *Field v. U. S.*, 9 Pet. 182, it was held that in a cause where the trial by jury had been waived the objection to the admission of evidence was not properly the subject of a bill of exceptions, and the reason given is that, if the evidence was improperly admitted, the court would reject it, and proceed to decide the cause as if it were not in the record. And it has been recognized in several subsequent cases. In *Arthurs v. Hart*, 17 How. 12, speaking of the rule, the court says: "It certainly is so as far as the evidence improperly admitted bears upon a question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision cannot be reviewed on a writ of error. The error in this aspect would be unimportant, because not the subject of an exception, the question involved being one of fact. If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and a proper subject of a writ of error." In this case it does not appear that the court relied on such evidence, and the presumptions are, if any was admitted, it was not considered by the court in making its findings. A different rule would apply where the exceptions were to the rejection of competent and proper testimony; but the exceptions in this case, in every instance, are to the reception of evidence over objection, and therefore come directly under the rule laid down in the case cited above. Therefore the further examination of these exceptions becomes immaterial. Finding no substantial error sufficient to reverse the case, the judgment of the lower court will be affirmed.

O'BRIEN, LEEDS, and McFIE, JJ., concur.

(7 Utah, 143)

PERRY v. CITY COUNCIL OF SALT LAKE CITY.

(Supreme Court of Utah. Feb. 19, 1891.)

INTOXICATING LIQUORS—LICENSE—DISCRETION IN GRANTING.

Comp. Laws Utah 1888, § 1755, subd. 40, providing that the council of Salt Lake City shall

have power "to license, regulate, and tax" the sale of intoxicating liquors, vests in the council a legal discretion, and not an arbitrary power; and it cannot refuse a license to an applicant who has complied with the law governing applications for a license to sell intoxicating liquors. Per MINER, J., dissenting.

Application for *mandamus*. For majority opinion, see ante, 739.

The power of the council of Salt Lake City in respect to licensing the sale of intoxicating liquors was conferred by 1 Comp. Laws Utah 1888. Section 1755 provides that the city council shall have the power "to license, regulate, and tax" the selling of intoxicating liquors.

MINER, J. I am unable to fully concur with the majority of the court in this case. The relator appears to have complied with all the requirements of the statutes and ordinances, and it cannot be claimed that the place at which he proposes to carry on the business is within the prohibition of the statute or ordinances. The question arises, can the city council, under the power to regulate (conferred by the charter) impose additional restrictions? If so, how is that power to be exercised? Must it be by ordinance, so that the requirements prescribed, whatever they may be, will operate uniformly upon all alike under the same circumstances, thus precluding partiality and favoritism; or may the council, notwithstanding the compliance by the applicant with all the provisions of the statute and ordinances of the city upon the subject, arbitrarily grant or refuse each particular license as the same is applied for, and that, too, without giving any reason for its action? It seems to me that the regulation should properly be by an ordinance. If the statute conferred upon the council any such absolute power, then, as relator's counsel contend, are they admirably calculated to enable the members of the city council to reward their friends and punish their enemies, but they furnish no safeguards for equality or honesty of official action. Some members may vote against the application because in their honest judgment it would be detrimental to the best interests of the city to grant it; another, because he believes there are already saloons too many; another, because the applicant is a personal enemy of his; another, because the applicant is not a member of his religious or political faith; another, because he does not think it right to sell liquor, or license a wrong; another, because he wants to prohibit the sale. Thus a bare majority may be secured against the issuance of the license to one man and grant it to another. It is claimed that in this case seven councilmen voted for and seven against the petition, the mayor giving the casting vote against it. Neither the council, as a body, nor any individual member thereof voting against the application, gave or could be induced to give any reason for his vote or action; and why this license is refused this court is still in ignorance, except by the return, which gives no reason for individual or corporate action.

The sale of liquor has always been a lawful business in this city. It has never been prohibited by statute, and the council never had the power to prohibit it. By the charter of 1860 it had power to license, regulate, and restrain it. See Comp. Laws 1876, pp. 699-703, § 24. And so it remained until January 20, 1882, when the charter was amended. By the amendment, power was given to the city council to license, tax, and regulate; the power to restrain being omitted. This leaves no power to prohibit. See Laws 1882, p. 2. The defense rests entirely upon the supposed right of the council, in its discretion, to grant or withhold license as it may see fit. All men are equal before the law; and if one man, on complying with the statutory provisions, may be licensed to engage in the business of selling liquors, every other man in like condition, on complying in like manner with the conditions imposed by law, has an equal right to a similar license. Legislation in a free republican form of government should mete out equal rights to all law-abiding citizens; and it is alike against the spirit and form of our government and institutions to grant any special privileges to one individual, and deny it to another who stands on equal footing with himself; and this, in my judgment, cannot be accomplished under the guise of "discretion." The "discretion" vested by the legislature in the city council is not an arbitrary power, to be exercised as the caprice or prejudices of that body may dictate, but a legal discretion, whereby the council is to determine whether or not the applicant has substantially complied with the provisions of law. The common council of a city must be governed by the same rules of law in their action upon the granting of these licenses as other bodies who are called upon by statute to pass upon the qualifications of others to engage in any business or calling requiring special conditions preliminary to its exercise, and they are bound in all cases to act fairly, and to treat each application upon its own merits, impartially. In the present case it seems there is one saloon in the neighborhood already licensed, and the common council think this sufficient for the needs of the neighborhood. If this reasoning were sound, the common council might, in their "discretion," grant to any favored individual an exclusive monopoly of the business in any neighborhood, or even in the entire city. Could a more fruitful field of favoritism be possibly devised? It is certainly not in accordance with my views as to equality before the law. That the discretion vested in the common council is not an arbitrary power, but a legal discretion, to be exercised equally towards all in like condition, I might cite numberless authorities. I call attention, however, to *Ex parte Candee*, 48 Ala. 386; *State v. County Court*, 41 Mo. 221-227; *Mixer v. Supervisors*, 26 Mich. 422; *Amperse v. Kalamazoo*, 59 Mich. 78, 26 N. W. Rep. 222; *Potter v. Homer*, 59 Mich. 8, 26 N. W. Rep. 208; *Zanone v. Mound City*, 103 Ill. 532; *Golden v. Bingham*, 61 Ind. 198; 11 Amer. & Eng. Enc. Law, 641. It is true that the charter of the city allows the council power to

license, regulate, and tax this business, which is greater authority than merely to approve or reject the bonds; but the council have not decided that the place or neighborhood was improper wherein to carry on the traffic, nor that the relator was disqualified in any manner, but have merely said, in effect, that in that neighborhood one man may engage in the business, but another may not. This is not a question of prohibiting the traffic in that locality, but of prohibiting a particular individual, against whom no disqualification is alleged, and who has complied with the law, from engaging in the business, and at the same time permitting another, under no worse legal circumstances, to do so. This cannot, in my view, be deemed within the discretionary powers of the council. I think the council had no right to withhold the license, and that the *mandamus* should issue as prayed.

(21 Nev. 107)

STATE V. DEPOISTER. (No. 1,324.)

(Supreme Court of Nevada. Feb. 17, 1891.)

RAPE — COMPLAINT — EVIDENCE AT PRELIMINARY HEARING — PRIVILEGED COMMUNICATIONS — VERDICT.

1. Where the complaint charging a crime is signed by complainant's mark, and the certificate of the committing magistrate that complainant subscribed and swore to the same is attached, attestation by a subscribing witness is not necessary.

2. On trial of an indictment perjury testimony of the committing magistrate, and of the clerk who wrote the testimony at the preliminary examination, is admissible to show that the depositions were in accordance with Gen. St. Nev. § 4036, requiring witnesses to be examined in defendant's presence, and an opportunity given him to cross-examine, and providing that the testimony may be reduced to writing, and admitted at the trial, if it has been read over to the witness, and corrected by him, and been subscribed by him and attested by the magistrate.

3. A signature to such depositions by making a mark may be attested by the magistrate as subscribing witness, and it makes no difference if his attestation is written below his jurat.

4. Gen. St. Nev. § 3406, provides that a physician shall not be examined, without the patient's consent, as to information acquired in attending the patient. *Held*, that on indictment for rape of a child of seven the privilege may be waived by the implied consent of her parents, and the fact that the prosecution was instituted by them, who, with the child, were the principal witnesses, and testified to the nature of the complaint for which the physician prescribed, warrants such implication. BIGELOW, J., dissenting.

5. Under Gen. St. Nev. § 4469, providing that no departure from or error in the proceedings shall render the same invalid unless prejudicial to defendant, a verdict of guilty of rape is not invalidated because the clerk, when ordered to record it, filed it instead, and read from it to the jury, asking if it was their verdict.

6. Under Gen. St. Nev. § 4244, providing that "proof of actual penetration into the body is sufficient to sustain an indictment for rape," the slightest proof will justify submitting the question to the jury, and such proof can be inferred from circumstances. BIGELOW, J., dissenting.

Appeal from district court, Humboldt county; A. L. FITZGERALD, Judge.

M. S. Bonfield, for appellant. The Attorney General, for the State.

MURPHY, J. The defendant was indicted, tried, and convicted for the crime

of rape upon the person of Bertha May Sadler, of the age of about seven years. The appellant contends that the judgment should be set aside, and a new trial granted, on the following grounds: That the court erred in permitting the prosecuting attorney to read to the jury the complaint upon which the warrant of arrest was issued, and the depositions of Bertha May Sadler, and Lou Alexander. Because no complaint was laid before the magistrate of the commission of a public offense; the magistrate did not examine, on oath, the complainant or prosecutor, nor any witness, and did not require the deposition of any witness to be reduced to writing and subscribed by the witness, or otherwise; it does not appear that any such examination was made or any such deposition taken; the alleged complaint is not signed by the complainant; his alleged mark is not witnessed as required by law, and is not witnessed at all. The complaint is sufficient in form and substance, — it states the title of the court, the name of the party accused, and the nature of the offense charged in ordinary and concise language, and demands the issuing of a warrant for the arrest of the party named therein. The other objection to the complaint is that the party signing his name to the complaint, by making his mark, leaving the name itself to be written by another hand, must have his signature attested by a subscribing witness. The complaint is made in the presence of and filed with the magistrate for his information, and if he is satisfied that a crime has been committed it is his duty to issue a warrant for the arrest of the party named therein, and to notify the accused of the nature of the charge, and the name of the party making the same. The complaint appears to have been made out by or in the presence of the magistrate, the complainant signing the same with his mark, some one else writing the full name of complainant. He then swore to the same, and the magistrate certifies that the same was subscribed and sworn to before him, etc. We think this is all that the law requires. The case of *Com. v. Sullivan*, 14 Gray, 98, is directly in point, wherein the court said: "But it by no means follows that the signature is not valid without such attesting witness, \* \* \* and in reference to complaints to a justice of the peace, presented by the complainant personally, and accompanied by taking the usual oath to the complaint before such justice, that the same is true, there can be no such necessity. The party virtually acknowledges the complaint as duly signed by him. This must clearly obviate all necessity of further proof of the signature." See, also, *Com. v. Quin*, 5 Gray, 478. The magistrate is not compelled to examine other witnesses than the complainant before issuing his warrant of arrest. All that the statute requires is that the magistrate should be satisfied that a crime had been committed within his jurisdiction.

The objections urged against the reading of the depositions of Bertha May Sadler and Lou Alexander to the jury are as follows: That they were irrelevant, im-



material, and incompetent, and that the proper foundation had not been laid for their introduction, and particularly in this: It does not appear that at the examination witness Bertha was examined in the presence of the defendant, or that he had the privilege of cross-examination; it does not appear that the testimony of said witness was read over to her, and corrected, or that she was given opportunity to correct the same as she might desire; it does not appear that said Bertha subscribed her alleged deposition, or that she refused to sign it. No reason is assigned for such refusal, if any. The alleged mark of said Bertha to said deposition is not witnessed as required by law, or at all. Said alleged deposition is not duly authenticated, is not authenticated at all. Neither of said papers have the slightest ear-mark of a preliminary examination, or of having any connection therewith. They are not certified to be, nor do they purport to be, any part or have any connection with a preliminary examination. The objections to the introduction of the deposition are without any real merit. Section, 4036, Gen. St. reads: "The witnesses shall be examined in the presence of the defendant, and may be cross-examined in his behalf. If either party so desire, the examination shall be by interrogatories, direct and cross: provided, by consent of parties, the testimony may be reduced to writing in narrative form. The testimony so taken may be used by either party on the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or when his personal attendance cannot be had in court. When the testimony of each witness is all taken, the same shall be read over to the witness, and corrected, as may be desired, and then subscribed by the witness; or, if he refuses to sign it, the fact of such refusal, and any reason assigned therefor, must be stated, and the same shall be tested by the magistrate. And such testimony, so reduced to writing, and authenticated according to the provisions of this section, shall be filed by the examining magistrate with the clerk of the district court of his county. \* \* \* The caption of said deposition is as follows: "In the justice court, Union township, Humboldt county, Nev. The State of Nevada, Plaintiff, vs. Samuel G. Depoister, Defendant. Bertha May Sadler, being duly sworn, deposes and says." Then follows the testimony given by question and answer, concluding with the signature and jurat, as follows: "BERTHA MAY SADLER, her X mark. Subscribed and sworn to before me this 6th day of Aug., 1889. E. S. ARCHER, J. P., and witness to the above signature." The court, over the objections of the defendant, permitted the prosecuting attorney to place on the stand E. S. Archer, the committing magistrate, and W. C. Owens, who wrote down the testimony at the preliminary examination, and they both testified to the fact that the complaint was read over to the defendant; that the depositions were taken and reduced to writing in the presence of the defendant; and that he was given an opportunity to

cross-examine the witness Bertha May Sadler; that the testimony was read over to her, and she was given an opportunity to correct the same; and that she signed the same by making her mark in the presence of the witnesses, and the same is attested by the committing magistrate as a witness to her signature, and the mere fact that the magistrate wrote the word, "signature," instead of "mark," or that he has written the words "witness to the above signature" below the jurat, is a mere informality. *Webb v. State*, 21 Ind. 237. The same is true as to the deposition of Lou Alexander, with the addition that it does appear from the record that the defendant did cross-examine this witness while on the witness stand at the preliminary examination. At common law the certificate of a public officer was not receivable in evidence. The provision making the certificate of the justice admissible is founded upon the reason of statutes authorizing proof of public documents by copies certified by the officer having their custody. "The reason of admitting a copy to be evidence is the inconvenience to the public of removing records which may be wanted in two places at the same time." 1 Starkie, Ev. \*251. And so it may be said, as one of the reasons for making the certificate of the justice admissible, that inconvenience to the public would result by compelling his attendance as a witness at a time when the duties of his office required his attention. The purpose of the statute is to afford a reasonable and convenient method of proof. The statute does not in terms exclude other evidence, and we see no reason why the common-law method of proof should not be admitted. Statutes containing provisions similar to those of section 4036 have existed for the last 300 years in England, and have been generally adopted by the states of this Union, and we are not aware that the established rules of decision of any court construe them as abolishing the common-law mode of proof. In the case of *People v. Carty*, 77 Cal. 214, 19 Pac. Rep. 491, upon the trial, the prosecution offered in evidence the short-hand reporter's transcript of his notes of the testimony taken before the committing magistrate. The certificate attached to this transcript was to the effect that it was a "full, true, and correct transcript of the short-hand notes taken by me herein." One of the objections on the trial was that the document was not properly certified. The reporter was then permitted to be examined as a witness, and he testified "that the document was a correct transcript of the notes taken by him of the testimony and proceedings at the examination before the magistrate." The supreme court held that the document was not admissible, not because the reporter was sworn as a witness to correct his certificate, but because, after he was placed upon the stand, he did not refresh his memory from the writing, and then testify as to what occurred at the examination, and that the notes as taken by him at such examination were correct. He having merely testified as to the correctness of the transcribing, this was not

sufficient. In the case of *People v. Dowdigan*, 67 Mich. 96, 38 N. W. Rep. 920, where the reading of a deposition to the jury was objected to on the grounds that the same had not been read over to the subscribing witness, the defendant was permitted to place the justice on the stand as a witness to try and establish the fact, but he could not swear whether it had been read over to her or not, yet the deposition was admitted. In England it is the custom that when a party signs his name to a deposition taken before a magistrate in a criminal prosecution the proof of the signature may be given by any one that was present at the time of such examination; but when the party signs the deposition with his mark, it must be proved that the deposition was correctly read to the witness, which proof must be made by the magistrate or his clerk. *Rex v. Chappel*, 1 Moody & R. 395. In the case of *State v. Jones*, 7 Nev. 415, the court said: "When a deposition is offered, it is true the person offering it should accompany it with proof that it was taken in conformity with the statute; and, if the proper objection be made, it should not be admitted until such preliminary proof is made;" meaning thereby that if the committing magistrate had not attached his certificate to the deposition, the state could have the same corrected, or the prosecution might place witnesses upon the stand to show that the law had been complied with. In Texas, where the statute in relation to the taking of depositions on preliminary examinations is similar to our own, in the case of *Clark v. State*, the supreme court said: "In our opinion there is no merit in defendant's third and fourth bills of exceptions to the reproduction of the testimony of C. W. Churchwell, which had been reduced to writing upon the examining trial, the witness having subsequently died. The justice of the peace was properly permitted to state the circumstances attending upon the taking of the deceased witness' testimony, and to identify the same." 28 Tex. App. 195, 12 S. W. Rep. 731. In the case of *Farnsworth Co. v. Rand*, 65 Me. 21, the defendant had levied on property of the plaintiff. The statute of Maine required that the collector should take the oath of a collector. There was no record evidence that the defendant had taken such oath, although he had been sworn in as a constable. The court held that in the absence of record evidence parol proof was competent to prove that the oath had been taken by defendant before making the levy. In the case of *People v. Moore*, 15 Wend. 421, the justice of the peace was permitted to go upon the stand and testify as to statements made in his court, which statements had been reduced to writing. The defendant then offered to introduce the deposition taken on the examination. The district attorney objected to its introduction, for the reason that it did not appear to have been correctly taken. The justice testified that the deposition was taken in pursuance of the statute, but whether it was read to the witness or not he did not recollect. The objection was sustained. On appeal to the su-

preme court the judgment was reversed, the court saying: "When the justice swears that the deposition was taken in pursuance of the statute, the presumption is that it was regularly and properly taken. The law presumes every public officer does his duty until the contrary appears. The deposition must therefore be considered properly taken until some irregularity is shown." No particular form is prescribed by law for the certificate of the magistrate to testimony taken before him on a preliminary examination, and a substantial compliance with section 4036 is all that is required, and an error or omission in the certificate can be cured by parol testimony. *Draper v. Snow*, 20 N. Y. 332.

Objection is made to the admission in evidence of the testimony of Dr. Hanson, the physician who attended the child during illness consequent upon the assault. The statute provides that "a licensed physician or surgeon shall not, without the consent of the patient, be examined as a witness as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." Section 3406, Gen. St. Nev. It is conceded, as shown by the record, that either the child or her mother could have given the consent required by the statute. The consent may either be express or implied. Upon this question the supreme court of the United States, in *Blackburn v. Crawford*, 3 Wall. 194, said: "We think it [the consent] as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony." \* \* \* A different result would involve a perversion of the rule inconsistent with its object and in direct conflict with the reason upon which it is founded." Applying these principles, the facts of this case establish consent by implication. In the present case the prosecution was inaugurated by the parents of the child. Her step-father laid the complaint before the justice. Her mother and herself were the principal witnesses. The mother testified, among other things, to the statements of the child charging the defendant with the commission of the offense, and to her physical condition, which led to the calling of the physician. Her testimony was of a nature to make public all matters bearing upon the injuries and sufferings of the child as affected by the defendant's acts. It practically disclosed the general nature of the complaint for which the physician prescribed. If any injury could be inflicted by testimony of this nature it was done by the mother's testimony, and, the facts having once been exposed, it would seem that there was no reason why the physician's knowledge should be treated as confidential. At all events, the facts stated show a disposition on the part of the step-father and the mother to prosecute the defendant, and in doing so to waive the protection which the law gave to the confidential information acquired by the physician. It is true, defendant's mother testified that the mother of the child declared

she would not again prosecute the defendant; but no other fact was disclosed tending to show such a disposition. The testimony of the physician was introduced in evidence by the prosecution before the defendant's mother testified in his behalf. The court, therefore, knew nothing of the alleged disinclination to prosecute when the physician's testimony was admitted, and no motion to strike it out was ever made. In the case of *McKinney v. Railroad Co.*, 104 N. Y. 354, 10 N. E. Rep. 544, on the first trial of the case, the plaintiff called the physician who had attended her and treated her for the injuries received, and he testified fully as to her injuries. On the second trial, after the plaintiff had closed her case, not having placed the physician on the stand as a witness in her behalf, the defendant called on Chapman, a physician, and proposed to prove by him the injuries claimed to have been suffered by the plaintiff in consequence of the collision in question, as learned by him upon a personal examination of the plaintiff when visiting her as a patient. "The plaintiff objected, upon the grounds that the information acquired by a physician while attending a patient was privileged, and could not, therefore, be admitted against the plaintiff without her consent." "This objection was sustained, the evidence excluded, and the defendant excepted." *RUGER, C. J.*, speaking for the court, said: "Such evidence is made incompetent at the option of the patient only, and in case she elects at any time to remove the seal from the lips of the witness, the evidence may properly be received. \* \* \* The patient cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage, and wield when it does not. After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the statute. The consent having been once given and acted upon cannot be recalled, and the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect. \* \* \* The object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such cases." The judgment was reversed. *Johnson v. Johnson*, 14 Wend. 641. In the case of *Pierson v. People*, 79 N. Y. 432, the defendant was charged with the crime of murder, by poisoning one Withey. Dr. Coe, a practicing physician, was called to see him by the prisoner; and he examined him and prescribed for him. On the trial the doctor was called as a witness for the people, and the following question put to him: "State the condition in which you found Withey at that time, both from your own observation and from what he told you." The prisoner's

counsel objected to this question, on the ground that the information which the witness obtained was obtained as a physician, and that he had no right to disclose it; that the evidence offered was prohibited by the statute. The court overruled the objection, and the witness testified as to the condition in which he found Withey from an examination then openly made in the presence of Withey's wife and the prisoner, and as he also learned it from Withey, his wife, and the prisoner. The court then quotes the statute of New York, which ours is copied from. "Such evidence was not prohibited at common law. The design of the provision was to place the information of the physician, obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney professionally of his client's affair. The purpose was to enable a patient to make such disclosures to his physician as to his ailments, under the seal of confidence, as would enable the physician intelligently to prescribe for him, to invite confidence between physician and patient, and to prevent a breach thereof. \* \* \* It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail it will be extremely difficult, if not impossible, in most cases of murder by poisoning, to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not been understood among lawyers and judges to be within the prohibition of the statute. \* \* \* The plain purpose of this statute, as in substance before stated, was to enable a patient to make known his condition to his physician without the danger of any disclosure by him, which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead; \* \* \* that the purpose for which the aid of this statute is invoked, in this case, is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the legislature can be supposed to have had in the enactment, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient, and not to shield one who is charged with his murder, that in such a case the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim." 1 Starkie, Ev. \*70; *Hewitt v. Prime*, 21 Wend. 79; *Renihan v. Dennin*, 103 N. Y. 580, 9 N. E. Rep. 326.

The objection of the defendant to the verdict of the jury is not tenable. It appears from the record that when the jury returned into court they were asked by the judge if they had agreed upon a verdict. They answered that they had, and at the same time the foreman handed to the judge the paper upon which the verdict was written, who in turn handed it to the clerk, with instructions to record the same, but instead thereof the clerk

filed the paper, and read therefrom to the jury, and the clerk asked each of said jurors if that was their verdict as read by him, and each of said jurors, answering for himself, said it was. Would the mere act of making a copy of the verdict, in pencil writing, in the rough minutes of the court, make it any more sacred? It is not claimed that the defendant was in any manner injured by the receiving, filing, and reading of the verdict, and it is not claimed that the verdict as returned by the jury is not the one upon which judgment has been pronounced by the court. *People v. Gilbert*, 57 Cal. 97. Section 4469, Gen. St., reads: "Neither a departure from the form or mode prescribed by this act in respect to any pleadings or proceedings, nor an error or mistake therein, shall render the same invalid, unless it have actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right."

The contention of appellant's counsel that the verdict is not sustained by the evidence, on account of the absence of positive proof of penetration, is without merit. Section 4244, Gen. St., reads: "Proof of actual penetration into the body is sufficient to sustain an indictment for rape." Under this statute we shall hold the slightest proof of the commission of the offense will justify the judge in submitting the question of fact to the jury, and no form of words is necessary to prove the commission of the crime. The proof, therefore, can be inferred from circumstances apart from the statements of the party injured. The prosecuting witness testified as to the position occupied by the defendant at the time of the commission of the offense, and it was such as to satisfy the minds of the jurors that the crime of rape had been committed, and the physician by whom she was examined found injuries upon her person which such an act might have occasioned. *Brauer v. State*, 25 Wis. 415; *People v. Crowley*, 102 N. Y. 237, 6 N. E. Rep. 384; *Taylor v. State*, 111 Ind. 280, 12 N. E. Rep. 400; *State v. Tarr*, 28 Iowa, 397; *Bishop*, St. Crimes, § 488. If the doctrines contended for by counsel for appellant should prevail, then the scoundrel who attempted the chastity of a child or a young girl would escape punishment merely because of her youth preventing his fully consummating the crime, which appears to us as undesirable as it would be unjust. In this case the circumstances prove the commission of the offense beyond a doubt; the intent of the accused is fully proved by his acts; the jury so found. Judgment affirmed.

BIGELOW, J., (*dissenting*.) I am unable to agree with my learned associates in the conclusion reached by them in this case. If we are at liberty to consider the sufficiency of the evidence given upon the trial, it seems open to grave question as to whether the defendant was proven guilty beyond reasonable doubt of the crime of which he has been convicted. It seems to me that the evidence as reported preponderates so greatly against the verdict that it must have been the result of passion or prejudice. The defendant was charged with a most heinous offense; one that

would naturally arouse the indignant feelings of a community to such an extent as to render it quite probable that they were communicated to the jury, and secured a conviction upon evidence that would have been entirely insufficient in other cases. Lord Hale's remark that such an accusation is one easily made, hard to prove, and still harder to be defended by one ever so innocent, has been often repeated and acted upon since by courts all over the land. Iowa has found it necessary to enact a law forbidding a conviction for the crime of rape upon the testimony of the prosecutrix alone. *State v. McLaughlin*, 44 Iowa, 82. In *Gazley v. State*, 17 Tex. App. 267, a conviction upon testimony strikingly like that given in this case was reversed as against the evidence. The opinion also shows how little reliance should be placed upon medical testimony, such as was given in the case at bar. Other courts have often set aside verdicts in rape cases upon similar grounds. *People v. Benson*, 6 Cal. 221; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371; *People v. Hulse*, 3 Hill, 309; *Mathews v. State*, 19 Neb. 330, 27 N. W. Rep. 234; *State v. Spidle*, (Kan.) 22 Pac. Rep. 620; *State v. Burdgorf*, 53 Mo. 65; and numerous others. Judging from the evidence the child's associations had not been such as were likely to leave her mind as innocent of all knowledge of such things as we generally expect children of her age to be. She testifies that the assault was committed in her mother's home, on Thursday, the 20th day of June, 1889; and that before they had time to adjust their clothing, the mother returned, and was let in by the girl. There seems to have been nothing, however, to arouse her suspicions of anything wrong, and she had none. The prosecutrix made no complaint, and showed no signs of injury, until two days thereafter, when she complained of being chafed, which was attended to by the mother. The next day she complained more, and walked in a peculiar manner, but did not know what was the matter with her, and made no complaint of ill usage. Ten days thereafter a physician was called, who determined she was suffering with the gonorrhea. Some time after this she charged this offense upon the defendant, who was her mother's brother. No attempt, however, was made to prosecute him until August 4th, when her step-father swore to a complaint in the justice court, and he was arrested. Upon the preliminary examination her testimony was taken briefly in answer to the most leading questions by the district attorney. The defendant was unrepresented by counsel, and there was no cross-examination; nor was any attempt made by any one to ascertain her competency as a witness, within Gen. St. § 3402. The only evidence tending to corroborate her in the slightest degree was that of the physician, who testified that he found the *vagina* unnaturally distended, and was of the opinion that she had the gonorrhea; that this distension might happen from other causes than sexual connection; and that he made no microscopic examination to determine whether she had the disease

mentioned. The defendant's counsel contends that this, at most, shows only an attempt to commit rape, and I feel justified in saying that this contention is fully borne out by the evidence. The girl does not testify to anything more than an attempt, and the circumstances are conclusive that this attempt, if made, was not successful. That a full-grown man could succeed in penetrating the body of a child of that age, and there be no cries or tears, no complaints, and no signs of distress, is, it seems to me, contrary to both reason and experience. It is incredible that she would not cry out from the pain that would inevitably be inflicted by such violence, and exhibit some signs of suffering, that could not be concealed. The medical authorities agree that there would be great laceration, a flow of blood, and much pain and suffering produced upon the victim. 3 Whart. & S. Med. Jur. §§ 219, 220. The evidence in *Burk v. State*, 3 Tex. App. 336, shows what could be expected in such a case. "A full and complete connection between an adult male and a child under twelve years of age is, on the first attempt, manifestly impossible." (3 Whart. & S. Med. Jur. § 218,) and it must be still more impossible with a child of only seven. The testimony of the physician concerning the child's diseased condition, while doubtless going very far with the jury, was really entitled to but very little weight, for the reasons: (1) It was not shown that the defendant had the gonorrhea,—a most important consideration. (2) The disease might have been communicated to her by some other person, or in some other manner than by sexual intercourse. 3 Whart. & S. Med. Jur. § 222. (3) Other diseases could easily be mistaken for gonorrhea. Upon this last point, in section 223 of the last quoted authors, it is said: "Leucorrhœa and gangrenous inflammation of the *vulva* are diseases which often arise spontaneously in young children, especially of the poorer class, and are due to bad diet, uncleanness, scrofulous taint, and epidemic influences. In the minds of anxious relatives they may awaken suspicions of violence with intent to commit rape, and sometimes form the occasion for criminal prosecutions against innocent persons for the sake of gain. Leucorrhœa may be easily mistaken for gonorrhea, for the discharge in the two diseases is nearly similar, and the local symptoms are so much alike as to render a positive opinion, in legal cases, rather hazardous." And again, (section 227:) "Within the last few weeks a child of nine years of age was brought to me, upon whom it was suspected that violence had been inflicted. A careful examination afforded evidence that the case was simply one of *vaginitis*. There was complete absence of any indication of violence, for although it can scarcely be believed to be possible that sexual entrance into the *vagina* of an infant could, under any circumstances, be perpetrated, yet, in the attempt, much confusion of the young and delicate soft parts must have ensued had it been made." Many instances of this kind are given in the books, where the parents' erroneous suspicions have even been confirmed by

the hasty and ill-considered opinions of physicians, given without making a proper examination. Cases are by no means rare where the necessity of accounting for the condition of what was supposed to be venereal disease has, under the persistent questioning and threats of anxious relatives, led the child into accusing some wholly innocent person of tampering with her. 3 Whart. & S. Med. Jur. § 229. Quite possibly this was the case here. It was only after the physician was called, and he had pronounced the disease gonorrhea, that the accusation was made against the defendant, and apparently not for some days after this. The necessity then existed of accusing some one, and it is quite evident that had it not been for this necessity the assault, if it was really made, would never have been made known by the child. The admission of the stepfather's affidavit, made in the justice court, showing that he believed the defendant guilty, was very prejudicial to his case, although its admission, as against the objections urged, was probably not error. The same may be said of the evidence concerning the particulars of the assault, as related by Bertha to her mother, when she finally accused the defendant of the offense. Such statements were mere hearsay, and their admission was considered sufficient to call for the reversal of a conviction for the same kind of an offense in *State v. Campbell*, 20 Nev. 122, 17 Pac. Rep. 620, and doubtless would have worked the same result here had the testimony been particularly objected to. But, although it was not, and consequently its admission was not error, it was equally as prejudicial to him as though it had been admitted against his most strenuous opposition, and probably goes far towards accounting for the verdict. For these reasons I think the conviction should be set aside as contrary to the evidence.

I agree that under the great weight of authority construing statutes similar to our own the depositions taken upon the preliminary examination were sufficiently proven to admit them as evidence in the case. The authentication required by Gen. St. § 4036, seems to be the signing by the witness and testing by the magistrate, as previously provided for in the section, and which had been done here. For the same reason the oral testimony, showing that the witnesses were examined in the presence of the defendant, etc., was properly admitted.

Dr. Hanson's testimony should not have been received. Section 4576, Gen. St., makes the rules for determining the competency of witnesses in civil cases applicable to criminal cases. Section 3406 provides: "A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." The information concerning which he must not be examined includes not only knowledge received from the lips of the patient, but also from the statements of others who surround him at the time, or from observation of his appearance or condition. *Grattan v. Metropolitan Co.*,

80 N. Y. 297. The intent of the statute in making such information privileged "was to enable a patient to make known his condition to his physician without the danger of any disclosure by him, which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead." *Pierson v. People*, 79 N. Y. 434. But notwithstanding the quotations made by my associates from the opinion in *Pierson v. People*, *supra*, in which it was held that the New York statute, of which ours is a substantial copy, did not apply to a case of murder by poisoning, and that, consequently, the physician's testimony was admissible, I do not understand them to hold that the statute is not applicable here, but that the ruling in admitting the testimony is sustained upon the ground that such "consent" to the physician testifying had been given as made it competent. The statute reads that the physician "shall not, without the consent of his patient, be examined as a witness," etc. There is no pretense here that the "patient" had given this consent, but its admissibility is placed upon the ground that the patient's parents, step-father and mother, have given implied consent to his testifying, and this, of course, must necessarily assume that the parents have the power to give the required consent, and to waive, for their children, the protection of the statute. But that they do not have this power seems to me reasonably clear from both the letter and spirit of the statute. It does not say that the physician's testimony shall not be admitted without the consent of the patient, or his parents or guardian, or executor or administrator, but the patient alone is mentioned. If it be objected that under such construction his testimony would always be lost where the patient was too young to give consent, or was insane, or dead, it may be replied that this is just what the statute was intended to do. It intended to place the information so obtained upon the same footing as communications between husband and wife, communications to an attorney, or confessions to a clergyman or priest. Such evidence is always to be incompetent except in the single instance of where the party in whose interest it is excluded is able to, and does, give his free consent to its divulgence. In *Westover v. Insurance Co.*, 99 N. Y. 56, 1 N. E. Rep. 104, the action was brought upon a life insurance policy issued to the plaintiff's testator. Upon the trial the plaintiff called a physician who had attended the deceased during his life-time, and asked him certain questions concerning the condition in which he had found him. To this the defendant, the insurance company, objected that the evidence was incompetent and privileged under the statute. This, of course, raised the question whether, the patient being dead, his executor could give the consent necessary to authorize its admission, and it was held he could not. In the course of the opinion the court says: "There does not seem to be left any room for construction. The sections are absolute and unqualified. These provisions of law are founded upon public policy, and,

in all cases where they apply, the seal of the law must remain until it is removed by the person confessing, or the patient or client. \* \* \* Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted." Nor do I understand that it has been conceded by any one that the mother could have given the consent required by the statute. Certainly, to my mind, it has not been done by the defendant or his counsel. But admitting that the parents could give the required consent, the next question is whether they have done so. That there may be implied as well as express consent, there can be no doubt, but the evidence of this implied consent or waiver must be distinct and unequivocal. 1 Whart. Er. § 584. *Hageman, Priv. Com.* § 151; *Westover v. Insurance Co.*, 99 N. Y. 59, 1 N. E. Rep. 104. It is supposed that the evidence shows a determination by the parents of the child to prosecute the defendant, and that, consequently, they intended to waive the protection of the statute for the child. Admit the premises, and the conclusion does not by any means follow. There is no logical connection between them. If this is to be the rule, then, in a case where it is supposed the evidence shows that the party to make the waiver does not desire the defendant prosecuted, it must be presumed that he has not consented. Before we can even speculate upon such a state of facts we must know how strong the desire for the defendant's conviction or acquittal is, how much or how little they cared for the physician's knowledge being made public, and all the other considerations that might influence them. It is sufficient to say that this would be no rule at all for the admission or rejection of evidence, and is entirely inadmissible. Nor does the fact that the mother appeared and testified upon the preliminary examination to the daughter's ailments constitute any such waiver or consent. She appeared the same as other witnesses, presumably in obedience to a subpoena, and it was not a matter of choice with her whether she would testify or not. If asked the questions, she must answer. It seems like going a good ways to hold that, because she was compelled to testify, therefore her testimony constitutes implied consent to the physician making public the information obtained by him. Nothing ought to constitute implied consent that is not voluntary. But, again, the testimony of the mother did not make public the information of the physician. She did not pretend to know what was the matter with the child, and the symptoms she described might have come from a dozen other sources than venereal disease. She supposed for some time that she was simply chafed. Even the assumption that at the time of the trial in the district court, when the physician's testimony was admitted, either the child or her parents wished to prosecute the defendant, is not supported by the evidence. It is founded upon the circumstances of the step-father having made the complaint

in the justice court, and that the mother and child had appeared and testified upon the hearing. Weak as this foundation is, it is further weakened by the uncontradicted evidence of two witnesses that before the trial they had taken back much they had said against the defendant in the depositions, declared they had only so testified because of the threats and promises of Joseph Alexander, the step-father, and that they would never testify against him again. That this was their feeling towards him is further borne out by the fact that neither of them was present at the trial. If the step-father ever had any right to consent for the girl, it was certainly lost when her own father appeared and took possession and control of her, as he had already done. But in my judgment the whole theory of implying consent from any such premises is wrong. While it may be implied as well as expressed, the implication should be based upon substantial, clear, and unequivocal grounds, such as do not exist here. See *People v. Murphy*, 101 N. Y. 126, 4 N. E. Rep. 326; *People v. Stout*, 3 Park. Crim. R. 670. If the evidence of physicians ought not to be received in rape cases or in criminal cases, the remedy is with the legislature. As said in *Renihan v. Dennin*, 103 N. Y. 580, 9 N. E. Rep. 320: "It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. In testamentary cases, where the contest relates to the competency of the testator, it will exclude the evidence of physicians, which is generally the most important and decisive. . . . But the remedy is with the legislature, and not with the courts." But the truth is, there is just as much reason for excluding such evidence in criminal cases as in any other. The inevitable result of the statute is to exclude evidence that would often be of the highest importance, but as a matter of public policy it is considered better that such testimony should be lost than that the confidence which ought to exist between priest and penitent, lawyer and client, and physician and patient, should be destroyed by the knowledge that they may be compelled to divulge the information so obtained from those who have placed trust in them. The minutes of the court show that after the jury was impaneled and sworn, the defendant's plea of not guilty was entered, and they do not show that he had ever pleaded prior to that time; but, believing that the conviction should be reversed for the foregoing reasons, I have not considered this point, nor the one concerning the verdict.

(2 Wash. St. 9)

STATE *ex rel.* NOOKSACK RIVER BOOM CO.  
v. SUPERIOR COURT OF WHATCOM COUNTY  
*et al.*

(Supreme Court of Washington. Jan. 16, 1891.)

WHEN PROHIBITION LIES—MANDAMUS—APPEAL.

1. Prohibition will not lie to restrain the superior court from further proceedings in an application for *mandamus* where the writ has already issued, and no application was made at the hearing, by motion or plea, to test the jurisdiction of the court in the premises.

2. Where defendant has submitted himself to the jurisdiction of the court by giving notice

of appeal from its judgment granting the writ, the subsequent filing of an answer and of a motion to vacate the judgment are of no effect to entitle him to the writ of prohibition.

3. It is error for the superior court to deny defendant's motion to stay the *mandamus* pending his appeal, and to fix the amount of the bond therefor, as Code Wash. § 701, provides that appeals may be taken from judgments directing writs of mandate in like manner and with like effect as in civil actions.

On petition for writ of prohibition to Whatcom county.

*Black, Harris & Leaming*, for plaintiff.  
*Thompson, Holcomb & Newman* and  
*Evans, Sherman & Husard*, for defendant.

STILES, J. On the 3d day of November, 1890, the relator, the Nooksack River Boom Company, and the Bellingham Bay Boom Company, were rival corporations organized under the act of March 17, 1890, entitled "An act to declare and regulate the powers, rights, and duties of corporations organized to build booms, and catch logs and timber products therein." Laws 1889-90, p. 470. Both companies had their booms and works at the mouth of the Nooksack river, in Whatcom county; but the Nooksack Company's boom was so much higher up, or further within the mouth of the river that logs floating down the river would reach its boom first; and, its boom being thus located, it had caught large quantities of logs floating down the river, some of which were the property of persons who had made arrangements with the Bellingham Bay Company to raft and boom their logs, or, as it is termed in the papers here and in the act, "consigned" their logs to that company. The Bellingham Bay Company claimed and demanded that all such consigned logs be passed by the Nooksack Company free of charge, and be allowed to float on unhindered into the works of the former; but the Nooksack Company denied this claim, and refused this demand, unless paid the sum of 75 cents per 1,000 feet, board measure, of the logs so detained, as permitted by the act in certain cases. Upon this the Bellingham Bay Company, deeming itself aggrieved at the action and demand of the Nooksack Company, sought redress by applying to the superior court of Whatcom county for a writ of *mandamus* requiring the latter company to follow its construction of the law and let the logs go free, both as to those detained and as to all others which should thereafter be floated down the Nooksack river under consignment to its care. The method of presenting this application for a *mandamus* was as follows: On the 3d day of November the attorneys of the Bellingham Bay Company delivered to Messrs. Harris, Black & Leaming, who were attorneys resident at Whatcom, and who, it appears, had theretofore been the usual attorneys of the Nooksack Company, a notice in writing, purporting to be a notice in a cause in the superior court, and having as a caption the title of the court, and "Bellingham Bay Boom Company, Plaintiff, vs. Nooksack River Boom Company, Defendant." It was addressed "to said defendant," and proceeded to give notice that at 2 o'clock P. M. on November



6, 1890, the plaintiff would apply to the superior court of Whatcom county for the issuance of a peremptory writ of *mandamus* commanding the defendant to pass the logs in question, etc. Reference was made in the notice to a "copy of motion and affidavits herewith served," and it was stated at the close of the notice that, "if you desire, you may appear at said time, and resist the issuance of said writ." It was signed by the attorney of the plaintiff. The "motion" was a document bearing a caption exactly like that of the notice, and was substantially in the form of a complaint in a civil action, and prayed a peremptory writ of *mandamus* commanding the defendant to remove the obstructions it had placed in the way of the passage through its boom of all logs consigned to the plaintiff, and to at once pass and permit to be passed, free of charge, all logs so consigned to it, and bearing certain proprietary marks, and any and all logs which in the future should be consigned to the plaintiff's boom. The motion was verified in the manner in which complaints are required to be verified, and to it were attached sundry affidavits of third persons, whose logs were among those alleged to be detained, who described their property, and stated various facts going to show a detention by the defendant. Harris, Black & Leaming indorsed upon a copy of the notice delivered to them: "Service of above notice accepted, and copies received, this 3d day of November, 1890," and signed themselves "Attys. for Deft." The motion and supporting affidavits were filed in the superior court on the 6th day of November, but (probably through an oversight) the notice, with its acceptance of service, was not filed until November 8th. At the hour noticed, 2 o'clock, November 6th, the business before the superior court, with a jury in attendance, was suspended, in order that the plaintiff might make his application for a *mandamus*. One member of the firm of Harris, Black & Leaming, at least, was present in the court to represent the defendant; and, both sides having been asked if they were ready to proceed, answered in the affirmative. The defendant's attorney thereupon orally objected to the court's taking any action upon the application, claiming that the procedure by motion was unauthorized; that it should have been commenced by the filing of a complaint and the issuance of a summons; that, not having been so commenced, the court had no jurisdiction of the person of the defendant; that there had been no service upon the defendant, but merely a notice to certain attorneys supposed to represent it; and that, finally, if the proper practice in *mandamus* was by motion, there must first be an alternative writ, which should be served upon the defendant, to which a return could be made at a time to be fixed in the writ. The court declined to recognize the objections thus made unless the defendant's attorney would appear in the proceeding by some plea in writing, and urged him to file such papers as he deemed material; but this the attorney refused, and requested the court first to rule whether the plaintiff

had any standing upon the proceeding by motion, to which the court again declined to accede. Defendant's attorney then contented himself with his position, and plaintiff's attorneys demanded that the relief asked be allowed as matter of course. The court took the matter under advisement until the next day, and on the morning of November 7th, at the opening of the court, announced an oral decision in favor of the plaintiff, and granted the peremptory writ; whereupon the defendant's attorney, without waiting for the formal entry of the judgment, or the issuance of the writ, or making any motion or appearance, gave notice of an appeal from the judgment to this court, which notice was entered upon the minutes of the court by the clerk. Shortly after giving notice of appeal, on the same day, and without the knowledge or leave of the court, defendant's attorneys filed with the clerk a purported answer to the motion for the writ, supported by a number of affidavits. On the afternoon of the same day the plaintiff's attorneys submitted to the court proposed forms of a judgment and writ, in accordance with the oral decision, which, after inspection by defendant's attorney, on November 8th, the court ordered to be entered and issued as of November 7th. The writ was served upon the defendant on the 8th day of November, by the sheriff of Whatcom county; and on the same day the defendant filed a motion to stay the writ pending its appeal, and to fix the amount of a bond therefor, which motion, after argument, the court denied, November 10th. On the 12th of November the defendant also filed a motion in the superior court to vacate its judgment and recall its writ, but this motion was not heard or otherwise disposed of. This completes the material part of the history of the case in the superior court. On the 12th day of November the relator, the defendant below, applied to this court for a *supersedeas* to stay any further action in the case in the superior court until the cause could be heard on the appeal, and for a writ of prohibition to restrain that court from any further proceedings whatever, other than the signing of a bill of exceptions. This application was granted to the extent of an order to show cause why such relief should not be given, with a temporary restraining order until the matter could be heard; and from the return of Hon. J. R. WINN, judge of the superior court of Whatcom county, to the order to show cause, we gather the facts as above stated, with the exception of those preceding the appearance of the parties in that court.

Upon this state of facts the question is, what should be done? having due regard to the accomplishment of justice, and the presentation of a dignified and orderly course of procedure in the courts of the state. This court undoubtedly has the power to issue writs of prohibition to the superior courts of the state in proper cases, but in so doing it must be guided by the rules of law applicable to such extraordinary proceedings, and must not in any case overstep the bounds of necessity,

in any spirit of zeal for the redress of what it deems an injustice. To justify the issuance of a writ of prohibition from a superior to an inferior court it must clearly appear—*First*, that the inferior court is about to take jurisdiction of a matter of which by law it has no jurisdiction; *secondly*, that there is still something which the inferior court is about to do under its claim of jurisdiction; *thirdly*, that an application has been made to the inferior court for a decision that it has not jurisdiction of the subject-matter involved, which has been refused; and, *fourthly*, that there is no other proper remedy. Measuring by these requisites, we should not be warranted in granting the writ of prohibition at this time. Before the application was made to this court the jurisdiction had been taken and exercised by the superior court, and its judgment had been entered, and its writ issued and served; therefore nothing remained for it to do in the case. True, upon a refusal of the defendant to obey the writ, the court could attach its officers, and punish them by fine and imprisonment; but it might never have done so, and it was not threatening to do so on the 12th day of November. No proper application was made to that court to test the question of its jurisdiction over the subject-matter, if, indeed, that subject was mentioned at all in the discussion at the hearing. The practice in *mandamus*, and the question whether there was jurisdiction of the person of the defendant, were discussed informally, without plea or motion; but, for all it amounted to, the attorney for the defendant might as well have remained mute, or absented himself entirely. The writ was allowed substantially *ex parte*, the defendant merely standing by as a spectator. Subsequently an answer was filed, and the court was asked to rehear the matter, and a motion was made to vacate the judgment and recall the writ; but these attempts came after the notice of appeal, which operated as a general appearance of the defendant, and cut off all further proceedings in the superior court excepting those necessary to the perfection of the appeal. Had the relator, without giving its notice of appeal, and thus submitting its person to the jurisdiction, at once applied to this court for a writ of prohibition on the ground that the superior court had no jurisdiction of the subject-matter of the proceeding, viz., of a proceeding in *mandamus* to enforce the asserted rights of the plaintiff, the result of its application might have been entirely different; but we do not pass upon that matter, for the reason that it seems to be necessarily involved in the case coming before us on appeal. It remains to be considered whether there is any other relief in the premises to which the relator is entitled. It is shown by the record that on the 8th day of November the relator applied to the superior court, by motion, to have the amount of its bond on appeal fixed, and for a stay of proceedings under the judgment and writ of *mandamus* pending the appeal, which motion the court denied on the 10th of November, on the ground that the filing of a bond

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would not act as a *supersedeas* or stay of execution of the writ of *mandamus*. And herein, as we view the matter, lies the true cause of complaint of the relator. The writ of *mandamus* being originally, in its English origin, a writ of the highest prerogative character, was, for that reason, excepted from the category of judicial decrees which were suspended by an appeal to a higher court. But in the United States, with but few, if any, exceptions, the idea of prerogative has been abandoned, and the writ has come to be regarded much in the nature of an ordinary action between the parties, to be issued or not according as the party aggrieved may or may not show himself entitled to that peculiar species of relief; or, in other words, an action for the enforcement of a right in cases where the law affords no other adequate means of redress. And a judgment in a *mandamus* proceeding, as in case of an ordinary action at law, is subject to review by writ of error or appeal upon like conditions as in other cases. See High, Ext. Rem. § 4, and notes of cases. Now, this modern and American theory of *mandamus* would seem to place this remedy, and the judgment and writ consequent upon it, precisely on a level with ordinary judgments and orders of courts in other cases; and it is a well-settled rule that while a *supersedeas* bond does not stay any part of a judgment which commands the party against whom it runs to refrain from doing any act covered by the judgment, yet, where the judgment requires a party to perform some affirmative act, an appeal stays the immediate necessity for the performance, and prevents the court which rendered the judgment from punishing as a contempt the failure to perform, until the conclusion of the case on appeal. But if there be any doubt as to the general rules thus rehearsed, and their application to the proceeding in *mandamus*, we hold it to be clearly resolved in this state by section 701 of the Code, which declares that not only may appeals or writs of error be taken from judgments directing writs of mandate, but that they may be taken "in like manner and [with like] effect as in civil actions." Therefore, inasmuch as the peremptory writ in this case, in so far as it had any legal effect, commanded the relator to do an act which it seeks by its appeal to relieve itself from doing, and the doing or not doing of which is the kernel of the whole controversy, it is proper that, under sufficient security that it will obey the judgment and writ if the final determination of the cause on appeal be against it, it should have had the amount of such a security fixed, and upon the filing of its bond all proceedings looking to the enforcement of the writ should have been stayed. In refusing this right the superior court erred, and the correction of its error is, we conclude, the proper remedy to apply. This conclusion, when carried out, will be substantially a *mandamus* to the superior court of Whatcom county requiring it to fix the bond as prayed for in the defendant's motion of November 8th, the effect of which bond, when filed, will be to stay any fur-

ther proceedings looking towards the enforcement of the writ. Let an order to that effect issue, costs to the relator.

ANDERS, C. J., and DUNBAR, J., concur. HOYT and SCOTT, JJ., concur in the result.

(1 Wash. St. 297)

METCALF V. CITY OF SEATTLE *et al.*

(*Supreme Court of Washington.* May 8, 1890.)

MUNICIPAL CORPORATIONS — INDEBTEDNESS—  
WATER, LIGHT, AND SEWERAGE SYSTEMS.

1. Const. Wash. art. 8, § 6, fixes the limit of municipal indebtedness at  $1\frac{1}{2}$  per cent. of the taxable property of the corporation, with a permission to increase the indebtedness to 5 per cent. for strictly municipal purposes on the assent of three-fifths of the qualified voters therein. It further provides that, with a similar assent, cities may incur an indebtedness to the extent of an additional 5 per cent., for water, light, and sewerage systems. *Held* that, as the matter of providing water, sewer, and lights for the inhabitants of a city is a strictly municipal purpose, the expense of the construction and maintenance of such works may be paid either out of the current revenues or the first 5 per cent. of indebtedness, as well as out of the additional 5 per cent. specially authorized for that purpose.

2. Act Wash. Feb. 26, 1890, (Sess. Laws, 225,) likewise fixes the limit of municipal indebtedness at  $1\frac{1}{2}$  per cent. of the taxable property of the corporation, and provides (section 2) that it may be increased to 5 per cent., with the assent of three-fifths of the qualified voters therein; while section 3 authorizes an additional indebtedness of 5 per cent. for the construction of water, light, and sewerage systems. Act March 26, 1890, (Sess. Laws, 520,) relates solely to the construction of water, light, and sewerage systems, and prescribes in detail the procedure to be followed, and provides that, if the indebtedness is to be paid out of the current funds, only a majority vote is necessary, but that, if bonds are to be issued, the assent of three-fifths of the voters is necessary. *Held* that, as these two acts were passed at the same session, they must be construed together; that Act Feb. 26th was not repealed by Act March 26th; and that, where a three-fifths majority has been obtained in favor of bonding a city for the construction of water, light, and sewerage systems, no further obstacle to the issuance of such bonds exists, though they may amount to more than 5 per cent. of the taxable property of the city, provided, with their issuance, the total indebtedness is not increased to more than 10 per cent.

3. The majority required by the constitution in favor of the issuance of bonds by the city being three-fifths of the "voters therein voting at an election to be held for that purpose," a three-fifths majority of the electors actually voting on the proposition is all that is necessary, and not three-fifths of all the persons who may be entitled to a vote.

Appeal from superior court, King county.

Action by James B. Metcalf against the city of Seattle and others, involving the power of the city of Seattle to issue bonds for the construction of water and sewerage systems. There was a judgment in defendants' favor, and plaintiff appeals.

Const. Wash. art. 8, § 6, provides: "No county, city, town, school-district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school-district, or other municipal corporation, without the assent of three-fifths of the voters therein, voting at an election to be held for that

purpose; nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school-district, or other municipal purposes: provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding 5 per centum additional, for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality."

Act Wash. Feb. 26, 1890, (Sess. Laws, 1889-90, pp. 225-227,) is as follows: "An act authorizing and empowering cities and towns organized prior to the adoption of the state constitution to extend their credit and to fund their indebtedness, and validating certain indebtedness already contracted, and declaring an emergency to exist. Be it enacted by the legislature of the state of Washington: Section 1. That any city or town having a corporate existence in this state at the time of the adoption of the constitution thereof is hereby authorized and empowered to borrow money and to contract indebtedness in any other manner for general municipal purposes, not exceeding in amount, together with the existing general indebtedness of such city or town, one and one-half per centum of the taxable property in such city or town, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes, whenever it is deemed advisable to do so by the city or town council thereof. Sec. 2. That any such city or town may borrow money or contract indebtedness for strictly municipal purposes over the amount specified in the preceding section, but not exceeding in amount, together with the existing general indebtedness, five per centum of the taxable property in such city or town, to be ascertained as provided in the preceding section, through the council of such city or town, whenever three-fifths of the voters therein assent thereto at an election to be held for that purpose at such time, upon such reasonable notice and in the manner presented by the city or town council, not inconsistent with the general election laws. Sec. 3. That any city or town described in the first section of this act shall, in addition to the power granted in the preceding sections, have the power, through its council, to borrow money, or to contract indebtedness, in an amount not exceeding five per centum of the taxable property in such city or town, ascertained as provided in the first section thereof, for the purpose of supplying such city or town with

water, artificial light, or sewers, when the plant or plants used for such purposes shall be owned and controlled by the city, whenever three-fifths of the voters therein assent thereto at an election to be held for that purpose, according to the provisions of section two of this act. Sec. 4. That any city or town of the description of those included in the first section of this act may fund its indebtedness at any time in such a manner, for such time and upon such terms and interest as its council may deem advisable: provided, that the indebtedness funded shall not, with all the existing indebtedness, exceed in amount one and one-half per centum of the taxable property thereof, ascertained as provided in the first section hereof, unless such indebtedness shall have been authorized by the assent of three-fifths of the voters of such city or town, as hereinbefore provided. Sec. 5. That any indebtedness now owing by any such city or town, contracted strictly for municipal purposes, whether the same exceeds the amount which such city or town was authorized to contract under its charter or not, is hereby validated and declared to be a binding obligation upon such city or town when the only ground of the invalidity of such indebtedness is that it exceeds the amount authorized by the charter of such city or town: provided that, if said indebtedness exceeds one and one-half per centum, including present indebtedness, upon the taxable property therein, to be ascertained as hereinbefore provided, then such indebtedness shall not be deemed to be validated by this act till three-fifths of the voters in such city or town shall assent to the same, at an election held for that purpose, in the manner provided by section two of this act: provided, further, that the indebtedness ratified, including all existing indebtedness, shall not exceed in amount five per centum upon the taxable property in such city or town, ascertained as hereinbefore indicated: and provided, further, that this section shall only apply to indebtedness now existing. Sec. 6. That when this act comes in conflict with any provision, limitation, or restriction in any local or special law or charter existing at the time that the constitution of the state of Washington was adopted, this statute shall govern and control. Sec. 7. That, whereas, many of the cities and towns of this state are seriously embarrassed in the making of needed improvements by restrictions in their charters, preventing them from extending their credit to the present constitutional limit, an emergency exists for the immediate effect of this law, and the same shall take effect therefor from and after its passage."

Act Wash. March 26, 1890, (Sess. Laws 1889-90, pp. 520-522:.) "An act authorizing cities and towns to construct internal improvements, and to issue bonds to pay therefor, and declaring an emergency. Be it enacted by the legislature of the state of Washington: Section 1. That any incorporated city or town within the state be, and is hereby, authorized to construct, or condemn and purchase, or purchase or add to and maintain, water-works within

or without the city limits for the purpose of furnishing the city and the inhabitants thereof with an ample supply of water for all purposes, and to construct and maintain a system of sewerage, with full jurisdiction and authority to manage, regulate, and control the same beyond the limits of the corporation, and to buy or build gas-works or electric light plants for the purpose of lighting streets and public places, and supplying lights to the inhabitants of such cities and towns, with full authority to regulate and control the same. Sec. 2. Whenever the city council or board of trustees of any such city or town shall deem it advisable that the city or town of which they are such officers shall exercise the authority hereby conferred upon them in relation to either or both such water-works or system of sewerage or plant or works for lighting purposes, the corporation shall provide therefor by ordinance, which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof as near as may be, and the same shall be submitted for ratification or rejection to the qualified voters of said city, at a special election, of which 30 days' notice shall be given in the paper doing the city printing, by publication in each issue of said paper during said time: provided that, if the said city or town is to become indebted or issue bonds for said water-works or sewerage system or plant or works for lighting purposes, the said proposition and authority to become so indebted shall be adopted and assented to by three-fifths of the qualified voters of said city or town voting at said election, otherwise by a majority vote; and, when so adopted and assented to as aforesaid, the said corporation shall become authorized to become indebted, and issue bonds as hereinafter provided; subject, however, to the condition that the total indebtedness shall not exceed ten per centum of the taxable property shown in the last assessment roll. Sec. 3. Whenever a city or town shall be authorized to issue bonds, the said bonds shall be issued in denominations of not less than one hundred or more than one thousand dollars, shall be numbered from one up, consecutively, shall bear the date of their issue, shall be payable not more than twenty years from date, and shall bear interest not exceeding six per cent. per annum, payable semi-annually, with interest coupons attached, and the principal and interest shall be made payable at such place as may be designated. The bonds and each coupon shall be signed by the mayor, and attested by the clerk under the seal of the city or town. Sec. 4. There shall be levied each year a tax upon the taxable property of such city or town, as the case may be, sufficient to pay the interest on said bonds as the same accrues, and before seven years prior to the maturity thereof an annual sinking fund tax sufficient for the payment of said bonds at maturity, which taxes shall become due and collected as other taxes. Sec. 5. Said bonds shall be printed or engraved or lithographed on good bond paper, and a duly-authenticated copy of this act, together with the

ordinance of the city or town authorizing and directing such special election, shall be printed on each bond, together with a statement signed by the mayor and clerk showing the result of said election. Sec. 6. Such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the city or town. A register shall be kept of all bonds, which register shall show the number, date, amount, interest, name of payee, and when and where payable of each and every bond executed, issued or sold under the provisions of this act. Sec. 7. There being no law in this state authorizing cities and towns to construct internal improvements, and to issue bonds to pay therefor, an emergency exists. Therefore, this act shall take effect and be in force from and after its approval by the governor."

*J. C. Halves and Chas. F. Fishback*, for appellant. *S. H. Piles, (Thomas R. Shepard, of counsel,)* for appellees.

STILES, J. This was an amicable suit brought to obtain the court's construction of section 6, art. 8, of the constitution, and the legislation had thereunder, resulting in the act of February 26, 1890, (Sess. Laws, p. 225,) and the act of March 26, 1890, (Sess. Laws, p. 520,) as applied to the city of Seattle, which was proposing to issue certain bonds for a water and sewerage system, amounting to \$955,000. The controversy, however, was a real one, and under the pleadings fairly brought to this court two questions for answer, viz.: (1) Can a municipal corporation become indebted for water-works, sewers, and artificial light works in any sum greater than 5 per cent. of its last assessment roll? (2) To carry an election, where the question is that of increasing municipal indebtedness above  $1\frac{1}{2}$  per cent. of the assessment roll, must the majority of three-fifths required be three-fifths of all the persons entitled to vote at the election or three-fifths of those who do vote thereat?

The circumstances which caused the presentation of the first question seem to have been a dispute as to whether, under the terms of the constitution and the acts referred to, the matter of providing water, sewers, and light for the inhabitants of a city is a "municipal purpose," or a "strictly municipal purpose." It is a fundamental principle in the law of municipal corporations that, although they are usually given a large discretion in the matter of raising and expending money, no money can be raised or expended for any but a "strictly municipal purpose," and that limitation is just as much laid upon the cities of this state with regard to the first  $1\frac{1}{2}$  per cent. of indebtedness as it is upon the additional  $3\frac{1}{2}$  per cent., which must be authorized by a vote, although, in the latter case, the framers of the constitution saw fit to express the limitation. But, in our view, there is nothing in the constitution which forbids the idea that works of the character of these under discussion are those of a strictly municipal character, and therefore proper works for a municipality to undertake and maintain, either out of the current revenue or

the first 5 per cent. of indebtedness. The limitation declared by the constitution is that whenever the indebtedness has reached 5 per cent. it must stop, unless more money is needed for water or light works or sewers. And in this connection we may say, in response to argument at the hearing, that we regard the language of the constitutional provision as reading in the disjunctive, as though it were "water, artificial light, or sewers." The city of Seattle was authorized by its charter (Acts 1886, pp. 240, 241, 244) to build, own, and operate such works, and to levy taxes therefor. It lacked only the power to incur indebtedness. This power it did not receive from the chapter of the constitution on municipal indebtedness, it is true; for that chapter contains no grant of power to these incorporations. It leaves them entirely to the legislature; but, deeming it certain that future legislatures would permit such indebtedness, it prescribed the limitations under which the power, when granted, must be exercised, and beyond which it must not go. The power was conferred upon the city of Seattle by the acts of the legislature referred to, we conceive, in very clear terms, though the appellant suggested a doubt on that point even. These two acts are entitled to be construed together, they having been passed at the same session; and we see no necessity to hold that the act of March 26th repealed that of February 26th. On the contrary, the latter act seems to form a fitting complement to sections 2 and 3 of its predecessor, elaborating the machinery by which they are to be operated, and leaving no room for hasty, careless, or underhand proceedings. By the last act the legislative body of the city must first express, by ordinance, the intention of the city to avail itself of its powers to inaugurate such works, specifying a distinct plan or system to be followed, with the estimated cost thereof; and the question of the adoption of the plan proposed must be submitted to the voters of the city. Clearly the intention was that, whereas such works are likely to demand large and unusual expenditures, the wisdom of which, in some cases, may be doubtful, the people, who would have to furnish the means, should be fully apprised of the whole scheme; and that there should be a definite, well-considered, and practicable scheme presented for their rejection or adoption. If no authority to incur indebtedness beyond the current revenue is asked for, the proposition may be carried by a majority vote; but if it is intended that the city shall incur a debt for these costly works, the majority to carry the proposition must be three-fifths, and the indebtedness must be created by the issuance of bonds, to run not exceeding 20 years, at a rate of interest not exceeding 6 per cent. The three-fifths majority having been obtained, there is no further obstacle to the issuance of such bonds, although they amount to more than 5 per cent. of the taxable property of the city, providing with their issuance the total indebtedness of the city is not increased to more than 10 per cent. of such property.

In response to the second question we have not the least hesitation in answering that the three-fifths majority required to carry an election in favor of increasing municipal indebtedness is three-fifths of those persons who actually vote at the election, and not three-fifths of all those who may have the right to vote thereat. The language of the constitution is that no municipal corporation shall become indebted beyond  $\frac{1}{2}$  per cent. of its taxable property "without the assent of three-fifths of the voters therein voting at an election to be held for that purpose." How could words be plainer? It is three-fifths of the voters voting, not of all persons who might vote, but may or may not do so. The word "therein," placed between "voters" and "voting," merely qualifies the persons who might vote, not the body of voters who must vote to constitute a lawful majority. At certain elections many persons residing outside of a city have their voting places assigned within the city limits; but at these particular elections it is only the voters "therein"—residing therein—who can vote. Perhaps a longer phrase might have served to remove all doubt from every mind, but to us the interpretation seems clear as it is. In every other instance, we believe, where the constitution prescribes the majority required to carry a particular proposition submitted to the electors, it is a majority of those who vote upon that proposition. See article 8, § 3, authorizing the state to contract debts; article 11, § 2, of the removal of county seats; article 11, § 10, of the adoption of charters by cities; article 14, §§ 1, 2, of the location of the seat of government; article 23, § 1, of amendments to the constitution; and section 2, of the calling of constitutional conventions. Against this it may be said that in each of the instances mentioned the majority required is only a majority of those voting on the question submitted; but when we observe that in all these cases the questions are to be submitted at general elections, where the whole number of votes cast may far exceed those cast for and against the particular proposition, the general policy of the constitution becomes clear in no case to require an absolute majority of all those who vote at a general election to carry a special proposition, but only a majority of those who see fit to express themselves upon the proposition. And, this policy being so, why, in this case of municipal indebtedness, should we, without any special or apparent reason, argue plain words out of their ordinary meaning, and conclude that a departure was intended from the otherwise steady policy of the constitution, simply because precisely the same form of words is not used? These elections are hedged about with all the precautions to secure fairness and a full vote that general elections have. Being purely special elections, they are free from the political influences and the vice of trading which often unjustly sway and control the vote on such matters at general elections. Every elector has full constructive notice, and it would be strange indeed if he did not have actual notice of

the pending question; and he cannot complain if the result, without his vote, is not according to his desire.

This question of majorities has been discussed by several of our courts of last resort in cases similar to this. In North Carolina, (*Southerland v. Goldsboro*, 96 N. C. 49, 1 S. E. Rep. 760, and *Duke v. Brown*, 96 N. C. 127, 1 S. E. Rep. 873,) in Georgia, (*Bell v. Americus*, 3 S. E. Rep. 612,) and in Mississippi, (*Hawkins v. Carroll Co.*, 50 Miss. 755,) the supreme courts of those states held that no less than a majority of all the persons qualified to vote was sufficient to carry the several propositions submitted. But in *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. Rep. 539, the supreme court of the United States reviewed the case of *Hawkins v. Carroll Co.*, and dissented from and overruled it. The constitution of Mississippi contained a provision that the legislature should authorize no county to aid any railroad company "unless two-thirds of the qualified voters of such county, \* \* \* at a special election or regular election to be held therein, shall assent thereto;" and this language the court, in *Carroll Co. v. Smith*, held to mean two-thirds of the qualified voters present and voting at the election in favor of the proposition, as determined by the official return of the result, saying: "In that connection a voter is one who votes; not one who, although qualified to vote, does not vote." This decision of the supreme court but followed its earlier decisions in similar cases, viz.: *St. Joseph Tp. v. Rogers*, 16 Wall. 644, and *County of Cass v. Johnston*, 95 U. S. 360. In the last-named case the constitution of Missouri prohibited townships from aiding railroad companies "unless two-thirds of the qualified voters of the \* \* \* town, at a regular or special election to be held therein, shall assent thereto," which is identically the same language, slightly transposed, as that of the Mississippi constitution, above quoted. But what was known as the "Township Aid Act" of Missouri, approved March 23, 1868, authorized townships to subscribe to the capital stock of railroad companies "whenever two-thirds of the qualified voters of the township voting at an election called for that purpose shall vote in favor of the subscription;" and it will be noted that the language of this township aid act—"voters of the township voting"—is precisely the same as that of our constitution—"voters therein voting." In that case the parties and the court agreed in construing the meaning of the legislative provision to be what we hold it to be here,—that the majority meant was a majority of those who voted; but the defendant in error contended that the constitutional provision required a majority of all the qualified voters of the township, but not successfully, for the court construed the constitution and the act to mean the same thing, and said that any other construction would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect was clearly expressed. In *McCrary, Elect.* (3d Ed.) § 173, the general rule is laid down thus: "Where a statute requires a ques-

tion to be decided \* \* \* by the votes of the majority of the voters of a county, this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by a majority of the voters."

The plaintiff, by two insufficient paragraphs of his complaint, attempted to set forth a second cause of action, alleging that the city of Seattle was indebted in about the sum of \$400,000, which was \$159,746.50 in excess of the indebtedness allowed to be incurred by law, and which excess was contracted since the act of February 26, 1890, validating certain municipal indebtedness, without the assent of three-fifths of the voters of the city. And he further alleged that the city was attempting to fund the said excess without a vote, and that it would do so unless restrained. His application for an injunction upon this statement of facts was refused, and, we think, rightly. The complaint was too vague, containing, as it did, no statement of any fact on the part of the city's representatives threatening the alleged funding. At the hearing in this court the parties, by agreement, sought to amend the pleading, and obtain a construction of the statute above mentioned; but we must decline to permit the amendment, as, in our view, it does not come within the rules which allow amendments in this court. We have looked into the proposed pleading, however, and find it open to the same objection as its original, viz., that it shows no acts going to constitute an invasion of the limits set up by the funding act, or a threat to invade the same. In short, it discloses no real controversy, such as appears in the first cause of action. The things feared may be done or attempted, and they may never be. When some step in their direction is taken it will be time enough to appeal to the courts. Upon all grounds, therefore, the action of the court below in sustaining the demurrer to the complaint should be sustained, and its judgment affirmed, and it is so ordered; costs to the appellee.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(1 Wash. St. 305)

STATE *ex rel.* BAKER *v.* SNODGRASS *et al.*

(Supreme Court of Washington. Aug. 8, 1890.)

Appeal from superior court, Clark county.

D. P. Ballard and J. W. Metcalf, for appellant. A. L. Miller, for appellees.

STILES, J. The matter at issue in this case was the same as that in *Metcalf v. City of Seattle*, ante, 1010, (decided at this special session of the court,) there being but one question to be passed upon, however, viz., that whether the majority required to authorize the officials of a county to issue bonds to build a court-house must be three-fifths of all the voters of the county, or three-fifths of those voting. The action of the court below was the same as that of the superior court of King county, and the judgment here must be the same as in *Metcalf v. City of Seattle*, for the reasons fully given in that case. Judgment affirmed, with costs to the appellee.

ANDERS, C. J., and SCOTT, DUNBAR, and HOYT, JJ., concur.

(1 Wash. St. 305)

YESLER *et al.* *v.* CITY OF SEATTLE *et al.*

(Supreme Court of Washington. Sept. 17, 1890.)

MUNICIPAL CORPORATIONS—WATER AND SEWERAGE SYSTEMS—BONDS.

1. The charter of the city of Seattle, § 12, (Acts Wash. 1886, p. 244,) which requires a proposition for the erection of water-works to be submitted to the voters of the city "at a general election," does not apply to water-works constructed under the authority of Acts Wash. Feb. 26, 1890, and March 26, 1890, which empower cities generally to construct and maintain water, light, and sewerage systems, with the proceeds of long-time bonds, to be issued with the assent of three-fifths of the voters voting at "a special election;" and hence the proposition for such a system need not be submitted at a general election.

2. Though water-works, sewers, and light plants are not commonly spoken of as "internal improvements," yet Act Wash. March 26, 1890, entitled "An act authorizing cities and towns to construct internal improvements," under which the legislature empowers cities to construct water, light, and sewerage systems, does not violate Const. Wash. art. 2, § 19, which requires the subject of an act to be expressed in its title.

3. Act Wash. March 26, 1890, which authorizes the council of a city, by ordinance, to submit to the voters a plan for the construction of water, light, and sewerage systems, "either or both," clearly authorizes an ordinance on these subjects to be either single, double, or triple; and hence it suspends the restriction imposed by the city charter of Seattle, § 78, that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title."

4. The record of an ordinance was made by the city clerk from a correctly printed copy, the original having been lost. Subsequently the city attorney undertook to prepare a substitute for the original, but by mistake he worded it differently in some particulars. This substituted copy was signed by the mayor and clerk, and placed on file in the latter's office. Afterwards an assistant clerk, without authority from any one, erased and interlined the recorded ordinance to make it conform to the substituted copy. *Held*, that showing these facts was not the impeachment of a record, and that the ordinance, as originally recorded by the clerk, before the erasures and interlineations were made, was the true ordinance.

5. Under an ordinance authorizing the construction of a water and sewerage system, "if three-fifths of the voters of said city shall at said election vote" in its favor, a three-fifths majority of those actually voting on the proposition is all that is necessary, and not three-fifths of the persons who may be entitled to a vote.

6. Act Wash. March 26, 1890, provides that before a proposition for the construction of water, light, or sewerage systems shall be submitted to the votes of the electors, the plan of operation shall be adopted, and the probable cost estimated, and certified to by the council in the form of an ordinance. *Held*, that the city council can lawfully submit to vote only those matters directed to be submitted by the legislature, and that the rate of interest that the bonds shall bear, their sale at par, and the place of payment, need not be submitted to the electors.

7. The fact that the ordinance submitted to the voters fixed the rate of interest for the bonds, and their place of payment, and provided for their sale at par, does not form an unchangeable rule under which the council must negotiate the bonds; and the actual negotiation of the bonds at a higher rate of interest than provided for in the ordinance will not be restrained at the suit of a tax-payer, where the mayor and council have acted in good faith, and have been unable to negotiate them at the rate originally fixed.

8. Where the bonds were not negotiated until some months after the day of their date, an agreement under which the purchaser is entitled to in-



terest for the entire term for which they have to run is not a violation of Act Wash. March 29, 1890, which requires the bonds to "bear the date of their issue."

9. Act Wash. March 26, 1890, which requires such bonds to be signed by the mayor of the city, is sufficiently complied with by the signature of the bonds by the person occupying the office at the date of their negotiation and delivery, though he was elected after the day of their date.

Appeal from superior court, King county.

Action by H. L. Yesler and others against the city of Seattle and others to enjoin the negotiation of the city's bonds. From a judgment for the defendant, complainant appeals. For the statutes involved in this case, see *Metcalf v. City of Seattle*, ante, 1010.

*Preston, Albertson & Donworth*, for appellants. *Thomas R. Shepard*, for appellees.

STILES, J. In this appeal the matter of the issuance of the same bonds which were the subject-matter of the recent case of *Metcalf v. City of Seattle*, ante, 1010, was again in controversy, the appellants seeking to enjoin the sale of the bonds to purchasers approved by the city council of the city of Seattle, upon the several grounds which will be stated and discussed in order.

1. Appellants maintain that inasmuch as section 12 of the act incorporating the city of Seattle (Acts 1886, p. 244) grants power to that city to erect and maintain water-works, provided that no such works should be erected "until a majority of the voters of the city, at a general election of the city, shall vote upon the same," the special election of June 4, 1890, was an invalid election; their contention being that since the act of February 26, 1890, contains no authority to erect water-works, and the act of March 26, 1890, has no clause repealing conflicting laws, this requirement of submission at a general election still stands as the law of that corporation. But even were we to hold that there had not been a repeal of the quoted part of section 12 of the act of 1886, by reason of the rule that special acts of this class are not to be taken as repealed by general acts unless the intent to repeal is plainly apparent, it is equally apparent that the act of 1886 did not provide for the erection of water-works and the construction of sewers with the proceeds of long-time bonds, which the acts of February 26 and March 26, 1890, do. Thus a new and distinct power is conferred by a method, the main and most beneficial feature of which is the relief of the present generation of tax-payers from excessive assessments to pay cash for such public improvements; and whenever that feature is sought to be availed of, as it was in this instance, all the safeguards accompanying it must be adopted. One of these is the special election, and there was therefore no error in the proceedings on that score.

2. It is objected that the act of March 26th is invalid, because the subject is not expressed in the title. Const. art. 2, § 19. The title is "An act authorizing cities and towns to construct internal improvements, and to issue bonds therefor, and

declaring an emergency," and the criticism is that although there is a subject expressed, it is not the subject treated of in the body of the act, since water-works, sewers, and artificial light plants are not "internal improvements" within the ordinary meaning of the phrase. Perhaps this is an original use of the term "internal improvements." It has certainly not been commonly applied to the improvements supposed to be made by cities for the benefit of their inhabitants, but has been employed more grandiloquently in reference to the improvement of highways and channels of travel and commerce in the statutes of congress and the state legislatures. And yet when under it our legislature particularizes water-works, sewers, and light plants, which certainly are in fact internal improvements, relatively to the cities of the state, we do not deem the verbal criticism of sufficient weight to set aside the act. The cases cited (*Railway Co. v. Colfax Co.*, 4 Neb. 450, and *Dawson Co. v. McNamar*, 10 Neb. 276, 4 N. W. Rep. 991) are not in point, since these were instances of the issuance of bonds for purposes not particularized in the statute, which was a general one authorizing counties to issue bonds in aid of railroad and other internal improvements.

3. The act of 1886, § 78, contains the usual restriction that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title;" wherefore it is asserted that ordinance No. 1343 was void, because both in its title and in the subject treated of it was double, in that it provided for both water-works and sewers; and, in so far as the double subject is concerned, our judgment is with the appellants, for both in the constitution and the statute water-works and sewers are distinct things; and it would probably be better that in all cases propositions for either of these improvements, as well as for lighting systems, should be submitted either at separate elections, or separately at the same election, so that the voters might be free to adopt one system without being forced thereby to adopt the other, or to reject one without losing the other. But the restrictive clause of section 78 of the act of 1886 has no effect upon that portion of the act of March 26, 1890, which provides for submitting propositions to the voters of cities, since the latter act, by its own terms, contained in section 2, suspends the restriction. Section 2 says: "Whenever the city council or board of trustees of any such city or town shall deem it advisable that the city or town, of which they are such officers, shall exercise the authority hereby conferred upon them in relation to either or both such water-works or system of sewerage or plant or works for lighting purposes, the corporation shall provide therefor by ordinance," etc. This is a general law applicable to all incorporated cities and towns, and is to be executed in the same manner wherever it is made use of. It has become a part of the charter of each city and town, and on this subject clearly authorizes ordinances to be either single, double, or triple.

4. The next proposition in the case em-

braces questions of mixed law and fact. The complaint alleged that the ordinance had never been published as required by section 79 of the charter, (Act 1886;) but it was admitted at the hearing that a publication had been made, excepting that, whereas section 6 of the ordinance adopted by the council and approved by the mayor, as appeared from the clerk's official record, had provided that the proposed works should be entered upon "if three-fifths of the qualified voters of said city of Seattle voting at said election vote in favor of authorizing" the same, on the other hand the attempted publication had represented section 6 as conditioned that "if three-fifths of the voters of said city of Seattle shall, at said election, vote in favor of authorizing" the same. The answer alleged, and the court below, over appellant's objection, permitted the appellee to show, that the ordinance was passed and approved in the words of section 6, as admitted to have been published, but that through haste in procuring publication the city clerk had permitted the printer to take the original sheets of the ordinance to be used as copy for the newspaper type-setters before the ordinance had been copied into the record book; that the printer had separated the sheets, perhaps cut them up, and ultimately lost them; that the clerk had preserved one of the newspaper copies, as officially published, and from that made his copy in the ordinance record book; that some time after this, through the frequency of calls for the original ordinance by third persons, the attention of the mayor and city attorney was drawn to the fact that it had been lost, and the city attorney undertook to make a substitute original copy, which was to be signed by the mayor and clerk, dated and filed as of the date of the original, and to be, to all appearances, the original itself; that the city attorney mistook a prepared draft for an ordinance which he had in his office for a *verbatim* copy of the one adopted, and prepared his substituted copy from that, instead of from a printed copy; that this substitute, containing the variations noted, was signed by the mayor and clerk, and dated and filed as proposed, and was for some time treated as the true original; and that an assistant in the office of the clerk, after the substitute copy had been deposited in the files of the clerk's office, noticed the discrepancy between it and the recorded ordinance, and without authority or instruction from any one interlined in the record the word "qualified," and erased the word "shall," and interlined the word "voting" in its place. The appellants' objection to proof of these facts was on the ground that the record of the ordinance could not be collaterally impeached. Dill. Mun. Corp. §§ 297-299. But we hold that this was not a case of the impeachment of a record, but merely to determine what was the record. The substitute copy made by the city attorney was certainly not a record; and no more were the interlineations and the erasure made by the unauthorized assistant clerk a part of a record. The testimony went to show these facts, and to

establish what was the true record, viz., the ordinance as copied into the record book, by the clerk, from the printed copy, before the erasure and interlineations were made; and this, in our judgment, was entirely competent.

This leaves the ordinance reading: "If three-fifths of the voters of said city of Seattle shall at said election vote in favor of authorizing," etc., which it will be observed is not the language of it as presented in *Metcalf v. City of Seattle*, ante, 1010. Appellants therefore confidently claim that since it is admitted that there were over 4,000 persons in Seattle entitled to vote on the 4th day of June, 1890, and less than 800 did in fact vote, the authority to bond the city for water-works and sewers was not granted. But under our construction of the word "voter" in *Metcalf v. City of Seattle* and the authorities there cited, we see no difference whatever in meaning between "if three-fifths of the voters shall vote" and "if three-fifths of the qualified voters voting vote." The word "qualified" adds nothing. Every voter is a "qualified" voter; and if a voter is one who votes, then, at an election, he is a "voter voting." It was competent for the city of Seattle to be more particular than the statute, and provide that, before the proposition for public water-works and sewers pass, it should be authorized by the affirmative vote of a majority of all the persons entitled to vote; but unless it has done so in clear and indisputable language it should be taken to have accepted the act of March 26th as the legislature enacted it; and, in view of the eagerness with which the legislative body of the city have pursued the matter, we deem it not likely that it would seek to make the way to the issuance of these bonds more difficult than was necessary under the law.

5. The ordinance, in addition to the systems of water-works and sewers set forth, declared the probable cost, and proposed the issue of bonds for \$955,000. This was required by section 2 of the act of March 26th. But the ordinance went much further, and enacted many other things not necessary to it as a complete ordinance for submission. The place of payment was fixed at the office of the city treasurer, the rate of interest was made 5 per cent., and it was ordered that the bonds be disposed of at not less than par. Now it is contended by appellants that every feature of the ordinance, by its submission to the voters, became a condition precedent to the lawful issue of the bonds under the authority conferred by the result of the election. Were this point held good, it will be seen that the whole scheme would be very effectually blocked, for the present at least. It appears that in accordance with the authority contained in the ordinance the mayor and the finance committee of the council, as soon as the election of June 4th had ratified the action of the council, prepared to have the bonds lithographed, and advertised them for sale as bonds of date July 1, 1890, running 20 years, at 5 per cent., interest on the first coupon from July 1st to delivery to be deducted. The time set for receiving bids was July 8, 1890; but neither at that time nor at any

subsequent date could any person be found to take the bonds on the terms offered, the rate of interest being lower than the market commanded for that class of securities. On the 19th of August, however, one N. W. Halsey, who was in the employ of the firm of N. W. Harris & Co., offered on behalf of Harris & Co. to purchase the whole issue of bonds, providing that terms could be made so that, in effect, the rate of interest could be raised to about 5% per cent. The experience of the mayor and finance committee had convinced them and the council that a 5 per cent. bond could not be negotiated at par, and they were willing to accept the offer of Harris & Co. But both parties to the transaction were fearful that the provisions of the ordinance were binding upon all action taken in furtherance of the issue of these bonds, and they therefore resorted to a series of clumsy fictions to avoid the effect of the requirements as to rate of interest and selling at par, the excuse on the part of the city officials being the pressing need of the people for a larger supply of water and better sewerage, the delay and expense of another election, and the fact that the credit of the city had already been pledged to a large amount for water machinery on the faith that the proceeds of these bonds would be immediately available. Harris & Co. offered to take the entire issue of \$955,000, paying \$350,000 cash, \$50,000 October 1st, \$50,000 November 1st, and \$505,000 after January 1, 1891, in installments of not less than \$10,000, nor more than \$50,000, as the funds should be actually needed by the city in paying for water and sewerage work on estimates to be furnished by the engineers in charge, with 15 days' notice of a call for each installment; all interest coupons from the date of the bonds, July 1, 1890, to remain attached to the bonds uncanceled. They further required that a commission of 2 per cent. of \$955,000 be forthwith paid to Halsey in a warrant on the general fund of the city, and that a warrant of the city of Seattle for \$19,000 be accepted as part of the first payment of \$350,000, to be made by them. The place of payment was to be changed to some national bank in the city of New York. We agree with the appellants that all of this maneuvering was simply a scheme to give the bonds to Harris & Co. at a discount, and the appellees substantially concedes such to be the fact. In the first place, the commission to Halsey, who was the authorized agent of Harris & Co., was a rebate to the purchasers of \$19,000 from the face of the first \$350,000; and, secondly, the retention of all coupons was an advance payment of interest to the extent of some \$43,000 for a period during which Harris & Co. would still retain the purchase money, and have the full use of it; so that the effect would be that the city of Seattle, in 20 years, would pay about \$62,000 more for the use of the money than it would had the bonds been sold in strict accord with the terms of the ordinance. This, doubtless, was the moving cause of the appellants' suit, and is the most strongly urged of all their grounds of complaint. The council, by ordinance, to the formality of which no

objection is raised, accepted the proposition of Harris & Co., caused a warrant for \$19,000 to be drawn on the general fund in favor of Halsey, (which was immediately indorsed to Harris & Co., and by them, through Halsey, turned in on their first payment,) and were proceeding to the execution of the bonds when this action delayed all further steps. Unless we hold that this change of plan by the council was not expressly or impliedly forbidden by the law governing their action, the injunction asked should be granted. We observe, at the outset of this part of the case, that no fraud whatever is alleged against the council, or any of its members; nor was there any attempt to avoid the effect of any part of the statute, unless it be what is claimed to be its unwritten part, binding the council to every provision of ordinance No. 1343. Municipal corporations are almost invariably invested with the power to borrow money. Very eminent jurists have maintained that this power was inherent with the idea of a corporation, and needed not to be granted specially. But the rule is settled otherwise, and now, aside from constitutional and statutory limitations, courts demand some charter provisions on this subject before they will recognize indebtedness of this kind. The power to become indebted being made apparent, however, courts are liberal in their construction of statutes and constitutional provisions couched in general language, so long as the purposes for which indebtedness is created are clearly seen to be municipal in their character. The standard for a county is, however, measured by the objects of its incorporation, that of a school-district by an entirely different set of objects, and that of a city or town by the peculiar and infinitely varied needs of their inhabitants, circumscribed by reasonable bounds. Usually the wisdom of incurring debt by these corporations is delegated to the legislative authority of each, though there have been exceptions in which corporations have been required by the legislature to issue bonds for purposes foreign to their organization, and there is a numerous class of instances in which it is common to submit propositions to the electors of the corporation, and thus delegate to the body of the people the power to say whether a debt shall be incurred or not. This latter class, however, is generally limited to cases where the object to be promoted is not within the purview of legitimate corporate purposes, though it is of a *quasi* public nature. Our constitution, in the most positive terms, has cut off from every municipal corporation every subject of expense and indebtedness excepting those which are within the legitimate intentment of its organization; and so far as cities are concerned, it has gone to the extreme of restriction by fixing the 1% per cent. limit, beyond which the legislative bodies of those corporations cannot incur valid indebtedness without the assent of their constituents. The act of February 28, 1890, undertakes to confer upon existing cities the power to become indebted up to the limit prescribed by section 6, art. 8, of the constitution; and upon examina-

tion we find that until the 5 per cent. limit is reached the council have delegated to them the whole matter of how, and for how long, and at what rate of interest, loans shall be negotiated, and all of the details; and this is with reason, since these are business corporations, acting, as a general rule, only through their legislative head, and it is not practicable to submit details to the body of voting inhabitants. True, when 1½ per cent. has been reached, the people must be consulted as to further borrowing of money or contracting indebtedness, but the method and other details are entirely left to the council, unless water-works, sewers, or light plants are contemplated, when the act of March 26th makes some modifications. Now the power is thus delegated to the municipal legislature, with the assent given, to proceed and "borrow money" or "contract indebtedness," it being the sole judge of the proper method, whether by bonds or warrants or open account, confidence being reposed in the wisdom and honor of its members that they will act for the best interest of the community. No citizen or tax-payer can question, in the courts, the uncorrupted action of his city council in these particulars, as no stockholder can dispute the doings of the board of directors of a private corporation of which he holds stock, in the absence of fraud. Nor does the law permit the council of a city to delegate to the popular vote the determination of any matter before it unless the right to so delegate it has been expressly conferred or enjoined by statute. Ministerial agents, with certain limited discretion, it may appoint, but that is all. Now, turning to the act of March 26th, we find that the legislature saw fit to enlarge somewhat on the requirement that the assent of voters should be secured to the proposition to borrow money or become indebted for water-works, sewers, or light plants, and prescribed that before the vote should be taken the plan of operation should be adopted and the probable cost estimated and certified to by the council in the form of an ordinance. Here is a mandatory delegation to the popular voice by the legislature itself. It is not in the discretion of the council to submit the question to vote or not. The council is merely the medium by which the wish of the people in the matter is recorded. Therefore we conclude that the council could lawfully submit to vote only those matters directed to be submitted by its superior authority, the legislature.

Appellants urge that, to be consistent with our decision in *Metcalf v. City of Seattle*, we must hold with them, since, in that case, we said, in reference to the act of March 26th: "The intention of the act was that the people who would have to furnish the means should be fully apprised of the whole scheme, and that there should be a definite, well-considered, and practicable scheme presented for their rejection or adoption;" they maintaining that the "scheme" submitted was to borrow \$955,000 net, running at 5 per cent. interest. But in using the word "scheme" in the former opinion we had no reference to any

matter connected with the bonds themselves. Nothing of the kind was involved in the case, and our use of the term was as a synonym for the phrase "system or plan" employed in section 2 of the act, and related wholly to the physical features of the proposition, not to the financial means of accomplishing them. Touching that point, the people have a guaranty in the further provisions of the statute that bonds must be payable in not more than 20 years, and bear interest not exceeding 6 per cent.

It follows that we hold the rate per cent., the sale at par, and the place of payment not to have been necessary to the ordinance, but the question remains whether, having been placed there, they must remain as the unchangeable rule of the council's action. We are cited to a number of cases which are presented as sustaining the affirmative. *State v. Delafield*, 8 Paige, 527, held that a sale of bonds, nominally at par, but allowing accrued interest to the purchaser, was not really a sale at par where the statute expressly required the par value to be realized. We have held that the plan here proposed would not be a sale at par. *Cowdrey v. Canadea*, 16 Fed. Rep. 532, fairly represents the other cases cited, all of which, without exception, are cases growing out of the issue of municipal bonds in aid of railroad or other quasi-public corporations; and the judge in that case clearly states the ground of difference in the treatment of bonds of that class and those issued for purely municipal purposes. He says: "The authority of a majority of the tax-payers of a town to incumber the property of a minority against their will in aid of a railroad or other corporation receives no countenance from the principles of the common law. Every step, therefore, required by the statute must be in strict conformity therewith." In *Lawson v. Schnellen*, 33 Wis. 288, the statute required the written proposition of the railroad company to be submitted to vote of the people, and the court held that if the proposition was assented to it became a contract, which could not be altered by county commissioners. *Douglas Co. v. Waldrige*, 38 Wis. 179, was of the same character. *Jackson Co. v. Brush*, 77 Ill. 59, held that railroad aid bonds should not be delivered until the conditions precedent, which had been made a part of the contract between the county and the company, had been fully complied with. The remarks of High on *Injunctions*, (volume 2, p. 1289,) and of *Dillon on Municipal Corporations*, (section 91,) and *Dillon on Municipal Bonds*, (section 6 et seq.,) are all directed to this class of corporation aid bonds, the latter volume being entirely devoted to them; and the gist of these cases and authorities, so far as they have any bearing here, is that if a railroad or other company is aided by such bonds, the propositions submitted to the vote of the people, whether originating in the statute, or with the municipal agents, or from the corporation, became a part of the contract between the two corporations, and follow the bonds as the law of their issuance.

But here we have no element of contract whatever, and the authority of a majority of the voters to incur the property of the minority, even against their will, in furtherance of municipal objects and improvements, receives the broadest countenance from the principles of the common law. There is no reason which commends itself to our judgment for holding that those parts of ordinance 1343, referring to the details of the negotiation, should be inviolate, and not subject to amendment in the manner adopted, when it was found that no one would take 5 per cent. bonds at par. We still have to consider the alleged post-dating of the bonds; but, aside from that, it is conceded that the motive of those engaged in the transaction were fair, and the actual result to the city of Seattle was a rate of interest higher by about one-third of 1 per cent. per annum, and two-thirds of 1 per cent. less than the rate recognized by the statute. It would certainly have been far better had the council, seeing their dilemma, met the fact that 5 per cent. bonds could not be marketed at par, with a new ordinance authorizing their negotiation at the best rate obtainable under 6 per cent. They would have been subjected to far less criticism, and the record here would have been much less involved.

6. The statute requires that such bonds shall "bear the date of their issue," and it has become a question in this case what the date of issue is, since the bonds were prepared with the date July 1, 1890, and the contract with Harris & Co. requires that the coupons remain intact from that date, although none of the bonds have been delivered, and some of them will not be delivered for many months. In financial parlance the term "issue" seems to have two phases of meaning. "Date of issue," when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery, and we see no reason why the act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be "issued" to him, which is the other meaning of the term. Usually the question of interest from the date of issue to the time of sale of bonds is adjusted by payment of the face and interest by the purchaser, or the removal of coupons. But here the contract stipulates that the coupons shall remain uncanceled. It was a fair contract, and there can be no wrong done if the term of some of the bonds, in the hands of purchasers, is something less than 20 years. No officer has sought to evade any statute affecting these bonds which came into operation since the date of issue, as was the case in *Anthony v. County of Jasper*, 101 U. S. 693; nor did a person not an officer of the corporation at the time of signing affix his name to the bonds, as an officer, to avoid the refusal of the acting officer to sign, as occurred in *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct.

Rep. 720. Under the circumstances the date July 1st was not an unreasonable date, and complied with the law in that respect.

7. The act of March 26th, among other formalities, required the bonds to be signed by the mayor of the city; but, pending the disposal of bonds, a municipal election was held July 14th, at which Harry White was elected mayor. As he was not the mayor July 1st, appellants maintain that he cannot consistently sign them under that date of issue. But if the bonds are valid, although not executed and delivered at the precise date of issue, it follows that the officer in office when the occasion arrived for executing them would be the proper party to affix the official signature of the mayor. In *Weyauwega v. Ayling*, 99 U. S. 112, the bonds of a town bore date June 1st, and were signed by the chairman of the board of supervisors, and by the town-clerk; but the person signing as clerk did not sign until July 13th, at which date he had ceased to be the town-clerk. Still the supreme court held the bonds good, presuming that the bonds were delivered with the assent of the then clerk, certainly a far more extreme case than that under consideration. *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. Rep. 720, seems to be, in some of its features, at least, on all fours with this case. The city of Cleburne, Tex., in September, 1883, contracted to pay city bonds for the erection of water-works, the bonds to bear date January 1, 1884. The works were not ready for acceptance until July 3, 1884, when the person who had been the mayor on January 1st had gone out of office, and his successor was acting. The statute of Texas required such bonds to be signed by the mayor; but the city council argued that the mayor, at the date of the bonds, should sign them, even though he had gone out of office, and they passed a resolution requesting him to sign them, with which he complied. An innocent holder had brought suit upon unpaid coupons of these bonds; but the supreme court held, without dissent, that no person but the mayor of the city could lawfully sign the bonds, although thus formally requested to do so by the council, and that they were therefore void. The court, however, nowhere hints that because the term of the mayor in office January 1st had expired in April no bonds bearing date January 1st could be issued by the city of Cleburne; and we have found no authority sustaining such a proposition. Upon all this branch of the case we can frame no better reason for our judgment for the appellee than is contained in section 6 of the act of March 26th, in the words: "Such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the city or town." The judgment of the superior court is affirmed, with costs to appellee.

HOYT, SCOTT, and DUNBAR, JJ., concur.

ANDERS, C. J., did not sit at the hearing of the case.

(20 Or. 355)

## WARD v. TOWN OF FOREST GROVE.

(Supreme Court of Oregon. Feb. 26, 1891.)

## MUNICIPAL CORPORATIONS—LIABILITIES—RATIFICATION OF CONTRACTS.

A municipal corporation, unless prohibited by its charter, is liable for the professional services of a physician in attending persons afflicted with small-pox, within its limits, employed by a committee assuming to act for it, when such services have been rendered with knowledge of its officers, and without notice that the contract of employment is not recognized as valid and binding, although the corporation has not conferred the authority in a formal manner on such committee to make the contract.

(Syllabus by the Court.)

Appeal from circuit court, Washington county; FRANK J. TAYLOR, Judge.

This is an action to recover from the defendant compensation for services as a physician, rendered by plaintiff at the request of defendant, in caring for persons afflicted with small-pox within the town. Section 32 of the act incorporating defendant, among other things, empowers the trustees "to make regulations to prevent the introduction of contagious diseases into the town; to remove persons afflicted with such diseases therefrom to suitable hospitals provided by the town for that purpose; to secure the protection of persons and property therein, and to provide for the health, cleanliness, ornament, peace, and good order of the town." Section 33 provides that "the power and authority given to the board of trustees by section 32 can be exercised or enforced only by ordinance, unless otherwise expressly provided." Laws 1885, p. 427. At the trial plaintiff offered to prove, and offered evidence tending to show, that at the time alleged in the complaint residents and inhabitants of the town of Forest Grove, then within its limits, were afflicted with small-pox; that such people were poor, and unable to procure necessary care or medical attention. These facts came to the knowledge of the board of trustees, who thereupon met and adopted a resolution appointing a committee and authorizing it to procure necessary medical and other assistance for the persons thus afflicted, and to make all necessary regulations to prevent the spread of the disease. The resolution was duly recorded, and the proper record thereof offered in evidence. The plaintiff then offered to show that at the request of such committee he attended the small-pox patients as a physician, and co-operated with them to prevent the spread of the disease; that such committee took charge of the house containing those afflicted, kept guards around to prevent any one going to or from the house except such persons as they permitted; ordered food for the inmates, and established quarantine regulations; that the reasonable value of the services rendered by plaintiff is \$500, and were performed on the credit of the defendant, and at its request, and have not been paid. To the introduction of all this testimony defendant by its counsel objected, because the authority of the committee employing plaintiff had not been conferred by ordinance, as provided in section 33 of the act incorporating defendant. The

court sustained this objection, excluded the evidence, and directed a nonsuit, to which ruling plaintiff duly excepted.


*Thos. H. Tongue*, for appellant. *Stott, Boise & Stott*, for respondent.

BEAN, J., (after stating the facts as above.) The contention of respondent is that, while the defendant, through its agents, had the right and power to employ plaintiff, yet, even if it did employ him, and upon the faith of said employment plaintiff rendered valuable services for the benefit of defendant, it had not conferred the authority upon its agents in a sufficiently formal manner, and therefore is not bound to compensate plaintiff for his services. The argument is that section 32 of the defendant's charter provides the mode and manner of exercising the right "to make regulations to prevent the introduction of contagious diseases into the town," etc., and until an ordinance for that purpose has been duly passed the town can incur no liability in respect thereto, although the services may have been rendered at the request and with the full knowledge of the town authorities. There would be much force in such an argument if the contract was executory, but here the contract has been fully executed. The defendant attempted to exercise the power given it by a formal resolution of its board of trustees authorizing a committee to provide the necessary care and attention for its small-pox patients. The plaintiff rendered the services at the request of such committee, and with the full knowledge and consent of the town authorities; and the defendant, having received the benefit of his services, should compensate him therefor. As was said by FIELD, J., in *Gas Co. v. San Francisco*, 9 Cal. 469: "The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility, under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations. This is as well settled by the authorities as any principle of law can be." So, in *Fisher v. La Rue*, 15 Barb. 323: "It is well settled, at least in this country, that when a person is employed for a corporation by one assuming to act in its behalf, and goes on, renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was made by a person not legally authorized to contract." To the same effect, see *Tyler v. Trustees*, 14 Or. 485, 13 Pac. Rep. 329; *Beers v. Dalles City*, 16 Or. 334, 18 Pac. Rep. 835; *Pixley v. Railroad Co.*, 33 Cal. 183; *Cincinnati v. Cameron*, 33 Ohio St. 336. Plaintiff having rendered

services as a physician in the care of small-pox patients by the request of the authorities of defendant, and with their full knowledge and consent, it hardly comports with fair dealing that it should seek to exonerate itself from liability from a debt on this account, contracted, as it was, by and through its accredited agents, and with its affirmative acquiescence, because the forms prescribed by its charter have not been pursued, and the law will fail to effect its true end if the defense can prevail. This is not a case where the officers of the corporation have exceeded their authority; nor is it a case where the mode of contracting is specially prescribed and limited by the charter. Here the power to make all needful rules and regulations for the care of and attention to persons within the corporate limits afflicted with small-pox or other contagious diseases, which necessarily include contracts for medical attendance, is fully and plainly conferred; and, although a particular form is prescribed which shall be the evidence of the exercise of such power, the absence of this evidence does not destroy the power. *Cincinnati v. Cameron*, 33 Ohio St. 365. The corporation had the power to make the contract with plaintiff upon which this suit is brought, and attempted to exercise such power by a formal resolution of its board of trustees. This resolution was, perhaps, an irregular exercise of the power, but it accomplished the purpose intended; and, having received the benefit of plaintiff's services, the defendant should be compelled to pay him the reasonable value thereof. Judgment reversed, and new trial ordered.

(20 Or. 318)

**D. M. OSBORNE & CO. v. HUBBARD.***(Supreme Court of Oregon. Jan. 12, 1891.)***PROMISSORY NOTE—SEALED INSTRUMENT.**

An instrument in the form of a negotiable promissory note, but with a scroll in which the word "seal" was written, thus, , after the signature of the maker, is a sealed instrument, and not a negotiable promissory note, though there is no reference to a seal in the body of the instrument.

*(Syllabus by the Court.)*

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.


*Francis Fitch*, for appellant. *H. K. Hanna* and *J. R. Nell*, for respondent.

**LORD, J.** The plaintiff brought this action upon the following instrument: "\$90.00. May 12, 1884. On or before the first day of October, 1884, for value received, I, or we, or either of us, promise to pay to the order of D. M. Osborne & Co. the sum of ninety dollars in U. S. gold coin, at the office of \* \* \*, with interest in like gold coin at ten per cent. per annum from September 1st until paid; and in case suit is instituted to collect this note, or any portion, I, or we, or either of us, promise to pay with reasonable dollars as attorney's fees in such suit.

Willow Springs, Or. C. C. PARKER. 

It is alleged "that prior to the delivery of said note to the payee, this plaintiff, the

defendant indorsed said note by writing his name across the back thereof, and thereupon said note was delivered to this plaintiff; that said plaintiff is the owner and holder of said note; that said note has not been paid, nor any part thereof; that said C. C. Parker and said defendant have failed and refused to pay the same; that twenty-five dollars is reasonable value of services," etc. A demurrer was interposed to the effect that no cause of action was stated against the defendant, and sustained, and, the plaintiff refusing to proceed, judgment was given for the defendant, and his costs, from which this appeal is brought.

The contention involved is whether the instrument sued on is a negotiable promissory note, and as such entitled to the special privileges conferred by the law-merchant. In form, the instrument executed is a negotiable promissory note, except that the signature has after it a seal, thus, . It is insisted for the plaintiff

that, by the affixing of a seal to his signature by the maker of the instrument, its negotiable quality was destroyed, and it became a non-negotiable note; while it is claimed for the defendant that the mere affixing of a seal to the signature does not make it a sealed instrument, unless there is a recognition of the seal in the body of the instrument, by some such phrase as "witness my signature and seal," or "signed and sealed," for otherwise the door would be thrown open to frauds and forgeries by the facility with which such seals could be superadded; in a word, that the seal annexed is mere surplusage. This is undoubtedly the view taken by the Virginia cases, but which are conceded in *Cromwell v. Tate's Ex'r*, 7 Leigh, 301, not to be in harmony with the common law, and are largely against the weight of authority. *Anthony v. Harrison*, 14 Hun, 201; 1 Daniel, Neg. Inst. § 32; 1 Rand. Com. Paper, §§ 70, 71.

In this state, while a seal may be made by a wafer or wax attached to the instrument, it may be also made by a scroll with a pen after the signature to the instrument at the time of its execution and delivery. Nor does it seem that it is necessary that the scroll or seal must be recognized in the body of the instrument. For *ARCHER, J.*, said: "If he execute and deliver it with the scroll attached, it being considered here as equivalent to the wax or wafer, it is as much his seal as if he had declared it to be so in the body of the instrument. The fact of the clause of attestation not appearing in the usual form of 'signed, sealed, and delivered,' can, in reason, make no difference; for the question always is, is this the seal of the obligor? And, if he has delivered it with the scroll attached, it is his seal, and must be so considered; for whether an instrument be a specialty must always be determined by the fact whether the party affixed a seal, not upon the assertion of the obligor in the form of an instrument, or by the form of attestation." In *Brown v. Jordhal*, 32 Minn. 137, 19 N. W. Rep. 650, the identical question raised here was thus disposed of by *GILFILLAN, C. J.*: "But



the appellant contends that merely placing upon an instrument a scroll or device, such as the statute allows as a substitute for a common-law seal, without any recognition of it as a seal in the body of the instrument, does not make it a sealed instrument. Such words in the *testimonium* clause as 'witness my hand and seal,' or 'sealed with my seal,' would establish that the scroll or device was used as a seal. No such reference in the body of the instrument was necessary in the case of a common-law seal. *Goddard's Case*, 2 Coke, 5a; 7 Bac. Abr. (Brown's Ed.) 244. Nor is there any reason to require it in the case of the statutory substitute, if the instrument anywhere shows clearly that the device was used as and intended for a seal. It would be difficult to conceive how the party could express that the device was intended for a seal more clearly than by the word 'seal' placed within, and made a part of it. This was an instrument under seal." In *Whittington v. Clarke*, 8 Smedes & M. 480. THATCH, J., said: "Whenever it is manifest that the scroll is intended to be used by the way of seal, it must have that effect, whether it appears from the body of the instrument or from the scroll itself." *McRaven v. McGuire*, 9 Smedes & M. 48. In the case at bar, the seal is not simply a scroll made with a pen opposite the signature, but the word "seal" is written within the scroll, and made a part of it. In what other way the party could have more clearly evinced that it was intended and used as a seal, it would be difficult to conceive. As a sealed instrument, the contention for the plaintiff is that the effect of sealing the instrument, though it was in form a negotiable promissory note, was simply to destroy its negotiable quality, leaving it in all other respects subject to the rules of law applicable to non-negotiable notes, and that the defendant, by writing his name across the back of it before delivery to the plaintiff, as payee, rendered himself liable as a maker. *Barr v. Mitchell*, 7 Or. 354. Under our statute, "the seal affixed to a writing is primary evidence of its consideration. In other respects, there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. A writing under seal may therefore be modified or discharged by a writing not under seal, or by an oral agreement otherwise valid." *Hill, Code*, § 753. A seal, then, is still something more than a mere formality in the execution of the instrument under our law, but is a matter of substance, and not of surplusage, giving or imparting to the instrument certain legal effects which do not attach to unsealed instruments as the statutory limitation. 1 Rand. Com. Paper, § 70. Its effect was to deprive the instrument sued on of its character as a negotiable promissory note, and thereby to convert it into a bond, or single bill, or, as more often designated, a note under seal, which are not entitled to the privileges and immunities of the mercantile law. *TILGHMAN, C. J.*, said such an instrument was "a bond without condition; sometimes called a 'single bill,' and differs from a promissory note in nothing but

the seal which is affixed to it." *Bank v. Greiner*, 2 Serg. & R. 115. Mr. Daniel says: "If a seal be affixed to a paper in the ordinary form of a note, its character as such is destroyed; and it is thereby converted into the deed or bond of the maker, who is then termed the 'obligor,' and the instrument is not subject to the peculiar doctrines that are applicable to mercantile securities." 1 Daniel, Neg. Inst. § 32. A bond of this character is sometimes designated as a "single bill," or "obligatory writing," but more usually as a "sealed note;" but, by whatever name called, such an instrument cannot, with strict legal propriety, be termed a "promissory note" in the commercial sense, and is distinguishable in the incidents which attach to it. As a writing, it is an acknowledgment of indebtedness in a certain sum to be paid on a certain day, and differs from a promissory note in having a seal affixed to it, which operates to convert it into a non-negotiable instrument, thereby depriving it of its character as commercial paper. *Muse v. Dantzier*, 85 Ala. 362, 5 South. Rep. 178; 1 Rand. Com. Paper, §§ 70-73. The effect, then, of the seal was to convert the instrument under consideration, though in the form of a negotiable promissory note, into a non-negotiable instrument or note; and while it may be entitled to a statutory limitation, different from or longer than a non-negotiable note not under seal, yet, it being similar in other respects, it is subject to the same legal rules as are applicable to such non-negotiable notes. This being so, within the ruling made in *Barr v. Mitchell*, supra, that a person who signs his name on the back of a non-negotiable note before delivery does not, in a commercial sense, become an indorser of it, with the rights and liabilities of a simple indorser, but is liable as a maker, the action is properly brought against the defendant, who is liable as a maker. It results that it was error to sustain the demurrer, and the judgment must be reversed, and the cause remanded.

(10 Mont. 410)

STATE ex rel. HARRINGTON v. KINNEY,  
State Auditor.

(Supreme Court of Montana. Feb. 19, 1891.)

LEGISLATURE—COMPENSATION OF MEMBERS—CONSTITUTIONAL LAW.

1. Const. Mont. art. 5, provides that each member of the first legislative assembly shall receive certain compensation, and that after the first session their compensation "shall be as provided by law: provided that no assembly shall fix its own compensation." It further provides that no member shall, during his term, receive an increase of compensation under any law passed during such term. Held that, as the first assembly made no provision, as contemplated by the constitution, for the compensation of the members of the second assembly, most of whom were members of the first assembly, Act Feb. 18, 1891, passed by the second assembly, making the same appropriations for the compensation of its members as was contemplated by the constitution, merely carries the intent of the constitution into effect, and is valid.

Application for *mandamus*.  
*McCutcheon & McIntire*, for relator.

BLAKE, C. J. This is an application to the court for a peremptory writ of mandate, directing the state auditor to audit and settle a claim of the relator for mileage and *per diem* for attendance as a member of the house of representatives of the legislative assembly of the state. The following facts appear in the affidavit, and are admitted by the return: The relator was elected October 1, 1889, a member of the house of representatives of the state, and qualified and served as such during the first legislative session; that as said member he has attended the second session of the legislative assembly of the state since the first Monday in January, 1891, a period of 40 days; that a committee on mileage was appointed by said house, which inquired into and reported that the relator had and will have traveled 388 miles in going to and returning from the seat of government from and to his residence, by the usual route, to attend the said legislative assembly; that said report was adopted; that R. G. Humber, as the speaker *pro tem.* of said house, issued the following certificate to the relator: "State of Montana, house of representatives. \$317.60. Helena, Montana, Feby. 13th, 1891. This is to certify that the state of Montana is indebted to F. Harrington for forty days' service as member of the house of representatives of the second legislative assembly of the state of Montana at the compensation of six dollars *per diem*, and mileage of 388 miles at 20 cents per mile. R. G. Humber, Speaker *pro tem.* Attest: CHAS. Z. POND, Chief Clerk." The relator presented February 13, 1891, the foregoing account to the respondent, and requested him to audit and settle the same, and give a certificate thereof, but he refused so to do in whole or in part. The second legislative assembly, by an act entitled "An act to appropriate money for the executive, legislative, and judicial departments for the fiscal year ending December 1, 1891, and December 1, 1892," approved February 18, 1891, made an appropriation for the payment of this claim of the relator and his colleagues. The respondent says in his return that he refused to draw a warrant on the state treasurer for the payment of said account, "for the reason that there is no law fixing the *per diem* and mileage of members of said second legislative assembly." This constitutes the sole inquiry at this time, and requires an interpretation of the following sections of the constitution: "Each member of the first legislative assembly, as a compensation for his services, shall receive six dollars for each day's attendance, and twenty cents for each mile necessarily traveled in going to and returning from the seat of government to his residence by the usually traveled route, and shall receive no other compensation, perquisite, or allowance whatsoever. No session of the legislative assembly, after the first, which may be ninety days, shall exceed sixty days. After the first session the compensation of the members of the legislative assembly shall be as provided by law: provided, that no legislative assembly shall fix its own compensation." Article 5, § 5. "No member

of either house shall, during the term for which he shall have been elected, receive any increase of salary or mileage under any law passed during such term." Article 5, § 8. We think it is evident that the constitution fixed the compensation of the members of the first legislative assembly of the state, and conferred upon that body the power to enact appropriate laws for the payment of its successors. Such legislation can be amended at any time, subject to the restrictions that no legislative assembly can pass a law which defines its own compensation, and that members cannot receive an increase of salary or mileage. It was also contemplated that the first legislative assembly would provide the statutes which were applicable to these conditions. But it is conceded, and we take judicial notice of the fact, that that assembly, through causes which are irrelevant to the discussion, did not discharge its functions by the passage of any laws. The second legislative assembly is in session, and is necessarily enacting statutes to carry into effect some provisions of the constitution, and thereby promote the general welfare, and afford the relief which should have been granted by its predecessor. It is a reasonable presumption that this omission or exigency in our history could not have been anticipated. It is contended that the act, which gives to the members of the present legislative assembly their compensation by means of an appropriation, was passed through their official action, and is, consequently, repugnant to the constitution, and void.

In the consideration of the questions pertaining to this controversy, it must be borne in mind that we are interpreting the charter of the government of the state, and weighing one of the fundamental objects for which it was framed and ratified by the people. In *Com. v. Hartman*, 17 Pa. St. 118, the court held that a state constitution must have a liberal construction, and we follow this canon of interpretation. What, then, was the mischief which the framers of the constitution labored to guard against in the sections *supra*? Their primary purpose was that a legislative assembly should not have the power to secure by the votes of its members extravagant compensation for their services. For this reason they were deprived of the privilege of fixing their *per diem* for attendance and mileage, and members who held over from a session by which either of these items had been increased could not receive the benefit thereof. The act making the appropriations *supra* has allowed to the members of the second legislative assembly the same compensation which is specified in the constitution *supra*. It is proper to state that the same persons, with a single exception, composed the house of representatives of the first and second legislative assemblies, and that one-half of the senators served therein. These representatives were elected for the "term of two years," which has not expired. "One-half of the senators elected to the first legislative assembly shall hold office for one year, and the other half for three years." Const. art. 5,

§ 4. While each of these bodies must be treated as a separate organization, yet, from a practical stand-point, the objections are as strong and relevant against the enactment of a statute fixing the compensation of a legislative assembly by the members of the first assembly, because there is a large majority (embracing all of them excepting eight) who have a direct interest in the result. We have already said that the first legislative assembly did not regulate this subject. Fifty-four members of the house of representatives and nine senators of the legislative assembly could not receive an increase of salary or mileage under the section of the constitution supra if a law of this nature had been enacted. Shall the relator be compelled to wait until the third legislative assembly meets, about two years from this time, and fixes his compensation which is now claimed? There is not a line of the constitution which supports the suggestion, and every clause relating to the legislative department deals with prospective laws. "No appropriation of public moneys shall be made for a longer term than two years." Const. art. 12, § 12. The act supra neither increased nor diminished the compensation of the second legislative assembly, but contained the amounts which had been inserted in the constitution, and which remain unaltered by any law. Obeying the rules for the construction of the constitution, which have been written by jurists from the foundation of the system of American state governments, and weighing the peculiar and exceptional circumstances which attend this investigation, we must indulge "every possible presumption in favor of the validity" of the act supra. We cannot say that the second legislative assembly, within the intent, spirit, and scope of the constitution, has fixed its own compensation. We are therefore of the opinion that the relator is entitled to the relief which he has prayed for. It is ordered and adjudged that a peremptory writ of mandate be issued in accordance with the prayer of the affidavit of the relator herein.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 296)

MONTANA LUMBER & PRODUCE CO. v. HOWARD *et al.*

(Supreme Court of Montana. Jan. 8, 1891.)

BILL OF EXCEPTIONS—SETTLING AND SIGNING.

Under Code Civil Proc. Mont. §§ 294, 301, providing that, when a motion for a new trial is decided upon the judge's minutes, a bill of exceptions must be settled in the usual form, and that all bills of exceptions shall be reduced to form and signed by the judge, a bill of exceptions purporting to contain all the papers, and stating "that all of the foregoing papers and evidence were of the files of said cause at the hearing of said motion for a new trial," and concluding, "Done and dated in this court," with the judge's signature, is not properly settled.

Appeal from district court, Deer Lodge county; D. M. DUFFEE, Judge.

Robinson & Stapleton and G. B. Winston, for appellant. Cole & Whitehill, for respondents.

BLAKE, C. J. The respondents move to strike from the transcript on appeal the paper designated as "Bill of Exceptions on Appeal," on the ground "that the same was not settled and allowed by the judge of the court below, as provided by statute." The action was tried by a jury, and the appellant made a motion for a new trial "on the minutes of the court." This bill of exceptions purports to contain the notice of intention to move for a new trial, pleadings, testimony, instructions, verdict, and judgment. The motion for a new trial appears to have been overruled July 24, 1890. The following statement is incorporated in the record: "That all of the foregoing papers and evidence were of the files of said cause at the hearing of said motion for a new trial." The bill of exceptions concludes as follows: "Done and dated in court this 27th day of September, 1890. D. M. DUFFEE, Judge." The Code of Civil Procedure provides that "when a motion for a new trial is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a bill of exceptions must be settled in the usual form, upon which the argument of the appeal must be had." Section 301. "All bills of exceptions shall be reduced to form, unless noted by the clerk, and signed during the term in which the same is tried. \* \* \* The bill of exceptions must be signed by the judge who tried the cause." Section 294. Questions of practice, under similar statutes, have been considered in many cases, with the same result, concerning the principle involved. In the case at bar, it is necessary that the papers, which are enumerated in the bill of exceptions, should be authenticated by the judge to determine what constitutes the minutes of the court. They are to be brought before us for argument and decision. The certificate of the judge has been carefully considered, and adjudged valueless, if defective or uncertain when tested by the provisions of the Code of Civil Procedure. What, then, was "done" September 27, 1890, by the judge in court? What definite idea relating to the bill of exceptions is expressed by the use of this term? No one can contend seriously that this is a settlement of this important record "in the usual form." As already intimated, the law does not tolerate any ambiguity of language in this matter. The authority conferred upon the judge to "settle" a bill of exceptions "in the usual form" carries with it the power to decide what shall be embraced therein. The bare signature of this officer upon a certain date does not prove that he has exercised judicial discretion. In *Sansome v. Myers*, 80 Cal. 483, 22 Pac. Rep. 212, the court held that *mandamus* will lie to compel a judge of the superior court to settle a bill of exceptions, and said: "If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would no doubt have been justified in refusing to settle the same, but not otherwise. This the findings show was not done. The respondent refused in the first instance to settle the statement, not to sign it." In *January v. Superior Court*, 78 Cal. 537, 15 Pac. Rep. 108, the court said: "The bill [of exceptions] as original-

ly presented was a transcript of the reporter's notes of the evidence and proceedings, and the court was justified in refusing to settle it." In *People v. Getty*, 49 Cal. 581, the court said: "The practice of making up bills of exceptions in the reprehensible form adopted in this case has become so prevalent that some measures must be taken for its correction. The judge of the court below would be justified in refusing to settle a proposed bill of exceptions when it is presented in that form, and we are of the opinion that it is his duty to strike it from the files." This legal distinction between the meaning and effect of the words "settle" and "sign" has been enforced in this court, and the bill of exceptions under consideration has not been settled according to law. *King v. Sullivan*, 1 Mont. 282; *Taylor v. Holter*, 2 Mont. 476; *Daniels v. Insurance Co.*, Id. 500; *Bank v. Irvine*, Id. 554; *Hardware Co. v. Sullivan*, 7 Mont. 307, 16 Pac. Rep. 588; *Sherman v. Higgins*, 7 Mont. 479, 17 Pac. Rep. 561; *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. Rep. 589. It is therefore ordered that the motion be sustained.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 422)

*In re DEWAR'S ESTATE.*

(Supreme Court of Montana. Jan. 12, 1891.)

APPEAL FROM PROBATE COURT—ADMINISTRATION.

1. An appeal by an administrator from an order of the district court, on appeal from the probate court, sustaining objections to his final report, and from a decree of distribution subsequently entered, is not objectionable on the ground that two separate actions are united in one appeal.

2. The provisions of Civil Code Mont. § 421, subd. 2, and § 444, which regulate appeals from judgments of the district court rendered on appeal from inferior courts, and which limit the time of appeal to 90 days, do not now apply to appeals from the district court in probate matters, as Const. Mont. art. 8, § 11, abolished the probate courts, and extended the original jurisdiction of the district court to matters of probate; and appeals from the district court to the supreme court, in probate matters, are now to be taken under section 421, subd. 1, which regulates appeals from final judgments in actions commenced in the court in which they are rendered, and which limits the time of taking the appeal to one year from the rendition of the judgment. Following *In re McFarland's Estate*, 26 Pac. Rep. 185.

3. An administrator, who has no interest in the estate, cannot appeal as such from an order of distribution.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

On motion to dismiss appeal.

J. W. Kinsley, for appellant. *McConnell & Clayburg*, for respondents.

BLAKE, C. J. This is a motion to dismiss the appeal. The substantial part of the notice thereof is as follows: "Henry C. Yaeger, administrator of the estate of William A. Dewar, deceased, hereby appeals to the supreme court of the state of Montana from an order made in the district court \* \* \* on the 22d day of July, 1890, wherein said court sustained the objections then considered to the administrator's final report herein, and from all subsequent action in said cause, including the v.25p.no.14—65

decree of distribution made therein on the 30th day of July, 1890, and from the whole thereof." It appears from the transcript that letters of administration were issued to Yaeger, the appellant, in June, 1887, upon the estate of said Dewar by the probate court of Lewis and Clarke county; that his final account as administrator was filed in April, 1889; that the objections of the persons who purchased the interests of the heirs of said estate to the fees claimed by the administrator for his services were overruled by the probate court; that they appealed in June, 1889, to the district court from the order fixing the amount of said fees; that the district court made, July 22, 1890, the order which is specified in the foregoing notice of appeal, and reversed the decree of the probate court concerning said fees, and reduced the same; and that afterwards, upon the 30th day of July, 1890, the district court made and entered the decree of distribution which is described in the said notice of appeal. We will review the grounds of the motion which has been submitted. The respondent maintains that two separate actions have been united in one appeal,—that the first order, which is appealed from, was made by the court below in the exercise of its appellate jurisdiction under the laws which governed the territory of Montana; and that the last-named order was made by the district court by virtue of its original jurisdiction under the constitution of the state. This position has been thoroughly examined by the supreme court of the state of California, and is untenable. These orders are not treated as actions, in the legal sense of the term. "We hold," said the court in *Estate of Rose*, 80 Cal. 166, 22 Pac. Rep. 86, "therefore, that upon appeal from an order settling an administrator's account, all the proceedings leading up to it, including the evidence upon which it is based, are open to review. \* \* \* The probate jurisdiction of the court is separate and distinct from its jurisdiction in ordinary civil actions." This question received the particular consideration of the court in *Sharon v. Sharon*, 68 Cal. 326, 9 Pac. Rep. 187, which was a case in which learned and eminent counsel were engaged. Mr. Justice THORNTON, in the opinion, said: "As to the notice of the appeals, if such notice is in one and the same paper in which the several appeals are distinctly designated, we cannot see that such notice is insufficient. Nor do we think that the majority of the court intended so to hold in *People v. Center*, 61 Cal. 191, inasmuch as such holding would be in conflict with the settled practice and the ruling of this court in all cases in which it has been called on to express any opinion. Some expressions are used in the opinion of the court which appear ambiguous, but there is nothing that indicates that a notice of more than one appeal may not be in one and the same paper, where the matters appealed from are so designated that it can be seen from what the appeal is taken." Among other cases which are cited is *Estate of Pacheco*, 29 Cal. 224, and the court commented thereon as follows: "The court held a notice of appeal from an order of the pro-

bate court made September 3, 1864, denying the petition of Penniman and others for the removal of Emeric and refusing to appoint Penniman, and from all orders and decisions made by the court in that behalf on that day, sufficient. It appears that there were two orders appealed from."

The respondents contend that the ruling of the court below in sustaining the objections to the account of the administrator is not appealable. The orders which are complained of were made in the district court more than eight months after the admission of the state of Montana into the American Union. This important question has been carefully considered in *Re McFarland's Estate*, 26 Pac. Rep. 185, and for the reasons which appear therein we are satisfied that the court can entertain the appeal from the order made July 22, 1890.

It is urged that the administrator was not interested in the estate of the deceased, and cannot appeal from the decree authorizing the distribution of the estate. The authorities support the proposition. The appellant was not an heir of the deceased, or a purchaser of any part of the estate. In *Bates v. Ryberg*, 40 Cal. 463, the executor appealed from the decree of distribution, and complained that the property of the estate had been improperly divided between the legatees. The court, in the opinion, dismissing the appeal, said: "The heirs and devisees or legatees interested in an estate are made parties to the proceedings for a distribution. Any one of them feeling aggrieved may appeal from the final order. The executor, however, does not represent any of these parties, as against the others; and, if they are satisfied with the distribution, he cannot complain because some have received less than they are entitled to." This case was followed in *Estate of Wright*, 49 Cal. 550. In *Estate of Marrey*, 65 Cal. 287, 3 Pac. Rep. 896, it appears that the appellant was the executor of an estate, and also a legatee under the will. The superior court reduced the amount claimed by appellant. The appeal was taken by him as "executor of the last will and testament of Maney, deceased." The opinion of the court, by Mr. Justice McKINSTRY, is in these words: "The appeal of the executor from the decree of settlement and distribution must be dismissed. He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate. (*Bates v. Ryberg*, 40 Cal. 463;) *a fortiori*, when he himself is the legatee whose claim he is attempting to maintain, at the expense of the estate, in his capacity of executor." In *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. Rep. 1176, the court said: "The appellant may have been interested as an individual in the distribution of the estate, claiming, as he did, to be the assignee of some of the heirs, but as administrator he had no interest. It is now well settled in this state that a decree of distribution will not be reviewed on an appeal by an executor or administrator, where he, as such, has no interest in the matter sought to be reviewed." In *Goldtree v. Thompson*, 83 Cal. 420, 23 Pac. Rep. 383, the court said:

"Executors, administrators, receivers, and trustees are, in their official capacity, indifferent persons, as between the real parties in interest. \* \* \* The funds which come into their hands are held *in custodia legis*, to be distributed by the court to those who show themselves entitled to them; and it is their duty to distribute the money coming into their hands as the court shall direct." And it was held that such persons are not aggrieved parties within the meaning of the statute providing that "any aggrieved party may appeal." In the case at bar it will be observed by an inspection of the notice of appeal that "Yaeger, administrator of the estate of William A. Dewar, deceased," is the appellant. He has no interest, by reason of his official character, in the decree of distribution, and his appeal from the order of the court below made July 30, 1890, is hereby dismissed. The motion to dismiss the appeal from the order of the district court, made July 22, 1890, is hereby overruled.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 426)

*In re DEWAR'S ESTATE.*

(Supreme Court of Montana. Feb. 17, 1891.)

DISTRICT COURTS—ADMINISTRATION—FEES—CONSTITUTIONAL LAW.

1. The date of filing papers is when they are deposited with the proper custodian, and not when they are marked "Filed," and, where papers on appeal from the probate to the district court allowed by the statute of Montana territory were deposited in the district court before admission of the territory as a state, that court acquired jurisdiction which could not be affected by the provisions of the state constitution transferring to the district courts all matters pending in the probate courts.

2. Act Mont. Sept. 14, 1887, amending Comp. Stat. Mont. § 253, and reducing the fees of administrators throughout the state, was not a local or special law within the inhibition of Act Cong. July 30, 1886, prohibiting territorial legislatures from passing "local or special laws" decreasing fees of public officers during their term of office.<sup>1</sup>

3. Under Prob. Prac. Act Mont. § 276, providing that the administrator may retain in his hands the necessary expenses of the administration, the administrator's fees can be ascertained, allowed, and paid only on his final settlement, and are to be determined by the law then in force, unless the services were fully performed before passage of the law.

4. An administrator's claim to fees allowed by statute is not a contract, within the inhibition

<sup>1</sup> "The constitutionality of an act is not to be determined by its form, but is to be determined by what, in the ordinary course of things, must necessarily be its operation and effect. If its operation and effect must necessarily be special, the act is special, whatever may be its form. If, on the other hand, the act has room within its terms to operate upon all of a class of things, present and prospective, not merely upon particular things or upon a particular class of things existing at the time of its passage, the act is general." *VALENTINE, J., in City of Topeka v. Gillett*, 4 Pac. Rep. 800. An act providing for the vaccination of school children, and operating on all who attend the public schools of the state, is not special, though it does not include all classes of individuals. *Abeel v. Clark*, (Cal.) 24 Pac. Rep. 383. An act extending the time of completion of railroads is not special by virtue of the fact that it applies only to roads organized under the general railroad law, and not to those organized under special charters. *State v. Railway*

of Const. U. S. prohibiting a state from passing a law impairing the obligation of contracts.

Appeal from district court, Lewis and Clarke county: WILLIAM H. HUNT, Judge.

This is an appeal of Henry C. Yaeger, administrator of the estate of William A. Dewar, deceased, from an order of the district court, exercising probate jurisdiction, sustaining objections to the final account of the administrator, whereby the court disallowed certain fees by him claimed. There was also an appeal from the order of distribution. That appeal was dismissed by this court at this term, (ante, 1025,) and the case thus relieved of much matter contained in the record, and argued in appellant's brief. Before the admission of this commonwealth into the Union of states all probate matters were adjudicated in the probate courts of the counties. From these courts appeals laid to the district courts. Title 11, c. 3, Code Civil Proc. The territory became a state November 8, 1889. By the constitution, (article 8, § 2, and section 20, Schedule, § 4,) all probate jurisdiction was transferred to the district court, and the probate court went out of existence. The schedule further provides: "Sec. 13. All matters, cases, and proceedings pending in any probate court in the territory of Montana at the time the state shall be admitted into the Union, and all official records, files, moneys, and other property of or pertaining to such court, are hereby transferred to the district court in and for the same county, and such district court shall have full power and jurisdiction to hear, determine, and dispose of all such matters, cases, and proceedings." "Sec. 2. All lawful orders, judgments, and decrees in civil causes, all contracts and claims, and all lawful convictions, judgments, and sentences in criminal actions, made and entered or pronounced by the courts within the territory of Montana, and in force at the time the state shall be admitted into the Union, shall continue and be and remain in full force in the state, unaffected in any respect by the change from a territorial to a state form of government, and may be enforced and executed under the laws of the state." Henry C. Yaeger, appellant, was appointed by the probate court of Lewis and Clarke county administrator of the estate of William A. Dewar, deceased, on June 1,

Co., (N. J.) 20 Atl. Rep. 762. Act Pa. May 13, 1887, regulating the sale of liquors, but declaring that it shall not be held to authorize the sale of liquors "in any city, county, borough, or township having special prohibitory laws," is not a special law. *Commonwealth v. Sellers*, 18 Atl. Rep. 541. An act empowering park commissioners to connect any public park with any part of any incorporated city, etc., is not local or special legislation, though there is but one city in the state whose parks are controlled by commissioners. *Park Com'rs v. McMullen*, (Ill.) 25 N. E. Rep. 676. An act providing that in a town which has been organized out of territory embraced within a city, the city council may regulate the number of justices of the peace to be elected, but the number shall not exceed the number allowed by law to other towns of like population, is in contravention of Const. Ill. art. 6, § 29, declaring that "all laws relating to courts shall be general and of uniform operation." *Tissier v. Rhein*, (Ill.) 22 N. E. Rep. 848.

1887. The appraisement and inventory of the estate, approved July 23, 1887, shows \$884.83 in money, and a large amount of real estate, making a total of \$36,446.83. On April 11, 1889, the administrator filed his final account and petition for distribution. The account discloses that the whole amount of money received by him from sales of real estate and other cash receipts is \$11,361.25; claims paid, \$8,397.28; and expenses of administration, \$2,954.22. In the latter item is included \$1,501.77 administrator's fees, a percentage on \$36,794.33, which was the appraised value of the estate. A. J. Steele and Lewis Davis, purchasers from and assignees of the heirs of the estate, and the persons to whom final distribution was to be made, objected to the final account of the administrator, in that he had charged his fees upon \$36,794.33, the appraised value of the estate, whereas he should have charged upon \$11,361.25, which was the sum actually received by him upon the sales of property and other cash sources. The administrator contended that he was entitled to fees under the provisions of section 253, Prob. Prac. Act, as follows: "Sec. 253. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him, as follows,"—then providing percentages for different amounts. The distributees relied upon the act of September 14, 1887, (Ex. Sess. Laws 15th Assem. p. 59.) as follows: "Section 1. That section 253, second division, of the Compiled Statutes of Montana, be, and the same is hereby, amended so as to read as follows, to-wit: When no compensation is provided by the will, or the executor renounces all claims thereto, he must be allowed commission on all sums of money only actually received by him from the sale of property of the estate, or actually disbursed by him in the settlement of the estate, as follows." Then follows percentage to be allowed, and provisions that the same shall apply to all administrators. The probate court held with the administrator, and on May 13, 1889, overruled the objections of the distributees, and allowed the final account, with the fees as claimed by the administrator. On June 8, 1889, the distributees gave notice of appeal from this order, and on June 11, 1889, filed their undertaking on appeal, as required by law. The case is next met in the district court, on April 29, 1890, after the state had come into life, and the probate court had ceased to exist, and its jurisdiction and business had been transferred to the district court. Section XX, Schedule, § 13. On that day the district court directed that the clerk indorse the papers in the case *nunc pro tunc*, as filed July 3, 1889. This was done on application of the distributees, it appearing that no indorsement had been made on the papers of their filing in the district court. The facts which were the grounds of this application were set forth in the affidavits of R. H. Howey, probate judge in May, June, and July, 1889; of John Bean, clerk of the district court since November 8, 1889; and of John B. Clayberg, attorney for the dis-

tributees. The facts so set forth were not controverted, and were as follows: Probate Judge HOWEY, in pursuance to the appeal from his court to the district court, prepared a transcript of the docket entries on the case, and, on the 3d day of July, 1889, delivered the same, together with other papers pertaining to the said matter, to W. F. Parker, then clerk of the district court. John Bean, clerk, makes oath that since November 8, 1889, the distributees' attorneys frequently inquired for the papers in the case; that he made diligent search for the same, and could not find them until he called to his assistance W. F. Parker, his predecessor in office, when, on April 10, 1890, the papers were found filed away with other papers in the vault, where they had been placed by said Parker. J. B. Clayberg, the attorney, says that before November 8, 1889, he had inquired for said papers, and said Parker could not find them. Upon this showing that the papers in the case had been duly deposited with the clerk of the district court by the probate judge on July 3, 1889, and had been found in his office, the district court ordered that the case be docketed, and placed on the civil calendar of the court. The administrator then filed a demurrer to the jurisdiction of the district court to hear the case. The demurrer was on the ground that by the operation of the constitution upon the admission of the state the decree of the probate court became the decree of the district court, and the district court had no jurisdiction to review the order of a former judge. This demurrer was overruled. The appeal then being heard, the district court made an order reversing the probate court upon its ruling; that the administrator was entitled to \$1,501.77 fees as a percentage on \$36,446.83, the appraised value of the estate; and held that he was to be allowed \$484.45 as a percentage on \$11,361.25, money actually received by him from the sale of property. From this order the appeal is prosecuted. By the agreement of counsel the great mass of papers in the case is omitted from the record, and only sufficient is brought up in the record to exhibit the foregoing facts. The appellant administrator contends for the following propositions: (1) The district court had no jurisdiction to hear the case, and herein: *First*. The appeal was not in the district court until April 29, 1890, when the *nunc pro tunc* indorsement was placed upon the papers, and the case was ordered upon the docket of the court. *Second*. The foregoing proposition being correct, the judgment of the probate court became, by the transition to the state form of government, a judgment of the district court; and the district court could not sit on an appeal from its own order. (2) Even if the district court had jurisdiction to hear the case, the allowance of the administrator's fees should have been upon the basis provided in section 253, which would have been \$1,501.77, and not reckoned as to be allowed by that section as amended in the act of September 14, 1887, by which the fees would amount to only \$484.45. The law in force when the administration proceedings

commenced must govern, and not the law passed during the proceedings, and prior to the final account and settlement.

J. W. Kinsley, for appellant. McConnell & Clayberg, for respondent.

DE WITT, J., (after stating the facts as above.) We will examine the appellant's position in the order above stated.

1. Appellant contends that the district court did not obtain jurisdiction of the case until April 29, 1890, when the papers were ordered to be indorsed, "Filed, July 3, 1889," and the case ordered onto the trial docket. It is not disputed that the papers in the case were duly deposited with the clerk of the district court, July 3, 1889. Appellant insists that they were not "filed" that day, but only on April 29, 1890, and the court had no power to make the *nunc pro tunc* order. Appellant misapprehends the signification of the term "file." To file papers is to deposit them with the proper custodian for keeping. The marking of them "filed" by the clerk is another matter, and is not the filing. *Tregambo v. Mining Co.*, 57 Cal. 501, citing *Engleman v. State*, 2 Ind. 91; *Lampson v. Falls*, 6 Ind. 309; and *Bishop v. Cook*, 18 Barb. 326. See, also, *Harrison v. Clifton*, 75 Iowa, 736, 38 N. W. Rep. 406; *Holman v. Chevallier*, 14 Tex. 337; *Smith v. Biscalluz*, 83 Cal. 358, 21 Pac. Rep. 15, and 23 Pac. Rep. 314; *Howell v. Slauson*, 83 Cal. 544, 23 Pac. Rep. 692; and *Bouv. Law Dict.* "File." The order of the district court of April 29, 1890, to indorse the papers, is not of great importance in this inquiry. That did not constitute the papers "filed." They were filed July 3, 1889, and the court, finding them so filed, properly placed the case on the docket of the court, and heard it. It was quite proper in the court to have the papers marked "filed" as of the day when they were filed, in order to preserve a memorandum of the fact. The cases cited by appellant are not in point: *Raymond v. Smith*, 1 Metc. (Ky.) 65; *Metcalf v. Metcalf*, 19 Ala. 319; *Hudson v. Hudson*, 20 Ala. 364. Those were all cases of an attempt to amend a record by entering a judgment *nunc pro tunc*, where the law required the solemnity of the record of a judgment, and nothing appeared in the record by which or upon which to amend. Mr. Justice BACH's discussion of the proposition in *Territory v. Clayton*, 8 Mont. 1, 19 Pac. Rep. 293, not cited by appellant, is satisfactory to our mind. But the principle of these cases does not interest us in this inquiry. There was no question before the district court of amending a record. The presence or absence of the clerk's indorsement on the papers was not conclusive. The indorsement was not a record, and ordering the case to be placed on the trial docket was not amending any record. We therefore find that the case was fully appealed from the probate court, and duly lodged in the district court, prior to the admission of the state into the Union, and the abolition of the probate court. Appellant argues from the constitution, section XX, Schedule, § 13, that only pending cases in the probate court were transferred to the district court by virtue of said section 13, and



that this was not a pending, but a determined, case in the probate court, at the time of the admission of the state. It is not pretended that the case was transferred to the district court by virtue of the provisions of this section 13. It had fully and safely arrived in the district court, and belonged to that court, four months before this section 13 began to operate. Nor does section 2 of the schedule have the effect that appellant urges, viz., that the judgment of the probate court of May 13, 1889, was a lawful judgment of the probate court, in force at the time the state was admitted, and must therefore remain in full force. As we have above observed, when the state was admitted the case was wholly out of the probate court, and wholly within the district court. It had gained its new foothold long before its old one was swept away by the rising tide of the new order of things.

2. Concluding that the district court had jurisdiction to hear the matter, and pronounce the judgment, we will endeavor to ascertain whether its said judgment is correct. It is not questioned that, if the administrator's fees are to be reckoned as provided in section 253, before amended, the cases appellant cites construing that statute are applicable. *Estate of Isaacs*, 30 Cal. 113; *Estate of Simmons*, 43 Cal. 550; *Estate of Ricaud*, 70 Cal. 69, 11 Pac. Rep. 471. But the point in controversy is whether the old law or the amendment must be invoked. Appellant, insisting upon the former, relies largely upon section 276, Prob. Prac. Act, as follows: "The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of the administration," etc. This section is identical with section 1646, Code Civil Proc. Cal., which section the supreme court of that state construes to mean that the administrator's fees shall be ascertained, allowed, and paid only upon his final accounting and settlement. *Estate of Miner*, 46 Cal. 564; *Estate of Barton*, 55 Cal. 90; *Estate of Rose*, 80 Cal. 180, 22 Pac. Rep. 86; *Ord v. Little*, 3 Cal. 287. See, also, 2 *Woerner, Adm'n*, § 533. Under that construction, appellant's fees were to be ascertained, allowed, and paid on April 11, 1889. On that day the court allowing the fees goes to the statute for instruction, and finds the act of September 14, 1887. But the administrator contends that when he was appointed, and for three and a half months out of twenty-two and a half months, during which he was administrator, the unamended section 253 was in force; to which contention the court applies the rule that, if a statute is amended, it shall be understood in the same sense as if it had read from the beginning as amended. *Surtees v. Ellison*, 9 Barn. & C. 750; *Peters v. Vawter*, 10 Mont. —, ante, 438. (The exceptions to this rule by virtue of constitutional limitations will be considered below.) Under the general rule, then, it is unhesitatingly concluded that the amended law

must regulate the fees of the appellant. Whatever right appellant had to fees prior to September 14, 1887, was an unascertained, inchoate one. If, by virtue of his qualifying and performing a few acts while the old law was in force, his right to fees accrued, and were to be settled upon the percentage allowed by that law, then it must also be true that, if he had resigned or died on September 13, 1887, before performing any labors, he or his estate would be entitled to all the fees provided by the old law. This absurdity is not contended for, yet it is as reasonable as the claim that, having performed the services, the fees must be reckoned by the provisions of a law in force when his administratorship commenced, but repealed before any fees were either due, payable, or to be ascertained. On the other hand, it is the law that, appellant's claim for fees being unsettled, unallowed, and inchoate, and the creature of the statute, (section 253,) it fell with the law creating it. An exhaustive and learned discussion of this principle by Judge COWEN, citing and reviewing authorities, is found in *Butler v. Palmer*, 1 Hill, 324. See, also, *Van Inwagen v. Chicago*, 61 Ill. 34. The legislature of Montana territory, then, had the right, on September 14, 1887, to amend section 253, and diminish the fees to which appellant might become entitled at the end of his service, unless, on September 14, 1887, the claim of appellant was (1) a contract; (2) a vested right; or (3) protected by the act of congress of the United States of July 30, 1886, commonly called the "Restriction Act," the part of which material to this inquiry is as follows: "That the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases; that is to say, [among others] creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed." The constitution of the state is not before us for construction, as this cause of action was perfected and the controversy arose under the territorial government. Examining the above propositions, it is not necessary to indulge in any discussions upon the general doctrine that an officer's claim to fees allowed by statute is not a contract. See cases last cited, and *People v. Devlin*, 33 N. Y. 269; *Butler v. Pennsylvania*, 10 How. 402; *Hoke v. Henderson*, 4 Dev. 1; *Conner v. Mayor*, 5 N. Y. 285; *Miller v. Kister*, 68 Cal. 142, 8 Pac. Rep. 813. See, also, cases *infra*. Nor is his claim to fees to be performed in the future a vested right. Cases *supra* and *infra*. But his claim to fees for services past, and wholly performed, upon a statutory fee-bill, in force while he was performing those services, might be a vested right, of which the legislature could not deprive him by a law diminishing the fees theretofore fixed by the statute. But let us see in what position appellant stands to invoke this principle. For the first three and one-half months of appellant's administratorship the old section 253 was in force; for the remaining nineteen months of his official relation to the

estate, the amendment of September 14, 1887, was the law, (except the period of the law of March 14, 1889, which we will advert to below.) Appellant does not separate his services as to these two periods, and claim compensation upon services rendered in the three and a half months' period under the old law, and upon those rendered in the nineteen months' period, under the amendment. If he did so, and claimed a higher percentage upon services fully performed and passed, during the three and a half months' period, the argument of vested right would address itself to us with some force. *People v. Pyper*, (Utah,) 21 Pac. Rep. 722. Appellant does not claim that any services were fully performed in the short period, nor does the record disclose that he had so performed them at the close of this period,—September 14, 1887,—so that his fees could be ascertained thereon. He gave no data to the district court by which his services could be classified into these respective periods, and made no demand for such segregation. On April 11, 1889, it did appear that his claim to fees had accrued since June 1, 1887. It did not appear that any of it had accrued prior to September 14, 1887. The district court was therefore right in concluding that the services and conditions on which fees could be claimed arose subsequent to September 14, 1887, and properly, under the facts before the court, allowed the fees upon the basis provided in the act of that date.

The legislature seems to have never tired of passing acts upon this subject, and we are again confronted with their will as expressed in Act March 14, 1889, going into effect April 1, 1889, by which act the fees of public administrators and all other administrators are placed at 6 per cent. of the first thousand dollars, which is a reduction of 1 per cent. on the thousand from the fees allowed by Act September 14, 1887. Appellant's final account was rendered April 11, 1889. The question is presented whether the act of March 14, 1889, in force April 1, 1889, operates to reduce appellant's claim 1 per cent. on the first thousand dollars. The record discloses that every act and service of the administrator was completed prior to April 1, 1889. All his services, as far as are concerned with Act March 14, 1889, come under the class of past services fully performed, the fees for which were wholly earned, under a former fee-bill, before the act of March 14, 1889, was passed; his claim to which was, therefore, a vested and accrued right, with which the legislature could not interfere by that latter act. *People v. Pyper*, *supra*, and cases cited in *Supervisors v. Allen*, 99 N. Y. 532, 2 N. E. Rep. 459, and cases *supra* and *infra*. Returning to the restriction act again, we have to observe, in order that the restriction act may protect appellant's position, two facts must be found: (1) That appellant, in his claim for fees, was a public officer; (2) that the act diminishing the fees was a "local or special law." If either of those propositions be found in the negative, the case is concluded. The restriction act did not forbid the legis-

lature of the territory from passing an act creating, increasing, or diminishing fees, percentages, or allowances of public officers during the term for which they were elected or appointed. It fell far short of the prohibitions of section 31, art. 5, Const., afterwards adopted by the people for the control of the legislature, and which inhibits the passing of any law increasing or diminishing the salaries or emoluments of a public officer after his election. The restriction act forbade only the passing of any local or special laws upon the subject indicated. The only inquiry, therefore, before us, is whether the act of September 14, 1887, was local or special. The operation of the act is not upon any particular person or officer, nor in any certain locality or localities in the territory. It applies to all executors and administrators, public and private, throughout the territory. What shadow or pretense of reason there is to pronounce this act local or special is not apparent to us. On the other hand, that it is not local or special seems to us perfectly clear, and so indisputably sustained by the decisions that to discuss the proposition, or review the cases, would be an unconstructive compiling of elementary and well-understood law. Suffice to refer to a few of the authorities: *State v. Parsons*, 40 N. J. Law, 1; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *McAulich v. Railroad Co.*, 20 Iowa, 338; *Haskel v. Burlington*, 30 Iowa, 232; *Land Co. v. Soper*, 39 Iowa, 112; *Railway Co. v. Hanniford*, 49 Ark. 291, 5 S. W. Rep. 294; *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. Rep. 297; *Montague v. Maryland*, 54 Md. 481; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. Rep. 383; *State v. Miller*, 100 Mo. 439, 13 S. W. Rep. 677; *Longan v. County of Solano*, 65 Cal. 122, 8 Pac. Rep. 463; *Brooks v. Hyde*, 37 Cal. 366; *Humes v. Railway Co.*, 82 Mo. 221; *Skinner v. Bogert*, 42 N. J. Law, 407; *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Tolle*, 71 Mo. 650; *Darrow v. People*, 8 Colo. 417, 8 Pac. Rep. 661; *In re Church*, 92 N. Y. 1; *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. Rep. 223; and many cases in *Sedg. St. & Const. Law*, pp. 534-539, notes. The conclusion last stated is sustained by the authorities cited, and it is not at all shaken by the cases to which the appellant has referred us in his supplemental brief. The cases he there cites were decided upon facts different from these now under consideration; and the law, as in those cases declared, does not affect the conclusion we have reached. The judgment of the district court is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 299)

MORRIS v. EDWARDS.

(Supreme Court of Montana. Jan. 12, 1891.)

CONTRACTS—INTERPRETATION.

Under a contract for the sale of a stock of goods providing that the buyer is to pay "75 per cent. of the present wholesale cost at the present time, with freight added, at present rates and classification," the buyer must pay the entire freight, not 75 per cent. of it only.

Appeal from district court, Lewis and Clark county; WILLIAM H. HUNT, Judge.

This case was tried upon an agreed statement of facts, from which the following appears: Plaintiff sold defendant a stock of goods. In their contract of sale is the following clause: "And the said party of the second part agrees to and with the said first party, who hereby assents to the same, to pay said first party, his personal representatives and assigns, for said stock in trade and merchandise, seventy-five (75) per cent. of the present wholesale cost at the present time, with freight added, at present rates and classification, to be paid as soon as invoice is taken, and the cost as aforesaid of the entire stock in trade and merchandise aforesaid is ascertained." In pursuance to the contract, the parties agreed that the wholesale cost of such stock was \$5,309, and that freight on the same, "at present rates and classifications," was \$1,327.25. Seventy-five per cent. of the valuation of the stock is \$3,981.75. Seventy-five per cent. of the freight is \$995.44. The sum of these two amounts is \$4,977.19. This was paid by defendant to plaintiff. The difference between the whole amount of freight, \$1,327.25, and 75 per cent. thereof, \$995.44, is \$331.81. Plaintiff claims that this additional sum should be paid. Defendant resists its payment. The controversy is upon the terms of the contract above recited. The parties agree that 75 per cent. of the valuation of the stock should be paid, but plaintiff contends that defendant should pay the whole of the freight; and defendant maintains that he should pay only 75 per cent. of the same; that is to say, that the words "seventy-five per cent." refer to the freight, as well as to the stock, or, in other words, that freight should be added to 75 per cent. of the stock, and not to the whole. The district court gave judgment upon the plaintiff's view, from which the appeal is taken.

*Henry C. Smith*, for appellant. *J. W. Kinsley*, for respondent.

*DR. WITT, J.*, (after stating the facts as above.) No briefs were filed or authorities cited by counsel. This court must construe the contract, and from its terms find its intent. The language of the contract is of the nature of a Delphic oracle, and is possibly open to two constructions, but we are of opinion that the circumstances throw light upon the intent. The subject of the contract was the sale of an entire stock of goods. Its wholesale value was discounted 25 per cent. We believe that we can see a reason for this. It is known to merchants, trading as these parties were, that even undamaged goods become shop-worn, out of style, out of demand, out of season, and their salable qualities are variously affected by the simple lapse of time. Would not a buyer naturally demand, and a seller accede to, a reduction from wholesale prices for these reasons? Otherwise there would be no reason for a buyer to take such a stock. If he were to pay full wholesale prices, might he not better go to the wholesale dealer directly, and buy wholly new goods? We can thus see a reason for a reduction on the goods. But this reason does not obtain with freight. Freight is money

paid for the transportation of goods. The money so paid does not deteriorate in value. It does not become shop-worn, out of style, out of season, out of demand, or, for any reason, unsalable. It is worth as much on old goods as on new. It is itself worth as much old as new. In fact, age gives it an additional value, if we consider accrued interest, which, however, is not here under view, for the parties agreed to freight at "present rates and classification." These words aid us in our view that the parties did not intend any discount on the freight. The contract is not clear in its terms, but we are satisfied, for the reasons above suggested, that the judgment of the district court must be affirmed.

*HARWOOD, J.*, (concurring.) In view of the language of the contract, I regard the question presented to this court as a very close and difficult one. If in contracting for the purchase of a stock of merchandise, A. says to B., "I will pay you for this stock seventy-five per cent. of the present wholesale cost at the present time, with freight added, at present rates and classification," what do the contracting parties intend? In the foregoing proposition, in stating the terms, I have adopted the exact language and punctuation of the contract as found in the record. Counsel for the purchaser contends that said form of words means that both the price of the goods at wholesale and the freight shall be discounted 25 per cent. Contrary to this, the seller contends that the wholesale price of the goods only was to be discounted, and the present cost of the freight was to be added. Counsel for respondent suggests that there are reasons for discounting the price of said goods,—that some goods are shelf-worn, damaged, out of style or demand; while the freight, as an element of cost, was a fixed item of value in the goods, having been paid out, and would not suffer depreciation, and therefore the seller would not intend to discount that portion of the cost. I deem such reasons or suggestions entitled to no consideration in our attempt to interpret and ascertain from the language of this contract the intent of the parties in the particular matter in question. Such suggestions pertain to the motive of the seller for discounting the price of his stock of merchandise, and we have no evidence of what his motive was. It could with equal force be suggested that the seller agreed to the discount because he desired to engage in some promising speculation, or because he desired to retire from business altogether. If we had positive evidence that the motive for discounting the cost of the goods was because some were shelf-worn, or out of style or demand, still it appears to me that there is a fallacy in the argument that such damage or depreciation only affected one part of the investment in said goods. Suppose a merchant should pay one dollar for an article at the wholesale market, and another dollar for the transportation of said article to his place of business. Of course the cost of the article to him would be two dollars. Now, according to the theory of

respondent's counsel, if said article should become "shelf-worn," so that its value was depreciated thereby, the depreciation or shelf-wear would all be upon the dollar of the cost paid to the wholesale dealer, and the item of cost paid by way of freight remains fixed and undiminished. As a result of such reasoning, the article would never depreciate in value below one dollar, although it became utterly worthless in the eyes of all dealers and consumers; and in case the owner sold the article, promising to discount the cost a certain per cent. on account of "shelf-wear," or without saying for what reason the discount was made, as in the case at bar, there would be a presumption that the seller did not intend to discount the item of cost involved in the freight, "for that could not become shelf-worn." I do not think that practical merchants are governed by such theories. Moreover, the contract before us shows by its own terms that no such considerations had any bearing upon the intention of the parties in stipulating for said discount. The damaged goods were excluded from the contract by the following provisions: "That such goods as toys, cards, poker-chips, smokers' articles, cigars, tobaccos, and notions, \* \* \* incomplete sets, hanging-lamps incomplete," etc., "and all goods or merchandise which are cracked, chipped, or damaged in any way, are not included or embraced in this sale and agreement." And, further, the purchaser reserved the right by the terms of said contract to reject \$500 worth of said goods at wholesale in case the parties to the contract could not agree upon the price thereof. It should be borne in mind that there is no evidence before us of the circumstances which surrounded said transaction, and the parties thereto, except the terms of the contract. "The circumstances under which [a contract] was made, including the situation of the subject of the instrument and the parties to it, may be shown, so that the judge be placed in the position of those whose language he is to interpret." Comp. St. div. 1, § 632. But in this case no such circumstance of the subject-matter of the contract, and of the parties thereto, has been shown to shed light upon the intent of the parties in respect to the particular matter in controversy. We have nothing but the contract to guide our endeavor to find the true intent of the parties. It is improper for this court in construing this contract to assume that any of said goods were "shop-worn, or out of style, or out of season," for there is nothing in the contract, and no evidence *aliunde*, showing that any of said goods subject to the contract were in that condition. It cannot be properly inferred from the language excluding certain classes of goods, and all "cracked," "chipped," and "damaged" goods from the contract. From all that can be gathered from this record before us, there is nothing to indicate that said stock of merchandise was an old or a new stock, or partly old and partly new. It is as legitimate for us to assume that the stock was all new and in season and style as to assume that any of it was

shop-worn, or out of style, or out of season. We know from the contract that the subject of the bargain was: "All the stock in trade and merchandise, except what is hereinafter mentioned, in that certain store called and known as 'Morris Crockery and Glassware Store,' of said party of the first part, in the city of Helena, Montana."

No authorities were cited by counsel on either side. The conclusion I have reached in concurring is based upon the following considerations: It seems clear, in reason and on authority, that if the contract had stipulated that the purchaser would pay "for said stock in trade and merchandise seventy-five (75) per cent. of the present wholesale cost at the present time," and had stopped there, the freight would have properly been added as part of the "cost;" and of course in that case the discount would have been taken from cost of freight as well as the price of the goods, because the freight is properly an element of the cost of merchandise. *Buck v. Burk*, 18 N. Y. 337; *Herst v. De Comeau*, 1 Sweeny, 590; *Goodwin v. U. S.*, 2 Wash. C. C. 493. But the contract does not thus provide; it separates the cost, or the price which the purchaser is to pay under this contract, into two component parts,—the wholesale cost at the present time, "with freight added" at the present rates. The freight was to be added to something in ascertaining what amount the purchaser should pay. The opinion of the learned judge of the district court upon this case is in the record. He observed: "It is admitted by counsel on both sides, and evidently intended to be embraced in the statement agreed upon, that the wholesale cost of the stock in trade and merchandise sold by plaintiff to defendant was to be estimated by the bills as they were contracted by the plaintiff at the place or places of purchase, and that in estimating such cost, and defining the words 'wholesale cost,' the significance should be the actual sum paid for merchandise at the point where the bill was contracted." Looking at the two distinct propositions, which, combined, make up the purchase price to be paid by the buyer, he held that the clause "75 per cent. of" should be limited to the first proposition which follows it, *i. e.*, the wholesale cost of the merchandise at present prices. I am of opinion that such is the proper construction to put upon the clause in question, unless the contract clearly shows a different intent. I therefore concur in affirming the judgment of the lower court.

BLAKE, C. J. I think that my brethren have interpreted correctly the contract of the parties, and concur in the judgment.

(10 Mont. 311)

STATE *ex rel.* MATHEWS *et al.* v. EDDY.

(Supreme Court of Montana. Jan. 26, 1891.)

FOREIGN ATTACHMENT—PERSONAL JUDGMENT—VALIDITY—MANDAMUS—JUDICIAL DISCRETION.

1. Code Civil Proc. Mont. § 80, provides that in case of attachment without personal service the judgment and execution shall be against the "property attached, as provided by section 73 of this chapter." Section 73 is silent upon the subject, as the part referred to in section 80 was

repealed by Act March, 1883. St. Mont. 18th Sess. 51. Section 245 provides that, in case of service by publication and proper proof, judgment may be rendered for plaintiff for the amount due, in cases in the district court. There is no statute in the procedure act requiring that the judgment in case of service by publication shall be against the attached property, and it is provided that the procedure in the district courts shall apply to the justices' courts, as far as applicable. Sections 745, 792, 804-806. *Held*, that, in case of attachment of a non-resident's property and service by publication in an action in a justice court, a general judgment could be rendered for plaintiff.

2. Under Code Civil Proc. Mont. §§ 802, 803, prescribing the contents of an execution, but not providing that in case of attachment it shall describe the attached property, and sections 194, 319, providing that the execution shall be satisfied out of the attached property, and that all property seized under attachment shall be liable to execution, the lien of an attachment is not lost by taking a simple money judgment; and the attached property may be subjected under a general execution.

3. Where a justice of the peace refuses to compel a garnishee to testify on the ground that the judgment rendered by him against the principal debtor was invalid, and that therefore he has no jurisdiction over the garnishee, *mandamus* lies to compel him to allow the garnishee to be examined, where it appears that the judgment was valid.

Appeal from district court, Silver Bow county; JOHN J. McHATTON, Judge.

*Chas. O'Donnell*, for appellants. *F. T. McBride*, for respondent.

BLAKE, C. J. This is an appeal from the judgment of the court below in refusing to issue a peremptory writ of mandate upon the application of the appellants. The affidavit of the parties, who are beneficially interested, contains the following statements, which are relevant and material to this inquiry. That said John Eddy is a lawful justice of the peace of the township of Silver Bow, county of Silver Bow, and state of Montana. That said William H. Mathews and C. F. Curtis were doing business in Walkerville, county of Silver Bow, aforesaid, under the firm name of Mathews & Curtis, and commenced an action September 12, 1889, against Sarah Borlace, in the justice's court of said township, to recover the sum of \$299 for goods sold and delivered to her by said Mathews & Curtis. That said Borlace left the territory of Montana, September 12, 1889. That on said 12th day of September, 1889, said Mathews & Curtis filed their complaint and affidavit for and bond on attachment in said action in said justice's court, and caused a summons to be issued thereon. That a summons and writ of attachment were then issued in said action, and placed in the hands of O. B. Benson, a constable of said county; and that said summons was returned by said constable with his return, showing that by diligent search he was unable to find said Borlace; and that said writ of attachment was returned by said constable, showing that he levied upon and attached, September 12, 1889, the following described property, to-wit: Money due said Borlace from Ben Clark, \$27; D. Cunningham, \$42; Frank Sands, \$15; Al Abbot, \$160; and that said parties acknowledged such indebtedness, and promised to pay said

moneys into court. That said Curtis, as one of said plaintiffs, filed September 20, 1889, his affidavit with said justice's court, and obtained an order that service of said summons be made by publication in the Butte Mining Journal; that said summons was then issued, and published in said newspaper for the period of 30 consecutive days, to-wit, from the 22d day of September, 1889, to the 22d day of October, 1889. That the foregoing proceedings were had in said court when J. J. Hopkins was a justice thereof; and that said John Eddy succeeded, December 10, 1889, the said Hopkins. That the said Eddy, as the justice of said court, signed and entered, December 12, 1889, a judgment in favor of said Mathews & Curtis, and against said Borlace, for the sum of \$299. That an execution was issued August 11, 1890, by the said Eddy, as such justice, and placed in the hands of the sheriff of said county. That said sheriff, by his deputy, one Richards, and said Abbot, went into the office of W. C. Shippen, who was acting as the agent for said Borlace, and said Abbot placed the sum of \$155, the amount he claimed he owed the said Borlace, and the money which was garnished in his hands, upon the table of said Shippen; and that, while said money was on said table, the said Richards, as said deputy-sheriff, served said Shippen with a copy of the execution issued by said Eddy, and also a garnishee notice. That the said Shippen made, August 15, 1890, a return to the said sheriff, showing that he held in his hands as the property of said Borlace the sum of \$29.90, and that he paid, August 14, 1890, to F. T. McBride, the sum of \$100, and retained for himself the sum of \$25. That Charles O'Donnell, as the attorney of said Mathews & Curtis, made, August 20, 1890, the affidavit required by section 803 of the Code of Civil Procedure, and obtained an order from said Eddy, as said justice of said court, commanding the said Shippen to appear before him at his office on said day at 7 o'clock, P. M., and be examined on oath concerning any money that he may have in his possession or under his control, and as to any debts, money, effects, credits, and other property owing to or belonging to said Borlace; and that said order was then served upon said Shippen. That said Shippen appeared at said time and place, in pursuance of said order, before said Eddy, as said justice, and was sworn according to law in such cases. That said Shippen was there with his counsel, F. T. McBride. That the said examination of said Shippen was postponed by said justice until August 21, 1890, at 9 A. M. That it was then postponed until August 22, 1890, at 10 A. M. That said Shippen appeared at said time before said Eddy, as said justice, and objected to any examination by the counsel for said Mathews & Curtis. That said counsel, Charles O'Donnell, demanded of said Eddy, as such justice, the privilege of examining the said Shippen, which was then refused. That said Mathews & Curtis, by said counsel, requested said court to make an order placing said Shippen in the custody of the sheriff aforesaid, for refusing to testify in this proceeding; and

that said Eddy, as such justice, refused to grant said order, or compel said Shippen to testify; and that the hearing was then continued until August 22, 1890, at 7. P. M. That said Shippen, in pursuance of said order, appeared before said Eddy, as such justice. That counsel for said Mathews & Curtis then asked said Shippen several questions, which the said Shippen refused to answer; and that said Eddy, as such justice, refused to allow said counsel to put any questions to said Shippen, but ordered said Shippen to be discharged from further attendance at said court, and dismissed the said proceedings. And that this action of said Eddy, as such justice, has deprived said Mathews & Curtis of said sum of \$155, or any part thereof, in the hands of said Shippen; and that they have no plain, speedy, or adequate remedy in the ordinary course of law. The prayer is for an alternative writ of mandate commanding said Eddy, as such justice, to issue an order to compel said Shippen to appear and testify on oath, according to said section 803 of the Code of Civil Procedure. Thereupon the court below issued an alternative writ of mandate in conformity with the application of said Mathews & Curtis. The answer of the said Eddy "denies, on information and belief, that on March 12, 1889, or at any other time, the said petitioners filed any complaint in the case of Mathews & Curtis vs. Sarah Borlace in the said J. J. Hopkins' court, or any paper that from courtesy could be called either a complaint or account; denies that the said bond or affidavit on attachment was filed in said cause or court prior to September 12, 1889." The answer then admits that said Benson, as said constable, made the following return upon the writ of attachment in said case of Mathews & Curtis against Borlace: "I do hereby certify that I received this writ on the 12th day of September, A. D. 1889, and personally served the same by, on the 12th day of September, A. D. 1889, levying upon and attaching the following described property, to-wit: Money due defendant, Sarah Borlace, from Ben Clark, \$27.00; D. Cunningham, \$42.00; Frank Sands, \$15.00; A. C. Abbot, \$160.00; said parties acknowledging said indebtedness, and promising to pay the same into court. All done in the county of Silver Bow, M. T. Dated this 14th day of September, A. D. 1889. O. B. BENSON, Constable." The answer admits that an affidavit for the publication of the summons in said case was filed September 20, 1889; and admits that he, the said Eddy, as such justice of the peace, signed the judgment in said case, which is made a part of said answer. "And this defendant, as justice of the peace aforesaid, is of the opinion, and has so decided, that said judgment was not duly or regularly entered, for the reason that there never was any personal service of summons on defendant, Sarah Borlace, and she never voluntarily appeared in said case; and the statutes provide that when there is no personal service on defendant within the state, and no voluntary appearance on her part, the judgment and execution shall be against the property attached; and therefore denies that said

judgment was duly entered against the said defendant, Sarah Borlace, for the said sum of \$299.00." The answer admits that an execution was issued August 11, 1890, in said case, and alleges: "And this defendant is of the opinion, and as justice of the peace has decided, that said execution was not duly or regularly issued; the judgment upon which it issued not being in accordance with law." The answer further alleges: "As to the said W. C. Shippen being duly garnished under said execution, this defendant is of the opinion, and as said justice of the peace has decided, that he was not, for the reasons that neither the said execution nor judgment upon which it issued was in accordance with law." These averments respecting the validity of the judgment and execution are reiterated, and it is also stated in the answer that said Shippen "had never been served with garnishee process under the attachment, and no indebtedness or other property had ever been levied upon it in his hands under the attachment issued in this case." The papers which were filed in the justice's court in the case of Mathews & Curtis against Borlace appear in the transcript. The court below heard and tried the application for the preperatory writ of mandate upon the affidavit, answer, and papers. No opinion was delivered upon the entry of the judgment, but we infer from the argument of counsel that the reasons which have been given in the foregoing answer controlled the decision.

It will be necessary to examine the proceedings in the justice's court in the foregoing case of Mathews et al. v. Borlace. No personal service was had upon the defendant therein, but the affidavit for the publication of the summons was made according to the terms of the statute, the summons was duly published, and the proof thereof was made, and the property of said Borlace was attached by the constable. The respondent, as a justice of the peace, was authorized to enter a judgment in favor of said Mathews et al. and against the defendant. *Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350. 1 Sup. Ct. Rep. 354; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. Rep. 135; *Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. Rep. 742; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165. In *Cooper v. Reynolds*, supra, Mr. Justice MILLER, in the opinion, said: "So, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court. \* \* \* So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." The answer alleges that the

action of this justice in entering this judgment was void, and his counsel insists that the provisions of the Code of Civil Procedure prescribing the form thereof were disregarded. The following language is relied on to uphold this view: "And in all cases where there has been property of the defendant attached to secure any judgment that may be recovered against him, and there is no personal service on such defendant within the territory, or voluntary appearance, as aforesaid, the judgment and execution shall be against the property attached, as provided in section seventy-three of this chapter." Code Civil Proc. § 80. The section thus referred to is silent upon the subject, and there are other provisions regulating judgments, which must be compared, to assist us in this investigation. The transcript shows that there has been entered in the docket of the justice's court all the proceedings required by law in the case of said Mathews et al. v. Borlace. The title specifies correctly the court and the names of the parties, and it is stated that the "judgment was entered against defendant and in favor of plaintiffs for the sum of \$299.00, costs of this action, constable fees, \$8.90." The property which was attached comprised debts which were due from various parties to said Borlace, and amounted to \$244. The requirements of the Code of Civil Procedure relating to proceedings in the justice's court have been scrupulously observed. Under this title there is no section which defines or distinguishes the character of the judgment which shall be entered when jurisdiction of the defendant has been obtained by the publication of the summons and the attachment of property; in other words, there is no clause which is similar to the eightieth section, *supra*. It provides for the publication of a summons in certain cases, which embrace the action of Mathews et al. v. Borlace. Code Civil Proc. § 745. "When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows: When a copy of the account, note, bill, or other obligation upon which the action is brought was filed with the justice at the time the summons was issued, judgment shall be given, without further evidence, for the sum specified in the summons." Code Civil Proc. § 792. It is further provided: "Every justice shall keep a book denominated a 'docket,' in which he shall enter: \* \* \* *Ninth*. The judgment of the court, specifying the costs included, and the time when rendered." Code Civil Proc. § 805. "The several particulars of the last section specified shall be entered under the title to the action to which they relate, and at the time when they occur. Such entries in a justice's docket \* \* \* shall be primary evidence to prove the facts so stated therein." Code Civil Proc. § 806. It is further enacted that "the provisions of this act in relation to parties to actions in the district courts, and relative to practice, pleading, and trial, shall, so far as the same are applicable, and do not conflict with this title, be observed in the justices' courts." Code Civil Proc. § 804. Therefore the contention of the respondent is that the eightieth

section, *supra*, should have been followed in the entry of the judgment by the justice of the peace. We think that this construction of the statute is erroneous, and that the legislature, which treats with great liberality the pleadings and practice of the tribunals of this inferior jurisdiction, would not in such an indirect mode adopt a stringent rule concerning the formalities of a judgment and execution. But, conceding that the position of the respondent is sound, we find that the eightieth section, *supra*, is in conflict with the chapter which regulates "judgment upon failure to answer," and provides: "In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer has been filed, apply for judgment, and the court shall thereupon require proof to be made of the demand mentioned in the complaint, \* \* \* and may render judgment for the amount which he is entitled to recover." Code Civil Proc. § 245, subd. 3. These sentences are contained in the first division of the Compiled Statutes of Montana, which were approved at the same time, March 1, 1887. The history of this legislation should be reviewed. The part of the eightieth section, which has been cited, was added to the seventy-third section of the Code of Civil Procedure by an act approved February 23, 1881, (St. 12th Sess. 9.) The seventy-third section was then amended by adding the following: "And in all cases where the action is for the collection or enforcement of a moneyed claim, obligation, or demand against the persons upon whom such service is sought to be had, it shall also be made to appear by said affidavit, or other satisfactory evidence, that some property or effects of the defendant, or in which he has an interest, has been attached in pursuance of the statute in such case provided, describing the property or effects so attached, which shall be set forth in the order of the court or judge directing the publication of the summons, and recited in the summons published in pursuance of such order." St. 12th Sess. 9. By an act "concerning the publication of summons," approved March 1, 1883, it is expressly provided that said seventy-third section, "and all acts and parts of acts in conflict herewith, are hereby repealed." St. 13th Sess. 51. Thus the portion of said seventy-third section, which is mentioned in the eightieth section, *supra*, was repealed about eight years ago, and has not been re-enacted. The expression above quoted, "as provided in section seventy-three of this chapter," is meaningless, and the reason for its insertion therein has long since ceased. It must be confessed that the intention of the lawgivers could have been declared in terms which would have removed every doubt regarding the forms of judgments which may be entered in the district courts. It is a serious question as to whether said eightieth section, *supra*, is valid, but it is needless to give an opinion thereon. In view of these considerations, we have concluded that there is no statute which requires justices of the peace to enter any



other judgment than that which is recited in the record.

The same principles are applicable to the execution which was issued to collect the judgment entered against Borlace. The title affecting the justice's court prescribes the contents of an execution and the duties of the officers to whom it may be delivered. Code Civil Proc. §§ 802, 803. The execution, which is exhibited in the transcript, does not describe the property which was attached by the constable, but is framed according to the provisions of this title. The authorities which discuss these matters are harmonious. In *Anderson v. Goff*, 72 Cal. 65, 13 Pac. Rep. 73, the court said: "Our statute gives the right to service of summons upon defendants in all cases where they are non-residents of the state, without reference to the fact of their having or not having property here. The effect of a judgment thus obtained is quite another thing."

\* \* \* The judgment, when rendered, does not differ from that entered in other cases upon a money demand." The court commented upon the statutes of that state, but we will give in lieu thereof excerpts from our Code of Civil Procedure, which are in substance the same. "If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him, which has not been delivered to the defendant or claimant." Code Civil Proc. § 194. "All goods, moneys, chattels, and other property, both real and personal, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution." Code Civil Proc. § 319. The court then proceeded: "Under these provisions it has been held by this court that no order of sale by the court is necessary to authorize the sheriff to sell the attached property, and that the lien of the attachment is not lost by taking a simple money judgment without embodying therein directions for the sale of the attached property."

\* \* \* Had our courts adopted the practice, in cases where attachments are issued, of declaring the lien of the attachment in the judgment, and directing the attached property to be sold in satisfaction of such lien, the orderly connection between the lien and the rights accruing to a purchaser under a sale thereunder would be more readily apparent; but, in the light of the interpretation given to the statutes, and to the judgments in such cases, the same result is reached. In view of this result, we think it must follow that, while a personal judgment against a non-resident debtor who is only served with process by publication is void and of no effect, yet, in a case where the debtor has property within the state, which is seized under a writ of attachment issued in the cause at the time the suit is brought, a judgment therein, which, though general in its terms, has the effect of perpetuating the attachment lien, and of subjecting the attached property to the payment of a debt due from the non-resident, is so far in the nature of a proceeding *in rem* as to uphold a sale of the attached property, and

considered for that purpose and to that extent is not void. It is the method, and only method, pursued in our courts for subjecting the property of a non-resident debtor to the payment of demands due from him to our citizens; and the object sought is the essential thing to be considered, and is of more importance than the means by which the end is attained." The case of *Low v. Henry*, 9 Cal. 538, which was decided in 1858, is approved, and the court therein said: "We come now to consider the question as to whether the liens of the attachments were lost in consequence of the form in which the judgments were taken. The counsel of plaintiffs insist that the liens were lost 'by the fact that simple money judgments were entered up, without any directions for the sale of the attached property.'"

\* \* \* There is no prayer in the complaint that the court should order a sale of the attached property. The lien of the attachment arises after the commencement of the suit. The Code contains express directions to the sheriff as to property attached. \* \* \* There is nothing in the Code that requires any order of court to authorize a sale. For these reasons, we think the objection not well taken." In *Cooper v. Reynolds*, supra, the court further said: "But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*; the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted." The application of the authorities to the facts contained in the record leads to one determination. The judgment of the justice's court and the execution issued thereon were lawful, and the answer of the respondent which sets forth their invalidity cannot be supported.

Another important question which has been discussed in the briefs cannot be determined upon this hearing. It appears from the record and admissions of counsel that said Abbot, when served with the writ of attachment by the constable, was indebted to Borlace on account of the purchase of real property in the sum of \$155; that said Shippen, as the agent of Borlace, held the deed therefor in escrow, and would not deliver it until he received the consideration; that for this reason the said money was placed by Abbot upon a table in the office of Shippen; that the sheriff, by virtue of the execution, levied upon the money which Abbot claimed to be due from him to Borlace, and also served the same upon Shippen; and that the said deed was then received by Abbot. We have no jurisdiction in this proceeding to inquire into the respective liabilities of Abbot or Shippen to Mathews et al. under

these circumstances. The debt, which was owing from Abbot to Borlace, has been regularly attached, and Mathews et al. are entitled to the fruits of their judgment. The respondent maintains that this security has been lost or impaired; and this contention may be correct, but we cannot adjudicate the issue without evidence offered upon a legal trial. The foundation for a statutory investigation has been laid, and it is necessary that Shippen and other witnesses should be required to testify in said justice's court concerning this indebtedness from Abbot to Borlace. Our inquiry is limited to a narrow scope, and we determine that the respondent should have proceeded with the examination of Shippen upon this subject. The respondent contends that the judicial discretion of the justice's court cannot be controlled by the writ of mandate, but this is not the ground upon which the appellants stand. The authorities are numerous in holding that the appropriate remedy was applied for in the court below. *Harrington v. Haller*, 111 U. S. 796, 4 Sup. Ct. Rep. 697; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. Rep. 825; *Ex parte Brown*, 116 U. S. 401, 6 Sup. Ct. Rep. 387; *Ex parte Parker*, 120 U. S. 737, 7 Sup. Ct. Rep. 767; *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708; *People v. De La Guerra*, 43 Cal. 225. In *Ex parte Parker*, 131 U. S. 221, 9 Sup. Ct. Rep. 708, the court said: "The right of *mandamus* lies, as held in *Ex parte Parker*, 120 U. S. 737, 7 Sup. Ct. Rep. 767, where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise." It is therefore ordered and adjudged that the judgment be reversed, with costs, and that the court below issue a peremptory writ of mandate according to the prayer of the affidavit and application.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 283)

METCALF *et al.* v. PRESCOTT *et al.*

(*Supreme Court of Montana*. Jan. 7, 1891.)

MINES—DESCRIPTION OF LOCATION NOTICE—VERIFICATION.

1. Where the location notice for a mining claim refers to a permanent monument, and is recorded in the county in which the claim is actually situated, the fact that the location notice, after giving the courses and distances, which show it to be in one county, describes it as being in another, will not vitiate the description, and the name of the county will be rejected as surplusage.

2. Parol testimony is admissible to show that the monument referred to is of a permanent character.

3. Where the affidavit to the location notice is not signed by the locators, and there is no jurat showing it to have been subscribed and verified, the notice is insufficient, under section 1477, p. 1054, Comp. St. Mont., which provides that any person discovering any mining claim shall within 20 days thereafter make and file for record a declaratory statement, in writing, on oath, describing such claim, as provided by the laws of the United States; and evidence *alunde* to show that the affidavit was in fact sworn to will not be received.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

The action is a contest between claimants of mining ground on the public domain of the United States. The plaintiffs below, respondents here, relied upon their claims of the Ida May and Corbett lodes. They were contested by the defendants, appellants here, with their New Brunswick and Crucible lodes. The gist of the case was reached by the partial sustaining of a demurrer to the answer, and a motion to strike out a portion of the same. Therein the court settled propositions hereinafter stated, and the trial following was *pro forma*. Four points are argued by counsel, and the facts upon which they are presented are:

(1) The location notice of the Crucible lode states, among other things, "This lode is situated in Vaughn's unorganized mining district, Lewis and Clarke county, Montana territory, and the discovery shaft is 335 feet from the west end of the claim. \* \* \* The exterior boundaries of this location are distinctly marked by posts or monuments at each corner of the claim, so that its boundaries can be readily traced, viz.: Beginning at the N. E. corner, from which corner No. 4, survey No. 889, bears northerly about one mile; thence westerly 1,500 feet to post marked 'N. W. corner Crucible'; thence southerly 600 feet to post marked 'S. W. cor. Crucible'; thence 1,500 feet to post marked 'S. E. cor. Crucible'; thence northerly 600 feet to post marked 'N. E. cor. Crucible,' and place of beginning." As to this description the defendants plead, in their answer: "That the corner No. 4 of said survey No. 889, referred to in the said Crucible notice of location as being about a mile distant therefrom, lies wholly within the said county of Jefferson, is a fixed, definite, and permanent monument, and, taking the said notice of location, and starting at the initial point named, from the calls of said notice, one would of necessity, and without uncertainty, find the said claim in the county of Jefferson." It further appears from the answer that the notice of location was duly filed in the office of the county recorder of Jefferson county, and not of Lewis and Clarke. The court held that this location notice was not competent, as not entitled to record in Jefferson county, by reason of the statement in the notice that the claim was situated in Lewis and Clarke county; and also that the allegation and proposed proof that said corner No. 4 shows the claim to be in Jefferson county was incompetent. This is assigned as error.

(2) The location notice of the New Brunswick shows these facts: The notice itself is signed by the locators. Then appears an unsigned affidavit, as follows: "Territory of Montana, County of Lewis and Clarke—*as*. Charles K. Cole, being duly sworn, says that he is of lawful age, and one of the locators and claimants of the foregoing quartz lode mining claim; that said location is made in good faith; and that the matters set forth in the foregoing notice by him subscribed are true. ————— ERASTUS D. EDGERTON, Notary Public in and for Montana Territory. [Notarial Seal.]" Said Charles K. Cole

was one of the locators, as appears upon the notice. The notice was recorded in Jefferson county. It further appears by averment of the answer "that said Charles K. Cole, the person named as affiant in the affidavit attached to said notice of location, in truth and in fact swore to the same before a notary public (Edgerton) therein named prior to the record thereof, and subsequent to Jan. 2, 1885." The district court held that this notice, not being sworn to, was not entitled to record, and defendants could not claim title thereunder. This conclusion must have been reached by taking the face of the affidavit alone, and disregarding the *allunde* matter pleaded in the answer. This is assigned as error.

(3) The New Brunswick was located January 2, 1885, and recorded February 5, 1885. The record was more than 20 days after the location. But it appears "that between January 2, 1885, and February 5, 1885, no person whomsoever occupied, possessed, or endeavored to assume to occupy or possess the claim or any part or portion of the said New Brunswick lode, other than the said locators above named." Was the record, under these circumstances, made in time?

(4) The Ida May location notice states: "This lode is situated in unorganized mining district, Jefferson county, Montana territory, and the claim is situated about one mile south-easterly of the Peerless Jennie mine. The joining claims are the Corbett quartz claim on the east; no others known." The Corbett location notice states: "This lode is situated in Frowner unorganized mining district, Jefferson county, territory of Montana; and the adjoining claim is the Leslie on the north." The point is made that these descriptions are not "by reference to some natural object or permanent monument as will identify the claim." Rev. St. U. S. § 2324. An opinion upon these two last points is not required for decision of the case; but they will be treated, for the reason set forth in the opinion below.

Toole & Wallace, for appellants. Comley & Foote and Shober & Rowe, for respondents.

DE WITT, J., (after stating the facts as above.) We will discuss the points in the order outlined in the foregoing statement of the case.

1. The Crucible claim was situated in Jefferson county. Its notice of location was recorded in Jefferson county. Its location description names corner No. 4 of the survey No. 889, which corner defendant alleges lies wholly within Jefferson county; and further alleges that the described courses and distances, when run by reference to this survey corner No. 4, locate the claim wholly in Jefferson county. It is not for the court to say, from an inspection of the location notice, whether or not this survey corner was a permanent monument. This is a matter for proof. Russell v. Chumasero, 4 Mont. 317, 1 Pac. Rep. 713; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302. Then, if defendants had been allowed to attempt to prove this, as they had the right to do, and had succeeded

ed, they would have been in this position: They would have shown where their claim was by reference to a permanent monument. They would have shown thereby that it was in Jefferson county, the county in which they had properly made their record. Are they to lose their claim because they stated in their notice that the premises were in Lewis and Clarke county? The statement of the county, in the notice, is not required by law; nor does it appear that it was required by any rules of miners consistent with the laws of the United States or the then territory; nor is it necessary in this case, in order to find or identify the claim. It was surplusage. Does this surplusage vitiate an otherwise good description, and a legal recording? *Falsa demonstratio non nocet*. See cases in 2 Pars. Cont. (5th Ed.) 555 note *d.*, and page 514. The rule applies the more forcibly in a case, as that before us, where the false description is surplusage. "So much of the description as is false is rejected, and the instrument will take effect, if a sufficient description remains to ascertain its application." 1 Greenl. Ev. § 301, and cases cited; also Wade, Notice, §§ 184, 185; Partridge v. Smith, 2 Biss. 183; Worthington v. Hylyer, 4 Mass. 196; Jackson v. Loomis, 18 Johns. 81; Reamer v. Nesmith, 34 Cal. 624. There can be no doubt that, if defendants be successful in proving what they allege to be the fact as to a permanent monument, the description is sufficient, and the error in stating the county, under the circumstances of this case, is harmless. We are satisfied that the district court erred. The notice of location is competent, and proof whether the corner No. 4 of survey No. 889 be a permanent monument is competent. Upon the subject of description of mining claims, see Gamer v. Glenn, 8 Mont. 371, 20 Pac. Rep. 654; Flavin v. Mattingly, 8 Mont. 246, 19 Pac. Rep. 384; Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Garfield, etc., Co. v. Hammer, 6 Mont. 53, 8 Pac. Rep. 153. The foregoing is sufficient for the decision of this appeal, but, as the case goes back for further proceedings, we will express our views upon the additional points raised, as a guide to the district court in the further consideration of the case; and, therefore—

2. The new point is whether the location notice of the New Brunswick claim is defective, by reason of the condition of the verification. This court, after incidentally doubting the validity of the law of the territory requiring a location notice to be verified, (Wenner v. McNulty, 7 Mont. 30, 14 Pac. Rep. 643,) afterwards, in O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. Rep. 302, met the proposition squarely, and held the law to be good. While we can conceive doubts as to this power of the territorial legislature, we do not feel it our duty to disturb the rule in O'Donnell v. Glenn, and the practice established upon that rule. We therefore sustain the law, which is as follows: "Any person or persons who shall hereafter discover any mining claim upon any vein or lode \* \* \* shall within twenty days thereafter make and file for record in the office of the recorder of the county in which discovery or location

is made a declaratory statement thereof, in writing, on oath, made before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States." Section 1477, p. 1054, Comp. St. The question, then, arises, is the location notice of the New Brunswick, with its attachment, "a declaratory statement in writing, on oath?" It is "a declaratory statement in writing;" and, if it is properly "on oath," the verification by Cole, one of the locators, is sufficient, without his co-locators joining with him. *Wenner v. McNulty*, supra. An affidavit is one method of taking an oath. An affidavit is "a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath." *Bouv. Law Dict.* Appellant cites *Shelton v. Berry*, 70 Amer. Dec. 326; *Jackson v. Virgil*, 3 Johns. 540; *Millius v. Shafer*, 3 Denio, 60; *Ede v. Johnson*, 15 Cal. 57; *Burns v. Doyle*, 28 Wis. 460; and *Crist v. Parks*, 19 Tex. 234,—to the effect that the affidavit need not be signed. But the want of signature to this paper is not its most serious defect, if it be attempted to view it as an affidavit. There is no jurat thereto. It does not appear by the hand of the notary that the paper was either subscribed or sworn to, or that the party was ever present before the officer. We are not cited to any authority, or given any reason, that would warrant us in holding this paper to be an affidavit. In all the cases presented by appellants (last supra) there appeared some sort of authorization or certification from the notary, which evidenced the oath having been taken. In the paper before us there is nothing but the notary's name and official title. It does not appear that the party took an oath, or was ever present before the officer. We cannot call this an affidavit, or an oath by virtue of an affidavit, or by virtue of any certification. But appellants urge that an affidavit is not required, but only a statement on oath. Granted for the argument's sake; but have we any statement on oath? We have no notarial evidence of such fact. If the notary had officially certified, attested, or declared in any manner that the locator made the statement on oath, we would be inclined to view the matter more favorably. Certainly there is nothing whatever on the paper to remotely indicate that Charles K. Cole, the locator, made the statement on oath. In *Murray v. Larable*, 8 Mont. 212, 19 Pac. Rep. 574, there appeared at the end of a deposition an alleged certificate. It was signed by the deponent, and then followed: "Sworn to and subscribed before me, this eighteenth day of February, 1885. OMERE VILMORE, Not. Pub. [Notarial Seal.]" The court held "the simple statement at the end of the deposition, of 'sworn to and subscribed before me,' is no certificate of anything, except that the witness swore to and subscribed his name to the deposition." If, under those circumstances, the notary certified to nothing except that the deposition was subscribed and sworn to, then we must hold that, in the case at bar, the simple signature of the notary,

without even the jurat, which was present in the case of *Murray v. Larable*, did not certify to anything. We are of opinion that the paper before us is not, intrinsically, a declaratory statement on oath. But counsel offer to prove *aliunde* the notice that the oath was taken after location, and before recording. Let it be remembered that the statute (section 1477, div. 5, Comp. St.) requires that the locator shall "make and file for record a declaratory statement in writing, on oath." It shall not only be made "on oath," but "filed for record on oath." We are of opinion that the statute intends that the oath shall be part of the record. Without directly so declaring, there seems to be a strong implication from analogy to other recording laws that one office of the oath is to entitle the instrument to record. We believe that any other view would open the door to abuses, mischiefs, and errors. Suppose notices may be recorded with no affidavit or certificate of oath, although the oath may have been actually taken by the party. There would be no official evidence preserved of the act of the officer taking the oath; and titles to valuable mining property would be made to depend upon the doubtful memories of notaries public, and perhaps years after the event, or even after the death of the notary. And the temptation would be opened to such officers to remember or forget, as interests ulterior to their duties might sway them. We feel that it is utterly unsafe to sanction such a practice. We are of opinion that the view of the district court as to the New Brunswick location notice was correct, and we affirm that ruling.

3. It is conceded by respondents, in their brief, that they claim no rights by virtue of the fact that their adversary claim, the New Brunswick, was not recorded within 20 days after discovery. That disposes of this point.

4. Under the view expressed in paragraph 1, above, and on the authority of *Russell v. Chumaseero*, it must be held that in the location notices of the *Ida May* and *Corbett* claims the reference to adjoining claims is sufficient to allow the notices to be introduced in evidence, and proof to be offered, whether such adjoining claims are permanent monuments. The judgment is reversed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 304)

YORE v. MURPHY.

(*Supreme Court of Montana. Jan. 15, 1891.*)

CHANGE OF VENUE — AMENDMENT OF COMPLAINT.

1. In conversion, where the complaint fails to state the county in which the wrongful taking occurred, defendant, if a resident of another county, may have a change of venue, under Comp. St. Mont. div. 1, § 59, providing that the action shall be tried in the county where defendant resides, and that actions for torts shall be tried in the county where the tort was committed.

2. Where defendant in conversion is entitled to a change of venue, because the complaint fails to state the county in which the wrongful taking occurred, he cannot be deprived of that right by

the joinder of another cause of action, sounding in tort, in which the county where the wrongful act was committed is properly stated.

Appeal from district court, Cascade county; GEORGE H. BENTON, Judge.

This appeal is from an order denying a motion for a change of venue made by the defendant. The complaint states two causes of action. The first is that on June 20, 1890, in the county of Cascade, plaintiff was the owner and in possession of a band of sheep, describing them, and alleging their value; that at said time, and while plaintiff was such owner, and in possession in said Cascade county, where she was keeping said sheep, the defendant did, against the consent of plaintiff, unlawfully and with force, take from the possession of plaintiff all said sheep, and converted the same to his use, to the damage of plaintiff in the sum of \$12,775. The amount of damages alleged is the same sum as the value formerly pleaded. The second cause of action is that on June 20, 1890, plaintiff was the owner and entitled to the possession of certain horses, describing them, and placing upon them a value; that on said day, while plaintiff was the owner and so entitled to possession, the defendant was in possession, and refused to deliver the same upon demand, and still refuses, and has unlawfully converted the same to his own use, to the damage of plaintiff in the sum of \$700. The allegation of damage is in the same sum as the statement of value. The second cause of action varies from the first, in that the place of alleged conversion is not stated; and the wrongful act, if there be one, is stated to be in the retaining, and not the taking, of the property. The complaint concludes: "So that plaintiff avers that, by the wrongful acts of defendant hereinbefore alleged, she has been damaged, in the aggregate, by the defendant in the sum of \$13,475, and she is entitled to recover of him that amount, with interest on the same from the dates of the said wrongful acts until paid." It will be observed that the aggregate damage alleged is the same sum as the aggregate value pleaded. The demand is for said sum and interest from June 20, 1890, until paid, and costs. Complaint was filed August 25, 1890, in the district court for Cascade county. Summons was served on defendant August 26, 1890, in the county of Lewis and Clarke. Defendant filed a demurrer October 4, 1890. On the same day he filed a written demand that the place of trial be changed to Lewis and Clarke county, and therewith an affidavit of merits, and an affidavit that the place of his residence was Lewis and Clarke county. That he was a resident of said county was not controverted. On these papers defendant moved for a change of venue, on the ground that the county designated in the complaint is not the proper county for the reason that defendant is a resident of Lewis and Clarke county, and was served with summons in said county. The statute in reference to change of venue is as follows: "Sec. 59. In all other cases the action shall be tried in the county in which the defendants, or any of them, may reside at the commence-

ment of the action, or where the plaintiff resides, and the defendants, or any of them, may be found; or if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and, if any defendant or defendants be about to depart from the state, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contract may be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed. subject, however, to the power of the court to change the place of trial as provided in this act. \* \* \*

Sec. 61. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county. Sec. 62. The court may, on good cause shown, change the place of trial in the following cases: *First*, when the county designated in the complaint is not the proper county; *second*, where there is reason to believe that an impartial trial cannot be had therein; *third*, where the conveniences of witnesses, and the ends of justice, would be promoted by the change; *fourth*, where, from any cause, the judge is disqualified from acting in the action." The district court denied the motion to change the place of trial. From that order the appeal is prosecuted, and constitutes the only question before this court.

*Cullen, Sanders & Shelton*, for appellant. *Leslie & Baum* and *P. H. Leslie*, for respondent.

DE WITT, J., (after stating the facts as above.) Respondent contends that the last sentence of section 59 fixes the place of trial in Cascade county, and retains it therein; while appellant insists upon his right to the change. It is necessary to determine whether the action is in contract or in tort; for, if in contract, it seems that the face of the contract must disclose that it was to be performed in the county in which the action was commenced, in order to lay and retain the venue in that county. But we need not decide that point, for we are of opinion that the action sounds in tort. In actions growing out of the taking or retaining of personal property, the pleader may declare in replevin, or in conversion, or may waive the tort, and sue upon an implied contract. It is sometimes difficult to determine which course the pleader has intended to pursue; but in this case we believe that it is determinable. There is a clear allegation of a wrongful taking in one cause of action, and a wrongful detaining in the other. In each there is an allegation of conversion, and in each a statement of damages to plaintiff. She demands a judgment for the amount in which she says she is damaged, which amount she lays at the value of the property at the time of

conversion, and interest. The whole tenor of the complaint leads to the conclusion that the action is in tort. Then, as to the place of its commission. The tort set up in the first cause of action is explicitly alleged to have been committed in Cascade county. The second cause of action, for tort also, is separately stated. It nowhere appears in the complaint that this alleged tort was committed in Cascade county. We have before us no other source of information. We have no knowledge that the second tort complained of was committed in Cascade county.

Counsel have argued the construction of the last sentence of section 59, in connection with the previous portion of that section; but it is not necessary in this decision to construe those provisions. It may be assumed for the purposes of the case, as now before us, that the plaintiff has a right to have an action for tort tried in the county where it was committed, notwithstanding the residence of defendant in another county, and his service therein.

In this complaint two causes of action are joined. In one it appears by the complaint that the tort was committed in Cascade county; in the other it does not so appear. Therefore, as far as this court is informed by the record, defendant has the right (section 59) to have the second cause of action tried in Lewis and Clarke county, the county of his residence and of service upon him; and this right is not modified by the fact that this second alleged tort was committed in Cascade county, for it does not appear that it was there committed. And, if defendant has the right to have the second cause of action tried in Lewis and Clarke county, plaintiff cannot abridge this right by joining in her complaint another cause of action, (the first in the complaint,) which might be properly construed as triable in Cascade county. This position is thoroughly and satisfactorily discussed in *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. Rep. 381. See, also, *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. Rep. 120.

In consideration of the facts before the district court, we are of opinion that defendant's demand for a change of venue should have been granted. It has been so held in *Williams v. Keller*, 6 Nev. 141, and *Watkins v. Degener*, 63 Cal. 500. The statutes of those states are similar to section 59, except that the last sentence is omitted. As that last sentence is in no way before us for construction, these cases last cited are in point, and we are satisfied with their reasoning. It is therefore ordered that the order appealed from be reversed, and the case is remanded to the district court, with directions to make an order transferring the case to Lewis and Clarke county.

BLAKE, C. J., and HARWOOD, J., concur.  
(10 Mont. 325)

KORNBURG v. BOARD COM'RS DEER LODGE COUNTY.

(Supreme Court of Montana. Jan. 26, 1891.)

COUNTIES—ESTABLISHMENT OF BOUNDARIES—LIABILITIES.

1. Acts Mont. Feb. 8, 1889, § 8, providing for the establishment of a boundary commission, and v.25P.no.14—66

for the auditing of the expenses of a survey defining the boundary lines between certain counties, authorizes the boundary commission to ascertain the expense, and to certify the amount to the county commissioners, and, when so ascertained and certified, the county commissioners have no power to review the action of the boundary commission, or to demand from the surveyor an itemized bill of such expenses.

2. Section 5 of the act authorizes the commission to employ a surveyor and necessary assistants, and the county is liable not only for the wages of the surveyor, but of such assistants as he may employ.

Appeal from district court, Deer Lodge county; DAVID M. DUFFEE, Judge.

The action is by the plaintiff as surveyor, employed under the provisions of the act of February 8, 1889, (16th Sess. p. 231.) That act provides for the survey of the boundaries between the counties of Deer Lodge, Missoula, Silver Bow, and Beaverhead; that a commissioner shall be appointed by the county commissioners of each county interested, who shall constitute the boundary commission. Their duties are specifically defined. The sections of the act material to this inquiry are: "Sec. 5. That the said commissioners shall be, and they are hereby, authorized and empowered to employ a competent surveyor with the necessary assistants, who shall be paid *pro rata* by the respective counties interested, by warrants drawn on the contingent fund thereof." "Sec. 8. That all expenses incurred under the provisions of this act shall be ascertained by the commissioners appointed under the provisions of section one of this act, and by them certified to and filed in the office of the county clerk of their respective counties." There is a stipulation in the record as to what was the evidence in the case, and from that and the pleadings the following facts appear: That the several counties duly appointed their respective boundary commissioners; that the commission met as provided, and marked the boundaries as contemplated by the act; that plaintiff is a competent surveyor; that the commission employed him with necessary assistants to aid in performing the duties imposed by the commission; that plaintiff performed said services; that said boundary commission had a full and complete accounting with the plaintiff; that, on said accounting, there was found to be due plaintiff from the county of Deer Lodge, as the one-fourth of the value of the whole services, the sum of \$1,826.44; that the boundary commissioners ascertained that said amount was due to plaintiff from Deer Lodge county, and certified the same, and filed said certificate in the office of the county clerk of said county. Two certificates seem to have been filed, one a certificate of the amount due plaintiff from Deer Lodge county alone, \$1,826.44, and stating that the sum had been carefully computed. The other certificate gave the total due from the four counties, and presented it in four items as follows: Surveyors' wages, board of men, man wages, \$5,372; for general expenses, transportation, and fitting out, \$1,633.75; for office work, field-notes, and survey, \$300. The plaintiff demanded from the commission-

ers of Deer Lodge county that this sum so certified be paid, which was refused. The said commissioners demanded from plaintiff an itemized bill for his services, which was refused. The plaintiff, on the trial in the district court, recovered judgment for the full amount of his claim, interest, and costs. The county appeals. Section 762, Gen. Laws, (Comp. St.) provides: "No account shall be allowed by the board of county commissioners unless the same shall be made out in separate items, and the nature of each item be stated; nor unless the same be verified by affidavit, showing that the said account is just and wholly unpaid; and if the same be for official services, for which no specified fees are fixed by law, the time actually and necessarily devoted to such service shall be stated; but nothing in this section shall prevent such board from disallowing any account in whole or in part, when so rendered and certified." The defendant county resists payment on two grounds: (1) That they are not bound to pay on the certificate of the boundary commission, but may require, under the provisions of said section 762, an itemized bill of the services, before they are liable to pay. (2) That plaintiff sues not only for his personal services, but for those of his assistants, and the expenses of the commission, except the commissioners' *per diem* compensation.

W. S. Shaw, Co. Atty., and Robinson & Stapleton, for appellant. Forbis & Forbis, for respondent.

DEWITT, J., (after stating the facts as above.) It is undoubtedly the law that in accordance with the provisions of section 762, Gen. Laws, it is the duty of the commissioners of a county to require an account to be made in items, before they allow it; but the law making this requirement emanated from the legislature, and not from the constitution. The same authority, viz., the legislature, which provided a method to be followed in allowing accounts generally against a county, had power to provide a different method for certifying and allowing a particular account. This power they exercised in unequivocal terms, in section 8, Act Feb. 8, 1880. The account of plaintiff was to be ascertained and certified by a board specially provided for the purpose,—the board of boundary commissioners. Section 762 was not repealed. No one pretends that it was. But the one subject of the account in question was taken out of its operation, and given to another board. That board had authority and jurisdiction in its special matter, from the same high source, as does the board of county commissioners generally. When the boundary commission had acted within its powers, as it did, and in the absence of fraud, collusion, or bad faith, the board of county commissioners had no province in the premises but to pay the account as certified by the proper authority. The resistance of the county defendant is beyond our understanding.

The second ground of defense by the appellant seems equally untenable. The boundary commission were empowered

to employ a "competent surveyor, with necessary assistants." The office of the commission was to make a survey. Necessarily, the only expenses of the commission (outside of the commissioners' *per diem*, which is provided for in another section of the act) would be for a survey. The reasonable construction of the act is that the commission should employ a surveyor with his own equipment, instruments, and assistants. It would be an unnatural construction of the act to hold that the commission should employ a surveyor separately, and then hire assistants, and buy and rent instruments, tools, and equipments. These accessories are all found with a surveyor, as part of implements of his craft. They belong with him as naturally as the tools of the carpenter or the library of the lawyer. The commission properly employed the surveyor, and he provided his own ordinary means of executing his work, and put in his whole account for the service to the auditing board provided by law, and it successfully passed the careful scrutiny of that board, the members of which had been chosen, and their capacity and integrity approved, by the boards of commissioners of the counties interested. The contention of the appellant seems to be without substantial merit. The judgment of the district court is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 330)

BARDEN, County Treasurer, v. MONTANA CLUB.

(Supreme Court of Montana. Jan. 28, 1891.)

INTOXICATING LIQUORS—LICENSE—SOCIAL CLUBS.

A social club, not organized for the purpose of evading the liquor laws, but which furnishes its members with liquors and refreshments, without profit to itself, is not engaged in the sale of intoxicating liquor by retail, within the meaning of St. Mont. (15th Ex. Sess.) 74, which imposes a license tax on all persons who deal in, sell, or dispose of intoxicating liquors by retail.

Appeal from district court, Lewis and Clarke county; GEORGE R. MILBURN, Judge.

Bach & Buck, for appellant. Henri J. Hnskell, Atty. Gen., and C. B. Nolan, Co. Atty., for respondent.

BLAKE, C. J. This is an appeal from a judgment which was entered against the Montana Club for the recovery of a license tax, under the following statute: "All persons who deal, in, sell, or dispose of, directly or indirectly, any spirituous, alcoholic, vinous, or malt liquors, in any quantity less than one quart, shall, before the transaction of such business, obtain a license for which he or they shall pay as follows." St. (15th Ex. Sess.) 74. The Montana Club was incorporated under the laws of the territory, and the articles contain the following certificate: "The particular business or objects for which the association is formed are as follows, to-wit: For literary, educational, and social purposes, and for mutual improvement and benefit, and to maintain in the said city of Helena, in said county and territory, apartments fitted with the proper



fixtures, and furnished with the proper furniture and appurtenances, to be used for said purposes by ourselves, and our associates and successors, and to do each and every other act and thing necessary and convenient for the maintenance and perpetuation of a social club in said city of Helena." The articles bear the date of March 28, 1885. The transcript contains an admission in these words: "It was also admitted by the counsel for the state that the membership is about 225; that members pay their annual dues, in the case of resident members \$40 a year, and in case of non-resident members \$20 a year, and an initiation fee of \$100; that the club pays a rental for its rooms of \$100 a month, and it employs a steward at a salary of \$100 a month; employs a bar-keeper, a man who takes charge of what is called the 'bar' of the club, at \$100 a month, and three other employees, at salaries of about \$75 a month each." It is also conceded by counsel that the club has a library and magazines and newspapers for the use of the members; that persons who do not reside in the city of Helena can be admitted to the privileges of the corporation for the period of 10 days upon the receipt of a card from a member; that the invited guests and members can obtain at the bar of the club all the liquors which are mentioned in the statute supra, upon a compliance with the rules; and the member who introduces a visitor is responsible for the indebtedness which may be incurred thereby, although the latter is primarily liable. It is further shown that the daily receipts from the disposal of the liquors by the club amounted to \$40. The following among other findings were made by the court below: "That on the 1st day of April, A. D. 1890, at Helena, said county and state, the defendant corporation, through its agents, did sell and dispose of spirituous, vinous, and malt liquors in quantities less than a quart to its members, permanent and temporary, and continues so to do, and has made sales of liquors as aforesaid to persons from abroad, who according to the rules of the club had secured a temporary or provisional membership; \* \* \* that the liquors disposed of by said defendant corporation were the property of said corporation, and were purchased by said corporation with corporate funds; \* \* \* that said liquors were disposed of at a profit by said club." The conclusions of law were stated as follows: "(1) That the disposal of liquors by the club to its members, permanent and temporary, constitutes a sale of said liquors; (2) that the sale of liquors by the club to its members constitutes a business, for the carrying on of which the club is liable for the payment of a license." The fourth specification of errors is that "there is no evidence to show, or to justify the finding of fact by the court, that the defendant has ever disposed of liquors of any kind at a profit." An examination of the testimony compels us to sustain this proposition. Four witnesses were called for the state, and testified upon this point. Three of them were officers of the club, and stated positively that there was no profit in the sales of the

liquors at the bar, and that a committee adjusted the prices for the sole purpose of paying the expenses thereof, including the purchases. Another person testified: "Of my own personal knowledge, I don't know of any profit made there to-day." The foregoing finding must be set aside and disregarded in reviewing the legal questions which are before us.

The authorities which discuss the problems to be solved in this case cannot be reconciled. Some of the decisions which have been cited relate to associations that have been organized for the purpose of evading and violating the law restraining the sale of intoxicating liquors. They are inapplicable to the present inquiry, for no charge of this nature has been uttered against the appellant. Such is *State v. Mercer*, 32 Iowa, 405. In the opinion of the court, Mr. Justice BECK referred to the articles of association of the "Winterset Social Club," and said: "They appear by the statement of counsel to have been nothing more than the foundation of an organization, the object and intent of which was to evade the law for the suppression of intemperance,—a rather clumsy device by which the defendant and the members of the 'Social Club' hoped to defeat that law, and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. The fact that, under the arrangement of selling tickets, the members of the club became the owners of the liquors to the extent of the money paid, does not make the sale of the liquors in that way lawful." The statute which was interpreted by the court formed a part of what is generally designated as a "prohibitory liquor law," and did not relate to any system of taxation. The case of *Marmont v. State*, 48 Ind. 21, belongs to the same class, and the opinion says that "the appellant was indicted, tried, and convicted in the court below for selling intoxicating liquors on Sunday, and permitting them to be drunk upon the premises." Chief Justice BUSKIRK in the opinion gives at length the statement of facts concerning the "Modock Club," and proceeds: "It is agreed that each member, upon his initiation, paid fifty cents, and thereafter a monthly assessment of ten cents, to form the basis of a fund for the payment of expenses and reliefs of the society; and that the money received for each glass of beer drawn for and used by a member of said association goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs; which expenses are for fuel, rents of hall, newspapers, the beer used, and the donations or reliefs payable to each member of said association, who, from sickness or other mishaps, may require assistance; and a standing committee from the members of said society is appointed to see after and inquire into and direct the payment of necessary reliefs in all such cases \* \* \* When the society appointed the appellant its agent for the sale of its beer to the members of the association, it consented that each member might become the owner of such portion of the partnership property as he might

be willing to pay for, and appropriate it to his individual use. If the transaction set out in the agreed statement of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which if done by one person would be unlawful. It would be a reproach to the law and its administration if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will." To the same effect are *Rickart v. People*, 79 Ill. 85; *State v. Horacek*, 41 Kan. 87, 21 Pac. Rep. 204; *State v. Lockyear*, 95 N. C. 633. It should be observed that these citations support the contention of the respondent that the transaction which is described in the case at bar possessed the elements of a sale. It must be further admitted that the following authorities are directly in point, and uphold the ruling of the court below: *U. S. v. Wittig*, 2 Low. 466; *Martin v. State*, 59 Ala. 34; *People v. Andrews*, 115 N. Y. 427, 22 N. E. Rep. 358; *People v. Soule*, 74 Mich. 250, 41 N. W. Rep. 908; *Chesapeake Club v. State*, 63 Md. 446; *State v. Essex Club*, (N. J.) 20 Atl. Rep. 769. They assert, generally, that the property which belonged to the corporation or club has been transferred for a valuable consideration to persons who have received it; that the intention or good faith of the members who authorized such acts is immaterial; and that the law contemplates that the license shall be paid for the disposal of liquors in this manner. The opinions in some of these cases are elaborate essays upon the question under consideration, and their conclusions have been fairly announced. We do not deny their weight, and will not attempt to refute the reasons upon which they are founded, and will go further, and say that the controversy is surrounded by uncertainty.

There are, however, well-considered cases in which a contrary view has been expressed. *Graff v. Evans*, 8 Q. B. Div. 373; *Tennessee Club v. Dwyer*, 11 Lea, 452; *Seim v. State*, 55 Md. 566; *Com. v. Smith*, 102 Mass. 144; *Com. v. Pomphret*, 137 Mass. 564; *Com. v. Ewig*, 145 Mass. 119, 13 N. E. Rep. 365. In *Graff v. Evans*, supra, Mr. Justice FIELD said: "In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offense within the section. It is not disputed that the club was *bona fide* a club. \* \* \* I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods, although they had other agents with respect to special properties in some of the goods. I am unable to follow the reasoning of the learned magistrate in saying that the question depends on whether or not a profit was made upon the sale of the liquors. \* \* \* The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The legislature have come to the conclusion that it is inadvisable that intoxicating

liquors should be sold anywhere without a license. The enactment is limited to 'sales' of intoxicating liquors, and only seems aimed at sales by retail traders, because the wholesale trader is not touched. The question here is, did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail? I think not. I think Foster was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price. \* \* \* There was no contract between two persons, because Foster was vendor as well as buyer. \* \* \* I think it was a transfer of a special property in the goods to Foster, which was not a sale, within the meaning of the section." Mr. Justice HUNDELOSTON concurred, and said: "It seems to me clear that Foster had a property, or at least an interest, in the goods which were transferred to him. Mr. Hill rightly designated that interest as a one eleven-hundredth share. Foster, on payment, got from the bar-man who served him the interest of the other 1099 members, who thereby transferred their interest to him. There was no transfer of the general or absolute property in the goods to Foster, but a transfer of a special interest. That, in my view, was the result of the transaction. I cannot think it was a sale of intoxicating liquors by retail."

In *Seim v. State*, supra, Chief Justice BARTOL for the court said: "It will be observed that the license laws, (Code, art. 57,) which forbid the sale or barter of spirituous or fermented liquors without a license, have never been construed as applicable to social clubs, of which there are several in Baltimore city, where liquors are procured for the use of the members, and are furnished to them in the manner described in the present case; and we think it very clear that no license is required, for the reason that such a transaction is not a sale, within the meaning of the license laws. And, by a parity of reason, we conclude that the members of such associations as the Concordia is admitted to be, who obtain refreshments and liquors at the club by paying into the common fund the price fixed by the regulation of the society, cannot be said in any sense to buy them from the corporation, nor can the corporation be said to sell them to the members, within the meaning of the act of 1866. \* \* \* The society is not an ordinary corporation, but a voluntary association or club united for social purposes. Each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members.

These are not sold to him by the corporation, but furnished to him by the steward, upon his paying into the common fund what is equivalent to the cost of the article furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a bargain or sale in the way of trade, and therefore not within the purview or meaning of the act of 1866." In *Chesapeake Club v. State*, supra, the doctrine of *Seim v. State*, supra, was recognized, but held inapplicable, and the court said: "The language of the Sunday law of 1866, under which the case of *Seim v. State* was decided, is altogether different from that of the act of 1882, c. 112; and the decision in that case would seem to have been in the mind of the framers of the act of 1882, c. 112, for by the latter act terms are employed more comprehensive, especially those making the act applicable to associations and corporations, than are to be found in the Sunday law of 1866." A comparison of the statutes of the state of Maryland, which are referred to in *Seim v. State*, supra, and *Chesapeake Club v. State*, supra, illustrates clearly the distinctions which have been pointed out. In the first case, the court construed an act providing that "no person in this state shall sell, dispose of, barter, or, if a dealer in any one or more of the articles of merchandise in this section mentioned, shall give away, on the Sabbath day, \* \* \* any \* \* \* spirituous or fermented liquors. \* \* \*" In the last case the court interpreted a statute embodying these clauses: "If any person or persons, house, company, corporation, or association, or body corporate, shall sell, directly or indirectly, at any place, or give away at his, her, their, or its place of business, any spirituous or fermented liquors. \* \* \*" And, "in case of any violation of any provision of this act by any company, corporation, or association, each or any member of such company, corporation, or association shall be liable, and shall suffer imprisonment. \* \* \*" In *People v. Soule*, supra, this statute was under consideration: "All saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug-stores, where any of the liquors mentioned in this act are sold or kept for sale. \* \* \*" In *Com. v. Pomphret*, supra, the court cites *Com. v. Smith*, supra, and the statutes in force when the decision was made, and Mr. Justice FIELD says in the opinion: "Nothing is contained in this act, or in any subsequent acts, which, in terms, relates to clubs, until the statute of 1881, c. 226, was passed. \* \* \* The intention of this statute, however, plainly is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses, and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes." The statute of 1881, which is mentioned in the opinion, uses this language: "In any city or town in which the inhabitants vote \* \* \* that licenses shall not be granted, all buildings or places therein used by clubs for the purpose of selling, distributing, or

dispensing intoxicating liquor to their members or others shall be deemed common nuisances; and whoever keeps or maintains, or assists in keeping or maintaining, such a common nuisance shall be punished. \* \* \*" The court in *Com. v. Pomphret*, supra, stated: "It must be assumed that the decision in *Com. v. Smith* was known to the legislature at the time the existing statutes were passed. The inference is that the legislature intended that unlicensed clubs in cities and towns, whose inhabitants vote to grant licenses, must be dealt with according to the construction given by this court to statutory provisions similar to those in existing statutes prohibiting the sale, or exposing or keeping for sale, of intoxicating liquors." The amendments which have been incorporated in the laws concerning licenses are instructive. The Revised Statutes provided for the payment of certain sums by "any person or persons who shall keep any house, or saloon, or room where any banking game, or other game of chance, is dealt or played for money. \* \* \*" Rev. St. div. 5, § 805. This section was amended to read: "Any person or persons, or association of persons, who shall keep any house or saloon, or room or club-rooms, where any banking game or other game of chance is dealt or played for money. \* \* \*" St. (13th Ex. Sess.) 47. The last provision, and the act under which judgment was entered against the appellant, are found in Comp. St. div. 5, §§ 1346, 1350. In 1887 these sections were amended in some respects, but the peculiar phraseology which has been specified was retained. St. (15th Ex. Sess.) 74, 75. The decisions involving the liability of the appellant to pay the license under our statute are contradictory, but a slight modification by the legislative power would decide plainly and finally the question. There is no room for construing the act relating to gambling games. When these distinctions are so carefully preserved it is a reasonable inference that the legislature did not designate the business of the appellant in framing the law defining licenses. The court below erred in its findings and conclusions that the Montana Club at the times set forth in the complaint made sales of intoxicating liquors. This court cannot review the evidence in the transcript, and find the facts, and order judgment to be entered accordingly. *Barkley v. Tieleke*, 2 Mont. 435; *Chumasero v. Vial*, 3 Mont. 376. It is therefore ordered and adjudged that the judgment be reversed, with costs, and that the order overruling the motion for a new trial be reversed, and that the cause be remanded for a new trial.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 369)

STATE ex rel. BEGEMAN v. NAPTON.

(Supreme Court of Montana. Feb. 2, 1891.)

FICTITIOUS APPEAL—DISMISSAL.

Where an appeal is taken from an order in an action for a writ of *mandamus*, and subsequently the appellant obeys the order of the district court, the supreme court will not take ju

isdiction of the case, and the appeal will be dismissed as fictitious.

Appeal from district court, Deer Lodge county; D. M. DUKFEE, Judge.

*W. S. Shaw, Co. Atty., and Henri J. Haskell, Atty. Gen., for appellant. Cole & Whitehill, for respondent.*

DE WITT, J. The relator applied to the third district court for a writ of *mandamus* requiring the appellant, Napton, clerk of the district court, to issue to relator a certificate of his mileage and attendance as a trial juror at that court. The district court ordered the writ to issue. The clerk appeals. But counsel inform this court that the clerk has obeyed the writ of the district court, and issued the certificate; that the decision of this court is not expected to affect this case; but that this appeal is taken only for the purpose of having this court establish a rule for the government of the appellant in the future. A judgment of any kind from this court would present a peculiar result. An affirmance would be to direct the district court to issue a writ, which that court has already issued, and which has been obeyed. A reversal would be to say to the lower court: "You may not order the clerk to do that which he has already fully performed." It is apparent that there is no controversy before us. The case is fictitious. We are of the opinion that it is not a safe precedent to depart from the rule that courts will hear only genuine controversies, and will not tender advice upon matters not in litigation. For the reasons stated we decline to take jurisdiction of the appeal.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 370)

STATE ex rel. ROOT et al. v. MCHATTON.

(Supreme Court of Montana. Feb. 7, 1891.)

PETIT JURY—MODE OF DRAWING.

Const. Mont. art. 8, § 17, provides that the district court in each county which is a judicial district by itself shall "always be open" for the transaction of business, and that in each district where two or more counties are united the judges of such district shall "fix the term of court." Held, that the constitution does not annul St. Mont. 16th Sess. 186, providing that it shall be the duty of the judge of the district court, "at each regular term," to appoint jury commissioners. The act applies to district courts which are in session continuously, as well as to those having regular appointed terms.

Application for writs of prohibition and *mandamus*.

*Toole & Wallace, McConnell & Clayberg, Nathaniel Myers, and Robert G. Ingersoll, for petitioners.*

BLAKE, C. J. This is an application to this court upon the part of Henry A. Root and Maria Cummings for a peremptory writ of mandate to compel the judge of the district court of the second judicial district of the state, in and for the county of Silver Bow, to appoint three persons to serve as a commission in selecting a petit jury. The same parties have also filed an application for a peremptory writ of prohibition to command the said judge to de-

sist and refrain from any further proceedings in the matter of the probate of a certain instrument purporting to be the last will and testament of Andrew J. Davis, deceased, until otherwise ordered by this court. The affidavits of the relators embrace, in substance, the same allegations, and the returns of the respondent are similar, so that a determination of the issues in one proceeding necessarily controls both judgments. The relators have submitted two motions to strike from the returns certain portions thereof, which will not be considered by themselves, because they must stand or fall with the main propositions to be examined. There is no controversy respecting the facts, and the sole question before us must be solved by the construction of the constitution and statutes relating to the impaneling of a jury in the district courts, which exercise jurisdiction in a single county. It will not be profitable to set forth fully the statements of the affidavits and returns, but the material facts appearing therein should be presented. Andrew J. Davis died March 11, 1890, in Butte, county of Silver Bow, aforesaid, and left an estate exceeding in value the sum of \$8,000,000. Said Root and Cummings and others are heirs at law of the deceased. John A. Davis, a brother of the deceased, produced to said district court, July 24, 1890, a paper purporting to be the will of the deceased, and to have been executed in the state of Iowa, July 22, 1866, and by which the said estate, with the exception of some small annuities, was bequeathed to the said Davis. Said Root and Cummings within the proper time appeared and contested the will in the manner required by law. The issues of fact which were thereby raised were settled October 23, 1890, and the court on December 20, 1890, set the same for hearing February 2, 1891. The contestants filed, January 29, 1891, in the court, their demand in writing to have these issues tried by jury. The panel of trial jurors was obtained and drawn in pursuance of a certain order of the court made December 20, 1890, which is as follows: "In the Matter of the Trial Jury. This day it appearing to the court that the regular panel of trial jurors herein were on December 17, 1890, discharged from further attendance upon court; and that there is at this time no trial jury in attendance upon the court; and that a jury is necessary, there being several causes pending and set for trial: It is ordered that the clerk of this court, or his deputy, under the direction of the judge thereof, prepare a list of names of forty persons, competent to serve as trial jurors, and include the names of the persons so selected in a *venire*, directed to the sheriff of the county of Silver Bow, commanding him to summon the persons whose names appear in said *venire* to be and appear before this court on Monday, January 19, 1891, at 10 o'clock A. M. JOHN J. MCHATTON, Judge." The population of said county of Silver Bow exceeds 10,000. The contestants demanded, January 31, 1891, of the court the appointment of jury commissioners, and that a jury should be drawn in accordance with the provisions of the

act relating to the drawing of jurors, approved March 14, 1889. They also moved to quash and set aside the *venire*, and discharge the said panel of petit jurors; but the court refused to appoint said commissioners, and overruled the motion. The district court for the county of Silver Bow, under the territorial government, adjourned *sine die*, November 12, 1889, and no order for the appointment of a jury commission was made during the term which then expired. Since the organization of the district court within the state, no petit jury has been impeached through the action of any jury commission.

The respondent says in his returns that "the district court of the state for the second judicial district has no terms or regular stated provisions of time for its sitting, but is always open, and there are continual sessions as in the constitution provided, and there has been no time at which jury commissioners could be appointed by this defendant; and the first section of said act of March 14, 1889, has by the provisions of the constitution been superseded and annulled, so far as applicable to said district court." The respondent also alleges that he has followed the requirements of the fifteenth section of said act, which is in these words: "If during a term of the district court a lawful petit jury is not present, and one is wanted, it shall be lawful for the judge of the court, and the clerk of such court, or his deputy, under the direction of the judge, to prepare a list of the names of at least twenty-four competent persons, to serve as trial jurors for such term. After such list is so prepared, it shall be the duty of the clerk of the court, or his deputy, to issue a *venire* containing the names of the persons selected as aforesaid, and to place the same in the hands of the sheriff, who shall thereupon summon such persons to appear before such court upon the day named in such *venire*, and fixed by the judge of such court. The persons so drawn and summoned, and not excused by the court, shall constitute the panel of petit jurors for such term. If, during the progress of any trial of any cause in such court where a jury has been drawn as in this section provided, it shall become necessary for any cause to summon additional jurors, such additional jurors shall be drawn and summoned by an open *venire*, in accordance with the provisions of section two hundred and fifty-five of the first division of the Compiled Laws of Montana, and the acts amendatory thereto." St. 16th Sess. 168. The first section of the act which is mentioned in the return is as follows: "It shall be the duty of the judge of the district court, at each regular term that shall be holden in any county, to appoint three persons of honor and respectability, not parties litigant to any matter pending in such court, and who shall have resided in such county at least two years next preceding, and shall also possess the qualification required by law for jurors, to constitute jointly, along with the judge of probate of said county and the county clerk, a commission to select a grand and petit jury, whose duty it shall be to serve at the next regular term of said court in

each county." St. 16th Sess. 166. The manner in which this commission shall discharge its duty is carefully defined, and the fifth section of the act should be noticed in this inquiry: "The jury commissioners for such county shall then proceed to draw a petit jury for the next ensuing term of court, in manner following: In any county where the population exceeds ten thousand, such commissioners shall select the names of three hundred persons lawfully qualified to serve as jurors, from the county assessor's books of the county; \* \* \* and the names of the persons so selected, after being written on separate slips of paper, shall be deposited in a box to be provided for such purpose, and well shaken up, and from the names so deposited the jury commissioners shall alternately draw the names of thirty persons, who shall be summoned as trial jurors for the next ensuing term of such district court." St. 16th Sess. 166. The particular steps which must be taken after these services have been performed are pointed out in other paragraphs of the law, which do not affect the discussion.

It must be admitted that the statute regarding the appointment of a jury commission was enforced throughout the territory, and that there is no difficulty in carrying into effect its provisions in the judicial districts of the state which comprise more than one county. But the respondent maintains that there exists in his district an insurmountable obstacle to its execution, which has been created by this section of the constitution: "The district court in each county which is a judicial district by itself shall always be open for the transaction of business, except on legal holidays and non-judicial days. In each district where two or more counties are united, until otherwise provided by law, the judges of such district shall fix the term of court, provided that there shall be at least four terms a year held in each county." Const. art. 8, § 17. It is claimed by the respondent that the regular terms or stated times of holding the district court in the county of Silver Bow have been thereby abolished, and that the act concerning the jury commissioners has lost its vitality, or been rendered impracticable.

What, then, is a "term" of court? The importance of a precise definition of this legal phrase is obvious when the language of the returns is remembered, and also the constitution and laws, *supra*. It is often employed in the Compiled Statutes, and a reference thereto may afford some light upon our path. The Code of Civil Procedure provides for the relief in certain cases of a party who "has been unable to apply \* \* \* during the term at which such judgment, order, or proceeding complained of was taken," and whose application has been "made within a reasonable time, not exceeding five months after the adjournment of the term." Code Civil Proc. § 116. "The clerk shall enter causes upon the calendar of the court according to the date of the issue. Causes once placed upon the calendar, for a general or special term, if not tried or heard at such term, shall remain upon the calendar from court to

court, until finally disposed of." Code Civil Proc. § 251. "A final adjournment of the court for the term shall discharge the jury." Code Civil Proc. § 269. "When, on the day appointed for the commencement of any term of the district court, the \* \* \* Judge of such court being not present to hold the same, the clerk of the court shall adjourn such term of court from day to day until the expiration of one week from the day appointed for the commencement of the term; \* \* \* and if the \* \* \* Judge of such court be not then present to hold such term on the day one week from the time appointed for such term to commence, the clerk shall adjourn the court for the term." Code Civil Proc. § 531. "There shall be regular terms of the probate court held in the several counties of the territory on the first Mondays of January, March, July, September, and November of each year for the transaction of probate business. The probate courts shall be always open for the transaction of all business within their jurisdiction." Code Civil Proc. § 709. The criminal practice act requires a magistrate in some cases to commit a defendant to jail, "to be held to appear at the following term of the district court." Crim. Prac. Act, § 96. He shall take a recognizance from each material witness, "conditioned to pay the sum of five hundred dollars, should he fail to appear and testify, as required, at the term of court at which the defendant is required to appear." Crim. Prac. Act, § 99. Provision is made for witnesses who may be taken into custody "awaiting a term of court." Crim. Prac. Act, § 102. "All examinations and recognizances taken by any magistrate, as provided herein, shall be certified and returned by him to the clerk of the court \* \* \* on or before the first day of the next term thereof." Crim. Prac. Act, § 105.

If the position of the respondent is correct, and there can be no terms of the district court in the judicial districts which include respectively one county, a remarkable conclusion must be declared. Juries would be impaneled in one forum by a mode which would be different from that pursued in other courts of equal jurisdiction, and the wholesome part of the act authorizing the jury commission would be obeyed in 12 counties and ignored in the remainder of the state. We will not express any opinion as to the force of this interpretation upon the above citations from the Code of Civil Procedure and criminal practice act. In *Horton v. Miller*, 38 Pa. St. 270, Mr. Justice THOMPSON in the opinion says: "Terms of court 'are those times or seasons of the year which are set apart for the dispatch of business in the superior courts of common law.' 1 Tidd, Pr. 105. Sir Henry Spelman traces their origin to the canonical constitutions of the church, which the four ordinary feasts of Hilary, Easter, Trinity, and Michaelmas, being the names of the four terms of the courts of common law in England, very clearly indicate to be their true origin. \* \* \* But still, terms, definite and fixed, are prescribed and are absolutely necessary to the successful administration of the judicial duty,

so far as the public is concerned; and hence they are with us fixed by positive law." In *Bronson v. Schulten*, 104 U. S. 410, Mr. Justice MILLER for the court says: "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for the term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant." There is no act which prescribes the time when the terms of the district court shall begin or end, and by virtue of the acts of congress the judges of the supreme court of the territory of Montana were clothed with this power. Rev. St. U. S. § 1914. The constitution has expressly empowered the judges of certain districts to fix the terms of the courts, subject to a limitation as to the number which must be held in every year, and also "until otherwise provided by law." A mandatory rule of interpretation is laid down in this explicit section: "All laws relating to courts shall be general and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform." Const. art. 8, § 26. Therefore there must be one statute, for the impaneling of a petit jury by each district court of the state, and the rights of parties which are dependent upon the commencement, duration, or adjournment of its terms, and which have been secured in the above extracts from the Code of Civil Procedure and criminal practice act, must be the same in every county. The 709th section of the Code of Civil Procedure, *supra*, contains expressions which are similar to those of the constitution, *supra*, and is a valuable aid in ascertaining its meaning. It provided for definite terms of the probate courts, and further, that they "shall always be open for the transaction of all business within their jurisdiction." There is no inconsistent matter or repugnancy in these clauses. Another resemblance to the conditions which confront us should be commented on. A probate court was formerly organized in every county of the territory, and the judge thereof was obliged to "keep his office at the county-seat," and "keep the same open during the business hours of each day, (Sundays excepted.)" Comp. St. div. 5, § 911. The judge of a district court, which has jurisdiction over two or more counties, from the necessity of the situation, must notify litigants and all whom it may concern of the times when he will be present to transact the public business. During most of the year he would probably be absent from the counties in which he does not reside, and for this reason the framers of the constitution have declared that the judge "shall fix the term of court." While no direction thereon is expressed for the officer who occupies the public trust of the respondent, his discretion is not restrained by prohibitory words. The respondent appears to have assumed that the construction

was within the principle of the maxim, *expressio unius est exclusio alterius*. The fifteenth section of the act, *supra*, on which the respondent places his reliance, and fortifies his defense, mentions a "term of the district court," and says that certain persons "shall constitute the panel of petit jurors for such term." We say unhesitatingly that a district court without terms is a legal impossibility, and the constitution and statutes, *supra*, recognize and sanction the proposition. We think that ample authority is conferred upon the respondent to designate the terms of his court by the Code of Civil Procedure, which says: "The supreme court, and each of the district courts, shall respectively have power to make rules and regulations for governing their practice and procedure, in reference to all matters not provided for by law." Code Civil Proc. § 523. This authority, when put in motion under the circumstances disclosed in these proceedings, has the strength of a statute. The constitution has, by general and special expressions, continued in perfect vigor every provision of the law creating a jury commission. "All laws enacted by the legislative assembly of the territory of Montana, and in force at the time the state shall be admitted into the Union, and not inconsistent with this constitution, or the constitution or laws of the United States of America, shall be and remain in full force as the laws of the state, until altered or repealed, or until they expire by their own limitation; \* \* \* and provided, further, that the duties which now by law devolve upon probate judges as jury commissioners \* \* \* shall, until otherwise provided by law, devolve upon and be performed by the clerks of district courts in their respective counties." Section XX, Schedule, § 1. The distinct office of the probate judge was abolished when the government of the state was inspired with political life, and the constitution has wisely ordained that the integrity of the jury commission shall be preserved by designating the person to fill the vacancy which had been caused by the change. We have examined the rules of practice which have been adopted by the respondent, and find that he has not fixed the terms of his court according to the views which have been upheld by us. This is an omission which should be promptly remedied. The relators have saved their exception to the action of the respondent with reference to the impaneling of the jury in his court. Under the statutes governing the issuance of the writs of *mandamus* and prohibition, and authority, we think that the relators are entitled to the relief which they have sought in this court. We cannot conclude these observations without commending the conduct of the respondent, who seems to have been led into error by a misapprehension of the language of the seventeenth section, *supra*, of the constitution, and who has, in a spirit of candor, requested us to remove the cloud of doubt which has obscured the subjects that have been considered. Wherefore it is ordered and adjudged that a peremptory writ of mandate and a peremptory writ of prohibition

be issued in the form prescribed by law, according to the prayer of the affidavits, respectively, of the relators.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 381)

SCHWAB *et al.* v. OWENS *et al.*

(Supreme Court of Montana. Feb. 9, 1891.)

CHATTEL MORTGAGES—VALIDITY—PRIORITIES.

1. A chattel mortgage on a lot of specifically described articles, fixtures, etc., and "also all the wines, liquors, and cigars now in and upon said premises, of whatever kind, character, or description, whether for consumption or otherwise," and providing that the mortgagor shall "have the right to remain in possession, and carefully use" the property, until default, and that if the mortgagor shall "make way with, sell, or in any manner dispose of it" the mortgagee shall have the right to the immediate possession, is not void as to the mortgagor's creditors, on the ground that by its terms it was given solely to hinder and delay them. *Distinguishing Leopold v. Silverman*, 7 Mont. 266, 16 Pac. Rep. 580.

2. An instrument reciting that in consideration of \$500 paid and \$450 rent due the goods described "are sold and assigned" to the assignee, and that he shall sell them, retain expenses, fees, etc., and the amount due, and shall pay the balance to the assignor, and which is executed and recorded as a mortgage, and is spoken of as such by the parties, will be treated as a chattel mortgage.

3. In an action by the first mortgagee against a subsequent mortgagee of the same goods, who alleges that the first mortgage was given solely to delay and defraud creditors, evidence that the mortgagor was allowed to buy and sell goods after the execution of the first mortgage is inadmissible to show its invalidity on that ground; the question as to the sufficiency of the description of "wines, liquors, and cigars now in and upon said premises" not being raised.

4. Where, in such action, the jury find specially that there was no intent on the part of the first mortgagee to defraud creditors, the mortgage is valid as between him and the mortgagor, and the second mortgagee is not entitled, in any event, to recover more than the amount of his claim.

5. Where the second mortgage recites that it is made in consideration of \$950 money paid and rent due, but that the mortgagee may retain out of the proceeds only \$450 for cash paid and rent, "besides expenses of sale and fees," and the evidence is conflicting as to the amount due, but shows that in no case was it more than \$450, a verdict for \$1,850 to the second mortgagee, in case the first mortgagee retains the property, is unsupported by the evidence.

Appeal from district court, Lewis and Clarke county; THOMAS J. GALBRAITH, Judge.

Henry C. Smith, C. B. Nolan, and J. A. Carter, for appellants Shober & Rowe and McConnell & Clayberg, for respondents.

HARWOOD, J. Appeal from judgment and order overruling motion for new trial. This action was brought to recover possession of certain personal property. The plaintiffs were mortgagees of the chattels in controversy, by virtue of a mortgage executed and delivered to them by one Julius Levy, to secure the payment of \$4,000, evidenced by a promissory note described in the mortgage. The chattels described are a lot of specific articles, such as "a bar and work-board, back-bar, 5x12 mirror and frame, one bottle case, ice-box, screen, 5x15 mirror, cigar counter



and case, two faro-tables, eighteen chairs, 3 chandeliers, 5 hanging lamps, one clock," etc.; the description being specific as to a lot of saloon fixtures, and a certain lot of bedroom furniture, situate in a certain building. This descriptive portion of the mortgage closes with the following words: "Also all the wines, liquors, and cigars now in and upon said premises, of whatsoever kind, character, or description, whether for consumption or otherwise." The mortgage provides that the mortgagor should "have the right to remain in possession and carefully use" said property until default was made under the conditions of the mortgage; and further provides, among other things, that if the mortgagor should "make way with, sell, or in any manner dispose of said described property, or any part thereof, or attempt to do so," then, in any such event, the mortgagee should have the right to the immediate possession of said property. It appears from the evidence that the mortgagor remained in possession of all of the mortgaged property for the period of about one month from the execution and delivery of the mortgage, during which time he carried on the business of buying and selling liquors and cigars, the same as he had before the execution of the mortgage. About a month after the mortgage was given the mortgagor came to the mortgagees, saying he would turn the property over to them, and they "may get out of it the best they could." Thereupon the mortgagees took possession of the property, and put their watchman in possession thereof to watch and take care of the same for them. The property remained at this time in a building owned by defendant Emily Schlesinger, where the mortgagor had been carrying on business. When plaintiffs took possession of said property on the 29th of August, said defendant Emily Schlesinger, by her agent, B. J. Schlesinger, granted, in writing, permission to plaintiffs to store said chattels in said building "free of charge, until September 15, 1888." On the 17th of September, 1888, as appears by the evidence, while plaintiffs' watchman was temporarily absent from said building, the defendant B. J. Schlesinger, as agent for his wife, Emily Schlesinger, took possession of said goods, and put other locks on the doors of said building, and excluded plaintiffs from the possession thereof.

The defense interposed by the defendants' answer was a denial of the allegations of plaintiffs' complaint, and new matter, which may be stated, in effect, as follows: (1) That plaintiffs' mortgage upon said chattels "was made by Julius Levy for the sole purpose of hindering, delaying, and defrauding the creditors of Al. Owens and Julius Levy," and that defendant Emily Schlesinger was their creditor to the extent of \$450 at the time said mortgage was executed. (2) That defendant Al. Owens was a copartner, equal with said Levy, in the ownership of said goods and chattels, and that said mortgage was made to plaintiffs without the consent of said Al. Owens, and for a purpose foreign to said copartnership, and without consideration. (3) That after

the execution and delivery of said mortgage plaintiffs "permitted said Owens and Levy, as partners, to openly and notoriously sell and dispose of said mortgaged goods and chattels in the usual course of the saloon business, in the same manner as before the execution of said mortgage. (4) That said goods and chattels were sold and delivered to defendant B. J. Schlesinger, as agent of Emily Schlesinger, by the firm of Levy & Owens, through Al. Owens, one of said firm, on the 17th of September, 1888," as shown by a bill of sale attached to defendants' answer as a part thereof. The instrument attached to defendants' answer recites that "Julius Levy and A. T. Owens, copartners under the firm name and style of Julius Levy, (A. T. Owens being a silent partner,) the lessees, for and in consideration of the sum of five hundred dollars to us in hand paid, and for the further sum of four hundred and fifty dollars, rent due Emily Schlesinger, lessor," the said goods are sold and assigned to said lessor. Said instrument further provides "that said lessor, Emily Schlesinger, her agent or attorney, shall be entitled to take immediate possession of all of said goods and property, and shall take an invoice thereof, and shall sell all of the same to the highest bidder, at private sale or otherwise, and the balance of the proceeds remaining, if there be [any,] over and above the above-named consideration, to-wit, four hundred and fifty dollars, for cash paid and for rent due," and reasonable commission fees, etc., "all of which shall be retained by said lessor, Emily Schlesinger, shall be paid over to the above-named Julius Levy and A. T. Owens, a partnership, as above stated." This instrument is executed by said A. T. Owens with all the solemnities required for the execution of a chattel mortgage, according to the laws of the territory of Montana at the time the same was executed, and was filed for record September 18, 1888. It also appears from the evidence that said instrument was considered by the party of the second part as a mortgage, for her agent said in his testimony that he took possession of said property September 17, 1888, "by virtue of a mortgage for rent due" and he refers to the instrument elsewhere as a mortgage. Al. Owens, who executed said instrument, in his testimony also speaks of it as a mortgage given "for the purpose of securing money for rent." The feature of said instrument which indisputably stamps it with the character of a chattel mortgage is its own condition, that the property transferred shall be sold by the party of the second part, and the proceeds applied by her to the payment of her stated claim, and that the residue should be paid to the firm of Levy & Owens. The instrument will be treated as a chattel mortgage.

There is no question before us relating to the rights, interests, or claims of defendant Al. Owens in respect to the property in controversy.

The first question to be resolved is whether plaintiffs' mortgage was, by its own terms and conditions, fraudulent and void as to creditors, under the doctrine held in

Leopold v. Silverman, 7 Mont. 266, 16 Pac. Rep. 580, as contended by respondents' counsel. It will be seen by comparison that the instruments in question are radically different. The mortgages under consideration in Leopold v. Silverman contained a provision "that the said parties [mortgagors] may continue to sell the said stock of merchandise in the usual course of trade," and notwithstanding that one of the instruments contained a provision to the effect that the mortgagors should account for the proceeds, as often as requested, and "at least once a month," the fact appeared by the pleadings, as the case stood, that the mortgagors retained a portion of the proceeds by the knowledge and consent of the mortgagees. The mortgagors in that case were merchants, and the property mortgaged was "their stock in trade." In the case at bar the main portion of the mortgaged property, so far as the mortgage shows, was a lot of specific articles of furniture, described. What "the wines, liquors, and cigars, now in and upon said premises," was, as to kind, quantity, or value, is not disclosed by the mortgage, nor by any evidence *aliunde*. There is no power to sell any of the mortgaged goods and chattels provided by the conditions of this mortgage. On the contrary, that act is expressly made a violation of its conditions, as well as the act of "making way with, or in any manner disposing of, said described property." These conditions may be inconsistent with the provisions allowing the mortgagor "to remain in possession of and carefully use" property mentioned in said mortgage, necessarily consumable by the use thereof. But we are not now considering that feature of the instrument. Moreover, inconsistencies in an instrument do not *per se* vitiate the same. Comp. St. div. 1, §§ 628-638. Nor are we to consider whether said mortgage was void as to any attempt to include merchandise therein, for the reason of uncertainty of description as to that. The question is, shall the mortgage be declared fraudulent and void by reason of its own terms? We think not. The mortgage in the case at bar is not like the mortgages declared void in the case of Leopold v. Silverman, *supra*, or others of a kindred nature, which have been declared void by reason of their own conditions, in numerous well-considered cases. Pierce, Mortg. Merch., and cases cited.

Closely connected with this branch of the case is the defense wherein defendants allege that, after the execution of the mortgage of plaintiffs, they permitted said Levy & Owens to openly and notoriously sell and dispose of said mortgaged goods and chattels in the usual course of trade. We have already noticed the obscurity and uncertainty of plaintiff's mortgage, as to what was intended to be described by the clause, "all wines, liquors, and cigars now in and upon said premises." Much evidence was introduced tending to show that, after the execution of the mortgage to plaintiffs, the mortgagor continued to buy and sell wines, liquors, etc., in his saloon business, as usual. It appears that the case was tried on the theory that such

goods were covered by the mortgage. On no other theory can we account for the introduction of so much evidence as to what merchandise used in the saloon trade was bought and sold by the mortgagor after the execution of said mortgage. Even if said clause was sufficient as descriptive of anything, (a point upon which we express no opinion, because it is not before us on that question) it could not be held that the words, "wines, liquors, and cigars now in and upon said premises," included or covered future purchases and sales of such merchandise. The evidence does not show, if indeed evidence *aliunde* could be permitted to show, what goods were intended to be covered by said clause, nor that such goods were sold, nor that any specific article included in the mortgage was sold. If the jury arrived at their special or general verdict on this point by a consideration of evidence introduced to show that, after the execution of said mortgage, the maker of it was allowed to buy and sell such merchandise, and for that reason the mortgage was void or voidable, clearly the verdict is not supported by the evidence.

Was the plaintiffs' mortgage shown to be void by the allegation and proof of facts sufficient to support the conclusion that the transaction was consummated by plaintiffs and said Levy, with the intent to hinder, delay, or defraud the creditors of the mortgagor? The allegations of the answer upon this point would hardly bear criticism. However, counsel have not directly raised a question as to the sufficiency of such allegations, and we shall therefore only notice them in connection with the specification that the evidence is insufficient to support the verdict. The allegation is that plaintiffs' mortgage was made "by one Julius Levy for the sole purpose of hindering, delaying, and defrauding the creditors of Al. Owens and Julius Levy." There is no allegation of privity or conspiracy on the part of plaintiffs in the alleged scheme to defraud the creditors of Owens & Levy, nor is there proof of any such fact. Van Sant, Pl. 147; Wait, Fraud. Conv. §§ 141 et seq., 199.

The answer contains an allegation to the effect that plaintiffs' mortgage was made "without consideration," but there is no evidence to support that allegation. The evidence on that point is all against it, and the special findings of the jury are contrary to that averment. The jury found that there was no intention on the part of plaintiffs to commit fraud in obtaining said mortgage, and that they took the same to protect themselves. Another aspect of the case deserves notice. Among the grounds on which appellants ask for a new trial, they specify excessive damages, and that the verdict is against law, as well as insufficiency of evidence to justify the verdict. The instrument on which defendant Emily Schlesinger bases her claims to the possession of said property is demonstrated, from its own terms, to be a chattel mortgage for security of her claim against Owens & Levy. If plaintiffs' mortgage was held to be void as against her claim, or subsequent to her mortgage, it does not necessarily follow that plaintiffs'

mortgage is not good as between plaintiffs and the mortgagor, (Comp. St. div. 5, §§ 229, 1538;) and on the finding by the jury that there was no intent on the part of plaintiffs to defraud any one in taking said mortgage, and the same not being such an instrument as by its own terms fraud could be imputed to it, does it not follow that, as between plaintiffs and Emily Schlesinger, if her claim on said property was precedent to plaintiffs', (a fact which we in no way decide here,) she was then only entitled to recover from plaintiffs the amount of her claim secured by her mortgage, in the absence of the redelivery of said property? What was the amount of her claim? The mortgage executed to Emily Schlesinger recites that it was made in consideration of \$950 money and rent due the party of the second part, yet in the body of that instrument she is authorized to retain out of the proceeds of the property \$450, "for cash paid and rent due," besides expenses of sale fees, etc. The evidence introduced in reference to her claim shows still a different amount as due. B. J. Schlesinger, husband and agent, who attended to the interests of Emily Schlesinger, testifies that he took possession of said property "Sept. 17, 1888, by virtue of a mortgage for rent due." Again he says, "The rent was paid up to August;" and again, "There was \$225 rent due on the 27th of August; I took possession on the 17th of the next month;" and again, "When I gave him this paper there was only \$225 due from Owens & Levy." The paper referred to was the written permission given to plaintiffs by the witness as agent for Emily Schlesinger, on August 29th, allowing said chattels to remain in her building until September 15, "free of charge." Two days later the witness took possession of said goods for his wife, Emily. Another witness on behalf of defendant says her claim for rent was about \$450, and that Owens made the mortgage to her to secure this rent. No other claim was proved in her favor, yet the jury returned a verdict in her favor for \$1,550 in case redelivery of the property was not made. This was undoubtedly excessive. The jury ought to have found what her claim secured by said property was, and her recovery should not exceed that. The verdict of the jury is not sustained by the evidence, and therefore a new trial ought to be granted.

The record before us in this case has been prepared in a manner so grossly in violation of rules of this court it ought to have been promptly stricken from the files, without consideration beyond an observation of its defects. The documentary evidence is not found in its proper place in the record, but these documents, together with depositions on both sides, are bundled together in a sort of appendix near the close of the statement of the case. The depositions are not reduced from questions and answers to the compactness of narrative, and in one case the questions are found in one document and the answers in another. These exhibits are found with no little inconvenience, in a voluminous record, without proper index, and written on paper which violates the

rules of court. It is the duty of appellants' counsel to see that the record is properly made. This record has only been tolerated by reason of our unwillingness to impose the expenses of preparing the record anew upon litigants. But hereafter these irregularities will be corrected by striking such records from the files of the court. The judgment and the order overruling appellants' motion for a new trial are hereby reversed, and the cause remanded for trial *de novo*.

BLAKE, C. J., and DE WITT, J., concur.

(10 Mont. 396)

FLANDERS v. MURPHY *et al.*

(Supreme Court of Montana. Feb. 12, 1891.)

LABORER'S WAGES—ATTACHMENT—PREFERENCES.

Under Gen. Laws Mont. c. 121, § 2050, providing that, in all assignments for benefit of creditors, the wages of laborers, clerks, etc., for services rendered within 60 days previous to the assignment, not to exceed \$200 to each person, shall be preferred, a laborer whose employer is attached, and then transfers his property directly to the creditor in payment of the debt, is entitled to a preference out of the goods thus transferred.

Appeal from district court, Jefferson county; THOMAS J. GALBRAITH, Judge.

This action was brought for the purpose of obtaining relief under the provision of chapter 121, Gen. Laws, the act for the protection of wage-workers, the first section of which is as follows: "Sec. 2050. That in all assignments of property made by any person, association, corporation, copartnership, chartered company, or corporation, to trustees or assignees on account of inability of assignor at the time of the assignment to pay his or their debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such assignor for services rendered within sixty days immediately previous to such assignment, not to exceed two hundred dollars to each person, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of such assignor." The complaint sets forth the following facts: Plaintiff is a laborer. On March 3, 1890, one Johnston owed plaintiff \$92.85 for labor performed within 40 days of said date. That on March 3, 1890, defendants sued Johnston for \$1,609.85, and upon a writ of attachment in said suit the sheriff of the county levied upon all the goods and chattels of Johnston. On March 5, 1890, defendants herein, plaintiffs therein, took a bill of sale of all Johnston's said property to secure their said claim of \$1,609.85, for which amount they had commenced said action. At the time of receiving said bill of sale the defendants herein dismissed the suit against Johnston. That the goods so assigned were of the value of \$2,220. On March 8, 1890, plaintiff served upon Johnston and defendants an affidavit, setting forth the fact and the nature of the indebtedness of Johnston to plaintiff. That at all the times mentioned Johnston was insolvent and unable to pay his debts. That Johnston or defendants have not paid plaintiff any of said sum. Plaintiff demands judgment for \$92.85, interest and costs, and for such

other and further relief as to the court may seem just and equitable. A demurrer was filed on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, no further appearance was made by the defendants, and judgment was entered for plaintiff on his application. It appears from the judgment that it was adjudged and decreed as follows: That plaintiff's claim of \$92.85 be paid by the defendants out of the chattels, etc., obtained by defendants from Johnston, with interest since April 1, 1890, and, it appearing that there is sufficient property therefor, it is adjudged that plaintiff have judgment for his claim, etc., against defendants.

*Cowan & Parker*, for appellants. *W. L. Hay* and *Thos. Joyes*, for respondent.

DE WITT, J., (after stating the facts as above.) We readily arrive at a conclusion in this case by comparing the allegations of the complaint with the provisions of the statute. Plaintiff was a laborer, having performed services of less than \$200 in value, within 60 days immediately previous to the transfer of property by Johnston to defendants. Johnston was insolvent, and unable to pay his debts. It was for this reason, as we believe it appears from the complaint, that he transferred his property to the defendants. He was indebted; he did not pay; he could not pay. His property was attached for debt, and when this occurred he made the transfer to the defendants. No other reason for the transfer appears, and we are of opinion that the common understanding of language, as used in this complaint, makes it certain that Johnston transferred his property by reason of his inability to pay his debts. So far the complaint seems to state a cause of action under the statute. But defendants object that the transfer was not to the defendants as trustees, or for the benefit of creditors, but was in payment of a debt due from Johnston to defendants. Surely the defendants were assignees of Johnston, and equally certain is it that the assignment was made for their benefit as creditors. To say that the wage-workers' law should not operate, because the assignment is made to a creditor directly, and for his sole benefit, instead of being made to a third disinterested person, and for the benefit of more than one creditor, would be to fritter away the law in unsubstantial verbal criticism. We are of opinion that the demurrer was properly overruled. No further appearance being made by defendants, the form and substance of the judgment was such as should have been entered under the statute and the facts before the court. The judgment is affirmed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 401)

STATE *ex rel.* MURPHY v. JUDGE OF SECOND DISTRICT COURT.

(Supreme Court of Montana. Feb. 12, 1891.)

APPOINTMENT OF SPECIAL ADMINISTRATOR.

Under Prob. Prac. Act Mont. § 95, providing that the court may appoint a special adminis-

trator in certain cases, or may direct the public administrator to take charge of the estate, the court may appoint another than the public administrator, and in so doing is not required to follow the order of priority prescribed in section 55 so far as the public administrator is concerned.

*Certiorari* to district court. Silver Bow county; JOHN J. McHOLTON, Judge.

James W. Murphy, upon a writ of *certiorari*, asks this court to review the action of the district court in appointing James A. Talbot a special administrator of the estate of Andrew J. Davis, deceased, and not appointing the relator. The facts material to the inquiry, and the statutes necessary to be construed, are as follows: Andrew J. Davis died in the county of Silver Bow, March 11, 1890, leaving a large estate, and a large number of heirs. Afterwards John A. Davis, a brother of deceased, was appointed by the court having jurisdiction administrator of the estate, as that of an intestate. An appeal was taken from that appointment, and on the 24th day of July, 1890, that appeal was pending in the supreme court. On that day, July 24, 1890, said John A. Davis filed in the district court his petition for the probate of an instrument, purporting to be a will of said Andrew J. Davis, and for the appointment of himself as administrator with the will annexed. Objections were filed by some of the heirs to the probate of the alleged will. On August 9, 1890, the appeal to the supreme court above mentioned had not been determined, and the petition for the probate of the alleged will had not been heard in the district court. On the last-mentioned day the said John A. Davis filed in the district court his petition to be appointed special administrator of said estate. The petition set forth the above-recited facts, and, in addition, that the hearing of the petition for the probate of the alleged will had been set for August 23, 1890; that four parties had filed objections to the probate, alleging that the same was not the will of said Andrew J. Davis; that it was evident that much time must elapse before the question of the probate of the alleged will could be determined, and that thereby there would be delay in granting letters of administration; that there was then no one authorized to take charge of the property of the estate, or attend to its business; that petitioner was the brother of deceased, and residuary legatee in said will. On the same day, August 9, 1890, James W. Murphy filed his petition for appointment as special administrator. He set forth that he was public administrator of Silver Bow county, and also, in effect, the facts above recited; that the estate would be wasted and scattered; and prayed that he might be appointed special administrator. The district court acted upon these petitions on August 12, 1890. Prior to said day no written objections had been filed by either petitioner against the appointment of the other, except as his own petition might be construed as an objection to the appointment of the other applicant. On said last-named day the district court made an order in which it reviewed the facts, and concluded that the court, having considered said peti-

tions, and all matters alleged therein, and being advised in the premises, and finding that it is necessary that a special administrator of said estate should be appointed, and finding it to be to the best interests of the estate that neither of said petitioners should be appointed special administrator, denied each of their applications, and, upon its own motion, ordered that James A. Talbot, a suitable and competent person, and a resident of Silver Bow county, Mont., be, and is hereby, appointed special administrator, with powers, etc., and that letters shall issue to him, upon his giving bonds in the sum of \$3,000,000. In pursuance to said order, letters issued to said Talbot on August 18, 1890. Such appear to be the facts upon the return of the writ of *certiorari* issued on the application of said Murphy from this court October 24, 1890.

The statutes of the state interesting to this inquiry are as follows: "Sec. 821. There shall be elected in each county in the state one public administrator, whose term of office shall begin. \* \* \* and who shall hold his office for two years." Comp. St. p. 863. "Sec. 333. Every public administrator, duly elected and qualified, must take charge of the estates of persons dying within his county, as follows: *First*. Of the estates of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost; *second*, of the estates of decedents who leave no known heirs, or are strangers; *third*, of estates ordered into his hands by the probate court; *fourth*, of estates upon which letters of administration have been issued to him by the probate court." Comp. St. p. 357. "Sec. 334. Whenever a public administrator takes charge of an estate which he is entitled to administer, without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in a like manner and on like proceedings as letters of administration are issued to other persons." Id. "Sec. 95. When there is delay in granting letters testamentary, or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies or is suspended or removed, the probate judge must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or counties the same may be found, and to exercise such powers as may be necessary for the preservation of the estate, or he may direct the public administrator of his county to take charge of the estate. Sec. 96. The appointment may be made out of term-time and without notice, and must be made by entry on the minutes of the court specifying the powers to be exercised by the administrator. \* \* \* Sec. 97. In making the appointment of a special administrator, the probate judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appoint-

ment." Last three sections from Comp. St. p. 296. "Sec. 55. Letters of administration on the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, who are respectively entitled thereto, in the following order: *First*, the surviving husband or wife; \* \* \* *second*, the children; *third*, the father and mother; *fourth*, the brothers; *fifth*, the sisters; *sixth*, the grandchildren; *seventh*, the next of kin entitled to share in the distribution of the estate; *eighth*, the public administrator; *ninth*, the creditors; *tenth*, any person legally competent. Id. p. 289. As to the writ of *certiorari*, the law is: "Sec. 554. The writ of *certiorari* may be denominated the 'writ of review.' Sec. 555. \* \* \* The writ shall be granted in all cases when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. Sec. 556. The application shall be made on affidavit by the party beneficially interested. \* \* \* Sec. 561. The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer. Sec. 562. \* \* \* When a full return has been made, the court \* \* \* may give judgment either affirming or annulling or modifying the proceedings below." Chapter 1, p. 205, Comp. St. The statutes above cited were enacted by the territorial legislature. The constitution of the state, November 8, 1889, adopted these statutes, and merged the jurisdiction and existence of the probate court in the district court, and provided for the change of the word "probate" to "district" wherever it occurs. Section 20, Schedule, § 4. In the affidavit for the writ of *certiorari* the applicant prays that this court review the said proceedings of the district judge, alleging that they were in excess of the jurisdiction of that court. The action of this court is limited to annulling or affirming the proceedings of the district judge, so far as they come before us.

*E. D. Weed and John M. McDonald*, for petitioner. *M. Kirkpatrick*, for respondent.

DE WITT, J., (after stating the facts as above.) Much has been brought into this case in the argument that is not pertinent to the hearing. The application is for a writ of *certiorari*. The general principles of law applicable to the invocation of this writ are the same throughout all the courts; but any doubts as to the province of the writ in this court, and any minor differences in the views of courts upon the writ generally, are fully set at rest by the explicit provisions of the statute of this state. Under that statute, we have only to inquire whether the application is properly before us, and, if so, whether the district judge exceeded his jurisdiction.

Many interesting points are discussed by counsel, to which we will not advert, but will only offer a construction of sec-

tion 95, which seems to us as clear as it is conclusive. The public administrator, when acting solely as such, is, perhaps, a public officer. His powers and duties are defined, and the estates of which he shall take charge are described. Section 821, p. 863, Comp. St.; section 333, p. 357, Id. When there is a delay in appointing an administrator, the district judge, for the temporary protection of the estate, may do one of two things, (section 95:) (1) He may direct the public administrator to take charge of the estate, or, (2) if he does not so direct, he must appoint a special administrator. There seems to be no ambiguity in this provision. A discretion is given to the district judge to adopt one of two courses. In the case at bar the judge exercised this discretion, and exercised it by not directing the public administrator to take charge of the estate. The judge took the other alternative of the statute, and proceeded to the appointment of a special administrator. He thereby did something wholly inconsistent with directing the public administrator to take charge of the estate, and thereby as well passed upon and decided the question of directing the public administrator to take charge, and decided it adversely to such taking charge by the public administrator. This was an act of judicial discretion, of which no abuse is shown, and of which the public administrator cannot complain. Having passed and settled this matter, and proceeding to the other alternative allowed the judge, under section 95, viz., the appointment of a special administrator, which the judge could do without notice to any one, and out of term-time, (section 96,) the judge finds that section 97 provides that preference must be given in such appointment to the persons entitled to general administratorship, in the order named in section 55. In that order, the public administrator appears as eighth. But the law has already provided, in the other alternative in section 95, that the public administrator, as to temporary care of the estate, stands ahead of all classes of persons named in section 55, if the judge chooses to put the estate into his hands. A special provision is thus made for putting the public administrator in charge: a special provision, which takes him out of the general classes of administrators. If it is the judgment of the judge that the public administrator should take the estate, the judge may so direct, to the exclusion of all claimants to special letters. Now, when the judge passes the public administrator, and practically says, "I will not appoint him, as I may," and determines to proceed under the other alternative of section 95, and appoint a special administrator, then, in making his selection from the classes of persons named in section 55, must he again adjudicate upon the claims of the public administrator, a question which he has already decided under an ampler provision of the law allowing him to give to him the estate? Must he again say whether or not he will give him charge of the estate, when he has already settled the matter in the exercise of his discretion, and said he would not do so? We think not. The judge had the

amplest and largest powers to direct the estate into the hands of the public administrator, to the exclusion of every one. He did not exercise that power. It cannot be said that, the judge having deliberately ignored the public administrator, when he had full power to recognize him, he must again consider his claim, when proceeding under the other alternative of the statute. This would be equivalent to holding that the judge may, if he chooses, make the public administrator the temporary custodian of the estate, but, if he does not do so, as he may, then, in appointing a special administrator, he must, under certain conditions, do the very thing which the other provision of the law says he may do, and which, in his discretion, he has decided not to do. We cannot agree to any such construction of the statute. It would be a strain upon language, approaching the point of fracture. The correct view of sections 95, 97, and 55 is that the public administrator is not in the list of candidates for special administratorship, for the reason that his claims for temporary custodianship of the estate are provided for in another separate portion of the section, by which he is first placed in choice, if the judge desires him to take charge. Our interpretation of these laws is that, when there is delay in the appointment of an administrator, the judge may direct the public administrator to take charge of the estate. If he does not do so, which he need not, then the public administrator is disposed of in the premises, and the judge must go on to appoint a special administrator, from the classes of persons named in section 55, other than the public administrator. Now, the public administrator invokes the writ of *certiorari* on the ground that the district judge exceeded his jurisdiction. Under our construction of the statutes, we are of the opinion that the district judge, as far as the relator is concerned in the proceedings, did not exceed his jurisdiction; and the writ is therefore dismissed.

BLAKE, C. J., and HARWOOD, J., concur.

(10 Mont. 407)

STATE v. FRY.

(Supreme Court of Montana. Feb. 16, 1891.)

CRIMINAL LAW—NEW TRIAL—SUFFICIENCY OF NOTICE.

Under Crim. Prac. Act Mont. § 856, providing that applications for a new trial, if made for any cause mentioned in the first four subdivisions of section 354, shall be based on affidavits filed at the same time as the notice of motion, and that in all other cases the notice must state particularly the error relied upon, a notice of motion entered upon the motion book, and service of which is admitted by the county attorney, stating that as soon as a transcript of the evidence is made defendant will move for a new trial on grounds to be set forth in the motion, is insufficient.

Appeal from district court, Deer Lodge county; D. M. DUFFEE, Judge.

John Duffy, for appellants. Henri J. Haskell, Atty. Gen., for the State.

BLAKE, C. J. The appellant was convicted September 19, 1890, of the crime of robbery, and judgment was pronounced

October 18, 1890. The following notice was made and entered September 19, 1890, in the motion book of the court below: "To W. S. Shaw, County Attorney: You will hereby take notice that the above-named defendant will, as soon as the transcript of the evidence in the above case is made, move the court for a new trial of the above cause, upon the grounds to be set forth in said motion. J. H. DUFFY, Att'y for Defendant. Dated Sept. 19th, 1890. Service of above notice admitted, and copy waived. W. S. SHAW, County Attorney. Sept. 19th, 1890." The appellant did not file an affidavit or make a statement of facts which called for a special order of the court, or apply for further time for the preparation of any papers. The record is silent upon this matter, and we can presume, in the absence of anything to the contrary, that "the transcript of the evidence" was furnished as soon as it was demanded. We cannot discover any good cause for the conduct of counsel in departing from the procedure which governs and defines the rights of parties who have been convicted of an offense against the laws of the state. The motion for a new trial, which was served and filed October 1, 1890, specified every error that was relied on by the appellant. This motion was overruled by the court on the "ground that no notice had been served." No brief has been filed by the appellant. The criminal practice act provides as follows: "The application for a new trial shall be made upon motion, and, if based upon any of the grounds mentioned in the first four subdivisions of the preceding section, written notice of such motion must be filed within thirty days after the discovery of the facts upon which the party relies in support of his motion; in all other cases notice of motion must be filed within ten days after the rendition of the verdict." Section 355. "Applications for a new trial, if made for any of the causes mentioned in the first four subdivisions of section 354 of this division, shall be based upon affidavits, which must be filed at the same time as the notice of motion, or within such further time as may be allowed by the court or judge; in all other cases, the application must be made, \* \* \* and the notice of motion must state particularly the error upon which the party making the application relies." Section 356. There are seven subdivisions of said section 354, which state the grounds for which a new trial will be granted in criminal actions. It will be observed that the notice of the motion must be filed within a certain number of days, which varies according to the causes on which they are based. The Code of Civil Procedure relating to motions contains this clause: "Notice of a motion made in term-time, except those made during the progress of a trial, shall be entered in a book to be kept for that purpose, and called the 'Motion Book'; and such motion shall be for hearing after twenty-four hours from the time such notice is entered in the motion book." Section 483. The criminal practice act provides further: "An application for a new trial shall be heard on the second day after notice filed, or as soon as practicable thereafter."

Section 356. The Code of Civil Procedure in another chapter regulates the mode of obtaining a new trial in civil cases, and requires the party intending to move therefor to file a notice of his intention in a certain form. Title 8, c. 10. The motion book is not used for any purpose in the proceedings which are applicable to new trials, and the appellant did not protect his right to the remedy he desired by the record of his notice. The service of the same was admitted by the county attorney. The statutes have designated the acts which are essential to the notice of the intention to move for a new trial. The court in *Burton v. Todd*, 68 Cal. 485, 9 Pac. Rep. 663, has said: "We conclude, therefore, (1) that, as the right to move for a new trial is statutory, it must be pursued in the manner pointed out by the statute." The appellant could not lawfully embody in his motion for a new trial the particulars which should be stated in his notice of intention. The appellant has not filed or served a proper notice of his intention to move for a new trial, and the judgment is affirmed, and will be executed as directed in the court below.

HARWOOD and DE WITT, JJ., concur.

(10 Mont. 390)

PALMER V. MCMASTER.

(Supreme Court of Montana. Feb. 9, 1891.)

LIABILITY OF SHERIFF—ILLEGAL SEIZURE—EVIDENCE.

1. In an action against a sheriff for the conversion of personal property, where the defendant justifies under an execution against the property of a third person, alleging him to be the real owner, it is not error to exclude the execution unless defendant proves or offers to prove the existence of a valid judgment upon which the execution issued.

2. Where the judgment upon which the execution issues is void it is not error to reject an amendment to the answer alleging more fully the indebtedness upon which the original action was brought, and setting forth the petition and writ of attachment, as the lien of the attachment merges in the judgment.

3. An offer of depositions "for the purpose of proving that the property in controversy is not the property of plaintiff, and that she was not in possession thereof," is properly excluded on the ground of vagueness, where the portions of the depositions which it is desired to introduce are not designated.

4. In an action for conversion of property, where the plaintiff's ownership and possession are in issue, it is error to instruct that the "only question" is the value of the property, although plaintiff's testimony as to her ownership is undisputed.

Appeal from district court, Deer Lodge county; D. M. DUFFEE, Judge.

*Robinson & Stapleton*, for appellant.  
*Cole & Whitehill*, for respondent.

BLAKE, C. J. This is the second appeal which has been before the court. The facts, which are recited in the reports, (8 Mont. 186, 19 Pac. Rep. 585,) will not be repeated in this opinion. At the trial the jury returned a verdict for the sum of \$2,068, and judgment was entered for the respondent for this amount. The motion of the appellant for a new trial was overruled.

We have deliberated upon all the ques-



tions which have been presented for adjustment, and arrived at the conclusion that the instructions were conflicting and misleading. As there must be a new trial of the case, we will review all the questions which must be determined at that time in the court below. The executions which are mentioned in the report of the case, supra, were offered in evidence by the appellant. They were regular upon their face, and one of them stated that James M. Bailey recovered April 22, 1884, in the district court, a judgment against William J. Palmer for the sum of \$645 damages and \$277.30, costs. The sheriff made this return thereon:

"I do hereby certify that I received the annexed execution on the 23d day of April, A. D. 1884, and executed same by levying upon and selling on the 3d day of May, A. D. 1884, the following described property, to-wit: [description of property in controversy.] Exhibit:

Amount of judgment.....	\$922 30
Accruing costs.....	33 14
	<hr/> \$955 44

Amount received from sale.....	\$907 00
To deficiency.....	48 44"

The bill of exceptions states that this evidence was excluded by the court "for the reason that defendant did not offer to prove any valid judgment upon which said execution was issued, and without such judgment defendant could not justify." Upon the first appeal it was held that the judgments which were entered in favor of said Bailey and Albert Kleinschmidt and against the said W. J. Palmer, and for the enforcement of which said executions were issued, "were void, and of no effect." 8 Mont. 194, 19 Pac. Rep. 585. Under the decisions of this court, the ruling complained of was correct. *Ford v. McMaster*, 6 Mont. 240, 11 Pac. Rep. 669; *Marcum v. Coleman*, 8 Mont. 196, 19 Pac. Rep. 394. It also appears in the transcript that "the defendant asked leave to amend his answer, setting up more fully the indebtedness on which James M. Bailey and Kleinschmidt & Co. instituted the suits in which the attachments were issued against said W. J. Palmer, in which said property was taken by defendant, and the complaint, affidavit, and undertaking for attachment therein, and the attachments issued in said actions, as a justification to him for taking said property." The court refused to allow this amendment to be made, and would not permit the testimony tending to prove the averments thereof to be introduced. The writs of attachment in the actions referred to were issued to authorize the officer to levy upon and hold said property as a security for the satisfaction of any judgment which might be recovered by the plaintiffs. When the sheriff sold and delivered the same under the foregoing execution, and accounted for the proceeds thereof, the possession and lien which were acquired by virtue of the proceedings in attachment were lost. This property was disposed of without any valid process, and under these conditions the officer is deemed a trespasser *ab initio*. The writs of attachment in the actions pending against

W. J. Palmer possess no vitality. In *Ross v. Philbrick*, 39 Me. 29, this statement appears in the facts: "The counsel for defendant requested the court to instruct the jury that, as the property sued for was lawfully attached by Burnham, and that suit still pending in court, the plaintiff can maintain no action to recover the value of that property while so pending, on account of defendant's having sold the same, although the sale was not conformable to the statute." The court, by Mr. Justice CUTTING, said: "Here, then, was an abuse of authority, and the defendant, according to the rule, was a trespasser *ab initio*. \* \* \* But it is contended that, so long as the process upon which the property in controversy was attached is pending in court, the plaintiff cannot sustain this action. \* \* \* An officer who has been guilty of a trespass from the beginning cannot invoke to his aid the process which he has abused. He places himself in the same situation he would have occupied had he seized the property without any process, and taken it from the owner's possession; and what consequence is it to the officer or the attaching creditor that the suit is pending when the attachment is dissolved, and can no longer be made available to satisfy a subsequent execution?" *Drake, Attachm.* (6th Ed.) § 291; *Zschocke v. People*, 62 Ill. 127. There was no error in the action of the court upon the amendment which was proposed to the answer, or the evidence thereunder. The testimony of the respondent was direct and positive that she owned the property in controversy, and that the horses were at her place on Warm Springs creek when the sheriff sold them. She was not cross-examined. Two witnesses testified, in effect, that the horses were "with Mrs. Palmer on her ranch," and in her custody. This evidence was uncontradicted, and admitted without any objection or exception upon the part of the appellant. The issue of ownership could not arise upon this trial, because this court laid down the law of the case, and said: "It is no concern of theirs [the creditors] who owns the property; for, unless they have valid judgments to support their executions, they cannot deprive the plaintiff of her possession." 8 Mont. 195, 19 Pac. Rep. 589. The appellant made several offers to prove matters relating to the question of actual possession at the time of the alleged conversion. When they are examined it is evident that the rules which govern this practice have not been followed. In *Chamberlin v. Vance*, 51 Cal. 75, the court said: "But when counsel make an 'offer' of evidence it must appear that the facts offered to be proven, in connection with facts as to which evidence has already been taken, are relevant; otherwise the court is justified in sustaining an objection to the offer. The offer must be complete in itself, and must not omit facts, without which the facts offered are not relevant." *Smith v. Mining Co.*, 54 Cal. 164; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. Rep. 243. For an illustration of these views we will refer to the transcript, which says: "The defendant offered in evidence the depositions of John Cartin and Albert Mead

\* \* \* for the purpose of proving, and by which testimony he would be able to prove, that the property set out in plaintiff's complaint was not the property of plaintiff, and that she did not own the same, and was not in the possession thereof." This offer does not embrace one specific fact, and the court was required to ignore it upon the ground of vagueness. The depositions are not in the record, but the appellant did not designate the portions of the testimony which he wished to introduce. This right to show that the respondent did not enjoy the possession of the property at the time complained of was not denied by the court, but his offers of proof thereon were ambiguous, and fatally defective. The first instruction covered the issue concerning the value of the property, and the following is a part thereof: "You are instructed that the only question for you to consider in this case is the value of the animals mentioned in the complaint. You are the sole judges of such value, which must be arrived at by you from the evidence given by the witnesses. It is admitted by the defendant in his answer that the value of such animals was at the time of their conversion \$907, and the plaintiff is entitled to recover such sum,—not less than \$907, and not more than \$2,100,—as you may think her entitled to under the evidence." The fifth instruction is as follows: "The jury are instructed that before the plaintiff in this case can recover she must prove that at the time said property described in the complaint herein was taken and levied upon by the defendant, James B. McMaster, she was in possession thereof, and that said property was taken from her; but, if the plaintiff has failed to prove that at the time defendant took said property she was [not] the owner of it, or in the possession thereof, then the jury should find for the defendant." The jury were instructed that the sole question for their consideration related to the value of the property, and that the plaintiff was entitled to recover a sum, which could not be less than \$907, nor more than \$2,100. The jury were also told that there were other issues to be determined, and that the plaintiff must prove that at a certain time she was in the possession of the property, and that the same was taken from her. The instructions were given upon material points, and were conflicting. It has been observed that the testimony of the respondent upon the issue of possession was not rebutted by the appellant, but the court should not have assumed in its charge that the facts were proven, which the evidence tended to establish. This proposition was controverted by the appellant, and never conceded. The fifth instruction was correct, and applicable to the evidence; and the jury could not find a verdict for the plaintiff in any amount unless they were satisfied that she was in the possession of said property when it was converted by the defendant. When this conclusion was reached, it was proper to inquire into and fix the value of the horses; and the court erred in instructing the jury without any qualification that the plaintiff was rightfully entitled to re-

cover a sum ranging between two amounts, which were specified. It is therefore ordered and adjudged that the judgment be reversed, with costs; that the order overruling the motion for a new trial be set aside; and that the cause be remanded for a new trial.

HARWOOD, J., concurs.

(10 Mont. 414)

BOARD OF COMMISSIONERS OF YELLOWSTONE COUNTY V. NORTHERN PAC. R. CO. *et al.*

(Supreme Court of Montana. Jan. 22, 1891.)

COUNTIES—BOUNDARIES—POWERS OF TERRITORIAL LEGISLATURE—TAXATION.

1. Act Cong. May 26, 1864, creating the territory of Montana, and defining its boundaries, excluded therefrom territory which, by Indian treaties, was not to be included within the jurisdiction of any state or territory. Afterwards a treaty was made with the Crow Indians, by which a reservation was set apart to them. Held that, as the treaty was silent on the question of the inclusion of the reservation within the boundaries of Montana, the Crow reservation became a part of the territory, and subject to the control of the territorial legislature, so far as the division of the territory into counties is concerned.

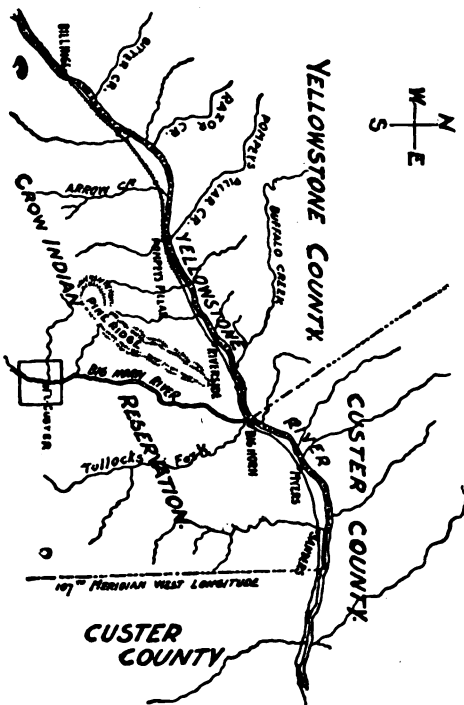
2. By treaty of Aug. 23, 1881, the Crow Indians ceded to the United States a strip of their land, 400 feet wide, along and parallel with the southern bank of the Yellowstone river, and used by the Northern Pacific Railroad Company for a right of way. This strip was subsequently granted by the United States to the railroad company, and formed a part of Custer county, as originally created by Act Mont. Feb. 2, 1865. Subsequently, by Act Mont. Feb. 26, 1883, the north-western part of Custer county was set apart as the county of Yellowstone, the southern boundary of which is the center of the channel of the Yellowstone river; thus leaving the railroad company's right of way within the limits of Custer county. Held, that Act Mont. March 5, 1885, which attached such right of way to the county of Yellowstone "for judicial purposes," did not confer, on that county, the right to tax it, as that is an executive, and not a judicial, power.

Appeal from district court, Yellowstone county; GEORGE R. MILBURN, Judge.

Jas. R. Goss and Toole & Wallace, for appellants. Strevell & Porter, for respondent.

DE WITT, J. This action was originally against the Northern Pacific Railroad Company for taxes; but the county of Custer was interpleaded, and the contention is now between the two counties, as to the right to collect the tax from the company. The railroad company is a disinterested party, and has paid the money into court, to await the decision of this case. It is not necessary, to an intelligent view of the case, to review the pleadings. The case is properly before this court. The tax in question, \$1,531.25, was levied by each county upon the property of the Northern Pacific Railroad Company, situated upon a strip of land, the right of way of the company, 400 feet wide, and extending westwardly from the crossing of the railroad over the Big Horn river to the crossing over the Yellowstone river, near the town of Billings; which is land ceded by the Crow Indians, from their reservation, to the United States, and by the latter granted to the railroad company for

right-of-way purposes. The geographical position and relation of this strip of land to the two counties and the Crow Indian reservation is made clear by the accompanying plat:



The only question before the court is as to what county has jurisdiction to tax the property within this strip. The district court decided in favor of Custer county, from which judgment Yellowstone county appeals. This controversy arose in the year 1889, under the territorial government of Montana. It is necessary to give a short historical review. The act of congress creating the territory (May 26, 1864) included within its boundaries the whole of what is now the Crow Indian reservation, and the counties of Custer and Yellowstone, and the strip of land in question. As to Indians, that act provided "that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until such tribe shall signify their assent to the president of the United States to be included within said territory." 13 U. S. St. at Large, p. 86, § 1. In examining the relations of the Crow Indians and the United States government, we find that on May 26, 1864, the date of said act, there was not within the limits of the territory of Montana, so created, any land as to which

it had been provided, by treaty with the Crow Indians, that it should not be included within the territorial limits or jurisdiction of any state or territory. The treaty with the Crows of February 6, 1826, is one only of amity and commerce. In it no land in the United States is set apart for their use and occupation. No land within the limits of what became the territory of Montana is so set apart for them until the treaty of May 7, 1868, which was subsequent to the act of congress of May 26, 1864, from which we have above quoted a portion of section 1. This latter treaty "set apart, for the absolute and undisturbed use and occupation" of the Crow Indians, a tract of land bounded on the east by the one hundred and seventh meridian, on the south by the forty-fifth degree of latitude, which was the southern boundary of Montana, on the north by the mid-channel of the Yellowstone river, and on the west by a line west of the strip of ground in controversy in this action. This whole area was within the then organized territory of Montana, and included within itself this strip of land, which afterwards became the right of way of the Northern Pacific Railroad Company. This latter treaty of May 7, 1868, being subsequent to the act organizing the territory of Montana, and defining the limits thereof, and placing this area in question within those limits, and the treaty of May 7, 1868, being absolutely silent on the question of any rights or claims of the Crow Indians to have or not to have their reservation included within the boundaries of said territory theretofore organized as above described, we conclude that the territory of the Crow reservation became, and was, and is a part of Montana.

The territorial government, thus having within its boundaries a vast area, proceeded to divide it into counties. It created the counties of Missoula, Deer Lodge, Beaverhead, Madison, Jefferson, Edgerton, (afterwards Lewis and Clarke,) Gallatin, and Choteau. Act February 2, 1865, (Sess. Laws, 1864-65, p. 528.) This act specifically defined the limits of each of said counties by mountain ranges, rivers, and other natural objects, and meridians of longitude and degrees of latitude. These lines left wholly without the limits of said defined counties a great district in the eastern part of the territory, as to which country the act provided (section 9) as follows: "That all the remaining portion of the territory of Montana, not included in the counties before named in this act, be, and the same is hereby, created a county, to be known as 'Big Horn County,' and shall be attached for legislative and judicial purposes to the county of Gallatin." This residuum of territory, created as and called "Big Horn County," included what is now the counties of Custer and Yellowstone and the Crow Indian reservation. For the purposes of this review, the situation remained the same in Codified St. 1871-72, p. 432. By act of February 16, 1877, (10th Sess.) p. 425, the legislature changed the name of Big Horn county to Custer county, in honor of the gallant soldier who had just fallen in defense of her people. In Febru-

ary, 1879, by an act which became a law without the governor's approval, (11th Sess. p. 100,) courts were created, and the county-seat named "Miles," (not "Miles City,") in honor of another soldier distinguished in her history. The strip of land was still within Custer county, and remained so, when the act of February 26, 1883, (Comp. St. p. 839, § 742,) created the county of Yellowstone partly from what has been Custer county. It is sufficient to say of its boundaries that the southerly one was "the center of the channel of the Yellowstone river." The strip of land now in question lies wholly south of the Yellowstone river, and parallel, or nearly so, to the said southerly boundary of Yellowstone county, created as above described. Let it be remembered that the northerly boundary of the Crow Indian reservation was the mid-channel of the Yellowstone river. On March 5, 1885, (Comp. St. p. 840,) the following amendment to the above act was passed: "That all that portion of the Crow Indian reservation lying between the Wyoming line and the Yellowstone river, and west of the Big Horn river, in Montana territory, that may hereafter be segregated and thrown open to settlement, shall form a part of Yellowstone county. All that portion of the Crow Indian reservation above described is hereby attached to Yellowstone county for judicial purposes." In this whole history of Yellowstone and Custer counties, the parties to this action, we can find no act of the legislature which took any of this country south of the Yellowstone river out of Custer county, or placed it in Yellowstone county, unless such intent can be construed out of the amendment last mentioned. To this we will return later.

We turn aside to observe the extinguishment of the Crow Indian title to the strip of land under discussion. On August 22, 1881, (22 U. S. St. at Large, p. 157,) by treaty between the Crow Indians and the United States, the former ceded to the latter "a strip of land, not exceeding four hundred feet in width,—that is to say, two hundred feet on each side of the line laid down on the map of definite location hereinbefore mentioned, (the Northern Pacific Railroad line,)—wherever said line runs through said reservation between the 107th degree of longitude west of Greenwich on the east, and the mid-channel of the Big Boulder river on the west, containing five thousand three hundred and eighty-four acres, more or less." This western boundary at the Big Boulder river is west of the western boundary of the strip in question, at the crossing of the Yellowstone river near the town of Billings, hereinbefore described. By act of congress of July 10, 1882, right of way, for railroad purposes, over this strip of land, was granted by the United States to the Northern Pacific Railroad Company, the original defendant in this action, before the interpleader of the county of Custer. Thus the Indian title was extinguished, and the land belongs to the county of Custer or the county of Yellowstone; or, rather, which county has the right of taxation upon said strip? is the question presented to this court.

This narrow ribbon of territory is certainly a portion of the county of Custer. It was, as has been seen, first placed within Custer county, and has never been taken out. This seems beyond controversy. It is equally clear that Custer county has the exclusive right to tax the property of the Northern Pacific Railroad Company upon said land, unless the amendatory act of March 5, 1885, (Comp. St. p. 840,) confers that right upon Yellowstone county. The only argument for this position that we have discovered is that this territory is attached to Yellowstone county for judicial purposes. What are "judicial purposes?" Webster's Dictionary defines the word "judicial" as "pertaining or appropriate to courts of justice, or to a judge thereof; as, judicial power; a judicial mind. Practiced or employed in the administration of justice; as, judicial proceedings. Proceeding from a court of justice; as, a judicial determination; ordered by a court, as a judicial sale." The Century Dictionary, the most thorough English lexicon of which we have any knowledge, devotes a large space to the definition of the word "judicial." Among other things it says: "Of or belonging to a court of justice; of or pertaining to a judge; pertaining to the administration of justice; proper to a court of law; consisting of or resulting from legal inquiry or judgment, as judicial power or proceedings; a judicial decision, writ, sale, or punishment; determinative; giving judgment. Judicial act, an act involving the exercise of judicial power." This excellent work defines the word "judicial" in connection with many words and expressions with which it is used, and invariably in the sense above indicated. It refers to the Sinking Fund Cases, 99 U. S. 700, in which Justice FIELD says, (page 761:) "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one." Bouvier's Law Dictionary does not define the adjective "judicial" separately, but treats of it used in connection with a dozen other words, and the whole tenor of definition is so completely in line with what we have already quoted that it is useless to cite further. We cannot doubt, in view of the meaning of the word "judicial," that the expression "judicial purposes," as used in the statute which we are endeavoring to construe, means purposes of the courts and the administration of justice. Taxation certainly does not pertain to the affairs of courts and the administration of justice. Judicial, legislative, and executive affairs are very distinctly separated throughout the whole history and policy of American law and government. Their provinces are well defined, and their boundaries sharply drawn. The legislature must have had this in mind when they attached the old

county of Big Horn to Gallatin county "for legislative and judicial purposes." Codified St. 1871-72, p. 432, § 11. Thus legislative and judicial purposes are expressed, and executive purposes are excluded. Thirteen years later, (Act March 5, 1885,) when we come to the attachment of this portion of the Crow Indian reservation to Yellowstone county, judicial purposes alone are expressed, and both legislative and executive are excluded. There seems here to be an application of the maxim, *expressio unius, exclusio alterius*. If the legislature had intended to include executive purposes, revenue, and taxation, they would have so expressed themselves. Their silence is significant. The use of the word "judicial," in other portions of the laws of Montana, indicate its meaning. Section 531, Code Civil Proc., provides that no judicial business shall be done on Sunday, etc., except; and then goes on to recite a large number of acts and classes of business which pertain solely to courts, and the affairs of courts. Sections 698, 699, Code Civil Proc., defines judicial districts, and then treats of the courts therein. Again, observe that the act of March 5, 1885, provides that portions of the Crow reservation, which shall hereafter be segregated and thrown open for settlement, shall form a part of Yellowstone county. But this strip of land in question had been segregated three years prior to this act. If the legislature intended to place this strip in Yellowstone county, why did they confine the operation of the act to only those portions, thereafter segregated? The whole spirit of these laws, and the history of events, and the common as well as the legal understanding of words, lead irresistibly to the conclusion, which we have held from the commencement of the investigation, that this portion of territory belongs to Custer county for the purposes of taxation. We have indulged in this otherwise unnecessarily voluminous discussion of what has always seemed to us a very clear proposition, by reason of the manifest injustice which this condition of affairs works upon Yellowstone county, and our desire to find some remedy for this injustice. Custer county, otherwise compact in form, stretches out over its neighbor, a shoe-string district, 105 miles long and 400 feet wide. Custer county takes the fruits of the land in the way of taxes, and leaves to Yellowstone the labor and expenses of maintenance. This injustice is so glaring and absurd that it demands immediate legislative remedy. That remedy is not at the hand of this court, and we can do nothing but affirm the judgment of the district court, which is accordingly done.

BLAKE, C. J., and HARWOOD, J., concur.

(87 Cal. 520)

MUNDELL v. CITY OF PASADENA. (No. 14,013.)

(Supreme Court of California. Jan. 26, 1891.)

CITY MARSHALS' FEES.

St. Cal. 1883, p. 93, § 855, provides that marshals of cities of the sixth class shall receive a compensation to be fixed by ordinance by the board of trustees. Section 880, prescribing the

marshal's duties, provides that he shall, for service of any process, receive the same fees as constables. *Held*, that the compensation fixed by the trustees under section 855 was for all duties imposed on the marshal.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Gage & Roberts, for appellant. W. A. Arthur, for respondent.

PER CURIAM. This is an action to recover for services rendered by the plaintiff as city marshal of the defendant. A general demurrer to the complaint was interposed and sustained. The plaintiff declined to amend, and thereupon the court gave judgment that he take nothing. From that judgment he appeals. The facts stated in the complaint are in substance as follows: In April, 1886, and again in 1888, the plaintiff was duly elected city marshal of the city of Pasadena, a municipal corporation of the sixth class. Each term of office was two years, and after each election he duly qualified and entered upon the discharge of his official duties. His compensation for both terms was fixed by the board of trustees of the city at \$800 per year, and was paid. Between the 31st day of July, 1886, and the 30th day of April, 1888, he rendered services to the defendant corporation, in arresting offenders, and summoning witnesses and jurors, by virtue of warrants of arrest, subpoenas, and *venires* duly and regularly issued out of the recorder's court of the city, and for these services the defendant became and is indebted to him in the sum of \$863.55. Again, between the 1st day of May, 1888, and the 22d day of March, 1889, he rendered other like services, for which the defendant became and is indebted to him in the sum of \$318.25. Before commencing his action, he demanded of defendant payment of both sums, but the defendant refused, and still refuses, to pay the same, or any part thereof. The act of the legislature, entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883, (St. 1883, p. 93,) provides, in the chapter relating to "Municipal corporations of the sixth class," (section 855,) that "the clerk, treasurer, marshal, and recorder shall severally receive, at stated times, a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." And section 880 of the same chapter provides what duties the marshal shall be required to perform. Among other things, it says: "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority. \* \* \* He shall, for service of any process, receive the same fees as constables. He may appoint, subject to the approval of the board of trustees, one or more deputies, for whose acts he and his bondsmen shall be responsible, whose only compensation shall be fees for the service of process, which shall be the same as those allowed to the marshal." In Pritch-

ett v. Stanislaus Co., 73 Cal. 310, 14 Pac. Rep. 795, the plaintiff was marshal of the city of Modesto, a city of the sixth class, in the county of Stanislaus. He brought his action against the county to recover for services rendered by him in the execution of process, such as warrants of arrest and subpoenas, issued out of a justice's court of the county in criminal cases. A demurrer to the complaint was interposed and sustained. It was said by this court, referring to the provisions of the statute above quoted: "The compensation fixed by the board of trustees under section 855 is to be for all duties imposed on the marshal by the act. These duties are set forth in section 880, (St. 1883, p. 277,) and include the duty to execute and return all process issued and directed to him by any legal authority, and by the same section, for the service of any process, he is to receive the same fees as constables." And again: "It does not appear that the board of trustees of the city of Modesto has passed any ordinance fixing the compensation of the marshal, but we presume it has. If it has passed such ordinance, the marshal is only entitled to the compensation so fixed. If no such ordinance has been passed by it, then the marshal can recover nothing." It was held that the demurrer was properly sustained, and the judgment was affirmed. That case is directly in point here, and upon its authority it must be held that the demurrer in this case was properly sustained, and the judgment must be affirmed. So ordered.

(88 Cal. 45)

COOPER V. COOPER. (No. 13,908.)

(Supreme Court of California. Feb. 14, 1891.)

DIVORCE—EVIDENCE OF PARTY—CORROBORATION.

A wife suing for divorce testified to various acts of violence, and her attorney testified the husband was a man of violent passions, and in private conversation had admitted to the witness that he had used violence upon the wife on various occasions, had pinched her arms, forcibly prevented her from leaving the house, and applied harsh names to her. It was shown also that he began an action for divorce, which he discontinued before this suit, alleging that she attempted to poison the minds of their children against him, and had stated in their presence that she hoped some accident would befall him, so he could not return, and that she had threatened to kill him. Held sufficient corroboration under Civil Code Cal. § 180, forbidding a divorce on the uncorroborated evidence or admissions of the party.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

J. W. Hughes, (A. L. Hart, of counsel,) for appellant. Chauncey H. Dunn, for respondent.

BELCHER, C. This is an action for divorce on the ground of extreme cruelty. The complaint charged the defendant with many acts of cruelty, extending over a period of several years, and the answer admitted all the averments of the complaint in this regard. After trial, the court found that all the averments of the complaint were true; that \$5,000 would be a fair share of the community property for

the plaintiff, and that the property rights of the parties had been amicably settled; that the defendant was better fitted to have the care, custody, and control of the children than the plaintiff, and was better able to support them. A decree was accordingly entered, dissolving the bonds of matrimony between the parties, and awarding to the plaintiff \$5,000 as her share of the property, and to the defendant the care and custody of the two minor children. Within 10 days after the decree was entered the plaintiff changed her attorney, and moved for a new trial, on the ground that the findings were not justified by the evidence, because they were supported only by her own uncorroborated testimony. The motion was denied, and thereupon she appealed from the judgment and order. At the trial the plaintiff was a witness, and testified to many acts of cruelty on the part of the defendant, such as repeatedly calling her harsh and opprobrious names, threatening her with violence, seizing her with great force and violence, pinching her arms until they were black and blue, striking her upon the face and body, leaving black and blue marks from his blows, throwing her upon the floor in a rude, angry, and threatening manner, and compelling her to leave the family residence and seek shelter elsewhere, which acts, as she said, were committed without any fault or provocation on her part, and had caused her great physical pain and mental anguish and sorrow. She also testified that about two years before—and this was alleged in the complaint—the defendant commenced an action against her for divorce on the ground of cruelty "without any cause therefor, and finally dismissed the same after having shamed and humiliated me by the charges which he brought against me." The complaint in the former action was introduced in evidence, and it stated, among other things, that the defendant, (plaintiff here,) by innuendoes and slurs and untruths, had attempted to poison the minds of the children of the parties against the plaintiff "for the purpose of causing them to mistrust and dislike plaintiff, and to deprive plaintiff of the affection of his said children naturally due him; that continuously since said defendant's return from Chicago, as aforesaid, she has said in the presence of and to said children, when plaintiff was absent or about to be absent from the city of Sacramento, the residence of plaintiff and defendant, attending to plaintiff's business, that she hoped some accident would befall plaintiff, so that he could not, or, for some other reason, would not, or ever, return to defendant or to said children; that on or about the 3d day of January, A. D. 1886, she (defendant) threatened to kill plaintiff, and has since said she then intended to do so." Grove L. Johnson, the plaintiff's attorney, was also called as a witness in her behalf, and testified that he was well acquainted with the plaintiff and defendant; that he had known them for many years; that the defendant, in conversation with him, had admitted that on several occasions he had used vio-

lence upon the plaintiff; that he had seized her by the arm, and forcibly prevented her from leaving the house on several occasions; that on one occasion he had pinched plaintiff's arms, and that he had also used harsh and opprobrious names to her. He further testified that the defendant is a man of strong and ungovernable temper, and accustomed to have his own way; that the plaintiff is a small, frail, and delicate woman, and her constitution is such that she cannot stand much mental suffering; that he knew of the divorce proceedings brought by defendant against the plaintiff, in which defendant charged plaintiff with cruelty; that Mrs. Cooper was afraid to and did not contest the same; that Mr. Cooper dismissed them of his own motion after they had come partly to trial; that said divorce proceedings had caused Mrs. Cooper much sorrow and trouble and grievous mental suffering, and had troubled her mentally a great deal, as the witness had ascertained and seen from many conversations with her. The above was, in substance, all the testimony showing cause for a divorce, and the only question is, was the plaintiff's testimony sufficiently corroborated to meet the requirements of section 130 of the Civil Code? That section provides: "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties." Under this section it evidently is not necessary that the plaintiff's testimony be corroborated as to every fact and circumstance testified to. It is enough if there be corroboration as to some fact or facts which is or are sufficient to support the action and justify the entry of a decree in plaintiff's favor. *Matthai v. Matthai*, 49 Cal. 90. In *Evans v. Evans*, 41 Cal. 103, the court, speaking of the statute then in force, and which was similar to the provision of the Code above quoted, said: "The statute does not define to what extent the corroboration must go. In the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence, the statute only requires that there shall be some corroborating evidence." We think there was some corroborating evidence in this case. One of the acts of cruelty alleged in the complaint was the institution by the defendant against the plaintiff of a former suit for divorce, without any cause therefor. The charges made in the complaint in that case, if untrue, were extremely cruel and unjust, and such as no husband should ever be permitted to make against his wife. That the charges were made was shown by the complaint itself, which was introduced in evidence; and that they were untrue must be presumed from the fact that the plaintiff voluntarily dismissed his suit, though he had by threats and fear prevented the defendant from appearing to contest it. These facts, with the testimony of Mr. Johnson, certainly corroborated the plaintiff's testimony as to one act of extreme cruelty on the part of the defendant, and we think this

sufficient corroboration to uphold the judgment. It follows, in our opinion, that the judgment and order should be affirmed, and we so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PATERSON, J. I concur in the judgment on the ground that the plaintiff is not a "party aggrieved" within the meaning of sections 657, 938, Code Civil Proc. Plaintiff was granted all the relief she prayed for. She was asked by the court whether she wanted the children, and she replied that she did not, because Mr. Cooper had always been kind to them, always had the care of them, and could take better care of them than she could. The property rights of the parties had been settled amicably between them. There is nothing, therefore, in the record upon which the plaintiff can base a claim of grievance; and I am at a loss to understand the object of the motion for a new trial and of this appeal. While it is true, as stated in *McBlane v. McBlane*, (Cal.) 20 Pac. Rep. 61, cited in the briefs, the public has an interest in the result of every action for divorce, and the court, on grounds of public policy, should exercise its discretion to the fullest extent in securing to both parties a full and fair hearing on the merits, the public has no right to appeal, nor has any one the right to represent it. Plaintiff probably desires a new trial for the purpose of securing some additional relief in regard to property matters, but as to such matters the public has no more interest than it has in any other action involving property rights.

(88 Cal. 111)

BOYS v. SHAWHAN *et al.* (No. 13,353.)

(Supreme Court of California. Feb. 24, 1891.)

JOINT DEFENDANTS—SEVERAL JUDGMENT.

Where an action for money is brought against three defendants alleged in the complaint to be indebted to plaintiff, and the court finds that all the allegations of the complaint are true, a judgment against two of them only, on such finding, is erroneous.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Henry McPike, for appellants. D. C. Ward, for respondent.

PER CURIAM. The plaintiff brought this action against W. D. Shawhan, Mary Shawhan, and John E. Shawhan, and alleged in his amended complaint that on the 22d day of December, 1886, "the said defendants, and each of them," were indebted to his assignor in the sum of \$408.55, for certain merchandise "sold and delivered to said defendants at their special instance and request." The defendants answered the complaint, denying all of its allegations. The court, having tried the cause without a jury, made the following finding of fact: "That all the allegations and averments in the plaintiff's amended complaint are true;" and, as a



conclusion of law, found "that said plaintiff is entitled to judgment against said defendants W. D. Shawhan and Mary Shawhan, and each of them," for the sum claimed in the complaint. Judgment was thereupon entered against the defendants W. D. Shawhan and Mary Shawhan only, and from this judgment they have appealed. It was error in the court below to render judgment against them upon the facts found by it without at the same time rendering judgment against their co-defendant, John E. Shawhan; and for this error the judgment is reversed, and the cause remanded for a new trial.

(88 Cal. 112)

*Ex parte* MORRISON. (No. 20,802.)

(Supreme Court of California. Feb. 24, 1891.)

HABEAS CORPUS—REGULARITY OF JUDGMENT.

Where a judgment of conviction, regular on its face, is rendered against a vagrant under Pen. Code Cal. § 647, he will not be released from confinement in the house of correction on *habeas corpus* on the ground that the first clause of that section is unconstitutional, it not appearing under which clause he was convicted.

In bank. *Habeas corpus*.

J. A. Harris, for the prisoner. Wm. S. Barnes, for the People.

DE HAVEN, J. This is a proceeding upon *habeas corpus*. It appears from the return to the writ issued that F. P. Morrison, the person in whose behalf the writ was issued, is detained by the superintendent of the house of correction of the city and county of San Francisco, under and by virtue of a judgment of the police court of said city and county, convicting the said Morrison of the crime of vagrancy, and adjudging that he be imprisoned therefor in said house of correction for the period of 90 days. The judgment was rendered February 5, 1891. The judgment appears to be regular on its face, and it does not appear therefrom under which clause of section 647 of the Penal Code said Morrison was convicted. It was argued that the first clause of this section is unconstitutional, but we cannot assume, for the purpose of passing on this question, or of discharging the prisoner, that this is the particular clause under which the conviction was had. The complaint, upon which the judgment was rendered, is not in this record. We cannot say from the record before us that the judgment is void. The said Morrison is remanded, and the writ discharged.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.; SHARPSTEIN, J.

(88 Cal. 30)

WINE *et al.* v. WILLIAMS *et al.* (No. 13,071.)

(Supreme Court of California. Feb. 12, 1891.)

ADMINISTRATORS—ALLOWANCE OF CLAIMS—RIGHTS OF HEIR—NOTICE TO CREDITORS.

1. Where a husband and wife declare a homestead on property they have mortgaged, the mortgage must be presented against the husband's estate for allowance after his death, notwithstanding the complaint in foreclosure expressly waives all recourse to any property of the estate except that described in the mortgage.

2. Under Code Civil Proc. Cal. § 1490, providing that notice to creditors of an estate "must be published as often as the judge or court shall direct, but not less than once a week for four weeks," a notice published for the first time on July 24th, and once a week thereafter, till August 21st, inclusive, while the order of publication was not made till August 2d, is ineffectual, and a claim presented December 20th following, and allowed, is in time.

3. Though by Code Civil Proc. Cal. § 2011, the affidavit of publication is made evidence of the fact, it is *prima facie* evidence only; and where the files of the newspaper in which the notice was published show that it was published once a week from July 24th to August 21st, inclusive, they will prevail over the affidavit that the notice was published on August 23th also.

4. Though a mortgage is allowed against the estate by the administratrix, and approved by the judge, the heir is not bound thereby, but may, under Code Civil Proc. Cal. § 1636, giving him the right to contest claims that have been improperly allowed in the probate proceedings, show, in an action to foreclose the mortgage, that the debt has been paid, or that payments thereon have not been credited.

5. The appellate court cannot direct final judgment upon evidence.

In bank. Appeal from superior court, Merced county; CHARLES H. MARKS, Judge.

Edward P. Cole and E. Jackman, for appellants. J. K. Law, for respondents.

PER CURIAM. This was a suit for the foreclosure of a mortgage. The trial court gave judgment for the defendants, and the plaintiffs appealed. This is the second time the case has come before the appellate court. The former judgment, which was upon demurrer, was reversed upon the ground that the complaint was not subject to the objections taken by the demurrer; and the court held, among other things, that the allowance of a claim by an administrator, and its approval by the judge, stopped the running of the statute of limitations. See 72 Cal. 544, 14 Pac. Rep. 204. As a matter of course, nothing that was then decided is open to question now. The facts material to the present appeal are as follows: The mortgage sought to be foreclosed was made in 1877 by John Connell and Sarah, his wife, to secure the payment of a note made by the former. After the execution of the note and mortgage they declared a homestead upon the property, and subsequently the husband died, leaving an estate of less than \$10,000. On the 19th of July, 1880, letters of administration were issued to the wife, and, in accordance with section 1491 of the Code of Civil Procedure, she gave notice to creditors to present their claims within four months from the first publication of the notice. The first publication was on July 24, 1880, but there was no order for publication until August 2d. The findings show a sufficient publication of the notice, but the evidence does not, as will be explained below. On November 27th a decree of due notice to creditors was made. On the 20th of the following December the plaintiffs presented their claim, and it was allowed by the administratrix as presented, and approved by the judge, and filed on the next day. On the 27th of the same month an order was made that the homestead be set apart to the widow, and a little more than a year afterwards she

died. Letters of administration upon her estate were issued to the defendant Hallinan, and letters upon her husband's estate were issued to the defendant Williams. The complaint states that the plaintiffs "expressly waive any and all recourse upon said note and mortgage against any property of the estate of said John Connell, other than the land above described as included in said mortgage." It does not appear what, if any, interest the wife had in the property at the time the mortgage was made; and nothing is said, either in the pleadings, findings, or evidence, as to the presentation of a claim to the wife's administrator. The counsel seem to have assumed that it was not necessary to present such a claim, and, following their lead, we have confined our examination to the husband's estate.

1. Inasmuch as a homestead had been declared upon the property, it was necessary to present a claim against the husband's estate, notwithstanding the waiver contained in the complaint. *Camp v. Grider*, 62 Cal. 20; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375; *Association v. King*, 83 Cal. 440, 23 Pac. Rep. 376. As has been stated, the claim was presented and allowed by the administratrix, and approved by the judge. But the respondents contend that such presentment and allowance was after the time prescribed by law, and, for that reason, of no effect. We do not agree with respondents on this point. The first publication was made on July 24, 1880, but no order for publication was made until August 2d. Now we do not think that a publication in advance of the order of court was of any validity. The statute provides that the notice "must be published as often as the judge or court shall direct, but not less than once a week for four weeks." Code Civil Proc. § 1490. The legal period of publication is to be fixed by the judge. Until he acts, it cannot be known whether the period of publication will exceed the statutory minimum or not. Without an order therefor there can be no legal period of publication, and consequently no authority for publishing. Now, inasmuch as the paper was a weekly paper, and the first publication was on July 24th, there must have been two publications before the order was made, viz., one on July 24th and one on July 31st, and, under the view we have taken, these two publications were of no effect. Notwithstanding this, however, if the affidavit were the only evidence on the subject, a sufficient publication would be shown; for it states that notice was published "once every week from the 24th day of July, 1880, to and until the 28th of August, 1880, both days inclusive," which would give four publications after the order was made, viz.: August 7th, 14th, 21st, and 28th. But the affidavit is not the only evidence on the subject. The files of the newspaper itself were introduced, and they showed that the notice was not published on August 28th. This contradicted the affidavit. Now, while the affidavit was made evidence by the statute, it is *prima facie* evidence only. Id. § 2011. And the newspaper itself is certainly more satisfactory evidence of its contents than any affidavit

would be, and we do not regard the decree, establishing due notice to creditors, as conclusive. It results that there were only three publications after the order for publication was made, and this is below the statutory minimum. The presentation and allowance of the claim were therefore in time.

2. The court found that all that was due upon the claim had been paid except \$861; and the appellants contend that this finding is not sustained by the evidence, and that the allowed claim could not be impeached by evidence that it had been paid previous to its allowance. There is evidence sufficient to sustain this finding of the court, and it was competent in this case for the son and heir of the deceased mortgagor to show either that the debt to secure which the mortgage was given had been paid, or that payments thereon had been made, and not credited. The allowance of the claim by the administratrix, and its approval as allowed by the judge of the court in which the estate of the deceased mortgagor is being administered, are not conclusive upon the heir. Such action would not of itself be conclusive, if the administratrix or plaintiffs were proceeding in the superior court to obtain a decree in the probate proceeding directing that such allowed claim be paid, and no greater effect can be given to it in this action. The plaintiffs cannot, by resorting to this action, deprive the heir of the right given him by section 1636 of the Code of Civil Procedure to show that their claim was improperly allowed in the administration proceedings.

3. The cause of action is not barred by the statute of limitations. As we have stated, it does not appear what, if any, interest the wife had in the property at the time the mortgage was made, and as no claim was presented against her estate, if she had any separate interest it could not be reached by the case as it is presented. And, so far as her rights as successor in interest of her husband are concerned, it was held upon the former appeal that the allowance of the claim stopped the running of the statute of limitations.

4. Appellants ask that final judgment in their favor be directed. But it is the settled rule here that the appellate court cannot direct final judgment upon evidence. The case must go back to the trial court to have the facts established. Judgment and order reversed.

(87 Cal. 523)

UNDERWOOD v. UNDERWOOD. (No. 13,688.)

(Supreme Court of California. Jan. 28, 1891.)

SETTING ASIDE JUDGMENT—DISCRETION OF COURT.

On appeal the court below will not be held to have abused its discretion in setting aside a judgment quieting title in plaintiff, on a showing that the disclaimer filed by defendant's attorney was under a misapprehension on his part that defendant's conveyance of the property to a third person was made before commencement of the suit.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Horace Bell and H. M. Smith, for appel-

lant. *T. J. De Puy* and *C. C. Stephens*, for respondent.

**PATERSON, J.** This is an action to quiet title to several parcels of land situate in the city of Los Angeles. A *lis pendens* was filed by plaintiff at the time the action was commenced. The defendant filed her verified answer, denying that plaintiff had any right, title, or interest in any of the lots described in the complaint. After this answer was filed, the defendant sold and conveyed to the respondents, John S. Underwood, Mary E. Regan, and Samuel A. Moore, all of the lots described in the complaint, except "lot 13 in block A." There after, the attorney of defendant having died, she employed another attorney, who, after being informed by her of all the facts, filed an amended and unverified answer, disclaiming on the part of the defendant any interest in any of the property described in the complaint, except said lot 13. The court found that defendant was the owner of said lot 13 in block A, and that plaintiff was the owner of the other lots in controversy, and judgment was entered accordingly on April 18, 1889. On July 22, 1889, the defendant moved the court to set aside the judgment, and for permission to amend her amended answer by striking out said disclaimer, on the ground that the amended answer containing the disclaimer had been filed through inadvertence and mistake. In support of her application she filed an affidavit setting forth that upon the advice of her first attorney she had sold the property (described in the disclaimer) to said Underwood, Regan, and Moore in good faith, and for valuable consideration; that, upon the death of her attorney, she had employed another counsel, and the latter, after being informed of all the facts, filed an amended answer containing the disclaimer, "he believing and understanding that said conveyances were made prior to the commencement of this action;" that "said disclaimer was an inadvertence and mistake of fact; that judgment was entered against her by reason of said mistake, and that she had no notice of the state of pleadings until July 10, 1889, when a writ of assistance was served on one of her grantees." Affidavits were filed by John S. Underwood and Mary E. Regan, alleging that the facts set forth in defendant's affidavit were true, and asking that they might be allowed to come in and defend against the claim of the plaintiff. The attorney who filed the amended answer made an affidavit showing that when he drew it he understood that the property described in the disclaimer had been conveyed by defendant before the suit was commenced. Counter-affidavits were filed by Horace Bell, showing that they had taken a portion of the property described in the disclaimer from the plaintiff for a valuable consideration subsequent to the judgment, without notice of any transfer by defendant, and after a search of the record, which failed to disclose any conveyance from defendant, and after the attorney for defendant had informed them

that he knew of nothing that would invalidate the conveyance to them. The court granted the motion to set aside the judgment, and from its order the plaintiff has appealed. The showing made on motion to set aside the judgment is a very weak one, but we are always unwilling to interfere with the decision of the court below in matters of this kind. The attorney for the defendant doubtless acted in good faith, and, as he supposed, for the best interest of his client, but under a mistake of fact as to the time when defendant had parted with her interest in the lots. We cannot say, under all the circumstances, that the court below abused its discretion. The order appealed from is therefore affirmed.

We concur: **HARRISON, J.**; **GAROUTTE, J.**

(87 Cal. 610)

**HOYT v. SAN FRANCISCO & N. P. R. Co.**  
(No. 14,066.)

(Supreme Court of California. Feb. 3, 1891.)

On rehearing. For former report, see ante, 160.

**DE HAVEN, J.** The appeal in this case was dismissed by the court in bank on December 11, 1890, and a rehearing thereafter granted. Upon full consideration we are satisfied with our former opinion, and for the reasons therein stated the motion to dismiss the appeal must be granted. It is true that for some purposes a day is regarded as an indivisible unit, and that, in the cases where such rule properly applies, courts refuse to look into fractions of a day for the purpose of determining which of two acts was first in point of time; but, when the question whether one legal right shall have priority over another depends upon the order of events occurring on the same day, this rule is necessarily departed from. *Bank v. Burkhardt*, 100 U. S. 689; *Louisville v. Bank*, 104 U. S. 474. And in *Maine v. Gilman*, 11 Fed. Rep. 214, it is said: "It is insisted that the law knows no fractions of a day. But this ancient maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, or a decree was entered, or an attachment was laid, or any title accrued." In the case of *Hill v. Finnigan*, 54 Cal. 313, the material fact, as to whether the notice of motion to dismiss was given prior to the time of filing the transcript, was a matter of controversy, and what was there said about not looking into fractions of a day for the purposes of dismissing an appeal must be considered as having reference only to the then state of facts before the court, and the general language there used should not be considered as furnishing a rule for a case like this, in which it is not denied that the notice of motion to dismiss was given before the filing of the transcript on appeal. Appeal dismissed.

We concur: **BEATTY, C. J.**; **McFARLAND, J.**; **PATERSON, J.**; **SHARPSTEIN, J.**; **HARRISON, J.**; **GAROUTTE, J.**

(87 Cal. 329)

BAKER v. BRICKELL *et al.* (Nos. 12,992, 13,574.)

(Supreme Court of California. Feb. 4, 1891.)

HUSBAND AND WIFE—OCCUPATION OF GOVERNMENT LAND—BONA FIDE POSSESSION—TRUST.

In 1860 a married man went into possession of part of the government land known as the "Outside Lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of Act Cong. March 8, 1866, (14 U. S. St. at Large, p. 4,) relinquishing and granting the right and title of the United States in said land to the city of San Francisco, in trust, to be "disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. Thereafter the city deeded the land to the widow, she having complied with the various ordinances and legislative acts relative thereto. *Held*, that she took the lands not absolutely in her own right, but in trust for her children. Per BEATTY, C. J., dissenting.

For majority opinion, see ante, 489.

BEATTY, C. J., (*dissenting*.) Respondent's petition for a rehearing of this cause having been denied by the court, I cannot allow the occasion to pass without expressing my dissent from the conclusion of the department upon the point principally considered in the opinion of Justice THORNTON. If the decision of the court had been rested upon the proposition that under the homestead laws of California Mrs. Baker, on the death of her husband, became by right of survivorship the sole and exclusive owner, as against her children, of the entire estate in the lands covered by their joint declaration of homestead, irrespective of its value at the time of such declaration or of her husband's death, I might not have dissented from that view. But the judgment and order of the superior court are reversed, and the cause is remanded for a new trial, to be had in accordance with the views expressed in the opinion, which thereby become, and must remain, the law of the case. Among the views so expressed is one from which I feel constrained to express my dissent. It is held—as I understand the opinion—that Mrs. Baker, by mere force of the act of congress of 1866, granting to the city of San Francisco the outside lands, and independent of any right accruing to her under our homestead laws, became entitled to a conveyance from the city of all the lands left in her possession by the death of her husband, to be held by her in her own right, to the exclusion of her children. This conclusion is based upon a narrow and literal construction of the clause of the act requiring the city to convey the lands granted to the parties in *bona fide* actual possession thereof by themselves or tenants at the date of the passage of the act. It assumes either that the person lawfully in possession by himself or tenant at the date of the passage of the act was the sole object of the bounty of the government, without regard to the character or capacity in which he had obtained or held the possession, or it assumes that when John H. Baker died in 1863, leaving his widow and minor children in possession of the

land in controversy, he had no estate in the land to which they could succeed, and that the possession so devolved upon her as head of the family was held by her absolutely in her own right, and not in any representative capacity. If this is true,—if the children of John H. Baker inherited no interest in this land from him when he died,—it must be equally true that if their mother also had died before the passage of the act of 1866, they would have inherited nothing from her. What, then, would have happened? Being minors and orphans, they and the land would naturally have passed into the charge and custody of a guardian, who would have been found in the *bona fide* actual possession of the land, as head of the family, at the passage of the act of 1866. Such guardian would have been just as clearly within the literal terms of the act in the case supposed, as Mrs. Baker actually was in the case as it is; and if the representative character in which she held the possession, and her trust relation to her children, must be ignored, so must the representative character and trust relation of the guardian have been ignored; and on precisely the same reasoning which sustains the exclusive right of Mrs. Baker to receive a conveyance of the land, it must have been held that the guardian was entitled to a conveyance of the land to the exclusion of his wards. But I venture to say that no court would have carried the principle here decided, to this, its logical and necessary consequence. In my opinion it would have been held, in the case supposed, that it was the duty of the guardian to obtain a conveyance of the lands from the city, and that he would hold them, when so conveyed, in trust for his wards, according to their several and respective rights as heirs and successors of their deceased parents. And, upon the same grounds, I am of the opinion that Mrs. Baker, when she obtained a conveyance of these lands, (considering the matter without reference to her rights under the homestead law,) held them in trust for her children, according to their respective rights as heirs of her deceased husband.

(20 Or. 360)

HOEHLER v. McGLINCHY.

(Supreme Court of Oregon. Feb. 26, 1891.)

VENDOR AND VENDEE—CONTRACT—INTEREST.

Where the first contract between the vendor and vendee provides for the payment of interest on the purchase price, but a subsequent contract or memorandum fails to mention interest, the vendor nevertheless is entitled to it from the vendee who takes possession, receives the rents, and pays one item of interest after the execution of the second contract, and whose evidence fails to show that there was a mutual understanding that interest was not to be paid.

Appeal from circuit court, Washington county; FRANK J. TAYLOR, Judge.

*Caples, Hurley & Allen*, for plaintiff.  
*Thos. H. Tongue*, for defendant.

LORD, J. This is a suit to recover \$750 and interest, based on the terms of certain contracts for the sale of land, specified in the complaint, and to foreclose an alleged mortgage upon the same. The only ques-

tion involved in the case is as to the payment of interest; the plaintiff claiming that he is entitled to it, and the defendant denying such liability, under the provisions of their contracts. The first contract provides that interest shall be paid annually at the rate of 8 per cent., and that the purchase price of \$750 for the land may be paid at any time within 10 years. The other contract, if it may be so called, made shortly thereafter, makes no reference to the payment of the interest, and seems to be somewhat in the nature of a memorandum. All agree that the two writings must be construed in the light of their surroundings to determine the question involved. The plaintiff's testimony is to the effect that he never agreed nor understood any change in this particular was to be made in the original contract, and that the failure to insert interest was an omission and mistake. If the contract was to have been changed in this respect, it would have required some such mutual understanding between the parties; but the testimony of the defendant does not disclose that any such agreement was made, but it does indicate that the defendant understood or expected to pay interest after the second contract was signed. There would seem to be no other explanation of his conduct in making the payment of \$50 as interest, and in the execution of a mortgage, which, though, for sundry reasons, was not accepted, nevertheless provided for the payment of interest upon the purchase price. Construing these writings together in the light of surrounding circumstances, we think the intention is to charge interest, and that there is no conflict between them. Nor does this result work any hardship. The record presents the case of a plaintiff as vendor, who has delivered the possession of his property to the defendant as a purchaser at the time, or near thereto, when the original contract was made, which the defendant has continued to enjoy without molestation ever since. Nor is this all; he has not only received the rents and profits, but has also held the purchase money. It is not equity that he should keep both, nor according to the ordinary course of business transactions. Whatever labor he may have expended on the property was for his own benefit, and to increase its value; and it sounds inequitable that he should enjoy the plaintiff's property during all the time for nothing. We think it is more equitable, after having been in the enjoyment of the estate, receiving its rents and profits, that the defendant should pay the interest. The judgment, therefore, must be modified so as to allow the plaintiff interest, and neither party will recover costs and disbursements.

(45 Kan. 477)

KINGMAN, P. & W. R. CO. v. QUINN.

(*Supreme Court of Kansas.* Feb. 7, 1891.)

PLEADING AND PROOF—CASE ON APPEAL—RULINGS ON EVIDENCE.

1. The first rule governing in the production of evidence is that the evidence offered must correspond with the allegations, and be confined to the point in issue. *Brookover v. Esterly*, 12 Kan. 152; 1 Greenl. Ev. §§ 50, 51.

2. A mere general averment of fraud and illegality, without stating the facts on which the charge is based, presents no issue, and no proof is admissible thereunder. *State v. Williams*, 39 Kan. 517, 18 Pac. Rep. 727.

3. The case made may be very brief, much more so than a transcript, and was devised mainly for the purpose of abridging the record and lessening the expense of review. *Neiswender v. James*, 41 Kan. 463, 21 Pac. Rep. 573.

4. When it is sought to review the action of the trial court in admitting incompetent and irrelevant testimony, it is not necessary that the case made should contain all of the evidence. If it contains the pleadings, the judgment, and sufficient of the evidence showing the errors complained of, and the exceptions thereto, this court has jurisdiction to consider the incompetent evidence excepted; and, if the incompetent evidence is material and prejudicial to the party objecting, it may order a new trial.

(*Syllabus by the Court.*)

Error from district court, Pratt county; S. W. LESLIE, Judge. On motion for rehearing. No opinion on first hearing.

*George R. Peck, A. A. Hurd, Robert Dunlap, and Fred W. Bentley*, for plaintiff in error. *J. C. Ellis and J. G. Waters*, for defendant in error.

PER CURIAM. A re-examination of the record in this case satisfies us that the first alleged error was not sufficiently considered in the former opinion. The case was dismissed in this court upon the ground that the evidence was not all preserved in the record. It was stated in the opinion "that the record should contain all of the evidence introduced during the trial of the case in the court below to intelligently consider the questions raised by the plaintiff in error." The first alleged error was "that the court erred in the admission of testimony tending to show that the justice of the peace, at the time of issuing the warrant, was just outside of the limits of his township and that therefore he acted without jurisdiction, and his proceedings were void. *Phillips v. Thralls*, 26 Kan. 780; *Wilcox v. Johnson*, 34 Kan. 655, 9 Pac. Rep. 610; *Railroad Co. v. Rice*, 36 Kan. 593, 14 Pac. Rep. 229. A mere general averment of fraud and illegality, without stating the facts on which the charge is based, presents no issue, and no proof is admissible thereunder. *State v. Williams*, 39 Kan. 517, 18 Pac. Rep. 727. The petition in the court below contained a copy of the complaint made and filed by James Moore, and also a copy of the warrant issued by F. R. Gammon, the justice of the peace, under which W. J. Quinn was arrested, but did not allege that the acts of the justice were void, because done outside of his township. The petition alleged that F. R. Gammon, the justice, was an agent of the railroad company, and that the arrest of Quinn was illegal and unlawful. If it were intended to prove that the warrant was illegal, because issued by the justice of the peace outside of his own township, allegations to that effect should have been inserted in the petition. In the absence of any such allegations in the pleadings, it was error for the trial court to admit testimony that the warrant was issued, or other acts of the justice were done, in a township where the justice of the peace had no power to act. The admis-

sion of this incompetent and irrelevant evidence against objections ought not to have been allowed. Mr. Greenleaf says, of the rules of evidence: "The first of these is that the evidence must correspond with the allegations, and be confined to the point in issue." 1 Greenl. Ev. §§ 50, 51; *Brookover v. Esterly*, 12 Kan. 152. A court ought not, by the admission of incompetent testimony, enlarge the issues, or permit a jury to pass upon a case not made by the pleadings. *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. Rep. 550; *Railroad Co. v. Irwin*, 35 Kan. 286, 10 Pac. Rep. 820. The record in this case contains the pleadings, the special findings, and the judgment of the trial court. It also contains the objectionable testimony concerning the issuance of the warrant in a township where the justice of the peace had no power to act. It was never necessary, when a case was brought to this court upon a bill of exceptions, to set forth any more than was necessary to show the errors complained of, if the record contained the pleadings and judgment. Section 547 of the Code provides that a party desiring to have a judgment of the district court reversed by the supreme court may make a case containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court. "There are two methods of bringing a civil case up for review: One upon a case made, and the other upon a transcript. In no other way can the appellate jurisdiction of the court to review such cases be invoked or exercised. The case made may be very brief, much more so than a transcript; and the first named was devised mainly for the purpose of abridging the record, and lessening the expense of review. We are not disposed to discourage brevity in the making of records for review, as it is a much-needed reform." *Neiswender v. Ja nes*, 41 Kan. 463, 21 Pac. Rep. 573. When it is sought to review the action of the court in admitting incompetent and irrelevant testimony, it is not necessary that the case made should contain all of the evidence. If it contains the pleadings, the judgment, and sufficient of the evidence showing the errors complained of, this court has jurisdiction to consider the incompetent evidence objected to. In such a case, it is not necessary that the record should contain all of the evidence. *Railroad Co. v. Grimes*, 38 Kan. 241, 16 Pac. Rep. 472.

It is urged that this court cannot review the objectionable testimony, because the instructions are not given, and it is also urged that the objectionable testimony was not material or prejudicial. The trial court may instruct a jury to disregard incompetent evidence, and such subsequent withdrawal may cure the error in its admission; but even this is not always the case. *Whittaker v. Voorhees*, 38 Kan. 71, 15 Pac. Rep. 874. But it is evident, from the special findings of the jury, that the jury did not disregard the incompetent evidence admitted; but, upon the other hand, they must have fully considered the same. It evidently had weight with them from the special findings returned. One of the spe-

cial findings of the jury stated that the warrant was illegal. Other findings tend to show that the justice of the peace issuing the warrant acted outside of his township. The motion for a new trial alleged errors committed upon the trial by the court. Sufficient evidence is preserved in the case made, showing the incompetent evidence admitted and objected to. If this evidence was not prejudicial, the plaintiff below might have suggested an amendment showing that the error was waived or cured; but, in the absence of such showing, we cannot presume that the error was waived or cured. The findings of the jury tend to rebut any waiver or any curative instructions. The evidence was not only material but prejudicial. The decision in the former opinion that a verdict of a jury cannot be challenged upon the ground that it is not supported by any evidence, if a statement is not contained in the case made affirmatively showing that all of the evidence is preserved, is in accord with a long line of decisions of this court. Many of the decisions are there cited. The rehearing will be granted. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(44 Kan. 696)

## LIMERICK v. HAUN.

(Supreme Court of Kansas. Nov. 8, 1890.)

## CASE MADE—STIPULATION EXTENDING TIME FOR MAKING—AUTHENTICATION.

The attorneys for the parties to a record cannot extend the time for making the case by stipulation between themselves, in the absence of an order of the court or judge granting such an extension. A "case made," signed by the trial judge, but not attested by the clerk of the court with his signature, and the seal of the court, will not be reviewed by the supreme court for alleged errors, when challenged for want of proper authentication.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Harper county; J. T. HERICK, Judge.

J. J. Merrick and Quinton & Quinton, for plaintiff in error. Sam S. Slisson and Crooker & Nofztger, for defendant in error.

STRANG, C. This case was tried by a jury January 25, 1888, resulting in a verdict and judgment for the defendant. The plaintiff's motion for a new trial was overruled the same day, and 60 days were given to make a case for this court. The plaintiff brings what purports to be a case made to this court, and asks that certain alleged errors therein be reviewed. The defendant objects to such consideration by this court, and challenges the so-called case made, and says: *First*, that it was not made and served within time; *second*, that it was not properly authenticated. Sixty days from January 25, 1888, were given the plaintiff to make a case. Afterwards, the plaintiff applied to the judge of the court to have the time in which to make a case extended to April 10, 1888. The judge allowed the application, and extended the time for making the case to April 10, 1888. Neither the application for the said order of extension

nor the order itself is dated, and neither seems to have been filed in the office of the clerk of the court. It is therefore impossible to say whether or not it was made during the life-time of the original order. April 10, 1888, attorneys representing the plaintiff and defendant, by stipulation, extended the time for making a case for this court to May 1, 1888. The case was served April 28, 1888, and 18 days after the last order of the judge had expired, and therefore was out of time so far as any order of the judge is concerned. It was served during the time stipulated for by the attorneys in the case; but the attorneys in the case cannot extend the time for making a case, by agreement, without an order of the court or judge trying the case. *Insurance Co. v. Koons*, 26 Kan. 215.

The second objection to the consideration of this case made as presented is that it is not properly authenticated, never having been attested by the clerk of the court. This question has just been considered and decided against the plaintiff at this term of the court in the case of *Limerick v. Gwinn*, 24 Pac. Rep. 1097. See, also, *Railroad Co. v. Quinn*, ante, 1068. It is recommended that this case be dismissed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(2 Wash. St. 185)

**DEXTER, HORTON & Co., Bankers, v. SPARKMAN et al.**

[*Supreme Court of Washington*. Feb. 25, 1891.]

**LIENS—MANUFACTURING LUMBER—CLAIM—DESCRIPTION—ENFORCEMENT—PRACTICE.**

1. Under Code Wash. § 1942, giving a lien to laborers who assist in manufacturing saw-logs into lumber, and section 1947, requiring the description of the property to be sufficient to identify it with reasonable certainty, a notice of claim of lien sufficiently describes the lumber, though it has no marks, which states that the lien is on "about 100,000 ft., which has been manufactured in Kitsap county, Washington state, and which is marked —, and is now lying at the saw-mill owned by the Builders' Material Co., in Kitsap county, the same being the place where the lumber was manufactured, about two miles south of Port Blakely, on Puget sound."

2. The lien given by the statute is personal, and where a laborer includes in the amount of his claim the assigned claim of another laborer the whole claim is vitiated.

3. The lien given by the statute for assisting in "manufacturing saw-logs into lumber" does not attach to shingles, and where the claim is for labor performed in manufacturing lumber and shingles, the whole lien fails.

4. As the statute requires no statement by the person verifying a claim of lien for another of the facts upon which he bases his belief, a verification by such person to the effect that he believes the claim to be true is sufficient.

5. Where the lien claimants state in their complaint that they claim a lien on the lumber and shingles, but the copy of the lien filed with the complaint shows that the lien is claimed on the lumber only, that part of the complaint referring to the shingles should be disregarded on a motion for judgment by a defendant, whose affirmative averment that the shingle bolts were made by others than plaintiffs is not denied.

6. Where, in such case, the owner of the lumber makes default, but an intervenor has appeared and defended the lien claims, the court cannot enter judgment for the lien claims against the owner before first entering his default.

7. The intervenor, having answered, denying

all the plaintiff's allegations, is entitled to a trial.

8. A judgment awarding a lien on the shingles not mentioned in the claim of lien is erroneous.

**Appeal from superior court, Kitsap county.**

Code Wash. § 1942, gives a lien to "every person performing labor upon or who shall assist in manufacturing saw-logs into lumber." Section 1947 requires the notice of claim to describe the property to be charged sufficiently for identification with reasonable certainty.

*McGilvera, Blaine & De Vries*, for appellant. *I. A. Murchison*, for appellees.

**STILES, J.** Five plaintiffs—J. M. Sparkman, D. A. McDonald, William Riechers, William Kemery, and W. B. Morris—joined in an action to foreclose laborers' liens on certain lumber and shingles, situated at the saw-mill of the Builders' Material Company, in Kitsap county. The Builders' Material Company was made a party to the action, and was served with process, but it made no appearance. Dexter, Horton & Co., bankers, a corporation, appeared, and demurred to the complaint and each of the separate causes of action therein stated, on the ground that no cause of action was stated. Copies of the several liens were annexed to and made a part of the complaint. The action was brought under section 1947 of the Code. Each of the liens was in substantially the following form: "Notice is hereby given that —, of Kitsap county, Washington state, claims a lien upon all lumber, being about 100,000 ft., which was manufactured in Kitsap county, Washington state, and which is marked thus —; and is now lying at the saw-mill owned by said Builders' Material Co. in Kitsap Co., the same being the place where said lumber was manufactured, and situated about two miles south of Port Blakely, on Puget sound, for labor performed upon and assistance rendered in manufacturing said lumber." Other clauses followed. We are of opinion that this description was sufficient, as against the objection of appellants that the place was not sufficiently located, that the lumber had no marks, and that it is not stated that the logs were manufactured into lumber. It is not usual, we think, to mark lumber; and, as the lien can only be taken upon lumber while still at the mill, it must be left to the proofs to show labor on the lumber upon which it is proposed to establish the lien. Of necessity liens of this class must be less definite than those upon real property, or no effect could be given to the statute. A mill which is "about two miles south of Port Blakely, on Puget sound," ought to be easily found. That one who manufactures lumber manufactures it out of logs would seem to be so nearly a violent presumption that it would not be necessary to say it in more abundant language than that used.

The notice of William Kemery alleged his own claim of \$32.50, with an offset of \$20.80; and it also alleged that the Builders' Material Company was indebted to G. M. Kemery in the sum of \$51.25, with



an offset of \$33.42, which indebtedness had been assigned to claimant. William Kemery claimed a lien for both balances in the gross sum of \$29.63. This he could not do. The lien given by statute is personal to the laborer; it does not run with the chose in action. Having perfected his lien, and thus entitled himself to the equity, an assignment of the debt might entitle the holder to the enforcement of the security thus obtained. There has been much discussion and diversion of opinion among courts and writers on this subject of the assignment of claims and the right of assignees to perfect liens to secure them; but we think the rule announced is the better one under our present statute. Having confused the two demands, plaintiff failed to comply with the statute, and lost all right to take benefit of the foreclosure.

The lien of J. M. Sparkman was like the others, excepting it was for labor in manufacturing the 100,000 feet of lumber and 300,000 shingles, at wages of \$3 per day for 33 days. No lien is given by statute for the manufacture of shingles, unless we hold that shingles are included in the term "lumber." We do not think the statute was intended to cover such an interpretation. It gives a lien only to those persons who labor upon or assist in "manufacturing saw-logs into lumber," which, we take it, means the grosser operation of converting logs into timbers, planks and boards. There could, therefore, be no lien for such part of the plaintiff's labor as was applied to making shingles, and as there was in the claim nothing to show how much was due for labor on the lumber and how much on the shingles, the whole lien failed.

The claim of W. B. Morris was verified by P. A. Ellsworth, to the effect that he believed it to be true. The statute seems to require no statement by the person verifying an instrument of this kind for another of the facts upon which he bases his belief, and lays down a form which may be used. We think the verification was sufficient.

The appellant, after the overruling of its demurrer, in the court below, filed an answer specifically denying the allegations of each cause of action stated in the complaint, and setting up that the shingles made by the Builders' Material Company were cut and sawed from shingle bolts made by other parties than the plaintiffs. The plaintiffs filed no reply to the new matter, and defendant moved for judgment on the pleadings. The court denied the motion, and, we think, properly, except as to the claim of Sparkman. It is true that in his complaint, each of the plaintiffs alleged that he had filed a lien upon all the lumber and shingles at the mill, but the copy of his lien, filed as a part of the complaint, showed how far this was untrue; and, in the absence of any motion to correct the pleadings, that part referring to shingles was to be disregarded, on the motion for judgment. Immediately upon the disposal of the defendant's motion for judgment, the court, without setting the cause for trial, or hearing any proofs, and before any default of the Builders' Material Company had been entered,

examined the plaintiff's liens, and entered up judgment against the Builders' Material Company for the full amounts claimed, decreeing the lumber and shingles to be sold. This was error. The default of the Builders' Material Company should have been entered before any judgment was rendered against it. And the defendant Dexter, Horton & Co., bankers, having answered, denying all the plaintiffs' allegations, had a right to have the case set down for trial regularly, to cross-examine witnesses, and to contest the sufficiency of the proofs. The judgment was also erroneous in that it awarded liens to all the plaintiffs upon the shingles, whereas only the lien of Sparkman mentioned shingles. The judgment is therefore reversed, with instructions to the court below to sustain the demurrer to and dismiss the complaints of William Kemery and J. M. Sparkman, and to set down for trial and try the cause involving the other parties. Costs to appellant.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT, J., did not sit at the hearing, he being disqualified.

SCOTT, J., did not sit, he being absent.

(2 Wash. St. 171)

DEXTER, HORTON & Co., Bankers, v. WILEY  
*et al.*

(Supreme Court of Washington. Feb. 25, 1891.)

LIENS—MANUFACTURING LUMBER—CLAIM—DESCRIPTION—SUFFICIENCY.

A notice of claim of lien on lumber, describing it as "a quantity of lumber, being about 70,000 feet, now lying at defendants' saw-mill in said county," is insufficient, under Code Wash. § 1947, requiring the description of the property to be charged with the lien to be sufficient for identification with reasonable certainty.

Appeal from superior court, Kitsap county.

McGillvra, Blaine & De Vries, for appellant. I. A. Murchison, for appellees.

STILES, J. The plaintiffs in this action, R. J. Wiley, C. W. Wiley, Harry Wiley, E. P. Wand, J. H. Snowden, Chris. Wyman, Thomas J. Oaskey, and C. Brownlee, sought to foreclose laborers' liens upon the same lumber as did the plaintiffs in Dexter, Horton & Co. v. Sparkman, ante, 1070, (just decided.) The pleadings, liens, and proceedings were the same as in the latter case, and for the reasons therein given, if there were no other defects, the same course would be pursued. But all the liens, excepting those of Wand and Snowden, were filed upon the shingles also, with no statements sufficient to show what portion of their labor was upon the lumber alone, which renders them incapable of enforcement. The claims of Wand and Snowden were not open to the objections above named, but the description was: "A quantity of lumber, being about 70,000 feet, \* \* \* now lying at the defendants' saw-mill, in said county." We held in the other case that the same description, with the addition, "being the place where the said lumber was manufactured, and situate about 2 miles south of Port Blakely, on Puget Sound," was

sufficient, but cannot sustain this one. The statute (section 1947) requires a description of the property to be charged with a lien, sufficient for identification with reasonable certainty; and there is a great difference between a location two miles along the shore of the sound, below Port Blakely, and the entire county of Kitsap, when it comes to determining where the property liened was. Therefore, in this case, the order will be that the judgment be reversed, and the cause remanded, with instructions to the superior court to sustain the demurrer and dismiss the action. Costs to appellant.

ANDERS, C. J., and DUNBAR, J., concur.

HOYT, J., did not sit at the hearing, he being disqualified.

SCOTT, J., did not sit at the hearing, he being absent.

(2 Wash. St. 45)

SPOKANE TRUCK & DRAY CO. v. HOEFER  
*et ux.*

(Supreme Court of Washington. Feb. 5, 1891.)

PUNITIVE DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

1. In Washington, punitive damages cannot be recovered for personal injuries, however occasioned.

2. A person who undertakes to hoist a heavy safe from a court, through which people are accustomed to pass back and forth, into an upper story of the building, is bound to use such care as the nature of the employment, and the situation and the circumstances surrounding the same, require of a prudent person, experienced and skilled in such or similar work, and is liable for injuries occasioned by the falling of the safe on account of the lack of such care and skill.

3. Where the court has already instructed that, if it did not appear by a preponderance of the evidence that the injury was occasioned by defendant's negligence, there could be no recovery, it may properly refuse to instruct that if the injury occurred by defects in the wall, caused by the elements, not discoverable by ordinary care, defendant was not liable.

Appeal from superior court, Spokane county.

Turner & Graves, for appellant. Jesse Arthur, for appellees.

DUNBAR, J. The plaintiff Mina Hoefler had her arm broken, and was otherwise injured, by the falling of a safe, which was being hoisted by the defendant into a five-story brick building, known as the "Eagle Block," in the city of Spokane Falls. Plaintiff had been to the office of her physician, in the second story of said building, where she was accustomed to go for treatment daily, and while returning from such a visit on the 7th day of February, 1890, she passed down the stairway, and into the court or opening under the hoisted safe just as it fell. The said stairway started from the entrance of said court or well on Stevens street, and landed on the north end of the covered way on the second floor of the rear building. Dr. Thiel's office, where Mina Hoefler had been just before she was injured, was in a room on the second floor of the Stevens-Street building, and was the first room north of the Stevens-Street entrance.

There was one other and perhaps main entrance to the building from Riverside avenue, and it is claimed by the defendant that the court or well on that side of the block was used for hoisting heavy articles to the upper stories of the building, and was not generally employed by the public as an entrance to the upper stories of the block; yet we think it fairly appears that the stairway leading from Stevens street was in common use, and that the plaintiff had a right to use it in going to and from the office of her physician. Suit was brought against the defendant, alleging damages in the sum of \$5,000. The case was tried by a jury, and a verdict rendered for plaintiffs for \$2,500, and a judgment rendered for the same, from which judgment an appeal was taken to this court.

The defendant assigns as error the following instructions to the jury, given by the court upon its own motion: "Furthermore, gentlemen, the plaintiffs claim in this action that the defendant was not only guilty of negligence, by reason of which the plaintiff was damaged, but was guilty of gross negligence, and, in case you find they were guilty of gross negligence, a different rule of damages applies to the case." "'Gross negligence' means a wanton and reckless disregard of the rights of other persons taken into consideration with the facts in the case; and, in case you find that it was, then, in addition to the actual damages which you may find for plaintiff, you may assess a sum which the law calls 'exemplary damages.' That means a damage to deter others from being wanton and reckless of the rights of others." Also the following instructions asked by plaintiffs: "If the jury believe from all the evidence that the agent and employes of defendant, the Spokane Truck & Dray Company, in placing the beams and planks across the well-hole, in plaintiffs' petition mentioned as being in the Eagle block, in the city of Spokane Falls, and in any other way, in the construction and preparation of the appliances, for hoisting the safe up and through said well-hole, and, in the hoisting of the same, failed to use such care as the nature of the employment, and the situation and circumstances surrounding the same, required of a prudent person, having had experience, and skilled in such or similar work, and that, by reason thereof, said beam and planks, and other appliances, in the attempt to hoist said safe, gave way or were broken, and fell down through said well-hole, striking plaintiff Mina Hoefler, breaking her arm, and otherwise injuring her, they should find for plaintiff, assessing the damage, if any, at such sum as they find she has sustained, not exceeding \$5,000, the amount claimed in the complaint." "The jury is instructed that, if they find for plaintiff under the preceding instruction, in assessing the damage they have a right to consider and allow for the loss of the personal services of plaintiff Mina Hoefler to her family; her mental suffering and bodily pain; the extent of probable duration of the injury; and the prospective loss of service occasioned thereby; also the ex-

pense incurred for medicine, nursing, etc., and such reasonable doctor bill as plaintiffs were obligated to pay." "Should the jury find for plaintiffs under instruction No. 1, and also find that defendant's agents and employes, in constructing the appliances for hoisting said safe, and in hoisting the same, were guilty of gross negligence, that is, exercised so little care as to evince a reckless and willful indifference to the safety of plaintiff Mina Hoefel, and all others using said entrance and stairway, then they may find for plaintiffs exemplary damages; that is, damages in money by way of punishment, in addition to the damages they may find under instruction No. 2, in no case exceeding in all the amount of \$5,000 claimed in the complaint." The court refused to give the following instruction asked by the defendant, which refusal defendant also assigns as error: "If you find by the evidence that the injury occurred by defects in the wall, caused by the elements, and such defects were not discovered by ordinary care, in the absence of further negligence on the part of the defendant, the plaintiff cannot recover." So far as the instruction is concerned that was asked for by defendant and refused by the court, we think it had already been substantially given by the court; and it was not necessary to repeat it in another form of words. The court had already instructed the jury that "if it did not appear by a preponderance of testimony that this injury was occasioned by the negligence of the defendant, that it was their duty to find for the defendant." Courts should not be called upon to particularize by referring to certain portions of the testimony. It is a far safer rule to state the law governing the case in general terms.

It is claimed by the defendant that the language used by the court in the first instruction asked by plaintiffs makes the defendant an actual insurer of the safety of the public, and is therefore erroneous. The statement was "that the defendant was bound to use such care as the nature of the employment and the situation and circumstances surrounding the same required of a prudent person having had experience, and skilled in such or similar work." We are unable to see how this instruction could be materially modified. Undoubtedly the "nature of the employment" must be taken into consideration. If it is an employment which is likely to endanger life or property, certainly a greater degree of care would be required than an employment, the careless performing of which would not ordinarily result in injury to person or property. It is plain that "the situation and circumstances surrounding the employment" must be considered; for, applying the rule to a case of this character, a person in hoisting a heavy weight in an unfrequented place, in no way connected with any thoroughfare or passage-way, would not be held to the same degree of care as he would be if the work were being done in a public thoroughfare, where people had a right to pass, and were actually constantly passing. It certainly cannot be gained that "prudence" should be one of the

requisite qualifications of a person engaged in such employment. Nor must his qualifications stop here, when engaged in a business which is liable to injuriously affect the public; for he might be an ordinarily prudent man, and yet, if he had no experience or skill in the particular work in which he is engaged, disastrous results would be liable to follow. Language which is not technical must be construed by its ordinarily accepted meaning, and we do not think that the language employed by the court could be so construed as to make the defendant an insurer; and we concur with the counsel for the plaintiffs that it states substantially the same doctrine as the quotation from Shearman & Redfield on Negligence, § 47, by defendant, where they define ordinary care to be "the care usually bestowed upon the matter in hand by persons accustomed to deal with such matters, and having the prudence of the general class of society to which the person whose conduct is in question belongs."

We next pass to the instruction of the court both upon its own motion and upon the motion of the plaintiffs in relation to punitive damages. This is a question which has engaged the earnest attention of courts and authors. A careful investigation of the discussion of this subject by such noted authors as Greenleaf, Sedgwick, and Parsons, and also other eminent text-writers, and by numerous courts, shows a wonderful diversity of opinion on this interesting subject. The weight of authority, especially considering the older cases, seems to be in favor of the doctrine of punitive damages, but the opposite doctrine has received the support and advocacy of many modern writers, and the judicial sanction of many modern courts; while other courts have frankly stated their repugnance to the doctrine, yet considered themselves bound, by former decisions in their respective states, to still maintain it, appealing to the legislature to relieve them from what they believe to be a pernicious practice. In this state it is a new question, and the court approaches its investigation untrammelled by former decisions, free to accept the reasoning which most strongly appeals to its judgment, and to adopt the rule which, in its opinion, will simplify judicial proceedings, and lead to the least embarrassing complications in the administration of the law, and the determination of rights thereunder. And this desired *ultimatum*, we think, will best be attained by adopting the rule laid down by Mr. Greenleaf (volume 2, § 253) that "damages are given as a compensation or satisfaction to the plaintiff for an injury actually sustained by him from the defendant. They should be precisely commensurate with the injury, neither more nor less; and this whether it be to his person or his estate,"—although it is stoutly maintained by so eminent an author as Mr. Sedgwick that this definition is too limited, and that, "wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation,

adopts a wholly different rule. It permits the jury to give what it terms 'punitive,' 'vindictive,' or 'exemplary' damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." 1 Sedg. Dam. p. 38; 7th Ed. p. 53. It seems to us that there are many valid objections to interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of a medley or legal jumble two distinct systems of judicial procedure. While the defendant is tried for a crime, and damages awarded on the theory that he has been proven guilty of a crime, many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions "from the time whereof the memory of man runneth not to the contrary," are absolutely ignored. Under this procedure the doctrine of presumption of innocence, until proven guilty beyond a reasonable doubt, finds no lodgement in the charge of the court, but is supplanted by the rule in civil actions of a preponderance of testimony. The fallacy and unfairness of the position is made manifest when it is noted that a person can be convicted of a crime, the penalty for which is unlimited, save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages, on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state, where the amount of the fine is fixed and limited by law; and, in addition to this, he may be compelled to testify against himself, and is denied the right to meet the witnesses against him face to face under the practice in civil actions of admitting depositions in evidence. Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. Ordinarily the administration of the laws is divided into two distinct jurisdictions, the civil and the criminal, each governed by rules of procedure, and by rules governing the admission and weight of testi-

mony different and distinct from the other. The province of the civil court is, as its name indicates, to investigate civil rights; there its jurisdiction ends, or ought to end; while the province of the criminal court is, as its name imports, to investigate and punish crime and restrain its commission. And it is to the criminal, and not the civil, jurisdiction that society looks for its protection against criminals. The object of punishment is not to deter the criminal from again perpetrating the crime on the particular individual injured, but for the protection of society at large; and as the state is at the expense of restraining and controlling its criminals, and as fines are imposed for the double purpose of restraining the offender, and of reimbursing the state for its outlay in protecting its citizens from criminals, we are at a loss to know by what process of reasoning, either legal or ethical, the conclusion is reached that a plaintiff in a civil action, under a complaint which only asks for compensation for injuries received, is allowed to appropriate money which is supposed to be paid for the benefit of the state. It is to be presumed that the state has fully protected its own interests, or as fully at least as they could be protected by laws, when it provides for the punishment of crime in its criminal statutes, and fixes the fine at a sum which it deems commensurate with the crime designated; hence, punitive damages cannot be allowed on the theory that it is for the benefit of society at large, but must logically be allowed on the theory that they are for the sole benefit of the plaintiff who has already been fully compensated, a theory which is repugnant to every sense of justice.

Again, while jurors should be the judges of the character and weight of testimony, that judgment should be exercised under some rule, and be amenable to some law, so that an abuse of discretion could be ascertained and corrected; but, under the doctrine of punitive damages, where the whole question is left to the unguided judgment of the jury, and where, under the very nature of the doctrine, no measure of damages can be stated, and hence no limits compelled, where there are no special findings provided for, it would not be often that a court would be warranted in interfering with a verdict, if indeed it could do so at all, if the verdict fell within the amount asked as compensatory damages. Take the case at bar for instance, and the court has no way of ascertaining whether the jury found that the plaintiff had actually been damaged to the full amount of \$2,500, or whether they found her actual damages to be \$500, and assessed the other \$2,000 by way of punishment. It seems to us that a practice which leads to so much confusion and uncertainty in the administration of the law, and that is always liable to lead to injustice, the correction of which is impracticable, cannot be too speedily eradicated from our system of jurisprudence. In this connection, we quote approvingly the language of the supreme court of Indiana in *Stewart v. Maddox*, 63 Ind. 51. Says the court: "The doctrine of exem-

plary or punitive damages rests upon a very uncertain and unstable basis. It is almost equivalent to giving the jury the power to make the law of damages in each case; and in a case where the defendant is a commanding, popular, influential person, and the plaintiff of an opposite character, and the local and temporary excitement of the time happens to be in favor of the defendant, the jury is apt to be reluctant in giving even pecuniary compensation, without adding anything by way of exemplary or punitive damages; while, in a case in which the character of the parties and the circumstances are reversed, the jury will be liable to push their powers to an unwarranted and unconscionable extent, dangerous to justice and the security of settled rights." Says the court in *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. Rep. 119: "The reflecting lawyer is naturally curious to account for this 'heresy' or 'deformity,' as it has been termed. Able and searching investigation made by both jurists and writers disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns, or Rutherford; that it was not recognized in the earlier English cases; that the supreme courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan, and Georgia have rejected it in whole or in part; that of late other states have falteringly retained it because committed so to do; that a few years ago it was correctly said, 'At last accounts the court of queen's bench was still sitting hopelessly involved in the meshes of what Mr. Chief Justice QUAIN declared to be "utterly inconsistent propositions;" and that the rule is comparatively modern, resulting in all probability from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases.' And in support of this theory the Colorado court quotes Mr. Justice FOSTER in *Fay v. Parker*, 53 N. H. 342, who concludes a discussion of the expression "smart money" as used by Grotius and jurists contemporary with that author, in the following language: "It is interesting, as well as instructive, to observe that one hundred and twenty years ago the term 'smart money' was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart." Some courts have held that it was in violation of the constitutional guaranty "that no person should be twice put in jeopardy for the same offense," where the criminal code provided a punishment for the same offense, and some have restricted or limited its abrogation to cases where the act charged to have been committed was made punishable by law; but, without expressing any opinion on the constitutional question, we believe that the doctrine of punitive damages is unsound in principle, and un-

fair and dangerous in practice, and that the instruction of the court on the subject of punitive damages was erroneous. With this view of the law it is not necessary to examine the further objection urged by defendant, "that this was not a proper case for the application of the doctrine of punitive damages." The judgment is reversed, and the case remanded for a new trial.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

(2 Wash. St. 131)

#### In re LYBARGER.

(Supreme Court of Washington. Feb. 19, 1891.)

HABEAS CORPUS — LEGALITY OF JUDGMENT—CONSTITUTIONAL LAW.

1. Under the statute of Washington, providing that no court shall inquire into the legality of any judgment or process whereby a party is in custody, when such custody is upon final process issued on final judgment of a court of competent jurisdiction, a person sentenced by a court of general jurisdiction cannot be released on *habeas corpus*, as the judgment cannot be gone behind for any purpose.

2. The above statute is constitutional.

#### *Habeas corpus.*

Marshall K. Snell and Heilig & Huston, for petitioner. W. C. Jones and Charles Bedford, for respondent.

HOYT, J. Upon the return of the officer to the order to show cause issued herein and the hearing had thereon, two questions are presented for our determination: *First*, as to the power of the legislature to provide for prosecution for offenses committed before we became a state, by information; *second*, as to whether or not the court, in *habeas corpus* proceedings, will go behind the final judgment of a court of competent jurisdiction for any purpose whatever. We will discuss the second question first. Our statute provides that no court shall inquire into the legality of any judgment or process whereby the party is in custody, when such custody is upon any process issued on any final judgment of a court of competent jurisdiction; and if the words "final judgment" mean what they say, it would seem to preclude the issuing of the writ in the case at bar. But it is contended by petitioner that these words refer only to judgments in cases where the court pronouncing it had jurisdiction of the subject-matter of that particular case, and of the person of the defendant; that all other judgments are void, and therefore nullities; that, however general the jurisdiction of the court might be, it would not be a court of competent jurisdiction as to that particular judgment, unless it had jurisdiction of the subject-matter of the suit and of the person of the defendant. With this contention of the petitioner we should probably agree, when applied to judgments of courts of special or limited jurisdiction, for the reason that the judgments of such courts do not even *prima facie* prove their jurisdiction to pronounce it; and, it being necessary that the facts showing jurisdiction should appear before the judgment is entitled to any standing, when these facts are wanting there is sub-

stantially no judgment. A judgment of a court of general jurisdiction, however, stands upon an entirely different footing. Such a judgment *prima facie* proves itself, and it is not necessary to aid it by proof of any jurisdictional facts. To authorize any of the steps that may be taken to enforce judgments of this kind it is only necessary to produce the judgment itself, as all jurisdictional facts will be presumed until the contrary appears. It is true that, when it is made to appear affirmatively by the record in any particular case that the facts necessary to jurisdiction did not exist, the presumption as to jurisdiction will be overcome; but this cannot make a writing in the form of a judgment, which, until such want of jurisdiction is made affirmatively to appear, is binding upon the whole world, an absolute nullity. The fact that it is the judgment of a court of general jurisdiction makes it *prima facie* valid, and that which is even *prima facie* valid cannot be said to be a nullity. When the officer returns as his authority for holding a prisoner a commitment which shows upon its face that such person is committed by a court of general jurisdiction in pursuance of its final judgment for a crime triable by such court, we think he has brought himself within the provisions of our statute, and that the courts are, by the terms thereof, precluded from inquiring further into the cause of detention; and that neither by having the record set out in the petition, nor by bringing it here by *certiorari*, can this court look therein to see whether or not the court had jurisdiction in that particular case. To hold that we could investigate this question in the face of the statute would be to hold that the judgment was an absolute nullity for all purposes, which we have seen would not be reasonable, and would lead to results which could not be tolerated without an entire change of practice as to the presumptions in favor of the judgments of such courts. If such judgments are nullities, then they can be good for no purpose; and every officer attempting to enforce them would be guilty of trespass or false imprisonment. Yet, so far as we know, no court has thus punished officers for enforcing the judgment of a court of general jurisdiction fair upon its face.

But petitioner contends that, if the statute must be construed as above, it is unconstitutional; his claim being that the writ of *habeas corpus* is a high prerogative writ known to the common law, and that it is this common-law writ that is secured to us by the constitution of the United States and of this state; and further, that at the common law said writ was used to inquire as to the jurisdiction of the court which rendered the final judgment upon which the petitioner was held. With the first part of this claim we find little fault, though it may need some qualification; but as to the second part we cannot agree that the scope of this writ was as contended for until long after the date when the statute of England ceased to be a part of our common law; and even at this time it is doubtful if the practice there goes to the extent above

claimed without some important qualifications. Prior to the passage of the act of 56 Geo. III., the return of the officer was absolutely conclusive; and if he returned that he held the petitioner by virtue of process issued by a court of competent jurisdiction, that was the end of the inquiry, and, however false this return might be, the only remedy was by an action for false return. This being the law and practice in England at the time we took therefrom our common law, it cannot be successfully contended that our statute conflicts therewith, for under it, as we have seen, the return that the petitioner was held by any process or judgment good upon its face not only precluded inquiry into the validity of such process or judgment, but also precluded inquiry as to the facts of his being held by such process or judgment at all. In fact, under the English common law, as we took it, the return of the officer was absolutely conclusive. See Church, Hab. Corp. §§ 138, 221. Many cases have been cited by the petitioner to show that courts will go back of the judgment, and inquire as to the jurisdiction of the court that rendered it. From the decisions of the supreme court of the United States in particular a large number of such cases have been cited. Such cases would be in point were they construing a statute like ours, but such was not the case; on the contrary, the United States statute in force at the time these cases were decided expressly authorized such inquiry. That such cases were entirely controlled by the statute in force at the time is made clear by an examination of the course of the decisions. Prior to the statute of 1833 it was "conceded that a return to this writ, showing an imprisonment under process legal and valid on its face, was conclusive." See Church, Hab. Corp. § 222. Of the cases upon the subject decided by the supreme courts of the different states they are nearly all controlled by statutes different from ours, and therefore not in point. The states of Missouri and Kansas have statutes substantially like ours, and the decisions in those states seem to warrant the contention of the petitioner. The Missouri cases, however, do not seem to have been carefully considered, and are far from satisfactory. But the case of *In re Petty*, 22 Kan. 477, was a well-considered case, and the court in an elaborate opinion sustains the position of petitioner, both as to the construction of the statute and as to the constitutional question. The court says that the statute cannot be held to speak of a judgment without jurisdiction for the reason that such judgment was a nullity. We have attempted to show that such judgments are not nullities, and, if we have succeeded, it follows that the reasoning of the court was from a wrong basis, and therefore without value. As to the constitutional question, the court was clearly in error as to the rule at common law; and, this being so, its reasoning, however elaborate, could have but little weight. Both of these questions have been decided adversely to the position of the Kansas case by the supreme court of the United States. In the

case of *Ex parte Watkins*, 3 Pet. 193, that distinguished jurist Chief Justice MARSHALL in an elaborate opinion decided both of these questions, and held that, in the absence of a statute authorizing it, the supreme court could not go behind a judgment of a court of general jurisdiction to inquire as to the fact of jurisdiction in that particular case; and as the *habeas corpus* provided for in the constitution of the United States was as much the common-law writ as ours is, this case must be held conclusive of the constitutional question; and as the learned judge decides therein that judgments without jurisdiction are not nullities, this case may well be said to be decisive of this entire question. From an examination of all the cases that we have been able to find we think our statute is constitutional, and that under it we are precluded from questioning a judgment of a court of general jurisdiction fair upon its face. This conclusion disposes of the application, and makes it unnecessary to decide the first question above stated; and, as such question will doubtless soon reach us in a case brought here on appeal, wherein it can be more deliberately briefed than it has been here, we think best not to decide it now. The order to show cause must be vacated, and the writ denied.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ., concur.

(2 Wash. St. 57)

SKAGIT RAILWAY & LUMBER CO. v. COLE.  
(*Supreme Court of Washington*. Feb. 10, 1891.)

CONTINUANCE—AMENDMENT OF PLEADING—BREACH OF CONTRACT—DAMAGES.

1. The trial of a cause began in the absence of defendant's principal counsel, with the expectation that he would arrive before any material progress had been made. During the trial, defendant asked for a continuance, on the ground of his absence, stating that grave apprehensions were entertained that he had been drowned, which was subsequently ascertained to be the fact. Plaintiff opposed the continuance on the ground that the absent counsel had refused to participate in the trial because plaintiff had counseled with him before the commencement of the action as to the matters in controversy therein. *Held*, that the refusal of the trial court to grant the continuance was not such an abuse of discretion as would justify a reversal of the judgment.

2. The refusal of the trial court to permit defendant to amend its answer so as to set up an entirely new defense is not such an abuse of discretion as will justify the reversal of the judgment, where the application was not made until after the close of plaintiff's testimony, and where the granting of the amendment would have necessitated a continuance to enable plaintiff to procure witnesses to meet the new defense.

3. Plaintiff entered into a contract with defendant under which plaintiff was licensed to cut timber on defendant's land at a specified rate of stumpage; defendant to furnish him with supplies during the continuance of the contract. *Held*, in an action by plaintiff for breach of contract to furnish supplies, that he was entitled to recover expenses incurred by him for repeated trips from his camp to defendant's store, made with a reasonable expectation to get the needed supplies, based on information furnished by defendant; and that plaintiff could not be confined to the expenses of his first trip, though that and all the subsequent ones resulted in a failure to procure the needed supplies.

4. An allegation in the complaint that plaintiff was prevented from carrying on his business by reason of defendant's failure to furnish the supplies is sufficient to render admissible proof that plaintiff had attempted to get supplies from other sources, and that he had failed in such attempts.

5. Where defendant knew, when it entered into the contract, that plaintiff was unable to obtain supplies elsewhere, and that its failure to furnish them would seriously embarrass him in the prosecution of his work, the measure of damages for defendant's failure to furnish the supplies, necessitating plaintiff to run a reduced crew, is the difference between that quantity of logs which he could have produced had defendant furnished all the necessary supplies and the amount of logs actually produced, less the cost of getting out the excess.

6. Where objectionable statements by counsel in the argument to the jury are made under a *bona fide* belief that they are permissible under the proof, the opposite party, to prevent their repetition or continuance, should call the court's attention to them by objection during the argument; and, where no objection is made until after the close of the argument, the opposite party must be content with an instruction to the jury to disregard such statements.

HORT, J., dissenting.

Appeal from superior court, Skagit county.

Action by H. D. Cole against the Skagit Railway & Lumber Company for breach of contract. From a judgment for plaintiff, defendant appeals.

J. C. Haines, for appellant. Ronald & Piles, for appellee.

SCOTT, J. This action was brought in the district court of the third judicial district of Washington territory, holding terms at Mt. Vernon, by the appellee against the appellant, to recover damages in the sum of \$7,575 for an alleged breach of a contract entered into between the appellant and appellee, by which the appellant let to the appellee, for certain terms of years mentioned in said contract, certain lands therein described, and, in consideration of the sum of \$1.50 per thousand feet stumpage, sold and gave him license to cut saw-logs, piles, and spars upon said lands during said time; and further agreed to furnish to said appellee at the reasonable market price all the provisions and logging supplies needed by him during the continuance of said contract. The appellee claimed that he entered upon the performance of his part of the contract, and employed a large number of men, purchased a large number of teams, and invested a large amount of money in camp equipage, tools, etc., and in every respect fulfilled all the conditions of the contract on his part; but that during the months of July and August, and the first part of September, 1888, the appellant refused to furnish him logging supplies and provisions, as provided in the contract, and that in consequence of such failure the appellee made 13 trips from his logging camp to the place of business of the appellant at an expense of \$195, for the purpose of procuring such supplies; but in consequence of the appellants' failure to furnish them these trips were made useless; and claimed further that during this period, in consequence of appellant's failure to furnish such supplies, the business of



the appellee was interrupted, and his teams compelled to remain idle, to his damage in the sum of \$450. The appellee claimed further that the appellant failed and refused to supply him with provisions and logging appliances, as provided in said contract, from the 12th day of September, 1888, for a period of six weeks continuously, and that in consequence of such failure the appellee was unable to carry on his business, and was compelled to shut down his camp and suspend his business for a period of six weeks, causing him loss and damage to the amount of \$2,000. He claimed further that on the 5th day of June, 1889, at the most advantageous time for logging, the appellant again refused to supply him with provisions and logging appliances as provided in the contract, and notified him it would no longer comply with the terms of its contract, and has ever since failed and refused to do so, and in consequence of such failure the men employed by the appellee abandoned their labors in the camp, and the appellee was unable to procure supplies or subsistence, or to maintain or operate his business to the extent of his ability, and, in place of 45,000 feet of saw-logs per day, which he had been putting into the market, was only able to put in 20,000 feet per day, causing him damage to the extent of \$3,000. The appellant joined issue with the appellee upon all the material allegations of the complaint except that of the making of the contract, and the allegation that in the month of June, 1889, it refused to furnish the appellee with supplies and so notified him. The appellant then pleaded in justification of its refusal to furnish supplies to the appellee in June, 1889, two affirmative defenses, setting up in the first defense breach of the contract by the appellee, and in the second defense breach of a subsequent contract entered into between them for the securing of certain acceptances to be made by the appellant of certain orders by the appellee. The appellee joined issues with the appellant upon these defenses. The case was called for trial at Mt. Vernon on December 9, 1889, in the superior court of Skagit county, which had convened December 2d. The trial occupied several days, and resulted in a verdict and judgment in favor of appellee for the sum of \$3,067.50.

The first ground of error claimed by appellant is that the superior court abused its discretion in refusing to grant a continuance of the cause. Appellant's motion for a continuance was made December 10th, while the trial was in progress, and was based upon the ground that one of its attorneys, Mr. Haller, was not present. Affidavits were filed in support of the motion showing that appellant had made every exertion to have Mr. Haller present; that a few days prior to the convening of said court he had left upon a hunting trip in company with two other gentlemen, none of whom had been definitely heard from for several days, but that it was rumored he, with the others, had been drowned, and the gravest apprehensions were entertained that said rumors were true; that Mr. Haller was the principal attorney for appellant in said matter, and

the one upon whom it relied to conduct its defense. (It was subsequently learned that Mr. Haller had, in fact, lost his life as reported.) Counter-affidavits were filed by appellee to the effect that Mr. Haller had said that he would not participate in the trial in consequence of a claim made by appellee that he had counseled with him previous to the commencement of said action as to the matters then in controversy therein; also that on said December 2d appellee notified Mr. Burke, of the firm of Burke & Haller, that said court was in session, and that he intended to have said cause called for trial. The first attorneys who appeared for appellant in the action were Cushing & Dunning, who filed a demurrer to the complaint September 20, 1889. Mr. Cushing was appellant's secretary. On November 23d following, Cushing & Dunning and Burke & Haller filed an answer in the case for appellant, a reply was filed by appellee, and the cause was at issue before the court convened. On December 5th appellant employed Hon. C. H. Hanford, Rochester, Lewis & Gilman, and E. C. Million as attorneys for it in said action, and on December 6th C. E. Patterson was also employed as one of its attorneys therein. It appears that the case was called several times during the first week of the session, and was passed at appellant's request, the last time on December 6th, upon a motion by appellant for a continuance to the first of the following week, which motion was granted, with the understanding that it would be the first civil cause called for trial. No exception was taken to this, appellant then expecting to have Mr. Haller present before said time had expired. It appears that appellant acted in entire good faith in the premises, and made great exertions to learn where Mr. Haller was, and also insisted upon its right to have him heard, if possible, as to the matters stated in appellee's affidavits relating to his intended participation in the trial. Upon Monday of the following week (December 9th) the case was called, and the parties proceeded to trial. No objection was made thereto by appellant, nor did it then apply for a further continuance. It now contends that it was understood when the trial was commenced that it would take several days within which to complete it, and that appellant expected Mr. Haller would arrive before any material progress had been made therein up to December 10th, when the rumors of his drowning became rife, and its said motion for a continuance was made.

The second ground of error alleged is in regard to the refusal of the court to permit the appellant to amend its answer, except in one instance on the condition that it pay the costs accrued, and in the other refusing it entirely. It appears that when the trial was commenced appellant asked and obtained leave to amend the answer in several minor matters. Two subsequent applications to amend were made by it. We are unable to gather from the record what the nature of the amendment was that was asked for in the first of the subsequent applications, but it appears to have been granted with the requirement

that appellant should first pay the costs accrued. Appellant refused to accede to the terms, and excepted to that part of the ruling imposing them. Its last motion to amend was founded on section 109 of the Code, and was made after appellee had rested his case. The amended answer itself, which was then tendered, is not to be found in the record; but it appears by the affidavits which were filed in support of the motion therefor that the purpose was to set up another defense, to the effect that appellant was prevented in the summer of 1888 from furnishing the supplies it had contracted to furnish appellee by reason of the extreme and unusual lowness of the water in the Skagit river during said time, so that the same could not be navigated, and that there was no other way of getting such supplies to appellant's store; that its attorneys who were engaged in the trial only knew of this matter a day or two before the commencement thereof; and that they had supposed up to the time of entering upon the defense that the court would permit the proof under the general denial pleaded. Appellee filed affidavits denying any cessation in the navigation of said river during said time, and claimed he could prove that the same was navigable throughout said season, but that in order for him to do so it would be necessary to have the cause continued so that he could procure the attendance or testimony of witnesses from a distance, and that it would be a great hardship to him if the amendment should be permitted. The court, in considering the motion, said if it was granted it would necessitate a continuance; that appellant had had an opportunity to amend under terms and refused to do so, and he would deny the motion; to which appellant excepted.

All of the foregoing alleged errors are in relation to matters which are addressed to the discretion of courts of original jurisdiction, and in some of the states and in the United States courts are regarded as so peculiarly fit for the decision of such courts only that the granting or refusing thereof constitutes no ground for an appeal. *Wright v. Hollingsworth*, 1 Pet. 168; *Henry v. Cannon*, 86 N. C. 24; *Westfield v. Westfield*, 19 S. C. 85. Another practice obtains in many of the states, however, and which we think is the better one, of holding them appealable in so far as to correct an abuse of such discretion. But such abuse must be clearly apparent before an appellate court would be justified in reversing a judgment upon such grounds. Considering all the circumstances connected therewith in this case, we cannot say that the action of the lower court in the premises was erroneous or unreasonable.

Another ground of error complained of is as to the allowance of testimony and recovery of damages for the several trips made by appellee from his logging camp to appellant's store for the purpose of procuring supplies, which trips, he claimed, resulted in failures. Appellant contends that damages could not be recovered for more than one of said trips. Appellee testified that the reason he did not get the supplies upon such occasions was because

appellant did not have the goods on hand, but informed him the same were constantly expected, and requested him to come at stated times therefor, and that appellant was disappointed from time to time in getting the expected shipment; that upon some of said trips he got a small portion of the supplies he went after, but that he did not get what he needed, and it was claimed such trips were practically failures. Numerous special findings were made by the jury, from which it appears that but two trips were made upon which no supplies were obtained. The jury allowed damages for eight trips in the sum of \$90, as follows: For two, \$15 each, and for six, \$10 each. No allowance was made for the others claimed to have been made. There having been testimony to show that the trips were made with a reasonable expectation of getting the supplies needed, based upon the information furnished by the appellant, it follows that the fault, if fault there was, cannot be held to have been that of the appellee, and there was no error in this respect.

A further point is urged, that the court erred in permitting appellee to introduce testimony as to his inability to procure the needed supplies elsewhere, on the ground that it was inadmissible under the complaint, it not having been alleged therein that appellee attempted to get such supplies from other sources, and that the only allegation in relation thereto was that he could not procure and pay for the supplies elsewhere. Appellant contends the statement that appellee could not procure and pay for the supplies elsewhere cannot be treated as an allegation that he could not procure them, and this of course is true; but the complaint does allege that the appellee was prevented from carrying on his business by reason of the appellant's failure to furnish the supplies it had contracted to furnish him. While the complaint is somewhat faulty in this particular, it seems to us the appellant was apprised by it that proof of this character was to be offered, and that it did not result in any surprise or injury. It may be fairly understood from the statement—that the appellee was thereby prevented from carrying on his business—that he attempted to procure the supplies from other parties and failed to get them, as that would be the ordinary way of proving such an allegation; and we do not think there was any substantial error here.

Appellant's main contention, however, is as to the damages, if any, appellee was entitled to recover, and this is the most important question in the case. The appellee claimed he should be allowed to recover as damages the value of the logs he could have put in the market during the time after September 12, 1888, when he was compelled to shut down in consequence of appellant's failure to furnish the supplies, less the cost of getting out and handling such logs, and also the value of the logs he could have put in the market in July and August and the first part of September, 1888, and after June 5, 1889, with the full force which he could have operated during said times had the sup-

plies been furnished as contracted, over and above what he did put in with the diminished force, less the cost of getting out and handling such excess. Appellant contends that such damages or profits were too remote, conjectural, and uncertain to be estimated; that the same depended upon the continuing ability of the men and teams engaged to perform the same amount of labor; that the weather should remain the same and the market price unchanged; that such damages could be allowed, if at all, only in those cases where there was a stipulation in the contract that the other party should take the proceeds of such labor for a price certain, or where the disposition thereof was provided for by a collateral contract of which the other party had knowledge at the time of entering into the original contract, or where the thing contracted for was to be furnished for a particular purpose, and so understood; and that in the present case the measure of damages could only be the increased price and extra expense, if any, in procuring the supplies in the market; that the contract provided for nothing more, and that nothing else could be held to have been within the contemplation of the parties. The appellee claimed he had a right to show the known situation of the parties at the time of contracting; the object they had in entering therein; that he was unable to get such supplies from any other source, and that appellant knew thereof when contracting with him. Appellant objected to such testimony upon the grounds that there was no allegation in the complaint that appellant knew appellee could not procure the supplies elsewhere; that the contract itself was the best evidence of what the parties contemplated; and for the reason that it was immaterial. The court allowed the testimony, from which it appeared that appellant was engaged in the mercantile business on the Skagit river; that it was carrying an extensive stock of merchandise, and owned large areas of timber lands bordering on said river; that a part of its business was to make money out of its timber, and from its store in furnishing supplies to persons engaged in cutting and hauling timber, and to this end appellant sought to create a market and a demand for its timber and the merchandise; that appellee was an experienced logger, and made logging his business, but that he was financially unable to undertake logging on an extensive scale, and would have to be carried in an undertaking like the present one; that this was known and contemplated by both parties in entering into the contract. The contract itself provided that the supplies should be furnished upon credit, and that appellant should have a preference lien on all the logs and timber cut to secure it for the amounts that should be due for stumpage and supplies, and it bound the appellee to purchase all of his supplies from the appellant during the continuance of the contract, and provided that such indebtedness should be paid out of the proceeds of such logs and timber by the purchasers at the time of purchase. An *addendum* to the contract

provided that after appellee should pay all indebtedness to appellant, and wished to purchase goods for cash, appellant would sell him goods for cash as cheaply as he could purchase elsewhere, and, in case appellant refused to do so, appellee should then be at liberty to purchase in the open market. There was testimony to show that the logs and timber had a general market value, and what that value was; also the number of feet appellee actually got out, and the proportionate additional amount he could have gotten out during the times provided for in the contract had he been furnished with the necessary supplies as agreed upon; and testimony as to the cost of getting out and hauling the logs, and the amount of profit that would have been realized thereon. One of the instructions given by the court to the jury upon the subject of damages was substantially as follows, (one paragraph relating to damage claimed by reason of a forced sale of cattle, upon which no point is made, being omitted:.) "In this case, that you may arrive at a just verdict, you will consider from the evidence the situation of the parties at the time they entered into the contract as known to each other, and the object they had in entering into the same as made known one to the other, and if you find from a fair preponderance of the testimony that the defendant knew at the time it entered into the contract with the plaintiff that the plaintiff was unable to carry out the terms of his contract unless defendant would supply him the provisions and supplies needed by the plaintiff mentioned in the contract, and, so knowing, it allowed plaintiff to enter upon the land mentioned in the contract, and to construct thereon extensive logging roads and other improvements, to purchase teams, tools, etc., necessary to successfully carry on said logging business, and that plaintiff did actually construct or cause to be constructed extensive logging roads upon said premises, and purchased teams, tools, etc., for said purpose, and that the parties to said contract entered into said contract for the purpose of making profits, and after plaintiff had expended considerable means in preparing and constructing logging roads, and placed the premises in good condition to be successfully and profitably logged, the defendant, without any legal excuse or justification, committed a breach of the contract by refusing to supply plaintiff with reasonable and necessary supplies to carry on said business, and that plaintiff was prevented thereby from continuing his business, or that his business was run in a reduced state, so that he was prevented from producing the same quantity of logs that he had under the same circumstances produced immediately prior to the time the defendant refused to furnish the supplies. If you find it did refuse so to do, without any legal excuse or justification,—then I instruct you that the measure of damages in this case is the value, at plaintiff's camp in Skagit county, of that quantity of logs which represents the difference between what plaintiff would have produced had the defendant furnished all necessary sup-

plies as alleged and claimed by the plaintiff and the amount of logs actually produced by said plaintiff, besides such special damage, if any, plaintiff sustained by reason of certain alleged trips he made for supplies. The jury will estimate the number of days, if any, which plaintiff's camp was shut down by reason of the alleged failure of the defendant to comply with the contract during 1888, and, having so estimated this time, the jury will estimate the value at plaintiff's camp at said time of such quantity of logs, if any, which the plaintiff would have produced at plaintiff's landing during the time that plaintiff was so compelled to shut down; and if you find that plaintiff was compelled by reason of the alleged breach of contract by the defendant to operate and run his camp, during any time in 1889, upon a reduced or diminished scale from that which he would have operated and run the same had such alleged breach not occurred, the jury will then estimate the time during which the camp was operated by the plaintiff upon said reduced scale. And I charge you that, if you find by a preponderance of the evidence that the plaintiff has been damaged at this last-mentioned time by reason of the alleged breach of contract on the part of defendant, that you will arrive at the measure of damages as follows: Having found the time he was compelled to operate said camp on a diminished scale, you will then find the quantity of logs, if any, which plaintiff would have produced at his landing had said alleged default in said contract not occurred, and from this quantity so ascertained by you you will deduct the quantity of logs actually produced at said place by defendant during the time he was so compelled to operate upon said reduced scale, and the value at the plaintiff's landing in said county of the difference between these two quantities thus ascertained will be the measure of damages which the plaintiff sustained by reason of said breach of said contract, if any he did sustain."

In addition to its other objections as to the measure of damages, appellant argues that this instruction was erroneous upon two other grounds: *First*, that it, in effect, allowed appellee to recover pay twice for his time in making the futile trips for supplies; in also allowing him pay for what he could have done in the way of getting out logs during said time had the supplies been furnished and the trips not have been made; *second*, that the jury was not instructed to deduct the cost of producing the excess which it was claimed could have been gotten out but for the fault of appellant, from the value of such excess. As appellant did not assign the first point as error in its brief, but only called attention to it in the oral argument, and as we are not entirely satisfied from what we have been able to gather from the record that the output of logs would have been necessarily diminished by the absence of the person and team engaged in making the trips, we will not disturb the verdict in the premises. The second point is disposed of by

another instruction, where the court told the jury that the cost of getting out the excess should be deducted, and by the fact that the jury did deduct the cost thereof from the value of such logs, as appears by their special findings.

As to the inadmissibility of the evidence objected to under the pleadings, while the complaint did not contain a direct allegation that appellant knew the appellee was unable to procure supplies elsewhere, it did contain the following statement: "That, at the time of purchasing said timber from the said defendant as aforesaid, plaintiff, for want of sufficient means, was unable to employ and pay a requisite number of men and to purchase the extra number of teams and tools necessary for plaintiff to have to enter upon said described premises and to make logging roads thereon so as to transport said timber to market, and to purchase a sufficient supply of goods, wares, and merchandise to enable plaintiff to carry on so extensive a logging business and remove said timber from said described premises during the limited period aforesaid; and in order to induce the said plaintiff to purchase said timber from the said defendant, and to induce the said plaintiff to remove the said timber from the said premises aforesaid within the respective periods of time aforesaid, and in consideration of the said plaintiff's purchasing said timber and agreeing to remove the same within the time aforesaid, the said defendant then and there contracted and agreed to and with the said plaintiff to furnish plaintiff with the means with which to employ and pay men, purchase teams, tools, etc., to properly conduct and carry on said business, and to sell, furnish, and deliver to said plaintiff all the provisions and logging supplies needed by said plaintiff upon credit." There was testimony also to show that the parties had transacted business with each other before entering into this contract, and appellant's vice-president testified that at the time the contract was made appellant knew Cole had no money, and that it would have to back him in the enterprise, and knew he could not get along without such assistance. From all the circumstances connected with this matter we are satisfied appellant did not sustain any injury therein.

As to the basis upon which appellee was entitled to recover damages, a long list of authorities was presented by each party, which it is difficult, if not impossible, to harmonize. The position taken by appellee and sanctioned by the superior court is sustained by a number of cases very similar to this one. If the appellant, when it entered into this contract, knew that the appellee was unable to obtain these supplies elsewhere, and that he could not carry on the undertaking without its assistance, and knew when it ceased furnishing the same that the result would be to compel appellee to abandon the enterprise, or seriously to embarrass him in the further execution thereof, it must be held to have contemplated the direct and presumable results of its own wrongful act,

and to be answerable in damages therefor. Nor do we think the damages too uncertain or conjectural to be estimated, within the trend of the better authorities. The trees were there from which the logs, spars, and piles could be manufactured; and, at the time of the breaches, there was the benefit of past experience—the known results of previous efforts in carrying on the work—from which to form an estimate of what could have been done thereafter had the supplies been furnished. The timber itself when gotten out was a staple commodity, with a market value not subject to any sudden or great fluctuation, and this value was easily susceptible of proof. Indeed, some of the cases go to a much greater extent than it is necessary to go in this case to sustain the rule of damages adopted at the trial. Of the authorities presented upon the question of damages we cite the following as supporting this case: *Shepard v. Gas-Light Co.*, 15 Wis. 349; *Booth v. Rolling-Mill Co.*, 60 N. Y. 487; *Richardson v. Chynoweth*, 26 Wis. 656; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. Rep. 1129; *Crescent Manu'g Co. v. N. O. Nelson Manu'g Co.*, 100 Mo. 325, 13 S. W. Rep. 503; *Houser v. Pearce*, 13 Kan. 104; *Benj. Sales*, § 870; 1 *Suth. Dam.* pp. 75, 90, 91, 106–116.

A further error is claimed, that counsel for appellee prejudiced the jury against appellant by repeatedly applying harsh and opprobrious epithets to it in his closing argument, which abusive language it is claimed was in no wise warranted by the evidence. It seems that no objection was made thereto at the immediate time, but at the close of the argument appellant excepted to the court's permitting said statements to be made, whereupon the court immediately said to the jury that the language was uncalled for, and should under no circumstances affect them or the case, and subsequently reiterated the same in his instructions. Appellant urges that it is the court's duty to supervise the making of an argument, and that it should in this case of its own motion have prevented counsel from repeating the statements complained of, without an objection by appellant; that it is not the correct practice for counsel to interrupt another at such a time. Appellee insists that all he did say was fully justified and called for by the testimony, notwithstanding the court's remarks to the contrary to the jury, and, if it was not, that it was waived by a failure to object at the time. In the view we take of the matter it is not necessary to set forth the statements or to examine the evidence to see whether the same were excusable. Some latitude must be allowed counsel in arguing to the jury. However, the court should without an objection prevent counsel from clearly transgressing all reasonable limits therein; yet, as here, where the statements were made under an apparent *bona fide* belief that they were permissible under the proof, if appellant desired to prevent a repetition or continuation thereof it should at least once have called the court's attention thereto by an objection during the argument, otherwise it must be con-

tent with the action of the court, when the objection was made, in its doing all it could to prevent the language from having an adverse effect to appellant upon the jury. Judgment affirmed.

ANDERS, C.J., and DUNBAR and STILES, JJ., concur.

HOYT, J., (*dissenting*.) I am unable to agree with the conclusions of the majority of the court as to most of the questions presented by this record; but, as no good purpose would be subserved by an extended discussion of the reasons which control my judgment, I shall content myself with a brief review of two of the many points presented.

*First.* As to the ruling on defendant's motion for a continuance. On the 10th day of December, 1889, defendant filed the affidavit of its secretary, substantially as follows: "Eugene B. Cushing, being first duly sworn, deposes and says that he is the secretary of the defendant corporation, and, as such officer, is familiar with the business of said corporation; that at the time of the bringing of the above entitled action he retained G. Morris Haller to defend said corporation, with the understanding that he was to have the sole and exclusive conduct and management of this suit, and was to prepare all the pleadings, investigate the testimony, and in every way to prepare the defense to said suit; that upon the settlement of the pleadings plaintiff's counsel objected to the appearance of Mr. Haller in this case on the ground that he had expressed some opinion with relation to some paper or document involved in this suit; that upon a full consultation between Mr. Haller and Judge Burke, his partner, and this affiant, it was decided that there was nothing whatever that could or should in any way prevent Mr. Haller from continuing in the case for the defense, and he then and there promised this affiant that he would do so; and since that time, to-wit, about the 10th of November last, affiant again saw Mr. Haller, and told him that if there was any doubt about his being able to try this case to be sure to let affiant know so that he could secure other counsel; and that then and there Mr. Haller assured affiant that he need have no anxiety about the matter, for he should attend promptly to the case, and in every way care for the interests of the defendant corporation, and would duly notify affiant when the case would be ready for trial, so as to enable him to have his testimony ready and the defendant's witnesses all present; that, relying upon these promises of Mr. Haller, affiant took no further steps in this matter, and that the first notice that this affiant had that the case was ready or would be called for trial at this term of this court was a telegram which he received from Mr. V. A. Marshall on last Thursday night, December 5, 1889, announcing that this case was set for trial, and that Mr. Haller was not present; that thereupon affiant telegraphed Mr. Haller to know if he was attending to the case, and received an answer from Judge Thomas Burke, his partner, that he was absent from home, and

he could not state where he was or when he would return; that thereupon affiant telegraphed Judge Burke that the defendant was taken wholly and completely by surprise, and was in no manner prepared for trial, and asked him to telegraph the court at Mt. Vernon explaining the facts, and to ask a continuance until such time as the defendant could get ready and proceed to trial with safety; that thereafter affiant received a telegram from V. A. Marshall on the night of Saturday, December 7, 1889, saying that the court would not grant a continuance, and for affiant to come to Mt. Vernon immediately; that thereupon affiant took the first possible conveyance, and arrived at Mt. Vernon Monday afternoon, December 9, 1889, after the trial of this case had commenced; that affiant is credibly informed that Morris G. Haller, aforesaid, started upon a hunting trip about two weeks ago with the avowed intention of returning in a few days, and of being present at this term of the court to attend to such cases as he was counsel in, and affiant is further credibly informed that the friends of Mr. Haller are now greatly alarmed about his safety, and express great fears that he may have lost his life, as his long absence and continued silence are so much at variance with his expressed determination to return in a few days. Affiant further states that defendant has made no preparation whatever for the trial of this cause, having relied wholly upon Mr. Haller to inform it when to take the necessary steps, which information it has never received; and affiant states that to be compelled to continue the trial of this cause at the present time would be unjust and oppressive, and work irreparable injury and hardships to defendant. Affiant further states that defendant should be given a reasonable time in which to acquaint counsel with the facts in this case, which involves a long period of time, to-wit, about four years, and the investigation of long and complicated accounts, and involving a very large sum of money, to-wit, more than fifteen thousand dollars. And affiant further states that, at the time he retained the said G. Morris Haller, he, the said affiant, made a full, true, and complete statement of the facts constituting the defense in this action, and that then and there his said counsel advised him that said defendant corporation has a full and complete defense to said action, all of which said affiant did then and does now verily believe to be true. And affiant states that the defendant has in no manner been negligent in this behalf, but has used every effort and diligence to be prepared for the trial of this case when it should be called for trial." This affidavit was corroborated by several other affidavits, and was absolutely uncontradicted, for though in the affidavits filed in opposition to the motion certain statements of said Haller and of his partner were set out, yet there was absolutely no proof that the intentions of said Haller or Burke, as stated by them, had ever been in any way communicated to any of the officers or agents of said defendant. After examining all of the affidavits filed I have

been unable to find that there was any substantial dispute as to the facts stated in the affidavit above set forth. This affidavit was supported by those of all the attorneys of said defendant present at the trial, to the effect that they were not prepared to try the case, and that the rights of the defendant could only be protected by a continuance of the cause. In addition to the above it appeared, before the question of continuance was finally disposed of, that the said Haller had been drowned on or about December 2d. On this showing I think that the motion for continuance should have been granted. The object of the law and of the institution of courts is that there may be a fair trial and a right determination of all alleged causes of action, and whenever this court is satisfied that, by the action of the lower court, a party has been deprived of the opportunity to fairly present his cause, it should order a new trial. I think the facts proved upon such motion for continuance show that without it the cause could not be fairly tried, and that therefore there should be a new trial.

*Second.* As to the rule of damages authorized by the contract as applied to the facts proven upon the trial. The conditions of the contract which bear upon this question are vague and indefinite, and it might well be held thereunder that no breach could be assigned thereon. There was an absolute want of the usual conditions of exactness and certainty. The agreement simply provided on the one part that supplies should be furnished, and on the other part that they should be accepted and paid for, but as to the amount of such supplies, or the time when or place where they should be thus furnished and accepted, the contract was entirely silent. If these conditions could be enforced at all they must be mutual. Now, suppose the plaintiff had made up his mind not to take the supplies of the defendant, and the defendant had decided to bring an action to compel such taking or to recover damages, could it maintain such action? If it could not, then it must follow that the plaintiff could not successfully allege a breach of such conditions. It is not necessary for the purposes of this discussion that I should come to a conclusion as to the above inquiry, as from my interpretation of the contract the measure of damages adopted by the lower court was wrong, even if the contract was held to be sufficiently certain to support an action for the breach thereof. There was nothing in the contract or in the proof at the trial to show that any of the supplies contemplated by the contract could not be obtained in the open market, and therefore the general rule as to damages would be the difference between the contract price and the price in the open market; and, there being in this case no contract price other than the market price, there could be no damage. It is claimed, however, that the contract, when viewed in the light of the circumstances surrounding the parties at the time it was entered into, as disclosed by the proof, shows that the parties clearly contemplated

other than the usual responsibility in regard to such furnishing of supplies by the defendant. I am unable to see that this claim has any foundation, as the plain conditions of the contract show that the agreement to furnish and take the supplies in question was mutual, and that the defendant was as much moved to enter into the contract by the agreement of the plaintiff to get his supplies of it as the plaintiff was by its agreement to furnish the same. But if it is conceded that said contract was all that the plaintiff claimed, and that thereunder the defendant became an absolute warrantor that such supplies would be furnished as stated therein, yet the measure of damages adopted seems to me to be wrong. The defendant had no control over the magnitude of the operations of the plaintiff, and had not contracted to supply any particular grade or kind of camp; and the simple fact that the plaintiff had established his enterprise upon a particular scale would no more compel the defendant to supply that particular scale than any other; and if the rule of damages laid down in this case is sustained, the plaintiff could have doubled the amount of his recovery by having instituted his enterprise on a scale as large again as he did. If the defendant was liable for the loss of prospective profits growing out of the reduction of his force from 40 to 20 men, he would have been likewise liable if the force had been reduced from 80 to 10 men. It seems to me impossible that the parties could have contemplated such a construction of the contract that the damages for a breach thereof could thus be increased or decreased at the will of one party without the act or consent of the other. I shall not attempt to review the cases cited by the majority of the court more than to say that I have carefully examined them all, and I do not think any of them sustain the doctrine approved in this case. If the contract as to supplies was enforceable at all, the highest measure of damages that could be sustained, upon any theory of the case, would be the actual loss suffered by reason of a breach thereof; and of this actual loss prospective profits could form no part. Such actual loss would, in ordinary cases, be the difference between what the supplies were to be furnished at and what it cost to procure them elsewhere. But if it appeared that it was known to the parties that it would be impossible for the plaintiff to get the supplies elsewhere by reason of want of money or credit, and in the light of such knowledge the defendant supplied plaintiff and allowed him to incur large expense by way of making roads, etc., in anticipation of getting in logs under the contract, and then, knowing these facts, refused to supply him longer, defendant should, for such refusal, be held liable to plaintiff for the money thus expended by him in the prosecution of the enterprise, less any sums he had received on account thereof. Even if the rule of damages approved by the majority of the court is correct upon the facts found it could not avail plaintiff, for the reason that the complaint is insufficient to author-

ize the introduction of proof as to the knowledge of defendant of the condition of plaintiff. In my opinion the judgment should be reversed, and a new trial ordered.

(2 Wash. St. 112)

FRONT ST. CABLE RY. CO. v. JOHNSON *et al.*  
(Supreme Court of Washington. Feb. 11, 1891.)

LABORERS' LIENS—STREET RAILWAYS.

Under Code Wash. c. 138, § 1957, giving a laborers' lien upon a "railroad" or "any other structure," and the land upon which it is erected, laborers cannot have a lien upon a street cable railway, since there can be no lien upon the land, the fee of the street being in the city.

Appeal from superior court, King county.

Struve, Haines & McMicken and James Kiefer, for appellant. McGilvra, Blaine & Devries, for appellees.

STILES, J. The decree from which this appeal was taken established that the appellees were entitled to the foreclosure of their numerous liens upon the cable railway of the appellant on Front and other streets, in the city of Seattle, and the power-house connected with the railway, and the machinery connected with the power-house, and ordered the sale of the same or so much thereof as might be necessary to raise the amount due the appellees. The liens thus adjudicated had been filed against the railway, etc., for labor performed at the instance of a subcontractor in connection with the construction of the concrete road-bed laid in the streets for the reception of the rails. Numerous questions growing out of the lien statutes of this state were pertinently raised by the record, but underlying all the others is that as to whether a lien can be maintained upon a street railway under chapter 138 of the Code. With this point resolved in the affirmative, we should be required to review the case further; but if it is decided in the negative, the judgment establishing the lien and ordering a sale must be reversed. Section 1957 specifies the structures upon which an unpaid laborer may have a lien. One of these is a "railroad;" another is, "any other structure." The lien is given upon the structure, and the land upon which it is erected, and, unless there can be a lien upon the land, there can be none upon the structure. This position was taken in the case of Kellogg v. Manufacturing Co., ante, 461, (decided at the last session of this court.) Therefore, to authorize a lien in the case of a street railway, it would be necessary that the person who caused the railway to be constructed have some estate in the land over which it was laid. This it could not have, as the fee of the streets of Seattle is in the city for the public use, the general public having the easement of use, and the municipal authorities having power to grant only a license to street-railway builders to occupy and use, as a part of the public easement, such portions of the streets as is necessary to the operation of their cars. Acts 1885-86, p. 244. The street railway company owns the structure laid by it on the highway, and a franchise to collect fares. Pierce, R. R.



252. The license of the street-railway company is not a distinct easement. *Attorney General v. Railroad Co.*, 125 Mass. 515. And it creates no additional burden upon the land for which abutting owners are entitled to compensation, unless there are special reasons therefor. *Elliott, Roads & S.* 558; *Mills, Em. Dom.* § 205; *Lewis, Em. Dom.* § 124; *Ror. R. R.* 1425. Being unable to find, therefore, that a street railway is such a "structure" as the statute contemplates, the conclusion follows that the right of the lien does not exist. We deem it to be a clear proposition, also, that these "railways" are not "railroads," according to the usual and ordinary meaning of the word, to which reference must be had for the interpretation of a statute. The difference between these two valuable instruments of public convenience was clearly pointed out in the earlier days of street railways, in a contest for the possession of some of the streets of the city of Louisville, Ky., between a railroad company and a street-railway company. The case reported is that of Louisville, etc., *R. Co. v. Louisville City Ry. Co.*, 2 Duv. 175. The legislature of Kentucky, in 1860, in furtherance of a certain railroad enterprise in which the state had an interest, enacted that "no other railroad" should be constructed in certain streets in the city of Louisville. Later, a street-railway company was organized, and, under license from the city of Louisville, commenced to lay its tracks on some of the streets mentioned in the act of 1860. The railroad company sought to enjoin the new company, on the ground that its rights under the act of 1860 were being violated. This brought up the question whether the street railways proposed to be built were "railroads," within the meaning of the statute, and the Kentucky court of appeals, holding them not to be, refused the injunction. In its decision the court said: "A 'railroad' and a 'street railroad' or 'way' are, in both their technical and popular import, as distinct and different things as a 'road' and a 'street,' or as a 'bridge' and a 'railroad bridge.'"  
 • • • A street railway is not, in either the popular or legislative sense, a railroad." This case is cited with apparent approval in 2 *Ror. R. R.* p. 1422, and in *Elliott, Roads & S.* p. 558, and we agree with the views there expressed. For these reasons the decree must be reversed as to the appellant, and the cause as against it dismissed. And it is so ordered. Costs to appellant.

ANDERS, C. J., concurs.

DUNBAR, J., concurs in the result.

HOYT, J., did not sit at the hearing of this cause, he being disqualified.

SCOTT, J., (dissenting.) I concur in the result as to all the appellees excepting Brown and Johnson, on the ground that except as to these two there was no proof by the lienors that their claims had not been paid. I think that in a case like this, where the claimants had contracted and dealt with another than the owner of the property in relation to the matters out of

which their claims arose, the burden of proof was upon them to show that the respective sums claimed were still due and owing them, as these were matters as to which the owner might and probably would have no knowledge, and that such circumstances are sufficient to take it out of the general rule in relation to the proof of payments. While payment is usually an affirmative defense, yet, where the property of a third person is attempted to be taken by operation of law to satisfy a claim against another party, the plaintiff should prove all facts necessary to entitle him to the relief prayed for. Lien claimants are required to swear that the amount claimed is justly due in order to obtain a lien, and they should also be required to prove their claim at the trial in cases like this. I can see no reason why a lien cannot be had and enforced on a street railway, including such franchise or right of way as may be connected therewith in the use of the street itself, under chapter 138 of the Code, without any strained construction or interpretation of its provisions; and the case of *Kellogg v. Manufacturing Co.*, ante, 461, cited, does not conflict therewith. The company certainly had the right to operate its road on the streets where it was laid. It would not be contended that a lien cannot be had on a building erected by a lessee on leased land, together with the right of the lessee in the land itself, in so far as the same should be necessary to the use of the building, where the lessee had the right to erect and use the building, and there is little difference in principle between such a case and this one. As to Brown and Johnson, I think the judgment should have been affirmed.

(2 Wash. St. 124)

#### STOWE v. STATE.

(*Supreme Court of Washington.* Feb., 1891.)  
 COSTS IN CRIMINAL CASES—LIABILITIES OF COUNTIES—CRIMINAL CASES—STENOGRAPHERS' FEES.

1. Const. Wash. art. 1, § 23, which provides that in no instance shall a defendant in a criminal case, "before final judgment," be compelled to advance money or fees to secure his rights, has reference to the judgment of the trial court, and not to the judgment of the supreme court on appeal; and hence one convicted of a crime cannot compel the county commissioners to pay the stenographer's fees for the purpose of enabling him to perfect his appeal to the supreme court.

2. Under Code Wash. § 2673, which requires the board of county commissioners to allow all accounts legally chargeable against such county not otherwise provided for, and which intrusts them with the management of the county funds, the county commissioners cannot be compelled, for the benefit of defendant in a criminal case, to pay for a copy of the stenographer's report of the trial.

Appeal from superior court, Pierce county.

*Frank L. Kuhn* and *A. R. Hellig*, for appellant. *W. H. Snell*, Pros. Atty., for the State.

DUNBAR, J. The defendant, upon the information of the prosecuting attorney of Pierce county, was tried for the murder of Enoch Crosby, and on April 25, 1890, found guilty of murder in the second degree. On

May 17, 1890, he presented his motion for new trial, based upon errors of the court, newly discovered evidence, and that the verdict was contrary to law and the evidence, which motion was overruled, and defendant, on same day, sentenced to imprisonment in the state penitentiary for 20 years. On June 11, 1890, his attorneys gave notice, in open court, of appeal to the supreme court of the state, which was duly entered upon the journal. Defendant's attorneys on the same day served the prosecuting attorney with notice that on June 23, 1890, they would appear before the judge that had tried the case, for the purpose of settling a statement of facts to be transmitted with the transcript of the cause to the supreme court. On the 16th day of June, 1890, defendant's attorneys presented and filed his petition setting forth that in order to prosecute his appeal it was necessary to make a transcript of the testimony, rulings, and charge of the court given at the trial a part of the statement of facts; that these were taken in shorthand by the official reporter of said court, and no long-hand transcript had been made thereof; that the reporter refused, on demand, to furnish a long-hand transcript thereof unless he was paid the sum of \$100 in advance as part of his fees for making such transcript; that defendant had no means whatever, and could not procure the money to pay said sum; and praying the court to make an order directing the county commissioners of Pierce county to pay or advance said sum in payment of said fees. But the court, on the 16th of June, 1890, entered an order denying the prayer of the defendant, and refused to grant him the relief prayed for; to which order defendant on same day excepted, and exception was allowed. From this order defendant appealed, and gave notice of appeal in open court, June 23, 1890.

Appellant bases his claim upon section 22, art. 1, of the constitution of Washington, which reads as follows: "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to testify in his own behalf; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his own behalf; to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; and the right to appeal in all cases; and in no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein granted;" and argues that the "final judgment," mentioned in said section, means the final judgment of the supreme court instead of the trial court.

We do not think this position tenable. By an inspection of the section cited it will be seen that all the rights and privileges guaranteed to the defendant are rights and privileges necessarily antecedent to the judgment in the trial court; and although the right to appeal in all cases is guaranteed, construing all the provisions of the section together, it is clear

that the qualification, "before final judgment," refers to the final judgment in the trial court, and that the interjection of the words, "and the right to appeal in all cases," is simply an announcement in the declaration of rights of the right of appeal. Again, as is forcibly argued by the prosecuting attorney, if the words, "final judgment," mean that judgment from which there is no appeal, the expression is meaningless; for after that judgment there is nothing more to be done for which fees or money could be demanded; and that in order to give force to the language at all, it must be construed to mean the final judgment of the trial court.

We do not think the county commissioners could, by virtue of section 2673<sup>1</sup> of the Code, or by any other provision of the law, be compelled to pay for a copy of a stenographer's report of a trial for the benefit of the defendant. There is no law compelling the state or county to employ a stenographer at all. Sometimes they are employed by the state, sometimes by the defense, and frequently criminal cases are tried without a stenographer; but, whenever one is employed, his services belong exclusively to his employer. If such a claim as this were allowed it would be difficult to limit the demands of defendants in criminal actions on the county treasury. We think there was no error in refusing to grant the relief prayed for in the petition. The judgment of the court below is affirmed.

HOYT, SCOTT, and STILES, JJ., concur.

(20 Or. 328)

FLEISCHNER *et al.* v. KUBLI *et al.*

(Supreme Court of Oregon. Jan. 21, 1891.)

ACCOUNT STATED—ITEMS—REASONABLE TIME—INSTRUCTION.

1. An account stated can only be opened for fraud, error, or mistake; and the fraud, error, or mistake relied upon must be set forth in the answer.

2. An account rendered, which has at the end the usual initials "E. & O. E.," will become a stated account if not objected to within a reasonable time, with like effect, in every respect, as if it did not contain those initials.

3. An account rendered, which begins on the debit side to balance, without giving the items which constituted such balance, when accounts are rendered annually between the parties, and such balance is brought forward from last year's balances, will become a stated account if not objected to within a reasonable time.

4. What is a reasonable time, when the facts are undisputed, is a question of law.

5. In an action upon an account stated, when it appears that the same had been rendered and forwarded by mail by the creditor to the debtor, residing in the same state, about six months before any objections were made thereto, it is the duty of the court to instruct the jury, if requested, that said account became a stated account.

(Syllabus by the Court.)

Appeal from circuit court, Jackson county; L. R. WEBSTER, Judge.

<sup>1</sup> This section provides, *inter alia*, that these several boards of county commissioners are authorized and required (5) to allow all accounts legally chargeable against such county not otherwise provided for; (6) to have the care of the county property and the management of the county funds.

This is an action to recover the sum of \$971.18 on an account stated. The defendants had judgment in the court below, and the plaintiffs have appealed. The testimony tended to show that plaintiffs were wholesale merchants, doing business in Portland, Or., and the defendants retail merchants, doing business as partners in Jackson county, Or. That dealings between the parties covered a period of seven or eight years. That during that time the plaintiffs furnished the defendants with several statements of account. The first was dated June 1, 1883, and showed a balance of \$2,148.69 in favor of the plaintiffs; the second was dated December 26, 1885, and showed a balance in favor of the plaintiffs of \$3,483.66; the third was dated December 20, 1886, and showed a balance in favor of the plaintiffs for \$3,693.16; the fourth, dated December 20, 1887, and showed a balance of \$1,606.01 in favor of the plaintiffs; the fifth, dated February 10, 1888, and showed a balance of \$971.78 in plaintiffs' favor. Statement No. 2 contained an item of interest of \$420.80; No. 3, an item of interest of \$251.74; No. 4, an item of interest of \$240.60. At the end of each statement were the letters "E. & O. E." The only objections which defendants ever made to any of these statements prior to August 27, 1888, are in the following letters addressed by the defendants to plaintiffs: "Applegate, Feb'y 7, 1888. Mess. Fleischner, Mayer & Co., Portland, Oregon—Gents: Would you kindly send us statement in full of all our dealings in order to make a settlement. Also please explain why your statements do not show a credit to us of \$3.75 error on mdse. invoice, June 23d, '83. Also why our a/c is charged with cash, Nov. 23, '83, (\$58.74.) Our books show no such item. Respectfully, KUBIL & BOLT." The corrections suggested in this letter were promptly made by the plaintiffs. On the 14th day of February, 1888, the defendants sent the following letter to plaintiffs with a remittance: "Applegate, Feb'y 14, 1888. Mess. Fleischner, Mayer & Co., Portland, Oregon—Gents: Inclosed please find check on First National Bank for fifty-eight and 65-100 dollars, which you will please credit Kubil & Bolt. Oblige, yours, respectfully, KUBIL & BOLT." On the 27th day of August, 1888, the defendants sent the following communication to the plaintiffs, after being again pressed to pay the balance of the account: "Applegate, August 27, 1888. Messrs. Fleischner, Mayer & Co., Portland, Oregon—Gents: Referring to your letter inclosing statements of a/c we would say that, according to our books and your statement we have paid our a/c in full. The balance shown by your statements is interest, and interest upon interest. As your salesman sold us goods upon our own time, and as we never agreed or promised to pay any interest whatsoever, we are surprised to receive your statement with request to remit. Respectfully, KUBIL & BOLT."

The defendant Bolt testified upon the trial, in substance, as follows: "I am one of the defendants in this action, and we commenced doing business with Fleisch-

ner, Mayer & Co. in 1881. That about that time a stranger, claiming to be Mark A. Mayer, a son of one of the members of the firm of Fleischner, Mayer & Co., and claiming to be a partner of the concern, wished to sell me goods. Was then dealing in San Francisco. Was in debt considerably then, and couldn't very well deal with Fleischner, Mayer & Co. Mayer told me that if we dealt with them we could have all the time we wanted to pay without interest, and without any dunning letters. Finally he offered me goods very low, reasonable, and I bought a bill of goods of him. We continued business right along. They sent us accounts and statements right along, a great many of them. I never remember of having made any direct response to them. Whenever we could spare money we sent it to them." That he understood the letters "E. & O. E." to mean that it gave either party the right to correct any errors. (Witness here identified certain statements, and plaintiffs admitted they were the ones sent.) "When I received the statement I did not think it necessary to reply particularly. When I received the statement of February 10, 1888, I was on my ranch on Humboldt, sick in bed, about three-quarters of a mile from my former place of business, having gone out of the mercantile business about two months before." This witness also produced and submitted in evidence the following letter from the plaintiffs: "Portland, Oregon, Aug. 31, 1888. Mess. Kubil & Bolt, Applegate, Oregon—Dear Sirs: We are in receipt of yours of 27th. Contents noted. We are very much surprised, indeed, that you should raise any question as to the balance due on your account, and especially that you should at this late day make any objection to the interest. It is our invariable rule to charge interest on all overdue accounts, and in doing so we only get back a portion of the large amount of interest that we have to pay the banks in order that we may be enabled to extend to you and other customers the accommodation they require. In your case we have charged interest after six months' time on all your bills, which is certainly a long credit. When you take into consideration the fact that the interest charged covers a period of seven (7) years' business, you must admit that the amount is not unreasonable, and it certainly only partially reimburses us for what we have paid out in interest in order that we might accommodate you. We have sent you statements from time to time, with interest charged thereon, and have your acknowledgment that you have received the same; and at no time in all these years have you ever made the slightest objection to the interest charged. We are certainly entitled to the balance due us as per statement rendered, and must insist upon your remitting in settlement of same; otherwise we shall be compelled to send the account to an attorney for collection. Hoping to hear from you promptly, we remain, very truly, yours, FLEISCHNER, MAYER & CO." The witness, after introducing another letter from plaintiffs, continued: "Since [the date of last letter] I have never

received any other statement or letter. I think my partner, Mr. Kubli, did, just before this suit was commenced. I have met a member of the firm. It was when Mr. Mark A. Mayer sold us the first bill of goods. After that it was traveling men. No member of the firm informed me personally that they would charge first interest, or change first agreement in relation to selling us goods." On his cross-examination the witness' attention was called to each statement, and he admitted they were received by the defendants, and that no objections were made thereto. The following letter, written by the defendants to plaintiffs, was identified by this witness and offered in evidence by plaintiffs: "Applegate, Oregon, Mar. 30, 1886. Messrs. Fleischner, Mayer & Co., Portland, Oregon—Gentlemen: Your communication of the 25 inst., asking for a remittance, received, and will say that we will dispose of some cattle by April 20th, when we will remit without fail. Thanking you for your long patience, we are, yours, respectfully, KUBLI & BOLT."

The court among others gave the jury the following instructions: "(4) What is such reasonable time is, in this case, a question for the jury. It is for you to say, gentlemen. In determining that question, you must take into consideration all of the circumstances surrounding the transaction. Among other things, the distance between Portland, the place where the plaintiffs reside, and Applegate post-office, or Applegate, the place where the defendants reside, or where the firm, —I don't know particularly where the defendants reside; but where the firm Kubli & Bolt did business at that time. You will also take into consideration the mail connections between those two places, namely, Portland and Applegate,—the facilities they had of communicating by mail to each other. You will also take into consideration the previous transactions, business relations, and the course of dealing between the parties, the circumstances under which their account was received by the defendants, and all of the circumstances connected with and surrounding the whole transaction; and from all these you are to say, gentlemen of the jury, whether any objection was made to the account by Kubli & Bolt within a reasonable time after it had been received by them." "(10) Now, a stated account must be an account that exhibits the items which constitute such an account. For one person to make a stated account against another he must show the items of the account,—items which make up the account. (11) If, however, gentlemen of the jury, you are satisfied from the evidence in this case that the account sent by the plaintiffs in this case to the defendants, and which, it is claimed here, ripened into an account stated by the failure of the defendants to object, if you are satisfied the account did not contain the items of the account,—the items which make up the balance,—still if you are satisfied from the whole evidence in the case that that account made contains the items of account,—the items which

made up the balance,—still, if you are satisfied from the whole evidence in the case that that account made such reference either by direct terms or by reason of the course of business between the parties,—made reference to other statements of account then in possession of the defendants,—which statements of account did show all of the items, that will be sufficient, so far as the character of the account is concerned; so far, in other words, as showing the items of the account. An account which simply shows a balance, without setting out the items from which balance arose, is not a statement of account. As I have said to you, that does not constitute a statement of account; but a statement of account must show the items of account." These instructions were severally excepted to by the plaintiffs. The plaintiff asked the court to give the following instructions: "(1) And if the debtor fails for several posts, when the dealings are between parties living in the same state, to object to said statement, he is presumed to have assented thereto. (2) What is a reasonable time in such cases where the facts are clear is always a question exclusively for the court. (3) It is alleged by plaintiffs that on the 10th day of February, 1888, they rendered and presented their account to the defendants, showing the amount due them thereon, which was assented to by defendants as being correct, which allegation is denied by the answer of the defendants; and this is the only issue of fact to be tried and determined by the jury. (4) If you find that plaintiffs rendered and delivered, either in person or by mail, a statement of their account to defendants, on or about the 10th day of February, 1888, and that defendants received the same, and made no objections thereto until August 29, 1888, the account became a stated account, and you will find a verdict for the plaintiffs and against the defendants in the amount asked for in the complaint, less the sum of \$58.64, which plaintiffs admit as having received on said account sued on. (5) In this case it is admitted that on February 10, 1888, the plaintiffs sent their statement to defendants, showing the balance claimed by them from defendants; and that the defendants received it in due course of mail, and within a very few days after it was written. That August 29, 1888, was the first time they objected thereto. That there is, and was in the year 1888, daily mail connection between Jacksonville and Portland; and that there was in 1888 mail connection twice a week between Jacksonville and Applegate, distant therefrom about thirteen miles. The court therefore charges you, under the circumstances in this case, that the account rendered became a stated account, and under the pleadings in this case you must find for the plaintiffs and against the defendants in the amount claimed in the complaint, less the sum of \$58.64, admitted to have been paid on said account." The court refused to give either of these instructions, to which several rulings of the court the plaintiffs duly excepted.

*Cox, Teal & Minor and P. P. Prim, for appellants. H. K. Hanna, J. R. Nell, and E. B. Watson, for respondents.*

STRAHAN, C. J., (*after stating the facts as above.*) 1. We have lately considered what constituted a stated account in two cases, and a reference to them seems to be all that is necessary at this time. In *Holmes v. Page*, (Or.) 23 Pac. Rep. 961, we held that an account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly or by implication of law from failure to object; and that the action was not founded upon the items of the account, but on the defendants' consent to the balance stated. And *Truman v. Owens*, 17 Or. 523, 21 Pac. Rep. 665, is to the same effect. Under the issues in this case the only question to be tried was whether or not the account between the plaintiffs and defendants became a stated account. This question was concisely stated in appellants' fourth and fifth instructions, refused by the court. If the plaintiffs delivered an account to the defendants, either personally or by mail, it would become a stated account if not objected to within a reasonable time; and in an action on such account it cannot be opened only for fraud, error, or mistakes, and the answer in such action must set forth fully the fraud, error, or mistake relied upon. *Kronenberger v. Bins*, 56 Mo. 121; *Terry v. Sickles*, 13 Cal. 427; *Young v. Hill*, 67 N. Y. 162.

2. But it was suggested that an account rendered, which had at the bottom thereof the usual initials, "E. & O. E.," (errors and omissions excepted,) could not become a stated account; that is, it would remain open and unsettled, so that either party would be at liberty to contest any item thereof, though, if these words had been omitted, the account would have become a stated account. But this does not seem to be the effect of those words. An account rendered containing them will become a stated account if not objected to within a reasonable time, with like effect as if they had been omitted. *Branger v. Chevalier*, 9 Cal. 353; *Young v. Hill*, *supra*. By the tenth and eleventh instructions the court charged that an account, before it can become a stated account, must contain the items. If by this was meant each item of merchandise or cash that constituted the debit and credit side of the account, we think the court was in error. The evidence showed that accounts had been rendered from time to time by the plaintiffs. These were in accordance with the course of dealing between the parties; and, though all accounts rendered after the first would begin with the balance claimed to be due on the former accounting, still that fact would not prevent their becoming a stated account. *Dows v. Durfee*, 10 Barb. 213. Instruction 4, given by the court, and those on the same subject, requested by the plaintiffs and refused, may be considered together. They relate to what is a reasonable time within which a party must object after an account is delivered to him so as to prevent the same becoming a stated account, and whether

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that was a question of fact for the jury in this particular case, or one of law for the court. Generally, what is a reasonable time when the facts are undisputed is a question of law for the court. Of course, if it were in controversy at what time the account was rendered, or at what time objections were made, these would be questions of fact for a jury; but in every case, as soon as the date is fixed, the question becomes one of law, whether or not such time was reasonable. *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. Rep. 178; *Wiggins v. Burkham*, 10 Wall. 129; *Talcott v. Chew*, 27 Fed. Rep. 273; *Powell v. Railroad Co.*, 65 Mo. 658; *Lockwood v. Thorne*, 11 N. Y. 170. The first instruction asked by the plaintiffs enunciated a correct principle of law, and it is difficult to understand upon what ground the court refused to give it. The earlier rule in the law upon the subject of account stated was that it was applicable to merchants only, (22 Cent. Law J. 76;) but this is not the rule at present. The needs of modern business have so enlarged it that it may be properly applied to all classes of business men. *Shepard v. Bank*, 15 Mo. 143; *White v. Campbell*, 25 Mich. 463. But within any rule we are able to find in the books the instruction asked was right, and should have been given. This transaction was between merchants. The account was rendered nearly six months before any objections were heard on the subject. The defendants made a remittance to be applied on account after its rendition, without suggesting any objections to the account. Under these facts the assent of the defendants to the account as rendered must be presumed, and it was the duty of the court to inform the jury that such was the law. 1 Story, Eq. Jur. § 526; *Wiggins v. Burkham*, *supra*; *Phillips v. Belden*, 2 Edw. Ch. 1; *Freas v. Truitt*, 2 Colo. 489. Having reached the conclusion that the plaintiffs' theory of this case, as presented by the bill of exceptions, was correct, we are relieved from any further examination of the defendants' views, as they are diametrically opposed to the plaintiffs'. The court erred in giving said instructions 4, 10, and 11, and in failing to give those asked by the plaintiffs. Let the judgment be reversed, and the cause remanded to the court below for a new trial.

(15 Colo. 574)

SLATER v. HAAS.

(*Supreme Court of Colorado. Feb. 13, 1891.*)

MINING PARTNERSHIP—RETIRING PARTNER.

Where several tenants in common of a mine employ a manager to work and extract the ores therefrom and account to the owners for the proceeds, thus forming a mining copartnership, though not for a fixed or definite period, one of the owners may withdraw from such enterprise without dissolving such copartnership as to the other tenants; and if the others continue thereafter to work the mine the withdrawing party may maintain an action in his own name for his share of the proceeds thus coming into the hands of the manager, without making his co-tenants parties to the action.

(*Syllabus by the Court.*)

Appeal from Lake county court.

This was an action originally brought by Haas, as plaintiff, against Slater, in a

justice's court, to recover a small money judgment. On appeal in the county court plaintiff recovered judgment for \$112. The defendant, Slater, appeals to this court.

*S. J. Hanna*, for appellant.

**PER CURIAM.** The assignments of error are confined to the overruling of defendant's motion for nonsuit and to the rendering of final judgment in favor of plaintiff. The trial in the county court was without a jury, and the only objections or exceptions appearing in the record are as follows: At the close of plaintiff's evidence "the defendant's counsel moved the court for a nonsuit, on the ground that plaintiff had failed to prove a good cause of action, which motion the court overruled." The defendant excepted to the ruling, and also excepted to the finding and decision of the court against him at the close of the trial, but did not state the grounds of his objection. There being no written pleadings, (*Thorne v. Ornauer*, 8 Colo. 353, 8 Pac. Rep. 568,) the questions to be determined on this appeal must be gathered from the evidence. The evidence shows that plaintiff and several other persons, some of them non-residents, were tenants in common of a certain mine in Lake county, plaintiff's interest being one-eighth. These co-tenants employed Slater to work the mine, extract and sell the ores, and account to the owners for the proceeds. By this arrangement it is assumed by counsel for appellant that plaintiff and his co-owners entered into a copartnership, thus constituting a relationship different from that existing between them as tenants in common; and, hence, that plaintiff cannot maintain this action in his own name for his share of the proceeds of the mine in the hands of defendant arising out of such employment. There is no evidence of an express contract of copartnership having been agreed to between the several owners for any fixed or definite period or at all. Nevertheless, the existence of a mining partnership with its peculiar limitations and conditions may perhaps be inferred from the acts of the parties and the circumstances appearing in evidence. *Manville v. Parks*, 7 Colo. 128, 2 Pac. Rep. 212; *Charles v. Eshleman*, 5 Colo. 111. During the progress of the work a controversy arose between the plaintiff, Haas, and the defendant, Slater, as to the rate of wages per month the latter was to receive under his contract of hiring; and finally plaintiff undertook by written notice to defendant to terminate defendant's employment so far as plaintiff's interest in the mine was concerned. In such notice plaintiff declared that after a certain date, so far as his (plaintiff's) interest was concerned, he would dispense with defendant's services, and would in no way be responsible for any debts that might be contracted in connection with said mine without his personal consent. This notice was received by defendant, and the substance thereof was promptly communicated by him in writing to the other owners. In such communication defendant, Slater, declared that so long as the other owners chose to retain him in their employ it would not increase their

expenses at all, but would only decrease his salary 12½ per cent.,—that is, one-eighth; and that he was ready to relieve plaintiff, Haas, of the burden of his salary. It does not appear that the other owners made any objection to this new arrangement. In addition to giving defendant notice of his withdrawal from the enterprise of working the mine, plaintiff also posted a written notice at the shaft-house, giving similar notice to all persons employed by or dealing with Slater in working the mine. The acceptance of plaintiff's notice by defendant, and his express assent to its terms, the communication thereof to the other owners, and their acquiescence therein, together with his posted notice to all other persons interested, justify the conclusion that there was a withdrawal by plaintiff from any mining copartnership which may have theretofore existed between the several co-tenants. The other owners, as well as plaintiff and defendant, having notice of the new arrangement, the court was warranted in finding that there was a complete termination by mutual consent of plaintiff's liability to defendant under the original contract of employment, and that by this means plaintiff's interest in the proceeds of the mining property was entirely severed from that of his co-tenants. The defendant continued working the mine and extracting ores therefrom for several months after the withdrawal of plaintiff as aforesaid. The evidence was somewhat conflicting as to the rate of monthly wages the defendant was entitled to receive; but it is clear that defendant at the close of his employment reserved out of the proceeds of the mine his monthly wages at the full rate and for the full time as originally claimed by himself, disregarding altogether the abrogation of the original contract resulting from plaintiff's written notice, his own response, and the acquiescence of the other owners. Though not specifically so stated, it is obvious that the finding and judgment of the court were based upon the amount of plaintiff's interest in the surplus proceeds of the mine in the hands of defendant, according to the theory that plaintiff's liability under the original contract had been terminated, and his interest in the proceeds of the mine severed from that of his co-tenants. The findings of fact by the trial court upon the conflicting evidence cannot properly be disturbed. Plaintiff's share in the proceeds of the mine having been entirely severed from that of his co-tenants, there appears to be no legal obstacle to his recovery of the same in this action. The judgment of the county court is accordingly affirmed.

(15 Colo. 572)

**MEYER v. BROPHY et al.**

(*Supreme Court of Colorado. Feb. 13, 1891.*)

**APPEAL—JURISDICTIONAL AMOUNT—INTERVENTION.**

In replevin, where a plea of intervention was filed by a third person, there was a general verdict and judgment in favor of plaintiff without any mention of the plea of intervention. *Held* that, appeals being allowable only when a judgment "shall amount, exclusive of costs, to the sum of \$100, or relate to a franchise or freehold,"

(Code Civil Proc. Colo. § 388,) and intervenor's liability for costs being less than that sum even if the judgment be treated as a dismissal of the intervention, an appeal by intervenor would not lie.

Appeal from district court, Phillips county.

*Smith & Muntzing*, for appellant.

HELM, C. J. Appellee White instituted a suit in replevin in the county court against appellee Brophy to recover the possession of certain described animals. Brophy, who is White's nephew, left the country without answering the complaint, and default was entered against him. Appellant filed his plea of intervention under the statute, asserting his right to immediate possession of the property by virtue of a chattel mortgage from Brophy duly executed and recorded. To this plea of intervention an answer was filed by White, and a replication to the answer followed. Under these pleadings, the controversy litigated related to Brophy's ownership of the chattels and right to give the mortgage in question. The cause reached the district court by appeal, and was there tried *de novo*. A general verdict was reported by the jury in favor of plaintiff for a return of the property, or if such return were not made, then for the value thereof. A general judgment based upon this verdict, and corresponding therewith, was entered by the court. No mention is made of the plea of intervention, nor is there any order or judgment expressly disposing of the issues thus framed. The assumption by intervenor that he is liable under the judgment for a return of the property or the value thereof, is manifestly erroneous. The record shows that upon failure of defendant in the original suit to give a forthcoming bond, the property was by the sheriff delivered to plaintiff in pursuance of law. Intervenor never obtained the possession, and therefore could not have been liable for a return, or for the value in case a return were not made. The judgment simply determines the right of property as between White and Brophy, plaintiff and defendant in the original suit; it imposes no liability upon intervenor.

The court is, in cases like the one at bar, required by statute to "determine upon the intervention." Code Civil Proc. § 24. The trial of the intervention issues may take place in connection with the trial of the principal case, but the court should either in the final replevin judgment, or by order or judgment prior thereto, expressly decide the intervention controversy; and, if the result be adverse to intervenor, the costs of the intervention must be adjudged against him. *Id.*; *Pom. Rem. & Rem. Rights*, § 430. We need not now consider whether a judgment in the replevin suit finding the right of possession in favor of the original plaintiff or defendant can, under any circumstances, be regarded as equivalent to a dismissal of the plea of intervention. For, in any event, the present appeal must fail. If there is no final order or judgment against intervenor, obviously there is nothing for him to review under the statute, either by appeal or

by writ of error. *Owen v. Going*, 7 Colo. 85, 1 Pac. Rep. 229; *Alvord v. McGaughey*, 5 Colo. 244. While if the judgment before us be treated as in legal effect a dismissal of the plea of intervention, the liability of intervenor thereunder is less than \$100, exclusive of costs, and, no franchise or freehold being involved, an appeal does not lie. Code Civil Proc. § 388. The appeal is dismissed.

(15 Colo. 592)

SONS OF AMERICA BLDG. & INVEST. ASS'N  
v. CITY OF DENVER.

(*Supreme Court of Colorado*. Feb. 20, 1891.)

APPEALS—JURISDICTIONAL AMOUNT.

Appeals to this court are allowable only when the judgment "shall amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold." Want of jurisdiction to entertain an appeal cannot be waived or cured by consent of parties.

(*Syllabus by the Court*.)

Appeal from district court, Arapahoe county.

*R. H. Gilmore*, for appellant. *John F. Shafroth*, for appellee.

PER CURIAM. By the record in this case it appears that the action was commenced in the district court in October, 1887, by the filing of the complaint and summons. In November and December of the same year the demurrer to the amended complaint was sustained, and plaintiff electing to abide by its complaint, the action was dismissed. Plaintiff now seeks to review such judgment of dismissal by appeal to this court. By the act of April 23, 1885, appeals might be taken in cases like this. But since August 1, 1887, appeals to this court are allowable only when the judgment "shall amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold." Code, § 388. Hence, this court is without jurisdiction to entertain this appeal. This has been repeatedly decided even in cases where the defendant has joined in error. The infirmity of the present proceeding in this court, being jurisdictional, cannot be waived or cured by consent of parties. The appeal is accordingly dismissed. See *Crane v. Farmer*, 14 Colo. 294, 23 Pac. Rep. 455, and cases there cited; also, *Meyer v. Brophy*, ante, 1090, (decided at the present term of this court.) Appeal dismissed.

(3 Idaho [Hasb.] 1)

TOOTLE *et al.* v. FRENCH *et al.*

(*Supreme Court of Idaho*. Feb. Term, 1891.)

RECORD ON APPEAL—SERVICE OF NOTICE.

1. The record of a case on appeal must affirmatively show that the notice of appeal was filed with the clerk below, and served upon the adverse party or his attorney, within the time required by the statute.

2. Without these requirements of the statute are complied with, this court has no jurisdiction.

3. Objections for want of jurisdiction may be made at any time.

(*Syllabus by the Court*.)

Appeal from district court, Alturas county.

*Bruner & Parsons*, for appellants. *Tex-us Angel*, for respondents.



**MORGAN, J.** This appeal is taken from the judgment and from the order overruling the motion for a new trial. The respondents ask the court to dismiss the appeal for the reason that the record does not show that there has ever been a notice of appeal filed in this case. The constitution gives this court jurisdiction to review upon appeal any decision of the district court, etc. Section 9, art. 5, Const. The statute points out the method by which an appeal to the supreme court is taken, as follows: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney." Section 4808, Rev. St. Idaho. The record must affirmatively show that the notice of appeal was filed with the clerk below, and served upon the adverse party, or his attorney, within the time required by statute. *Franklin v. Reiner*, 8 Cal. 340; *Whipple v. Mills*, 9 Cal. 641; *Hayne*, New Trials & App. § 210, and other authorities there cited; *Brewing Co. v. Gillman*, (Idaho,) 10 Pac. Rep. 32. Judgment in this cause was rendered in the district court on May 31, 1889, and placed on file June 1, 1889. Order overruling motion for new trial was filed January 8, 1890. Notice of appeal from said order and from the judgment was served on counsel for respondents March 10, 1890. This service was not within the 60 days given by the statute within which an appeal may be taken from an order overruling a motion for a new trial. The record does not show that the notice of appeal was ever filed with the clerk. That which is required by the statute cannot be dispensed with by the court. Failure of service of notice of appeal within the 60 days is fatal to the appeal from the order overruling the motion for a new trial. Failure to file the notice with the clerk of the court below is fatal to both appeals. Without these requirements of the statute are complied with, this court has no jurisdiction. Objection for want of jurisdiction may be made at any time. Both appeals are dismissed.

**HUSTON, J.**, concurring.

**SULLIVAN, J.**, having been of counsel in the court below, took no part in the hearing of this cause.

(3 Idaho [Hasb.] 3)

**GILBERT V. MOODY, Auditor.**

(Supreme Court of Idaho. Feb. Term, 1891.)

COURT REPORTERS—COMPENSATION—CONSTITUTIONAL LAW—MANDAMUS.

1. Stenographic reporters, appointed by district judges under an act of the fifteenth legislative assembly, are entitled to the compensation fixed by said act.

2. Said act is not repugnant to the constitution.

3. Said act creates the office of court reporter and makes the appropriation for the payment of his salary.

4. *Mandamus* will issue to compel the state auditor to issue a warrant for the payment of the court reporter's salary as required by said act.

5. The act of the first legislative assembly of the state of Idaho, amending the Revised Statutes of Idaho territory, and the Fifteenth Session Laws, changing the word "territory" to "state," and "comptroller" to "auditor," is not in conflict with the constitution.

(Syllabus by Sullivan, C. J.)

Application for a writ of mandate.  
*Cahalan & Budyer*, for plaintiff. *George H. Roberts*, Atty. Gen., for defendant.

**SULLIVAN, C. J.** The plaintiff, Justin Gilbert, applied to this court for a writ of mandate to compel the defendant, Hon. Silas W. Moody, auditor of the state of Idaho, to issue his warrant in favor of the plaintiff, in payment for certain services claimed to have been performed by said plaintiff as stenographic court reporter. The material facts set forth in said application are substantially as follows: On the 3d day of April, 1889, the plaintiff was duly appointed stenographic court reporter of the second judicial district of Idaho territory, by Chief Justice WIER, sitting as a district judge of said judicial district. That said plaintiff entered upon and performed the duties of said office, and performed the same under said appointment, to and including the 2d day of November, 1890, for which services he received the compensation provided by law. That from and after said 2d day of November, 1890, to the 18th day of November, 1890, he continued to perform the duties of said office under and by virtue of said appointment made as aforesaid. That on the 18th day of November, 1890, the plaintiff was duly appointed stenographic reporter of the third judicial district of the state of Idaho by the Hon. E. NUGENT, judge of said third district. That on said 18th day of November he entered upon his duties as such stenographic reporter under said appointment, and continued to perform the duties of such position up to the close of the 11th day of January, 1891, and still continues to perform said duties under said last appointment. That on the 9th day of January, 1891, the plaintiff presented his claim against the state of Idaho, for his services as official reporter, from the 3d day of November, 1890, to the 11th day of January, 1891; both mentioned days included, amounting in all to the sum of \$374.98. That on the 9th day of January, 1891, the defendant was, ever since has been, and now is, the duly-qualified and acting auditor of the state of Idaho. That the defendant, as such auditor, refused to allow plaintiff's said claim, and refused to issue to the plaintiff his warrant in payment of said claim, and asks that a writ of mandate be issued out of this court commanding the said auditor to draw his warrant on the state treasurer of Idaho, in favor of the plaintiff, for the amount of said claim. The defendant admits all of the material facts set forth in plaintiff's application, but denies that the Hon. E. NUGENT, as judge of the third judicial district of the state of Idaho, had any authority to appoint the plaintiff stenographic reporter of said third district court. And further alleges that no appropriation has been made by law for the payment of compensation to the stenographic court re-

porter of said district court; and, further, that there is no money or funds in the hands of the treasurer of the state of Idaho applicable to the payment of plaintiff's said claim.

This case involves the validity of an act passed by the fifteenth legislative assembly of Idaho, entitled "An act to provide for the appointment of a court stenographic reporter in each judicial district of Idaho territory," which act was approved February 4, 1889, (15th Sess. Laws, p. 25.) The plaintiff, in said application for a writ of mandate, alleges that he was appointed official reporter of the second judicial district of the territory of Idaho, and performed the duties of that position until the 18th day of November, 1890, on which date he was appointed official reporter of the district court of the third judicial district of the state of Idaho, and performed the duties of such position to and including the 11th day of January, 1891. The defendant contends that the appointment of the plaintiff, made by the Hon. E. NUGENT, judge of the third judicial district of the state of Idaho, on the 18th day of November, 1890, was made without authority of law. The first point to be determined, then, is whether the Hon. E. NUGENT, judge of the district court of the third judicial district of the state of Idaho, had the authority to appoint the plaintiff official reporter of said court on the 18th day of November, 1890. In other words, was the act above referred to in force on the 18th day of November, 1890, and continued in force to and including the 11th day of January, 1891? Idaho was admitted as a state on the 3d day of July, A. D. 1890, under a constitution theretofore adopted by the people of the state. Section 2 of article 21 of said constitution is as follows: "All laws now in force in the territory of Idaho, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." It is not claimed that said act has expired by its own limitation, or has been repealed or altered by the legislature. Said act in no manner conflicts with the provisions of the constitution, and is not repugnant thereto; hence said act was in force at the date of said appointment, and has been in force since its approval, February 4, 1889. Said act authorized the judges of each district court, in the then territory of Idaho, to appoint a competent official reporter; defines his duties; fixes the tenure of his office, and his yearly compensation; directs that it be paid quarterly out of the general fund of the territorial treasury; and authorizes the comptroller to draw his warrants, to make such payments, when they shall become due. Gen. Laws Idaho, 15th Sess., 1888-89, p. 25. The defendant also contends that no appropriation has been made for the payment of this claim, as required by section 13 of article 7 of the constitution. The act in question makes the appropriation. It fixes the compensation, the time of payment, and authorizes the comptroller to draw his warrant to pay the same when due. No further appropriation is required. The defendant fur-

ther contends that the act of the present session of the legislature, amending the Revised Statutes of Idaho, and the General Laws of Idaho of the Fifteenth Session, by changing the word "territory" to "state," and "comptroller" to "auditor," is in conflict with section 18, art. 3, of the constitution, which section is as follows: "No act shall be revised or amended by mere reference to its title; but the section as amended shall be set forth and published at length." The object of this provision is to prevent obscurity, confusion, and uncertainty in the laws. This section deals with such amendments of existing legislation as change the application, force, or effect of an act, or a portion thereof. The amendments referred to do not change the application, force, or effect of the sections amended, but merely change the words "territory" to "state," and "comptroller" to "auditor." These amendments cannot result in any ambiguity or uncertainty, nor can any one be misled as to the purpose of these amendments. To hold that each section, so amended, should be published at length would be an unreasonable construction of said provision, and entail needless expense upon the people. The office of comptroller has not been abolished by the constitution,—the name only as been changed to "auditor." The fact that there are no funds in the hands of the treasurer of the state with which to pay said claim will not excuse the auditor from issuing his warrant. We are of the opinion that a peremptory writ should issue, and it is so ordered.

MORGAN and HUSTON, JJ., concur.

(7 Utah, 170)

#### PEOPLE v. HANCOCK.

(Supreme Court of Utah. Feb. 4, 1891.)

#### HOMICIDE — EVIDENCE — INSTRUCTIONS — GOOD CHARACTER.

1. On indictment for murder, evidence that deceased had at one time been castrated is inadmissible to show malice, where there is no evidence connecting defendant with his castration.

2. On trial for murder, an instruction that "where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter," is erroneous, in that it limits the effect of good character to doubtful cases.

3. An instruction that "a man has to commit his first crime. He cannot commit all the crimes, if he does commit many, at once. He has to break over the rules of good conduct and good life for the first time some time in his life" is erroneous, and, if not withdrawn from the jury, is not cured by a subsequent correct instruction as to the effect of good character.

4. On trial for a murder committed 32 years before, when the principal witness for the prosecution was only 5 years old, where the other witnesses have grown old, the lapse of time since the commission of the crime is a strong circumstance to be considered by the jury.

Appeal from district court, first district; BLACKBURN, Justice.

Arthur Brown and Wm. H. King, for appellant. C. S. Varian, U. S. Atty., for the People.

MINER, J. The indictment in this case charges this defendant and two others

with the murder of Henry Jones on the 24th of April, 1858. It was found by the grand jury on the 8th day of March, 1890, or 32 years after the alleged crime was committed. Defendant Hancock was tried separately. The record shows that on April 24, 1858, the deceased, Henry Jones, was living with his mother, Hannah Jones, his brother, John Jones, and little sister, Ellen H. Brown, in a small dug-out at Payson, Utah. At this time Ellen was a child of about five years of age. At the time of the trial it appeared from Ellen's testimony that at about 9 or 10 o'clock in the evening of April 24, 1858, she was awakened by a disturbance outside the dug-out, caused by the firing of guns. She remembers seeing her two brothers, Henry, the deceased, and John, get up, hurriedly dress themselves, take their guns, and go out on the roof through a chimney hole. That soon after this five or six men came into the cabin, and wanted her mother to tell them something; but what they wanted her to tell, she could not remember; it was so long ago. She does remember, however, that her mother was begging and pleading for the lives of her boys, and that one of the men shot and killed her mother. There being no light in the room, she was unable to distinguish who was present. She was a stranger there at this time, and did not know the defendant Hancock. That several weeks after she saw Charles Hancock, the defendant's brother, on the street, and recognized him as the man that killed her mother; and that on July 4, 1858, she saw the defendant, and recognized him as one of the men who were present when her mother was killed, and that she was frightened at seeing him, and went and told her father. It also appears that on this occasion defendant Hancock was a constable. That this was a time of Indian wars, and guards were constantly kept out to guard against surprises from the Indians; and that Hancock and others of these guards had discovered a scheme on the part of Jones and his brother to steal horses that night, and escape from the settlement to meet the United States army, then not far distant; and that Jones was in fear of injury from the hands of the people at this time, which fear induced him to attempt to leave the country with stolen horses. That, in order to frustrate this scheme which had been discovered, watchmen had been placed at the *corra'* where the horses were kept and at Jones' house, to prevent his escape, as well as to guard against surprises from the Indians. That, after Jones had escaped from the dug-out, he went from place to place in that vicinity to escape pursuit, and was much frightened, and that he was shot in the arm while eluding pursuit, or in attacking an antagonist, which was alleged to be the defendant. Jones continued his efforts to escape, and early in the morning arrived at a town called Salem, or Pond Town, some three or four miles from his mother's house. That the *posse*, including the defendant, Hancock and many others, were in hot pursuit, and caught the deceased at this latter place, disarmed him, and took him

prisoner. Hancock seemed to be in command. A guard was placed on each side of the deceased. Hancock was a little to the rear, and others about and around them. In this position they started with the deceased to return to Payson with him. This was supposed to be three or four hours after the killing of Mrs. Jones. Thus guarded, the party started for Payson. What followed is a matter of speculation, as the witnesses all disagree. It appears, however, from the testimony of one Wilson, (a witness for the prosecution, whose testimony was discredited and impeached in many ways,) that Hancock directed the *posse* in charge of Jones to take him to Payson. All were armed, except the deceased. While walking along in the direction of Payson, and talking about stealing horses, etc., Jones remarked that he didn't want to go with them; that they had killed his brother; and he was not going with them, etc. About this time Jones looked up, and saw some other parties coming towards them, and remarked: "There comes some more of the d—d cusses after me." He then stopped, and threw up his hands, at which time the prosecution claims that Hancock remarked to his companions: "Now slap it to him, boys." A gun cracked, and then another, and Jones fell mortally wounded, and soon afterwards died where he was shot. There was a large party present at this killing, most of whom have since died. The next day Jones' body was taken by some one other than the defendant, and placed with that of his mother, without washing or changing the clothes. The supports to the roof of the dug-out were taken down, and the roof lowered to cover the remains, and they were both left thus entombed. It also appears, under objection from defendant's counsel, that a long time prior to this killing Jones had been castrated by parties then unknown. The defendant is not proved as having any complicity in that act. That prior to, and after the killing, Hancock had been a person of good moral character. Different and contradictory accounts of the killing of Mrs. Jones and her son, and of the time when the killing took place, appear from the testimony; but enough does appear to show that the killing of Mrs. Jones was a different transaction from that of the killing of Henry Jones; and whether Hancock was present at her death or not is left in dispute and uncertain. On the trial the defendant was convicted. Defendant's counsel assign 12 errors as grounds for a reversal of the verdict and judgment of conviction. Among them are the following: "(3) The court erred in allowing Henry Gardner, against the objection of counsel for defendant, to testify that Henry Jones had been castrated, and had no testicles." "(7) The court erred in refusing each one of the several requests asked for the defendant, to-wit, severally, each one of the twenty-one requests appearing in the record. (8) The court erred in charging the jury as to the effect of good character. (9) The court erred in charging the jury upon the facts as to the belief to be attached to witnesses who testified

to the exact language thirty-two years after the transaction. (10) The court erred in charging the jury that time does not run in favor of murder, and in charging that no lapse of time washes out the stains that the blood shed by the murderer makes, and in charging generally upon the facts of the case." (12) The court erred in charging the jury as to the subject of justification, the defendant not having made or asked for justification, but denying the killing; and the charge on the subject of killing was an argument that the defendant was guilty."

We do not consider it necessary to review each assignment separately. In the course of the trial it appeared by the testimony of Henry Gardner, under objection from the defendant's counsel, that Henry Jones had been castrated some considerable time before the alleged homicide. It nowhere appears that the defendant had any hand or complicity in this transaction, or was in any manner chargeable therewith, or that that fact in any way tends to elucidate the question involved, or throws any light upon the question of the guilt or innocence of the defendant. The presumption is that this testimony was admitted for the purpose of showing malice on the part of the defendant, and that was probably the ground upon which the learned judge admitted the testimony. If this be so, the prosecution failed in any way to connect the defendant with the act of castration. This, we think, was error. The only object for its admission, if it was admissible at all, would be to show that the defendant committed the act, or assisted in its commission, and that he must have had malice against the deceased at that time; and, when the prosecution failed to connect the defendant with the act, the testimony becomes wholly incompetent. Its admission, under the circumstances, would naturally tend to awaken a prejudice in the minds of the jury against the defendant. Testimony of this transaction was foreign to the issue and should not have been allowed.

Error is assigned upon the refusal of the court to instruct the jury as follows: "(16) In a criminal trial, evidence of the good character of a person is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. It will of itself sometimes create a doubt when without it none would exist. (17) There is no case in which the jury may not, in the exercise of a sound judgment, give a person the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the probabilities, that a person of high character would not be guilty of the offense charged, that the other evidence in the case is false, or the witnesses mistaken." The court refused these requests, but instructed the jury as follows: "Proof of the good character of the person charged with the offense is always allowed in this class of cases, and the weight to be given

to it is to be determined by the jury. It is all-important in doubtful cases. Where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter. The jury will always remember that a man has to commit his first crime. He cannot commit all the crimes, if he does commit many, at once. He has to break over the rules of good conduct and good life for the first time some time in his life." We think the requests numbered 16 and 17 should have been either given to the jury or embraced in the charge of the court, and that the instruction given to the jury on the court's own motion was erroneous. This charge, as given, limited the effect of good character to doubtful cases; and that, in cases where the evidence was clear, such evidence would only have the effect to cause the jury to hesitate and think about the matter. In other words, that in clear cases of guilt good character should have no weight, except for the jury to stop and think, but in doubtful cases it was all-important. We think the charge was misleading. In doubtful cases the jury should give the defendant the benefit of the doubt, and acquit; and to do so it would not be necessary for the defendant to add proof of good character to the doubt already existing in order to be entitled to an acquittal. It is in clear cases, therefore, where evidence of good character is of the most avail. There may be cases made out so clear that no good character can make them doubtful; but there may be others in which evidence given against a person without character would amount to a conviction, in which a high character would produce a reasonable doubt, or in which high character will actually outweigh evidence which might otherwise appear conclusive. "Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence; and, being in, the jury have a right to give it such weight as they think it entitled to." *People v. Garbutt*, 17 Mich. 9; *People v. Mead*, 50 Mich. 233, 15 N. W. Rep. 95; *Com. v. Leonard*, 140 Mass. 479, 4 N. E. Rep. 96; *Cancemi v. People*, 16 N. Y. 501; *Harrington v. State*, 19 Ohio St. 264; 1 Bish. Crim. Proc. §§ 1115, 1116; 3 Greenl. Ev. § 25; *People v. Ash*, 44 Cal. 288; Rem-

sen v. People, 43 N. Y. 6; Heine v. Com., 91 Pa. St. 145; State v. Daley, 53 Vt. 442; Coleman v. State, 59 Miss. 484; Whart. Crim. Ev. § 66.

This charge also gave the jury to understand that a man was expected to commit his first offense; and the jury may have been led to believe from it that the offense charged might be one of those crimes that the defendant might be expected to commit for the first time, and that, as a matter of course, if the defendant had a good character, and had never been connected with any crime before, he might now be expected to be guilty of this one; that the time had come at last for the defendant to break over the rule of good conduct, and commit his first offense; and that this might properly be expected from all men. We think this was error, and that it was not cured by a subsequent instruction to the jury at the close of the case, wherein the court said: "Gentlemen of the jury, I may have overlooked one important matter. I don't remember now what I said to you in reference to the character of the defendant. The character of the defendant is to be considered by you in weighing all the testimony in the case. If his character, notwithstanding all the evidence in the case, raises a doubt in your mind as to his guilt or innocence,—a reasonable doubt,—he is to have the benefit of it." This instruction in no way modifies the erroneous instruction first given: nor does the court withdraw his first instruction from the consideration of the jury, but leaves it to stand as the law in the case, which it is presumed the court did not intend to do. When conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which was erroneous. *Railway Co. v. Monroe*, 47 Mich. 152, 10 N. W. Rep. 179; *Jones v. Talbot*, 4 Mo. 285; *Brown v. McAllister*, 39 Cal. 577; *Aguirre v. Alexander*, 58 Cal. 21; *Phillips v. Jamieson*, 51 Mich. 153, 16 N. W. Rep. 318; *Murray v. Com.*, 79 Pa. St. 311-317; *Vanslyck v. Mills*, 34 Iowa, 375; *Railroad Co. v. Shuckman*, 50 Ind. 42; *Steinmeyer v. People*, 95 Ill. 383; *Linen Co. v. Hough*, 91 Ill. 63; *State v. Howard*, 14 Kan. 174.

The court also instructed the jury as follows: "The length of time that has elapsed since the murder that is charged was committed and the commencement of this prosecution is not to be considered at all. It is not an element to determine the guilt or innocence of this party. It is a matter not affecting his guilt or innocence, one way or the other. Time does not run against the murderer or in his favor. No lapse of time washes out the stains that blood shed by the murderer makes." This charge was possibly given under a mistake of fact. We think it had a tendency to mislead the jury, and that from it they might infer what the opinion of the court was as to the identity of the murderer, the degree of the offense, and the guilt of the defendant. This homicide was committed 32 years ago, and when we consider that the witness, Ellen Brown, was only 5 years of age at that time, and that other witnesses had grown old, and possibly forgetful with increasing age,

we cannot conclude that the length of time that has elapsed since the homicide should not be a strong circumstance to enter into the consideration of the jury in testing the truthfulness, forgetfulness, candor, or bias of those left to relate the circumstance of this alleged murder, and as bearing upon the probabilities of the guilt or innocence of the accused. *Hopt v. People*, 110 U. S. 574, 4 Sup. Ct. Rep. 202. For the reason stated the verdict and judgment of the court below should be set aside, and a new trial granted.

ZANE, C. J. I concur in the conclusion reached by the court.

ANDERSON, J. I concur.

(88 Cal. 121)

DONAHUE v. MEISTER. (No. 14,074.)

(*Supreme Court of California*. Feb. 25, 1891.)

QUIETING TITLE—JURY TRIAL—MINING CLAIMS—NOTICE OF LOCATION.

1. Under Const. Cal. art. 1, § 7, providing that the right to trial by jury shall be secured to all and remain inviolate, defendant, in an action to quiet title under Code Civil Proc. Cal. § 738, is entitled to jury trial on the issues of prior possession and ouster when his verified answer shows that shortly before the commencement of the action he was rightfully in possession, and was ousted by plaintiff and wrongfully kept out of possession by him.

2. Where, by a local mining custom, notices of location of quartz claims must be in writing, and "posted conspicuously in a conspicuous place upon the claim located at or near the lode line," a notice of location written on paper, folded with the writing inside, and placed on a mound of rocks about three feet high, under two flat rocks, to protect it from the weather, but with a part of the margin exposed to view, is properly posted, especially where it appears that the claimant properly marked the boundaries, and for three years, until ousted, performed annually the amount of labor required by law.

In bank. Appeal from superior court, Nevada county; WALLING, Judge.

*Thos. S. Ford*, for appellant. *John Caldwell*, for respondent.

McFARLAND, J. This is, in form, an action, under section 738 of the Code of Civil Procedure, to quiet title to a certain quartz mining claim and land called by plaintiff the "Uncle Sam" claim. The complaint is in the usual form, and contains an averment that plaintiff is in possession of the premises in contest. In the answer all the averments of the complaint are denied except that of possession. It is further averred in the answer that the south half of said Uncle Sam claimed by plaintiff is identical with the north half of a quartz mining claim, called the "Waldeck," belonging to defendant; that defendant is entitled to the possession of said south half of said Uncle Sam, and "was lawfully possessed thereof" for several years next preceding April 6, 1889; that on said April 6th "the plaintiff wrongfully and unlawfully entered thereon" and ousted defendant therefrom; and that plaintiff wrongfully withholds the same from defendant. In the prayer of the answer the defendant asked, in addition to general relief, that he "be restored to the possession of that

part of the Waldeck ledge described as being in controversy." At the proper time defendant demanded a jury "on the issue raised by his said averments of prior possession and ouster." The plaintiff opposed the demand because the case was a proceeding in equity; and on that ground the court refused a jury. The court then proceeded to try the case, and, after making certain findings, rendered judgment against defendant, from which he appeals. And the first point made by appellant is that the court erred in denying his demand for a jury. We think that in this contention appellant is right.

It is quite clear that the legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the state constitution which says that "the right to trial by jury shall be secured to all, and remain inviolate." Article I, § 7. And section 738 of the Code must not be construed as intending to violate that provision of the constitution unless that construction be unavoidable. Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the constitution was adopted, and therefore either party has the right to have such issues tried by a jury. (*Taber v. Cook*, 15 Mich. 322,) and section 738 need not be construed as attempting to take away that right. The main effect of said section is to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if, in such a suit, issues arise which are clearly legal and cognizable in a court of law, the Code does not take away the right to have such issues tried by a jury. Formerly an action like the one at bar could not have been maintained at all. Plaintiff would have been compelled to wait until the defendant chose to disturb his possession by an action. The Code enabled one in his position to commence the legal contest; but when he thus brings a defendant into court he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right, under the constitution, to have them tried. The nature of the action to quiet title before and after the Code provision is clearly stated by FIELD, C. J., in *Curtis v. Sutter*, 15 Cal. 262. At that time the provision of the statute was substantially as it is now, except that the plaintiff was required to be in possession. The learned judge says: "This statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. Such bills were of two classes. Those of one class lay where the right which the plaintiff asserted was controverted by numerous persons, holding distinct and separate interests upon a common source. A right of fishery asserted by one party, and controverted by numerous riparian proprietors on the river, and the right to tithes claimed by a parson and controverted by his parishioners, are instances cited

by Story where a bill of this nature would lie. Bills of the other class lay where the plaintiff was in possession of real property, and his possession had been disturbed by legal proceedings, in which his title had been successfully maintained. To the prosecution of bills of this latter class the concurrence of three particulars was essential,—the possession in the plaintiff, the disturbance of that possession by legal proceedings on the part of the defendant, and the establishment of the right of the plaintiff by judgment in his favor in such proceedings. *Shepley v. Rangely*, 2 Ware, 249. The necessity of bills of this class naturally arose from the nature of the action of ejectment, which being founded on a fictitious demise between fictitious parties, a recovery therein constituted no bar to another action. Thus the successful party might, by repeated actions, be subjected to vexatious and harassing litigation, and to procure repose courts of equity interpose and finally determine the controversy. It was in this way only that adequate relief could be administered. *Devonsher v. Newenham*, 2 Schoales & L. 208; *Welby v. Duke of Rutland*, 2 Brown, Parl. Cas. 39. Under the statute of this state it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has been passed in his favor. It is sufficient if, while in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court, sitting in equity, may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Upon the verdict of the jury, if a new trial be not granted, the court will then act, by either dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and of no effect, and awarding a perpetual injunction against its assertion to the property in question. There is no difficulty in so conducting a suit, under the statute, as to fully protect the legal rights of the parties, and at the same time to secure the beneficial results afforded by a court of equity in bills of peace, which is repose from further litigation." In *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, 6 Pac. Rep. 481, which was an action like the one at the bar, the court refers to *Curtis v. Sutter*, and says: "It may be the original defendants herein would have been entitled to demand a jury to try the legal issue as to the right of possession, but a jury was expressly waived." And there is the same intimation in *Hyde v. Redding*, 74 Cal. 497, 16 Pac. Rep. 380. Counsel have not called our attention to

any cases in this state where the point now under discussion has been clearly decided adversely to appellant's contention, although cases can no doubt be found where the court, not having its attention closely called to the subject, has assumed that the proceeding under the Code is an equitable action, and referred to the general rule that courts of chancery need not call upon juries for assistance. But it is clear that the right to a jury trial cannot be avoided by merely calling an action equitable. If that were so, the legislature, by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat the constitutional provision on the subject. In *Hyde v. Redding*, supra, the court intimates that the proceeding under section 738 of the Code may be either a suit in equity or an action at law. It is really a statutory action. The Code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable; but if it has to deal with ordinary common-law rights clearly cognizable in courts of law it is to that extent an action at law. And the proper course to be pursued in such a case is clearly pointed out by Judge FIELD in *Curtis v. Sutter*, supra.

The point here involved has been more thoroughly considered by the supreme court of Pennsylvania than in any other tribunal to which our attention has been called. In that state the legislature attempted in several different acts to avoid the right of trial by jury by providing new proceedings in equity for the determination of issues which parties clearly had the right to have determined by courts of law and juries; and in every instance the court held, either that the act was unconstitutional, or that it should be so construed as not to cut off the right of trial by jury. In one of those cases the court, in commenting on the attempt above stated, say: "If this could be done, there is not an ejectionment in the common-law courts which, by the inversion of parties, could not be brought into a court of equity." *Haines' Appeal*, 73 Pa. St. 172. In another case the court, speaking of the provisions of the constitution, say: "It cannot mean that the legislature may confer upon the supreme court and the courts of common pleas the power of trying according to the course of chancery any question which has always been triable according to the course of law by a jury." *Norris' Appeal*, 64 Pa. St. 281. In another case the court say: "An act of the assembly transferring any part of the jurisdiction of the common-law courts to a court of chancery, would be unconstitutional." *Tillmes v. Marsh*, 67 Pa. St. 508. The limits of this opinion will not allow more extended quotations from other cases, but the point will be found to be fully discussed and pointedly decided in *Coal Co. v. Snowden*, 42 Pa. St. 488; *Norris' Appeal*, 64 Pa. St. 275; *Haines' Appeal*, 73 Pa. St. 169; and *Tillmes v. Marsh*, 67 Pa. St. 507.

In the case at bar, according to the verified answer, defendant was entitled to possession, and was in the possession, of the disputed premises a short time before

the commencement of the action, and was ousted by the plaintiff. If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit and thus inverting the parties, could not deprive defendant of his right to a jury. If it were not for the provision of the Code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about the right to a jury; but, while the legislature had the power to grant the plaintiff the privilege of himself commencing the suit, it had not the power to give him, and we think did not intend to give him, the privilege of thus depriving defendant of his constitutional right. We have discussed this point somewhat at length because there is a growing tendency to resort to the statutory action to quiet title when other actions would be more appropriate; and it is well to consider the general nature of the proceeding. But, as other difficult questions may hereafter arise where this form of action is used, it is proper to say that the decision in the case at bar rests upon the facts of the case. It is decided here only that where the answer shows that the defendant was rightfully in possession, and was ousted by plaintiff, and wrongfully kept out of possession, upon the trial of those issues the defendant is entitled to a jury trial. For the reason above given the judgment must be reversed; but as there may be another trial of the case it is necessary to notice another point made by appellant.

As we understand from the findings, the court rendered judgment against defendant solely upon the ground that the original notice of location which defendant put on the Waldeck claim on October 7, 1886,—nearly three years before plaintiff's location,—was entirely invalid, and all acts done afterward worthless, because it was not posted in a proper manner. The court found that there was a local mining custom in the district that all notices of location of quartz claims should be in writing, and "posted conspicuously in a conspicuous place upon the claim located, at or near the lode line of said claim, and recorded in the office of the county recorder of said Nevada county." We gather from the findings that defendant's notice was in due form, and was put upon the lode line, and was duly recorded; that he properly marked his boundaries; that he performed annually upon the claim the amount of labor required by law and on that part of the claim which is in dispute; that his location was made in good faith; and that from October 7, 1886, to April, 1889,—the time when plaintiff's location was made,—he "in all other respects complied with law and custom except as to the manner of posting the notice." The notice was placed on the claim in this way: It was written on one side of a sheet of paper which was folded, with the writing inside, and placed upon a mound of rocks three feet high, and upon the notice were placed two flat rocks, so



that about three-fourths of an inch of the margin of the paper was exposed to view, the rest of the paper being obscured by the two stones which covered it. For this reason the court held that the notice was not conspicuously posted, and that therefore the entire location was void. In so holding the court, we think, erred. It was not found that the notice was so placed for the purpose of concealing it; but it was found that the location was made in good faith, and that "in posting said notice defendant, Meister, (who posted the same,) intended protecting it from the weather, and had made prior locations in the same way." It is further found that "other devices were resorted to by miners to protect the notices from the weather, such as covering the notice with glass, or folding it in a box and placing the box in a conspicuous place." If the plaintiff had attempted to relocate the claim immediately after defendant's notice had been placed there, and before defendant had done further acts of possession, and before there had been any legislation by congress upon the subject, and the only question had been as to the sufficiency of the posting, still we think that the posting, as shown by the findings, would have been sufficient. A substantial compliance with mining customs, where good faith is shown, is certainly sufficient. It appears that various devices were resorted to by miners in the district to protect their notices from the weather. The method which defendant adopted is certainly not more objectionable than "folding it in a box." An artificial mound of rocks on the line of a lode is a conspicuous object, which would naturally attract the attention of one seeking information as to a former location of the lode; and the slightest examination of the mound would result in the discovery of the written notice. Plaintiff should have seen it, and if he did see it, and had the actual knowledge which it gave, but concluded to take advantage of what he deemed a defect in the manner of posting, the technical point which he thus made is entitled to but little consideration. It does not appear how much labor and money defendant expended on his claim during the several years preceding plaintiff's entry, except that he expended more than was necessary to comply with the law; but if he had expended large sums of money in developing the mine, and had sold interests to others at high prices, the proposition to forfeit it all because he partly covered his original notice with two stones to protect it from the weather would, we think, have appalled either judge or jury. But the above view is greatly strengthened when we reflect that under the laws of congress the original notice cuts but little figure after the other acts necessary to the valid location of the mining claim have been done. The notice is valuable chiefly as a temporary protection to the locator while the other acts are being performed. Under the law of congress, "distinctly marking the location upon the ground, so that the boundaries may be readily traced," is necessary, and is the main act of original location. *Holland v. Mining*

*Co.*, 53 Cal. 149. In *Gleeson v. Mining Co.*, 13 Nev. 464. BEATTY, J., delivering the opinion of the court, speaks of congressional legislation on the subject as introducing "a system in which the preliminary posting and recording of notices is entirely out of place, except as a means of protecting a claim during the time necessary for tracing the ledge and marking the boundaries of the location. When the location is thus marked, all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete." We quote the above remarks, not to the point that a mining custom requiring the posting of a notice in a particular way can be wholly disregarded, (which is not necessary here to be decided,) but as showing additional reasons why such a custom, when invoked years after all other acts of location have been done, should receive a liberal and not a strict construction. Our conclusion is that (whatever evidence may be presented on another trial) under the facts as shown in the findings before us the the posting of defendant's original notice should be held to have been a substantial and sufficient compliance with the said custom. The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; SHARPESTEIN, J.; PATERSON, J.

(38 Cal. 268)

PEOPLE v. CHEW SING WING. (No. 20,661.)  
(*Supreme Court of California.* March 7, 1891.)

HOMICIDE—INSTRUCTIONS—FUNCTIONS OF THE JURY.

1. Where, on indictment for murder, the evidence does not show circumstances which are made by statute conclusive of murder in the first degree, an instruction that, if the testimony is believed, the prosecution has made out a case of murder in the first degree, by showing premeditation, deliberation, and malice, is erroneous, being in contravention of Const. Cal. art. 6, § 19, prohibiting a charge to the jury with respect to matters of fact.

2. The supreme court, on appeal, cannot weigh the evidence to find that the judgment was warranted notwithstanding an erroneous charge.

3. The error in such instruction is not cured by a subsequent statement by the court not particularly withdrawing his remarks, but merely charging the jury that they must disregard any opinions he may have expressed on the evidence, of which they are the sole judges.

In bank. Appeal from superior court, city and county of San Francisco; J. Mc-M. SHAFTER, Judge.

J. N. E. Wilson and T. D. Riordan, for appellant. W. H. H. Hart, Atty. Gen., for the People.

DE HAVEN, J. The defendant was by information charged with the murder of one Leuy Jing. He was tried, and convicted of murder in the first degree, and sentenced to be imprisoned for life. He appeals from the judgment and order refusing him a new trial. Upon the trial one Chang Fook, a witness for the people, testified: "I was going up Baker's alley

on the night of the 13th of July, 1889, in San Francisco. \* \* \* I saw Leuy Jing coming down the alley and the defendant coming seven or eight steps behind him. I saw the defendant fire a pistol at Leuy Jing. After the defendant fired the shot he ran back up the alley, while Leuy Jing kind of hurried off down towards Dupont street. \* \* \* When I saw Leuy Jing shot he ran down the alley. \* \* \* He said, 'Save life,' and he said, 'Sun Wing has shot me.' There were also introduced the dying declarations of the deceased, which were, in substance, that defendant shot him; that he turned, and saw him; that defendant followed him out of his room. He further said: "He accused me of asking Cum Moon for money. I did not attempt to hurt him or any one." This was all of the evidence in the case tending to show the circumstances of the shooting, and the court gave the following instruction to the jury: "If the testimony bearing upon the question of the killing, so far simply as the deceased is concerned, and the means by which he came to his end, are believed by you, it would undoubtedly make out a case by the prosecution of murder in the first degree, under the statutes. The testimony tends to show, under the circumstances, that the killing—whoever committed it—must have been deliberate, must have been premeditated, must have been unlawful, and must have been malicious. All the elements of murder in the first degree occur upon the testimony, if believed, as given in the case, and by the conversation of certain persons. The only question would be as to who committed the murder. The testimony is, I believe, contradicted, that this man, the deceased, was shot in that alley, in what is called 'Chinatown' in this city, in the night, in the back; that he ran a short distance, fell, and was picked up, and died of that wound; and that the murderer—so far as the immediate evidence is concerned, as to the act of killing—escaped from the spot without any further detection than this given by the testimony of one witness, who professes to have seen the transaction."

1. This instruction contravenes section 19 of article 6 of the constitution of this state, which declares: "Judges shall not charge juries with respect to matters of fact, but may state the testimony, and declare the law." *People v. Ybarra*, 17 Cal. 171; *People v. Ah Lee*, 60 Cal. 85. In *People v. Ybarra*, supra, the court, speaking through COPE, J., say: "This provision is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case, or to take away their exclusive right to weigh the evidence and determine the facts. The meaning of the provision is that the judge shall decide upon the law, and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter. The judge has no more right to control the opinion of the jury upon a matter of fact than the jury have to disregard the directions of the judge upon a matter of law." There is no question arising in a trial for mur-

der more peculiarly or purely one of fact than the one whether the killing was done with deliberation and premeditation, or in the decision of which so much is necessarily left to the sound sense, discretion, and experience of the jury, who, under the constitution, are made the exclusive triers of that issue. In *People v. Ah Lee*, 60 Cal. 86, this court said: "And we think it to be well settled in this state that it was error to instruct the jury that there were no circumstances in the case to reduce the offense below that of murder in the first degree. The question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree was one which it was peculiarly the province of the jury to determine." If the witnesses in this case had testified to a taking of the life of deceased under any of the circumstances enumerated by section 189 of the Penal Code as conclusive evidence of murder in the first degree, such as by means of poison, lying in wait, or torture, it may be that an instruction in the form given in the court below could be upheld; as, in that case, if the evidence were true, it could be said as a matter of law that the crime committed was murder in the first degree, because the act itself is made conclusive evidence of the fact that it was willful, deliberate, and premeditated. But the question arising upon the evidence here is far different; and whether the shooting of Leuy Jing was willful, deliberate, and premeditated was purely a question of fact, to be determined as an inference from all the circumstances surrounding the act, and was solely a matter for the jury to find and declare for themselves. No matter how clearly it may have appeared to the court that the circumstances or manner of the killing, as given by the witness, would, if truly given, furnish sufficient evidence of everything essential to make the killing murder in the first degree, still the constitution forbade the judge to announce his conclusion to the jury, and the defendant was entitled to have that question submitted for decision to the jury alone, as being the only persons authorized to pass upon it, and was entitled to a verdict based upon their own judgment, entirely uninfluenced by the opinion of the court as to what inferences of fact should be drawn from the evidence relating to this particular fact.

2. Nor are we permitted here to weigh the testimony for the purpose of determining whether the verdict of the jury is not right upon the evidence. What was said by the court in *People v. Valencia*, 43 Cal. 556, is in point here: "We are not justified in saying that the error was productive of no injury to the defendants, because we may be satisfied that the jury ought to have found from the evidence, as they did, that the defendants are guilty of murder in the first degree. The question as to the deliberation and premeditation of the defendants is one which is peculiarly the province of the jury to determine; and should we sustain the charge of the court because of the apparently satisfactory character of the evidence, that ques-

tion would virtually be withdrawn from the jury."

3. The error in this charge was not cured by this subsequent statement of the court: "I am not allowed to assist you in any way by suggestions on the testimony. And if you should think that there is any intimation of my opinion, or anything else, you should utterly disregard it. It is only your business to decide these questions of fact." This was not a withdrawal or a qualification of the former statement of the court that the killing of Luey Jing was murder in the first degree, if the witnesses for the prosecution were believed. Other parts of the charge are excepted to, but it is not necessary to pass upon any other assignment of error in the case. Judgment and order reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.; HARRISON, J.; PATERSON, J.; SHARPSTEIN, J.

(88 Cal. 36)

BOOTH *et al.* v. PENDOLA *et al.*<sup>1</sup> (No. 13,267.)

(Supreme Court of California. Feb. 13, 1891.)

MECHANICS' LIENS—PLEADING.

1. Where two separate buildings are constructed at different times, under different contracts between the owner and the same contractor, a mechanic's lien may be jointly filed against both, without specifying the amount due on each.

2. To render a judgment for a mechanic's lien valid, where the contract is not recorded, there must have been an allegation in the complaint, and a finding of the court, as to the value of the material furnished and the work done.

Affirming 23 Pac. Rep. 200.

In bank. On rehearing. For former report, see 23 Pac. Rep. 200.

PER CURIAM. This is an action brought by plaintiffs having several liens of mechanics and material-men against property owned by Pendola, deceased, in his life time. The findings show that Pendola entered into a written agreement with one Hamilton on March 29, 1887, for the construction of the Western Hotel, in the city of Santa Barbara, and on the 15th of June entered into another contract with said Hamilton to build a cottage near said hotel and on the same lot. Neither of these contracts was recorded. Belt & Co. furnished materials for both buildings, for which Hamilton agreed to pay a reasonable price. The court finds, that the reasonable value of the materials furnished by them was \$363.99. On May 2, 1887, Hamilton entered into an agreement with Backus & Heyl, by the terms of which the latter were to paint the hotel for the sum of \$365, and the cottage for the sum of \$135. The court finds that of these sums \$131.71 remains unpaid. Lightner & Buckingham furnished materials for, and performed certain work on, the cottage, for which Hamilton was to pay the sum of \$335, and performed certain work on, and furnished materials for, the hotel, for which they were to receive the sum of \$975, of which the sum of \$535.35 remains due and unpaid.

<sup>1</sup> Modifying 24 Pac. Rep. 714.

1. The claims of lien filed by Backus & Heyl and Lightner & Buckingham segregate and specify the amounts which they were to be paid on each building, and state the total of the amounts paid to them and the balance due on both buildings. It is not stated, either in the complaint or in the findings, how much remains due on each of the buildings, and the question is presented whether a joint lien can be filed against two buildings where they are separate structures which have been erected at different times, and under different contracts between the owner and the original contractor. It seems to be conceded that a joint lien may be filed against two buildings erected at the same time and under the same contract. We think there can be no doubt that such is the case; and whatever may be the rights of an original contractor, having constructed two separate buildings under two separate and valid contracts, we think that in the case at bar the only effect of the failure to state how much labor and material was furnished one building, and how much the other, is to postpone the liens of these claimants and give precedence to the liens of others.

2. The complaint alleges that Hamilton agreed to pay Backus & Heyl the sums of \$365 and \$135, above referred to, and that he agreed to pay Buckingham & Lightner the sum of \$975 for work done on, and material furnished for, the hotel, and \$335 on account of the cottage; but it is nowhere alleged, nor does the court find, what was the value of any of the materials furnished or any of the work performed. Such allegations and findings were necessary, and the judgment cannot be supported without them. The contract between the owner and Hamilton was never filed for record. It was void, and while it is doubtless true that the contract price agreed upon between Hamilton, the agent of the owner, and the material-men and laborers, is *prima facie* evidence of the value of the materials furnished and labor performed, and would support a finding of value, we think that an allegation and a finding on the subject are essential to support a judgment in actions of this character. All other points made by appellant and worthy of consideration were noticed by Mr. Justice McFarland in the opinion filed in department, (23 Pac. Rep. 200,) and we are satisfied with the conclusions therein reached.

Judgment as to plaintiffs Buckingham and Heyl is reversed, and the cause is remanded for new trial, with permission to amend their pleadings as they may be advised. In all other respects the judgment is affirmed.

(88 Cal. 68)

ALHAMBRA ADDITION WATER CO. v. MAYBERRY. (No. 13,126.)

(Supreme Court of California. Feb. 14, 1891.)

WATER-RIGHTS—CONSTRUCTION OF CONTRACT.

1. W., the owner of land in which a stream took its origin, made an agreement with K., the occupant of government land through which the stream flowed, whereby W. granted to K. the right to enter on W.'s land, and, by means of a ditch, conduct onto the upper part of K.'s land the water from said stream, for use for irrigat-

ing his land during two days of each week; and K. granted to W. the right to enter on the lands occupied by him, and dig such ditches as he wished to, to distribute the water over lands of W. Thereafter K. obtained title to the government land occupied by him, bought part of W.'s land above, through which the stream flowed, subject to a reservation of all water-rights, and from different sources acquired the lands below the lands which he occupied at the date of the contract. Plaintiff succeeded to the lands and water-rights of W.; defendant, to those of K. Held, that defendant could not claim water-rights under the contract and also as riparian owner through the subsequent purchases along the lower part of the stream. PATERSON, J., dissenting.

2. On the land purchased from W. by K., defendant, and not plaintiff, has the right to develop water by digging wells, running tunnels, etc., so long as the natural flow of the stream is not interfered with.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

*Houghton, Silent & Campbell*, for appellant. *Bicknell & White* and *Chapman & Hendricks*, (*Cross & Denson*, of counsel,) for respondent.

BEATTY, C. J. There is in the county of Los Angeles a natural stream issuing out of the Canada del Molino, and called "Mill Creek," which flows southward from the mouth of the Canada towards the town of Alhambra. In the year 1860, the land embracing the source of Mill creek, and extending to and including the mouth of the Canada, belonged to B. D. Wilson; south of and adjoining the land of Wilson, and including the lower course of Mill creek, was a tract of government land, embracing 154 acres, occupied by E. J. C. Kewen. Mill creek flowed across this tract and upon other vacant land of the United States. In its ordinary stages, and in its natural condition, the stream flowed but a short distance below the land occupied by Kewen. In order to irrigate higher portions of his land and get a head for conducting water to his house under pressure, it was necessary for Kewen to divert water from the stream on the lands of Wilson, and it was also convenient for Wilson to conduct a portion, at least, of the water used by him in irrigation across the lands occupied by Kewen. Under these circumstances, Wilson and wife on the one side, and Kewen and wife on the other, entered into the following contract: "This indenture, made this seventh day of May, A. D. 1860, between Benjamin D. Wilson and Margaret, his wife, of the first part, and Edward J. C. Kewen and Fannie, his wife, of the second part. Whereas, the said Benjamin D. Wilson is the owner of a certain tract of land called the 'Rincon de San Pasqual,' situate in the county of Los Angeles, the boundaries of which, are set out and described and are known to the parties hereto; and whereas, there is a certain stream of water, which takes its rise upon said tract of land and flows through a glen or Canada, called 'Canada del Molino,' or 'Mill Stream,' which glen is the glen which is in front of the old mill formerly possessed by the mission of San Gabriel, and being upon the banks of a certain fresh-water lake called 'Lake Vineyard,' which stream, after passing through

the said glen, flows over the boundary line of the said tract of land called 'Rincon de San Pasqual,' and on and upon the lands outside thereof; and whereas, the said parties of the second part possess certain lands outside of and bounding on said boundary lines, upon which they are desirous of bringing the said water flowing in said Mill stream, to which the said Benjamin D. Wilson is willing to consent in the manner and mode and for the considerations hereinafter expressed: Now, therefore, this indenture witnesseth, that the parties of the first part for and in consideration of the grants and privileges to said Wilson hereinafter made, and of the free, effective, and undisturbed enjoyment thereof, have granted, released, remised, and conveyed, and by these presents do grant, release, remise, and convey to the parties of the second part the right of entry for themselves and servants in, over, and upon those certain lands, being in the county of Los Angeles and in the tract of land called 'Rincon de San Pasqual,' which said tract of land has been finally surveyed by the United States surveyor general, which said certain lands are those lying within and on the western side of the glen or Canada, called the 'Canada del Molino,' or 'Mill Stream,' the mouth whereof is to the northward of the old mill formerly occupied by the mission of San Gabriel, near the lake now called 'Lake Vineyard;' and after entry thereupon the right of guiding and conducting for two days in each week, commencing Friday and continuing through Saturday—that is, Friday and Saturday of each week—the water flowing in said glen, along the western side, in the upper water ditch now existing therein, a portion whereof was dug and opened in the fall of last year, together with the privilege of keeping the same in repair, the right of digging earth therein, and after guiding and conducting said water along said ditch, as aforesaid, the exclusive right to use and distribute the same for the purpose of irrigating their lands during the said two days in each week: provided, nevertheless, that when the said waters shall not be used for the irrigation of the lands aforesaid, that then they shall be permitted to flow in the manner and mode as directed by said Wilson. To have and to hold the said right of entry as aforesaid and the privileges thereunto annexed to the said parties of the second part, or either of them, owner or owners of the land now occupied by them, and to their or his heirs forever. And the parties of the second part, for and in consideration of the grant hereinbefore made, have given, granted, remised, released, and confirmed, and by these presents do give, grant, remise, release, and confirm to said Benjamin D. Wilson and his heirs and assigns a right of entry for himself and his servants in and upon all the lands now occupied by them, called the 'Rancho del Molino,' being the same tract of land hereinbefore referred to, for the purpose of opening new water ditches upon and through the said lands, or of using those already opened, and for the purpose of erecting and building aqueducts or flumes,

or of using those already erected, and of keeping the said water ditches, flumes, or aqueducts in repair, and for these purposes the right to dig earth; also the right of way in and upon said lands for the purpose of guiding and conducting said water as the said Wilson may desire or wish, through said water ditches, flumes, or aqueducts now or to be opened or built upon or over the said lands in such directions, along such levels, and in such manner and mode as may seem to him expedient and useful, but not so as to wantonly and uselessly injure them, the parties of the second part and either of them shall permit to flow except as hereinafter specified, without disturbance, diminution, or injury, through and over their said lands along the said water ditches, flumes, or aqueducts, to such point or points outside thereof as the said Wilson may from time to time select; subject, nevertheless, to the right of the parties of the second part to use the water for irrigation of the said lands now occupied by them, flowing in the upper or higher ditch, or in any water ditch, flume, or aqueduct used, dug, or erected by the said parties of the first part upon the lands of the parties of the second part, or either of them, as aforesaid, during the two days hereinafter specified, and subject to their further right to conduct so much of the water in the upper ditch at any time when it may be flowing therein through a pipe two inches in diameter as may be sufficient to fill the same for the purposes of domestic use and for the playing of a fountain. And all the parties hereto mutually covenant to perform all the obligations herein contracted, and agree that the agreements and stipulations herein shall bind as well themselves as their heirs, executors, and administrators and assigns. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written. B. D. WILSON. [Seal.] MARGARET WILSON. [Seal.] E. J. C. KEWEN. [Seal.] FANNIE KEWEN. [Seal.]" Subsequently Kewen acquired the title to the government land occupied by him, and he also acquired 50 acres, including the mouth of the canal from Wilson, subject to a reservation of all water-rights, and from different sources he acquired the lands along the course of the stream below and adjoining the land which he claimed and occupied at the date of the contract. All these lands and all his rights under the contract were thereafter sold and duly transferred to the defendant. The plaintiff has acquired certain lands from Wilson, and succeeded to all his rights under the contract. Both parties have continuously claimed and asserted, and in this action are claiming and asserting, the rights secured to their respective predecessors by the contract, and none other. But they differ widely as to its proper construction, and the defendant is using water at times and for purposes which the plaintiff contends are in excess of his rights, and injurious to it.

This action was brought to determine the respective rights of the parties in the waters of the stream. The superior court

sustained the claims of the plaintiff, and made a decree declaring and establishing its rights, and enjoining the defendant from infringing the rights so established. Defendant appeals from the judgment and from an order denying a new trial. The assignment of error principally relied on is that the superior court gave an erroneous construction to the contract of May 7, 1860. But we think the court construed the contract according to the intention of the parties, as shown not only by its terms, but by their subsequent action under it. They seem to have acted upon the assumption that they had a right to divide between themselves the entire flow of the stream, and their agreement, though inartificially drawn and most awkwardly expressed, clearly evinces that such was their intention. Nor can it be urged against this construction that it imputes to the parties an intention to do that which they had no right to do. For, so far as appears, they were at that time the sole occupants of the lands bordering the stream, and the lands through which it flowed after leaving the lands of Kewen belonged to the United States. Such being the case, they had a right to appropriate the entire stream for any beneficial purpose. Evidently they contemplated such an appropriation for the purpose of irrigating the land then in possession of Kewen, and, subject to the limited rights secured to him by the terms of their agreement, for the further purpose of irrigating any lands owned, or thereafter to be acquired, by Wilson, whether riparian to the stream or not. There was nothing unlawful or improper in such an agreement, or in such appropriation and diversion of the water, as between themselves, or as against the United States. It was held by the superior court, correctly, as we think, that by the contract Wilson and his successors acquired, as against Kewen, and those claiming under him, the right to use all the waters of the stream and to divert the same to lands not riparian, subject only to the rights of Kewen, as defined by the contract, *i. e.*, the right to use the entire flow of the stream on Friday and Saturday of each week for the irrigation of the land owned or occupied by him at the date of the contract, the right to maintain his ditch and divert the water on the land of Wilson, the right to draw water therefrom, whenever it might be flowing therein, for domestic purposes, and for playing a fountain, to the capacity of a two-inch pipe, and the right to use the ditches, pipes, and works of Wilson, situated on his land, for the purposes of irrigation on Fridays and Saturdays. It was also correctly held by the superior court that Wilson, in his conveyance to Kewen of the 50-acre tract, reserved all water-rights then possessed by him, whether dependent on the contract or appurtenant to the land conveyed. But it is contended by the appellant that since he has become the owner of the lands bordering on the stream below the land owned or occupied by Kewen at the date of the contract, he has, as a riparian proprietor, a right to insist upon his share of the waters of the stream for the irri-

gation of those lands, independent of and superior to any rights of any party under the contract. But he cannot at the same time claim under the contract and against it. As above stated, the case shows that he, as well as his predecessor, Kewen, has always claimed and exercised the rights secured by the contract and wholly dependent upon it. In his answer in this case he makes no claim as a riparian owner, but relies on his construction of the contract. We do not see how he could maintain positions so inconsistent, even if his claim as a riparian owner was clearly well founded. But he seems to have acquired all his riparian land through Kewen. If this is so—if Kewen, after entering into the contract with Wilson, acquired title to the lands below him—his riparian rights as owner of such land became subordinated to the rights he had granted to Wilson by the contract. At least, it is certain he could not at the same time insist upon rights as a riparian owner inconsistent with the right he had granted to Wilson, and at the same time claim and exercise rights granted by Wilson upon no other consideration than his own grant to him. He could not at the same time enjoy the benefits of his contract and repudiate its burden. But, as we have seen, both Kewen and the defendant have always claimed under the contract, and to that they must look for a definition of their rights. In one particular, however, the findings and the decree are unwarranted by the evidence and by a proper construction of the contract and deed from Wilson to Kewen conveying the 50-acre tract. It is found as a fact, and decreed accordingly, that plaintiff, as successor to Wilson, has a right to develop water on the 50-acre tract, and that the defendant has no right to develop water thereon. We do not think that plaintiff has any such right, if by developing water is meant the digging of wells, running of tunnels, and the like. Nor do we think that the defendant is precluded, as successor of Kewen, either by the deed or contract, from digging wells, running tunnels, etc., on the 50-acre tract for the purpose of obtaining water, so long as he does not thereby interfere with or perceptibly diminish the natural flow of the stream. The decree of the superior court should be modified, so far as necessary, to bring it in harmony with these views. The cause is remanded, with directions to the superior court to modify its decree accordingly, and as so modified it will stand affirmed; the appellant to recover costs of the appeal.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; GAROUTTE, J.

PATERSON, J., (*dissenting*.) I concur in the judgment in so far as it directs a modification of the decree, but am unable to concur with the majority in the construction of the contract between the Wilsons and the Kewens. I am unable to see in that contract an intention on the part of the parties thereto to convey or partition their water-rights. The object of the contract was to secure water for the tract of

land then owned by the respective parties. Wilson could not get it upon his land—portions of his land—without crossing the lands of Kewen. Kewen could not get it upon certain portions of his land, which he desired to irrigate, without the use of the ditch he had constructed on Wilson's land. It seems that Wilson never used this ditch, but he could get water on his land lying east of Lake Vineyard by ditches, flumes, and aqueducts, through which to carry the water upon and across Kewen's land. Each granted to the other an easement for the purpose of conducting the water upon his land. In fixing the time each was to use the water, they did not necessarily convey any water-right, and, in the absence of an intention to do so clearly appearing in express and unequivocal terms, it should not be held that they did. If a third person had purchased the land lying below the 154.32 acres owned by Kewen, he certainly would not have been bound by the contract between Wilson and Kewen. He could have maintained his right to the use of the waters of the stream as a riparian proprietor, notwithstanding the fact that the stream had its source on the lands of Wilson. *Kidd v. Laird*, 15 Cal. 179; *Canal Co. v. Kidd*, 37 Cal. 311; *Gould v. Stafford*, 77 Cal. 68, 18 Pac. Rep. 879. As between themselves, of course, Wilson and Kewen could dispose of their water-rights as they chose; but they could not affect the rights of lower proprietors, and I am unable to see how the defendant can be estopped from claiming the same right that any other purchaser of the land below the Kewen lands would have had as a riparian owner. If he had owned the lower tract at the time the contract was entered into by Wilson and Kewen, or if he had purchased it before he purchased the Kewen tract, it does not seem to me that he would have lost his rights as a riparian owner of the first tract purchased, simply because his second grantor had entered into the contract with Wilson. I am at a loss to understand why he waived his riparian rights as owner of the lower tract by purchasing the Kewen tract. When he purchased the lower tract he took with the grant all the right that any other grantee could have taken. But, as stated before, it seems clear to me that the only object of the parties to the contract was to secure the right of way, each from the other, for conducting water across the land,—the agreement as to the time each was to use the water being a mere matter of convenience,—and the use of the water contemplated by the parties was confined to the lands then held by them. It may be, and doubtless is, true, that the defendant is entitled to use the water on the Kewen tract only in accordance with the terms of the contract between Wilson and Kewen, and that he would have no right to use the ditch or pipes located above for the purpose of conducting water upon the lower tract,—the tract below the land held by Kewen at the time the contract was made; but as to such lower tract, I think the defendant is entitled to use the water in the same manner as if no contract had ever been

entered into between Wilson and Kewen, and as if defendant had never purchased the upper tract from Kewen. The defendant did not in express terms set up his right as a riparian proprietor in the lower tract, and there may be a doubt as to whether such right has been litigated herein. If the issues and the decree do not cover the rights of the defendant as riparian owner of the tract below, regardless of the contract, what I have said is inapplicable to the case; but it seems to me that the decree determines all the rights of the defendant to the use of the water, without regard to any particular tract of land. I therefore dissent from that portion of the judgment which sustains in part the decree of the court below.

(38 Cal. 92)

HILL v. WILSON *et al.* (No. 13,586.)

WILSON *et al.* v. HILL. (No. 13,587.)

(Supreme Court of California. Feb. 18, 1891.)

VENDOR AND VENDEE—FRAUDULENT REPRESENTATIONS.

1. Defendants sold to plaintiff land and stock in a water company, representing that the water supply to which the stock entitled him was sufficient to irrigate the land and render it capable of producing crops. *Held*, that the representation was not a mere expression of opinion, but a material statement that there was a permanent and sufficient supply of water for irrigation.

2. Where certificates of stock are transferred by indorsement in blank, and not on the books of the company, an offer by the transferee to deliver them to the transferor on failure of the consideration is a sufficient tender.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

*Waters & Gird*, for appellant. *Hargrove & Bledsoe* and *H. C. Rolfe*, for respondents.

PER CURIAM. The case of *Hill v. Wilson* and wife was brought to foreclose a mortgage given by the defendants for a balance of purchase money alleged to be due for the real estate described therein, sold by the plaintiff to the defendants. To this complaint the defendants pleaded that the plaintiff had induced them to purchase the land and execute the mortgage by certain false and fraudulent representations. The action of *Wilson* and wife against *Hill* was one to rescind the sale of the land by *Hill* to them and cancel the mortgage, on the same grounds set up in their answer as a defense to the action to foreclose the mortgage; so that the issues in the two cases were substantially the same. There was a demurrer to the answer in the foreclosure suit and to the complaint in the action to rescind, which presented the same question. By stipulation the two cases were consolidated and tried together, and are brought to this court in the same transcript. The evidence is the same in both cases, so far as it becomes material on this appeal. The court below found for the defendants in the foreclosure proceeding and for the plaintiff in the action to rescind, and in the latter case decreed that the mortgage be delivered up by the defendant, and that he repay the purchase money paid in

cash, amounting to \$2,000. *Hill* appeals in both cases.

It is contended by the appellant that neither the answer in the first case nor the complaint in the last was good, because the representations alleged to have been made were not as to existing facts, but were mere opinions; that the offer to rescind was not made in time; and the tender made was not sufficient. The sale made by *Hill* was of the land, 45 shares of stock in a certain water company, 5 cords of wood, and a cow, for the sum of \$6,000. The shares of stock entitle the holder to so much of the waters of a certain water-ditch, to be used for irrigation and domestic purposes, and was for that reason only valuable in connection with the land. The allegation as to the fraudulent representations was as follows: "The said plaintiff, for the purpose of inducing the defendants to purchase the land and water-right hereinabove described, did falsely and fraudulently and deceitfully represent to defendants, and did by such false, fraudulent, and deceitful representations induce defendants to believe, that the said land was well and abundantly watered by means of the said forty-five shares of said Timber Ditch Water Company, and the water to be furnished for use on said land by the said ditch that the said Timber Ditch would carry, and that there would be flowing therein during all the dry and irrigating season of the year from two to three hundred inches of water, measured under a four-inch pressure, which was and would be sufficient and ample to irrigate the whole of said land, so that the same would produce large and valuable crops of alfalfa and other grasses. And the defendants, relying upon and believing said representations to be true, entered into the contract for and made the purchase of said land and premises, as hereinabove stated, without making any other or further inquiry or examination as to the water supply aforesaid, believing and relying upon the statements and representations of said plaintiff with reference to the said water supply, and, being entirely unacquainted with that portion of the country, entered into said contract and made said purchase of the said land and water-right solely and exclusively upon the representations and statements of the plaintiff that the said land was well and abundantly supplied with water for the purpose of irrigation during all the dry and irrigating season, which was the sole and only inducement to defendants to purchase said premises. That the soil of said lands is dry and sandy in character, which, without an abundant supply of water for irrigation, is absolutely unfit for farming or agricultural purposes of any character whatever, which was well known to plaintiff." These were not the mere expressions of opinion. They were statements of very material and important facts, and such as were well calculated to induce the purchase. It was not a statement that there would be water from a certain stream or ditch, but that the ranch was well supplied with water. This was a statement of an existing sup-



ply of water. Nor could it be construed as a mere statement that at the time the representation was made it was supplied with sufficient water. To say that the ranch was well watered was equivalent to a statement that it had a supply of water sufficient to irrigate and produce crops at all proper seasons of the year; and this was expressly stated. The allegations were sufficient in this respect. The allegation was that the vendees discovered, by the failure of the water supply on the 20th of June, that the representations were false; and they offered to rescind, and tendered a reconveyance of the land, and to return the certificates of stock, on the 20th of August. This, we think, was a reasonable time within which to offer to rescind, and the cause cannot be reversed on this ground.

It is insisted that the tender on the offer to rescind was not sufficient because the cord-wood and the cow were not tendered, and the certificates of stock were not tendered in such form as to vest the title in Hill if the tender had been accepted. The allegation as to the tender is as follows: "Defendants further allege and aver that as soon as they discovered and became convinced of the falsity of the aforesaid representations of plaintiff in regard to the water belonging to and with said land, they offered in good faith to rescind the entire contract of sale and purchase of the said premises between plaintiff and the defendants, made on the 10th day of March, 1888, as aforesaid, and for that purpose defendants made, executed, and acknowledged a good and sufficient deed for the reconveyance to plaintiff by them of the land and premises aforesaid, and on or about the 20th day of August, 1888, and before the commencement of this action, they tendered said deed to plaintiff, and offered to give and surrender to him the full, peaceable, and quiet possession of said premises, and every part thereof, together with the said certificates for the forty-five shares of stock in the Timber Ditch Water Company, being the identical certificates thereupon indorsed, and delivered by the plaintiff to the defendants as aforesaid; and defendants then and there demanded of the plaintiff a full rescission of the said contract of sale and purchase by and between the said plaintiff and defendants, and offered to restore to plaintiff all and every part of the said premises in as good state and condition as they were when defendants received the same, save and except such damage as the trees and other crops have suffered for want of water as aforesaid, and without any fault of defendants; and demanded of plaintiff the restoration and return to them of the full consideration paid on account of said sale and purchase, and of the notes and mortgage upon which plaintiff brings this suit; but to rescind the said contract the plaintiff then and there refused, and still refuses so to do, although well knowing that in equity and good conscience he ought to rescind the same." This was sufficient as to the land and water stock. It appears from the pleadings that the certificates of stock had been transferred to Wil-

son by an indorsement in blank. There does not appear to have been any transfer of the stock on the books of the company. This being so, an offer to redeliver the certificates to Hill was a sufficient tender of them. There was no direct allegation of a tender of the cord-wood or the cow. Counsel for appellant say there was no allegation of the value of the land or of the value of the personal property, and that the personal property not tendered might have been of the value of \$6,000. We can hardly believe cord-wood and cows must come high in San Bernardino county. But when we look at the evidence we find that the cord-wood and the cow were really no part of the consideration for the purchase or the mortgage, and that they, being on the ranch, were "thrown in" in the trade. We think the general allegation of an "offer to rescind the entire contract of sale and purchase," together with the specific allegations set out above, rendered the pleadings both sufficient. In the judgment rendered the Wilsons were required to account for or return all of the property received by them. The allegations and findings of fraud are fully sustained by the evidence, and the findings support the judgment. Some objections are made to certain rulings in the admission and exclusion of evidence, but we find no error in the record. The judgments and orders in both of the cases are affirmed.

(88 Cal. 86)

NAGLE V. CALIFORNIA SOUTH. R. CO. (No. 13,729.)

(Supreme Court of California. Feb. 16, 1891.)

CARRIERS—INJURIES TO PASSENGERS—ALIGHTING FROM TRAIN.

Plaintiff in an action against a railroad company for personal injuries had bought a ticket on defendant's road to his home, which was the third station from his starting point. At the third stop after the journey began, several passengers, bound for the same place as plaintiff, started up, one of them saying that it was their destination; and plaintiff, going onto the platform of the car, got off in the dark, and, after falling 15 feet into a canyon, discovered that the train had stopped on a trestle some distance from his station. No signal had been given for the stop, and it lasted only a minute or less, so that no one else had time to get off. One of plaintiff's witnesses testified that there had been a washout there; and it was not shown that it was so dark that plaintiff could not have noticed the canyon if he had taken the time to look. *Held*, that a nonsuit was properly granted.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Deakin & Story, for appellant. Hunsaker & Britt, for respondent.

FOOTE, C. The plaintiff brought this action to recover damages for injuries caused him by the alleged carelessness and negligence of the defendant. After the introduction of the plaintiff's evidence, a jury having been waived, the defendant moved for a nonsuit, which was granted. From the judgment rendered in the premises, and an order denying a new trial, this appeal is taken.

The facts, as they appear in the evidence of the plaintiff, are that on Sunday night, April 15, 1888, he was traveling on the defendant's railroad. Had bought his ticket at San Diego for La Jolla, a station on that road. He had been on this journey before in the day-time, and knew that at La Jolla there was a platform to get out upon, and that it had a shed over it, and the ground was level around the station at that point. In going from San Diego to La Jolla before, he knew the train had only made three stops,—at Old Town, Morena, and La Jolla. There were five other persons with him on the present trip, passengers to La Jolla. He did not know whether there were lights about La Jolla and the station at night. The train stopped some time at Old Town to water or coal. It then stopped at Morena. After this it again stopped. He did not "know what for." Everybody got astir in the car, and "the men allowed this was La Jolla." There was a kind of rush; that is, of the men in the car who had to get off at La Jolla, thinking they were there. The man along-side of the plaintiff stood up. The latter sat still until the train came to a stop. The man said: "You had better get out quick; the train don't stop a minute." The plaintiff got out, and in doing so "walked right off, and went down a canyon, as our car was standing on a trestle-work." He did not know how long this was after leaving Morena, or how far this place was from La Jolla. He thought he was walking down the steps to "the platform," instead of which he went down the canyon. He fell 10 or 12 feet. Nobody else got out. He sprained his ankle, and suffered other injuries. On cross-examination he did not seem to be certain that the train did stop at Morena, or how long. When the whistle blew he did not see the conductor, the latter having taken up the plaintiff's ticket before the train stopped; nor did he see any of the trainmen when he walked off. The whistle was blown sharply, but how many times he did not remember. On redirect examination he knew that the train stopped twice after leaving San Diego before reaching the trestle; once at Old Town, and once at Morena. The plaintiff thought the distance from where he walked off to La Jolla "must have been a couple of miles." His brother, also a witness for him, stated that he might be "in the neighborhood of a mile;" it may be a little more or less; and that he had heard it was about four miles between Morena and La Jolla. He and the other men in company thought the stop was for La Jolla. There had been no warning that they were going to stop, or that they must keep their seats. "From habit of getting off at the third stopping place we made the move to get off there." On cross-examination he thought the distance to La Jolla from where the plaintiff stepped off was more than a mile. He heard no whistle, and the train stopped on the trestle perhaps a minute. At the time the train stopped neither conductor nor trainmen were in the car. Three of the company went out at one door of the car and three at the

other. Another witness for plaintiff testified that the night was rather dark. That the third stop, which they supposed to be La Jolla, was about midway between Morena and La Jolla; that is, about two miles from either place. He did not know what the train stopped for at the third point. It was "no stopping place at all. It was just simply a stopping place for the train." He got up to get off at a different door from the plaintiff, but did not get off. He thought it "pretty hard to look the length of the car and tell the parties and recognize them." He did not think the train stopped at the trestle over 15 seconds. It was just about time enough to come to a standstill and move on. "It only came to a standstill and moved." He "judged" the trestle was about midway between Morena and La Jolla. He heard none of the trainmen say it was La Jolla. There was no station called or mentioned by any of them. Another witness swore that the train stopped at Old Town; then at another little station. "After that they stopped where there had been a washout. They had been working there; and they never 'hollered' for a station. They kind of checked up there. It was dark. We started to get off. Mr. Nagle [the plaintiff] got off, and when he got off he fell. They started so quick that he, having some bundles to gather up, did not have time to get off." From all this it appears that the cause of the stoppage of the train was a proper one, that due care might be taken of the whole train and all the passengers on it. As the train was approaching a washout, where danger might exist, it was the duty of the conductor and trainmen to be at their several stations,—at the brakes and on the lookout,—to see that there was no injury likely to result in passing this dangerous spot on the road. They could not perform this in the short time of the stoppage, and also go through the cars to warn passengers not to get out; for this stoppage lasted at the most a minute, or, as a witness said, not more than "fifteen seconds." If they had acted as the plaintiff seems to contend they should, an accident had happened to the train, and injuries been received by the passengers, then the negligence of the defendant would have been apparent. It was evidently the habit—that of making the third stop at La Jolla—that induced the plaintiff and his companions to rush for the door, and the former to jump out so quickly as not either to attempt to look about and see if he was at La Jolla, or apparently to use any sort of precaution in seeking to ascertain at what kind of a place he was stepping off. It appears that no one else got off; and, conceding that the two persons immediately behind the plaintiff did not get off because he had stepped off into the canyon, yet it still appears that none of the three at the other door of the car got off, probably because they saw they were not at La Jolla, or that the place of the stoppage was not a proper place at which to get off. It does not appear to have been so dark but that a person by the proper use of his eyes might have dis-

tinguished a canyon lying immediately before him, 10 or 15 feet deep, from a level place, where there was a platform and shed over it, which were to be seen at La Jolla. Instead of attempting to do this, the plaintiff heedlessly jumped off the car, and could not have taken time to look about him, as it would appear. The defendant cannot be held to the responsibility of warranting the safety of the plaintiff at all events. *Treadwell v. Whittier*, 80 Cal. 585, 586, 22 Pac. Rep. 266. It is "responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and therefore for the slightest neglect." 80 Cal. 595, 22 Pac. Rep. 272. It was for the court, on the undisputed facts, to determine if the defendant was guilty or not of contributory negligence. *Glascock v. Railroad Co.*, 73 Cal. 187, 14 Pac. Rep. 518. And even if the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff, this does not preclude a judgment "by way of nonsuit, whenever the evidence of the plaintiff so conclusively establishes a defense as that the court would grant a new trial in case of a verdict in his favor upon like evidence." *McQuilken v. Railroad Co.*, 59 Cal. 8. The plaintiff had no intimation from the trainmen that this was his stopping place, or that he should get off; but got off apparently because some irresponsible person said it was La Jolla, and perhaps because of the habit of persons getting off there usually as the third stopping place from San Diego. He got off in the dark, when the best use of one's eyes is necessary; and we must suppose that his were good. He should at least have used them, acting, as he was, upon his own responsibility, with sufficient care to have "looked before he leaped." This is the rule, as we think, announced in *Flemming v. Railroad Co.*, 49 Cal. 257; *Glascock v. Railroad Co.*, 73 Cal. 140, 14 Pac. Rep. 518. We think the judgment and order should be affirmed, and so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(88 Cal. 106)

DAVIS v. BAKER. (No. 14,023.)

(Supreme Court of California. Feb. 18, 1891.)

ATTACHMENT—SUFFICIENCY OF WRIT—POSTING COPY.

1. A writ of attachment cannot be held insufficient on appeal because of an alleged recital therein, where it is not shown by bill of exceptions, and the only thing that appears is an objection by counsel, in which he recites a portion of the writ.

2. The addition of the words "or thereabouts" after the amount of the demand in a writ of attachment does not render the proceeding void on collateral attack under Code Civil Proc. Cal. § 540, requiring writs of attachment to state "the amount" of plaintiff's demand.

3. Where a writ in attachment was posted on the side of a house next a street, the house being near a corner, and there being a vacant lot opposite the side of the house, and two witnesses testify that the notice could be easily and plainly

seen by passers-by, a finding that it was posted in "a conspicuous place," as required by Code Civil Proc. Cal. § 542, is warranted.

Commissioners' decision. In bank. Appeal from superior court, Butte county; G. G. CLOUGH, Judge.

*Park Henshaw and Grey & Sexton*, for appellant. *John Gale*, for respondent.

HAYNE, C. Suit to quiet title. Judgment for plaintiff. Defendant appeals. The parties stipulated that the only questions to be determined is whether a certain attachment, under which the plaintiff claims, was properly levied upon the lot in controversy. Upon the former appeal it was held that the return was *prima facie* sufficient. 72 Cal. 494, 14 Pac. Rep. 102. The defendant now urges two reasons why the levy should be held to be insufficient.

1. It is argued that the writ was insufficient in that it did not state "the amount" of the plaintiff's demand, as required by section 540 of the Code of Civil Procedure, but stated that the action was to recover \$620 "or thereabouts." We are inclined to doubt whether this question is open for consideration under the stipulation. Assuming that it is open, there is no foundation for it in the record. It appears that the writ was introduced in evidence, but it is not shown by the bill of exceptions. The only thing that appears is an objection by counsel, in the course of which he recites a portion of the writ. This is not a sufficient mode of showing a fact. If it be assumed to be sufficient, it only purports to be a part of the writ; *non constat*, but that the remainder of the writ was amply sufficient in the respect referred to. And if the fact was shown to be as the appellant says it is, we do not think that the words "or thereabouts," after the amount of the demand, renders the attachment proceedings void upon a collateral attack.

2. It is said that the evidence shows that the writ was not posted "in a conspicuous place," as required by section 542 of the Code of Civil Procedure. The finding is that the notice was posted in a conspicuous place; and the evidence shows conclusively that this was so. The house was near a corner formed by two streets, and on the east side was a vacant lot. The east side was the "long side." The notice was posted on this side, within five or six feet of the street. The contention is that it ought to have been posted on the front of the house. The sheriff testifies that "anybody could see it that would go by;" that "it was the most suitable place—conspicuous place—I could find;" and that it was the safest place to put the papers "so that they would stay placed." (Another witness testified that the papers posted could readily be seen; "no trouble to see them. One could scarce pass without seeing the papers, if they were looking at all.") There was no evidence to the contrary. The appellant says that the testimony of these two witnesses was materially weakened on cross-examination, but we do not think so. The statute does not require that the notice should be posted in "the most" conspicuous place, but only in a conspicuous place; but, if it

did, we should not be able to say that the evidence did not show that the place chosen was not as conspicuous as any other. We think that the judgment and order appealed from should be affirmed, with damages.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(88 Cal. 103)

COLE V. SEGRAVES. (No. 13,839.)

(Supreme Court of California. Feb. 18, 1891.)

EJECTMENT—PLEADING—COMPLAINT.

1. A complaint in ejectment, filed December 4, 1889, which alleges that on December 20, 1888, plaintiff was the owner and in possession of the premises sued for, and "that on the 24th day of December, 1889, plaintiff being so seised and possessed, defendant wrongfully entered and ousted plaintiff from the possession thereof, and now withholds wrongfully the possession," is not objectionable on general demurrer as alleging ouster subsequent to the filing of the complaint, as it is evident that this was a clerical error merely, and is inconsistent with the allegation that defendant "now withholds," etc.

2. Where the complaint alleges that the demanded premises are in Susanville it is not objectionable because it does not allege that they are in Lassen county, where the action is brought, as the court will take judicial notice that Susanville is in Lassen county, under the provision of Code Civil Proc. Cal. § 1875, subd. 2, that courts take judicial notice of whatever is established by law.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Shinn & Masten, for appellant. Spencer & Raker and Clarence A. Raker, for respondent.

PER CURIAM. Ejectment. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. His demurrer having been sustained, and plaintiff declining to amend, final judgment was entered dismissing the action, and for costs. Plaintiff appeals. The complaint consists of two parts, in the first of which there is an attempt to set up a valid title in plaintiff to the demanded premises founded on a sale for delinquent taxes. The second part of the complaint contains the general allegations usual in actions of this character. Various objections are made to the validity of the tax-title first set out; but we find it unnecessary to pass upon the sufficiency of the facts alleged to constitute a good title. The second part of the complaint is sufficient in itself to show a cause of action, and the first part may be treated as surplusage. It is alleged that on the 20th day of December, 1888, plaintiff was the owner and in the possession of the demanded premises, and "that on the 24th day of December, 1889, plaintiff being so seised and possessed, the defendant wrongfully entered and ousted plaintiff from the possession thereof, and now withholds wrongfully the possession," etc. The complaint was filed December 4, 1889, and, as will be observed, the allegation is of an entry and ouster on the 24th day of December, 1889. This alle-

gation of an ouster subsequent to the filing of the complaint is relied upon as justifying the order sustaining the demurrer. But it is evident on the face of the complaint that there is a clerical error in this allegation, and that it should have read "1888" instead of "1889." The latter date is inconsistent with the other part of the same allegation that the defendant "now withholds." The most that can be said of this inconsistency is that it rendered the complaint ambiguous or uncertain, and the only way in which advantage could have been taken of it was by special demurrer on that ground. Upon general demurrer, controlling force should have been given in construing the complaint to the words "now withholds," which show an ouster prior to the filing of the complaint.

There was no demurrer on the ground of want of jurisdiction, but respondent claims the right to object to the complaint on that ground at any stage of the proceedings, and he calls our attention to the fact that there is no allegation in the complaint that the demanded premises are in Lassen county. But it is alleged that they are in the town of Susanville; and not only the superior court, but this court, takes judicial notice that Susanville is the county seat of Lassen county. Code Civil Proc. § 1875, subd. 2.<sup>1</sup>

Judgment reversed, and cause remanded, with direction to the superior court to overrule the demurrer, and allow the defendant a reasonable time to answer.

(88 Cal. 108)

PERRI V. BEAUMONT. (No. 13,737.)

(Supreme Court of California. Feb. 19, 1891.)

APPEAL—SERVICE OF NOTICE—AMENDMENT.

Where an affidavit of service by mail states that the "within notice was deposited" in the post-office at a certain place, directed to respondent's attorneys at a specified place; that respondent's attorneys "reside" there, and appellant's attorneys "reside" at the former place; and that there "is" regular communication between the two places,—an amendment will be allowed to make the notice referred to more definite, and to show the residence of the respective attorneys at the date thereof.

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

Lamar & Rousseau, for appellant. Haggin & Van Ness, (George C. Gorham, Jr., of counsel,) for respondent.

PATERSON, J. The affidavit of service by mail states that a copy of the within notice was deposited in the post-office at Sumner, Cal., postage thereon prepaid, addressed to Haggin & Eibble, attorneys for respondent, 45 Nevada block, San Francisco, Cal., on February 8, 1890; that said attorneys reside at San Francisco, and the attorneys for appellant reside at Sumner; and that there is regular communication by mail between the two places. The affidavit is uncertain as to the notice referred to, and, as it was made on the 10th of February, 1890, it fails to show the places of residence of the respective attorneys on

<sup>1</sup>This section and subdivision provide that courts take judicial notice of whatever is established by law.

February 8th, and, strictly construed, is insufficient, (*Doerfler v. Schmidt*, 64 Cal. 265;) but as the defect is one arising, doubtless, out of a careless use of language, and the objection being rather technical, we deem it a proper exercise of our discretion to grant the appellant's request to file another affidavit of service. The court should be liberal in granting amendments which can cause the respondent no injustice, and which will secure to the appellant a hearing on the merits. If a sufficient affidavit of service is filed within five days from date hereof, the motion to dismiss will be denied; otherwise it will be granted.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.

(88 Cal. 136)

PEOPLE V. FOWLER. (No. 20,714.)

(Supreme Court of California. Feb. 25, 1891.)

PROSTITUTION—ABDUCTION—INFORMATION.

1. An information alleging that defendant unlawfully took away a certain unmarried female under the age of 18 years from the custody of her mother, without the latter's consent, and against her will, for purposes of prostitution, is sufficient under Pen. Code Cal. § 267, which provides that every person who takes away any female under the age of 18 years, "from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc., without alleging that the female's mother had "legal charge" of her person.

2. It is not necessary to allege that defendant knew that the female was under 18 years of age.

3. The misplacing of the concluding words of the information after instead of before a charge of prior conviction is immaterial, as it "does not tend to the prejudice of the substantial right of the defendant," within the meaning of Pen. Code Cal. §§ 960, 1258.

Department 1. Appeal from superior court, Santa Barbara county; B. T. WILLIAMS, Judge.

*Carroll Cook* and *J. E. Foulds*, for appellant. *Walter B. Cope*, Dist. Atty., and *George H. Johnson*, for respondent.

PATERSON, J. The information charges that the defendant, on the 12th day of June, 1889, "did willfully, unlawfully, and feloniously take away one Rosa Keep, then and there being an unmarried female under the age of 18 years, to-wit, of the age of 14 years, from and out of the custody of Maria Keep, her mother, without the consent and against the will of her said mother, for the purpose of prostitution." Section 267 of the Penal Code provides: "Every person who takes away any female under the age of 18 years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc. The information follows the language of the statute, and is sufficient. It alleges all the acts and facts which the legislature has said shall constitute the offense, and is direct and certain, both as to the party charged and the particular offense charged. These are the tests of sufficiency in matters of averment. It was not necessary to allege that the mother had the "le-

gal charge" of the person of the girl. One who takes a minor female from the actual custody of her mother for the purpose of prostitution should not be heard to say that as between the mother and the father the latter may have had the better right to the custody of the child, and may have given his consent. So long as the child was in the actual custody of the mother, the latter was bound by every principle of law, humanity, and parental care to protect her person, and had the legal charge of her person within the meaning of the statute. *Bish. St. Crimes*, § 633.

It is claimed that the information is defective because it is not alleged that the defendant knew the girl was under age. We think that under this statute the people are not bound to allege or prove that the defendant knew the girl was under 18 years of age. "The gist of the offense is the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution;" and one who does so acts at his peril, and cannot defend himself on the plea of ignorance as to the age of the child. *Id.* § 632. The law was intended to protect the family against the assaults of those who traffic in women for houses of prostitution,—to save the members thereof from sorrow and disgrace; and the court ought to be careful not to construe the statute so as to deprive it of any element of effectiveness in this regard. *People v. Demousset*, 71 Cal. 613, 12 Pac. Rep. 788. Appellant urges that "penal statutes are to be construed strictly in those parts which are against defendants, but liberally in those which are in their favor." Such is always the contention made, and too often followed; but it is no longer the rule. In former days, when the law-maker acted upon the idea that penal legislation was an important factor in shaping the morals of the people, many acts trivial in their consequences were declared criminal, and cruel punishments (whipping, and even death) were imposed on conviction of offenses which are now regarded as mere misdemeanors. The courts, as conservators of the natural and inalienable rights of the citizen, found it expedient and just in the administration of the law to strictly construe the provisions of penal statutes, and to resolve every doubtful question of construction in favor of the person charged. But the reason for such a rule of construction is no longer existent, and in this state it has been repudiated by express legislative enactment. Section 4 of the Penal Code provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of its terms, with a view to effect its object and promote justice."

The concluding words of the information are evidently misplaced, and should have been inserted before instead of after the charge of prior conviction, but such misplacement, being a matter of mere form, "does not tend to the prejudice of the substantial right of the defendant," and is therefore immaterial. Sections 960, 1258, Pen. Code; *People v. Biggins*, 65 Cal. 564,

4 Pac. Rep. 570. It doubtless occurred through the use of a blank information with the usual clause, *contra formam statuti*. The judgment is regular on its face, (section 1207, Pen. Code,) and the court properly took into consideration the prior conviction pleaded and confessed, as shown by the record. Ex parte Young Ah Gow, 73 Cal. 438, 15 Pac. Rep. 76; People v. Meyer, 73 Cal. 548, 15 Pac. Rep. 95. Other points made by appellant are not well taken, because the appeal is from the judgment only, and there is no bill of exceptions. Everything complained of may have been done with the consent or at the request of the defendant, in which event, of course, he could not be heard to complain. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(88 Cal. 146)

HAGMAN v. WILLIAMS et al. (No. 13,971.)  
(Supreme Court of California. Feb. 26, 1891.)

MECHANICS' LIENS—PLEADING—EVIDENCE—APPEAL.

1. Where the complaint in a suit to foreclose a mechanic's lien alleges that the claim for a lien was duly recorded, and states its contents substantially in the language of the statute requiring such claim, but the claim as recorded was inartificially drawn, and not in the language of the complaint, a denial in the answer that the claim contains the necessary averments is sufficient to raise an issue as to the alleged claim, though such denial is made on information and belief.

2. Where plaintiffs have introduced evidence that the work for which they claim a lien was well done, defendants are entitled to show that it was not done in a good and workman-like manner.

3. Error in excluding evidence may be considered on appeal, though the ruling was not specified in the bill of exceptions, since, under Code Civil Proc. Cal. § 650, it is not necessary that appellant should specify therein the particular errors of law on which he will rely.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Harris & Ward and A. G. Wooster, for appellants. John M. Lucas, for respondent.

BELCHER, C. This is an action to foreclose a lien for work and materials used in painting a house erected for the defendant Ellen L. Williams. The complaint states that the defendants were husband and wife; that Mrs. Williams owned a lot of land, and on a day named entered into a contract with certain builders to furnish all the materials and labor, and erect for her a dwelling-house on the lot; that the contractors commenced the construction of the house, and afterwards made a contract with the plaintiff and one Anderson, under and by which they were to furnish the materials and perform the labor of painting the house, and were to be paid therefor the sum of \$155; that upon the making of this contract Mrs. Williams promised and agreed with the painters that she herself would pay and guaranty payment of the sum of money to become due them under their contract, and would also pay them any and all further sums

which might become due them for extra work on the house; that the painters entered upon the performance of their contract, and fully performed and complied with all the conditions of the same, and at the request of Mrs. Williams furnished materials and did extra work of the value of \$26; that the full amount due under the contract, and for extra work, which Mrs. Williams promised and agreed to pay, was \$181, of which sum \$107 had been paid, leaving still due and unpaid the sum of \$74; that the house was finished, and in due time the painters filed and had recorded a claim of lien, which was duly verified, and stated all the facts required by statute to be stated in such a case; and that subsequently Anderson duly assigned and transferred to the plaintiff all his claim and demand under the lien, and against the said property and defendants. The defendants, by their answer, denied that they, or either of them, promised or agreed to pay Anderson and Hagman for the work done under their contract, or to guaranty payment thereof, or to pay for any extra work in any manner whatever; denied that Anderson and Hagman, or either of them, fully performed all the conditions of their contract, or of any contract, mentioned in the complaint, or complied with the same; and on information and belief denied that the instrument filed and recorded by Anderson and Hagman as a claim of lien, "contains a statement of their demand, or any demand, with the names of the person or persons by whom they were employed, or of any employment, or to whom they furnished materials; or of any materials, with a statement of the terms, time given, or conditions of their contract, or of any contract." The case was tried, and all the facts were found by the court to be as alleged in the complaint. Judgment was then entered, foreclosing the lien and awarding the plaintiff \$50 as a reasonable attorney's fee, and costs, as prayed for in the complaint. The defendants moved for a new trial upon a bill of exceptions, which was duly settled and filed. The motion was denied, and they appealed from the judgment and order.

It is objected for respondent that the order denying the new trial cannot be considered, for the reason that the record contains no copy of the order. The objection cannot be sustained. The record shows that after the order was made a second bill of exceptions was settled and filed, setting out that the motion was made by the defendants, pursuant to their notice of intention to move for a new trial, on certain grounds stated, and that both the plaintiff and defendants appeared by their attorneys; that the first bill of exceptions and certain affidavits were used on the hearing, and then, that "the court, having heard the argument of counsel, and being fully advised, doth order that said motion for new trial be, and the same is hereby, denied." And the clerk certifies that the record contains correct and complete copies of the records and documents on file in the case, and, among others, of the last bill of exceptions, "including the order refusing a new trial." This was sufficient to meet the requirements of section 952 of the

Code of Civil Procedure. It is contended by appellants that the judgment should be reversed because of errors committed by the court in its rulings. The proceedings were as follows: On the trial the plaintiff offered in evidence his claim of lien, and the defendants objected to the admission of the paper, on the ground that it was "incompetent, irrelevant, and immaterial." The court overruled the objection, and admitted the paper in evidence, on the ground, as stated, that the answer contained no denials of the allegations of the complaint in regard to the claim of lien, but admitted each of them. The defendants excepted to this ruling, and thereupon counsel for plaintiff announced to the court that the offer of the lien in evidence was withdrawn, and the court ordered that it be considered withdrawn. No other or further evidence relating to the notice and claim of lien alleged in the complaint was offered by either party. Subsequently the plaintiff introduced evidence tending to show that the work alleged in the complaint was done in a good and workman-like manner, considering the quality and amount of material called for by the contract. When the defendants were making their case, they offered evidence to show that the work sued for was not performed in a good and workman-like manner. To this offer the plaintiff objected, on the ground of irrelevancy, incompetency, and immateriality, and the court sustained the objection, and excluded the evidence, defendants reserving an exception. The defendants then, when they had nearly closed their testimony, asked leave to amend their answer by making specific positive denials of each and every allegation of the complaint, relating to the contents of the alleged notice of lien, and by adding averments that the material used in painting the house was of inferior quality, and not such as was called for in the contract, and that the work was done in a bad and unworkman-like manner, and inefficiently, and that by reason of such inferior workmanship and material the defendants were damaged in the sum of \$100. The court denied the application to amend, and the defendants duly excepted.

1. The first ruling complained of was evidently based upon the theory that the denials in the answer as to the claim of lien were insufficient to raise any issue, because they were made upon information and belief. In this case, we think the learned judge of the court below mistaken. It is true that, where facts are alleged in a verified complaint which are presumptively within the personal knowledge of the defendant, he is not permitted to deny them upon information and belief, but must answer positively. *Humphreys v. McCall*, 9 Cal. 62; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. Rep. 844. Here the allegations were as to a written instrument which had been recorded in the recorder's office of the county, and they stated its contents substantially in the language of the statute which provides for the making and recording of such an instrument. Section 1187, Code Civil Proc. But an inspection of the paper shows at once that it was inartificially drawn, and not in the

language of the complaint. A question, then, might well arise as to whether or not it was sufficient to meet the requirements of the statute and to create a lien; and that such a question did arise is shown by the fact that counsel here earnestly insist, on one side, that it was wholly insufficient, and, on the other, that it was fully sufficient, to effect the purposes intended by it. Under these circumstances we do not think it can be said that, because the defendants might have seen and read the record, they must be presumed to have such knowledge of the facts alleged in the complaint as to require positive denials if they deemed them untrue. Our conclusion is that the denials on information and belief were sufficient to raise an issue as to the alleged claim of lien.

2. We also think the court erred in excluding the evidence offered by the defendants to show that the work sued for was not performed in a good and workman-like manner. The plaintiff had introduced evidence to prove that the work was well done, and it seems clear that the defendants had a right to disprove that fact if they could. It is objected for respondent that this point cannot be considered, because the ruling is not specified in the bill of exceptions, as an error upon which the parties would rely. But specifications of the particular errors of law on which the appellant will rely are not necessary in a bill of exceptions. Code Civil Proc. § 650; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. Rep. 403.

3. It is to be regretted that a case involving so small a sum should be permitted to occupy so much of the time of the courts, and as, in consequence of the errors above spoken of, it must go back for a new trial, it is proper to state that we have carefully examined the paper introduced in evidence by the plaintiff as his claim of lien, and are of the opinion that it should be treated and held to be sufficient to meet the requirements of the statute. A substantial compliance with the statute is all that is necessary. *Tredinnick v. Mining Co.*, 72 Cal. 78, 13 Pac. Rep. 152; *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. Rep. 772; *Jewell v. McKay*, 82 Cal. 144, 23 Pac. Rep. 139.

We advise that the judgment and order be reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings if they shall be so advised.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded.

(88 Cal. 132.)

WHOLEY v. CAVANAUGH. (No. 14,079.)

(Supreme Court of California. Feb. 27, 1891.)  
VENDOR AND VENDEE—QUITCLAIM—SCHOOL-LAND  
CERTIFICATE OF PURCHASE.

1. Defendant's grantor executed an instrument by which he released and quitclaimed to defendant land on which he had only a school-land certificate of purchase, and by which he further agreed to perfect his title, and make defendant a good deed. Held, that the instrument



was a quitclaim deed, and conveyed all the grantor's interest, and that the agreement for a subsequent deed was only a covenant of further assurance.

2. In such case the subsequent issue of a patent to the grantor inures to defendant's benefit, and invests him with the legal title.

Commissioners' decision. In bank. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

James F. Faraher, for appellant. H. B. Warren, for respondent.

HAYNE, C. Ejectment; judgment for defendant; plaintiff appeals. Both parties claim through one Whitmire. In 1860, Whitmire, who then had only a school-land certificate of purchase, upon which 20 per cent. of the price had been paid, executed to one Coats an instrument, which is considered below, and Coats subsequently conveyed to the defendant. In 1878 the state issued a patent to Whitmire, who in 1884 made a deed to the plaintiff. The plaintiff's position is that, prior to the issuance of the patent, Whitmire had merely an interest which, while regarded as the legal title as against third persons, was not so regarded as against the state; that the legal title remained in the state until the issuance of the patent in 1878; that the instrument executed to Coats in 1860 was not a present conveyance, but only an agreement for a deed, and therefore did not pass the after-acquired title or any title; that, after receiving the legal title, Whitmire did not convey it to the defendant, but conveyed it to the plaintiff; and that, since the plaintiff has the legal title, he must prevail in ejectment. From this it is obvious that it is necessary to consider the effect of the instrument executed by Whitmire to Coats. The heading of this document in the transcript is "Agreement for a Deed." But it does not appear that the instrument itself was so called. It seems to be a mere characterization by the person who made the record on appeal. But, even if it were indorsed upon the document itself, it is clearly not a part of the instrument, and consequently would not affect its character. The material portions of the instrument are as follows: "This agreement, made and entered into this first day of November, 1860, by and between T. S. Whitmire of Shasta Valley, in the county of Siskiyou, state of California, the party of the first part, and Silas D. Coats of the same place, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, hath and hereby doth release and forever quitclaim unto the said party of the second part, and to his heirs and assigns and legal representatives, all that certain piece and parcel of land," (describing it.) If there were nothing else in the instrument, we think it clear that it would amount to a quitclaim deed. The operative words of such a deed are ordinarily "remit, release, and quitclaim;" but the omission of the first word is not material. The words "release and forever quitclaim" are sufficient. And it is

settled that a quitclaim deed conveys whatever title the grantor has. *Lawrence v. Ballou*, 37 Cal. 518; *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. Rep. 867. The appellant contends, however, that the effect of the instrument as a conveyance *in present* is destroyed by the following clause, viz.: "To have and to hold the same forever, subject to the following covenants, conditions, and agreements, to-wit: The said party of the first part, for himself, his heirs, and legal representatives, agrees to and with the said party of the second part, his heirs and legal representatives, to proceed and perfect his title to said granted section, which he has now commenced under the school laws of California, as fast as said laws shall or may require until his title thus commenced shall become perfect to an inheritance and unincumbered freehold therein; and upon the acquisition of said estate in said lands the party of the first part, for himself, his heirs and legal representatives, covenants and agrees to and with the said party of the second part, his heirs and assigns and legal representatives, to make out, sign, seal, execute, acknowledge, and deliver to the said party of the second part, his heirs, assigns, and legal representatives, a good and sufficient deed conveying said estate of inheritance free of incumbrance to so much of said quarter section above described, to the said party of the second part, his heirs, assigns, and legal representatives, the same to become operative upon the said party of the second part or his legal representatives paying or causing to be paid to the said party of the first part, or his legal representatives, within ten days thereafter, the sum of one hundred dollars." This, we think, is a covenant of further assurance, and does not impair the words of conveyance first quoted. The instrument was therefore a quitclaim deed, and operated as a present transfer of whatever interest the grantor then had. It is true that he did not then have the legal title as against the state, and that he did not make a deed to Coats or his grantee, after obtaining the patent, as his covenant bound him to do. But if his deed operated to pass the after-acquired title, no further assurance was necessary; and we think it so operated. As a general rule, a quitclaim deed does not have this effect. But it must be held to have this effect in this case, upon the authority of *Stanway v. Rubio*, 51 Cal. 41, which proceeds upon the ground that the title transferred by the patent relates back to the institution of the proceedings to acquire the government title, and subsequently inures to the benefit of the person to whom the holder of the certificate of purchase conveyed. If the plaintiff has any equitable rights he cannot maintain them upon a simple complaint in ejectment. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(88 Cal. 159)

**HAWTHORNE et al. v. SIEGEL et al.** (No. 13,868.)

(Supreme Court of California. Feb. 28, 1891.)

**TRESPASS—MEASURE OF DAMAGES—PLEADING—EVIDENCE.**

1. Plaintiffs were in possession as lessees of a building which they used as a barber-shop, when, by reason of defendants' trespass, the building was rendered unfit for such purpose, and they were compelled to move, losing thereby a hot-water privilege which they had purchased. *Held*, that they were entitled to damages for loss of the water privilege, the value of permanent improvements abandoned, expense of removal, and loss in their business, under Civil Code Cal. § 3333, which gives the right to recover the amount that will compensate for the detriment "proximately caused" by the trespass.

2. In such case, an instruction that plaintiffs are entitled to such an amount as will compensate them for "all loss and harm" suffered by reason of their enforced removal, taking into consideration the length of time of the lease, and the time it had been enjoyed, and the value of such advantages as were a part of it, or grew out of their interest in it, is not erroneous as not confining the recovery to damages proximately caused by the trespass.

3. To show the loss in plaintiffs' business by such enforced removal it is competent to show the amount of business done before and after the trespass.

4. Where it appears that an amended complaint was not obnoxious to a demurrer sought to be interposed, defendants cannot complain because the court, after overruling a demurrer to the original complaint, instead of allowing another demurrer to the whole complaint as amended, limited it to the amendment.

5. After an answer has been filed to an original complaint it is not an abuse of the court's discretion to confine a second answer to amendments to the complaint, if there is no difference between the answers except with reference to the amendment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

*Stephen M. White*, for appellants. *J. O. Kœpff, Baker & Long*, and *Will D. Gould*, for respondents.

FOOTE, C. This action was brought to recover damages for trespass alleged to have been committed by the defendants in "breaking and entering" upon the premises held, used, and possessed by the plaintiffs under a lease, and "forcibly and unlawfully altering and changing the construction" of the premises "by lowering a portion of the ceiling" thereof, "and by closing up and obstructing the windows and gratings thereof, through which plaintiffs obtained light and air for their said premises." It was further alleged that these acts of the defendants rendered the premises "totally unfit and useless" for the purposes of their business, which was that of carrying on a barber-shop and bath-room; that they were thereby compelled to vacate the premises, and did vacate them, under this compulsion, on the 3d day of September, 1888, the lease not expiring until the 26th of April, 1891. The damages claimed were from the loss of the established trade and business of the plaintiffs; from that occasioned by having to abandon a portion of the permanent improvements which they had

made on the leased premises; from that resulting from the plaintiffs being compelled to abandon and lose the benefit of their leasehold interest; from that which they suffered by being deprived of the benefit of their agreement with a party who allowed them a hot-water privilege for the use of their barber-shop and bath-room; and by reason of expenses entailed on them in their enforced removal from the premises. The plaintiffs obtained judgment for \$500, a very much less sum than they claimed. From that, and an order denying a new trial, this appeal is taken.

The evidence certainly tended to show that the plaintiffs occupied and used the premises as they claimed, and that the trespass was committed by the duly-authorized agent of the defendant Siegel. The main argument of the defendant seems to be on the alleged erroneous ruling of the court as to the measure of damages recoverable in the action, in the admission of evidence, and in the instructions upon the matter which it gave, refused, or modified. In this connection the defendant urges that no damages could be recovered by the plaintiffs for the loss of the hot-water privileges, which they derived from the agreement with E. Durham, mentioned in the eighth paragraph of the complaint. If, as we think, the evidence tended to show that the plaintiffs were compelled to abandon their place of business by the trespass of the defendant, then they were entitled to recover whatever "amount will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civil Code, § 3333. If the evidence tended to show any detriment suffered by the plaintiffs in losing this hot-water privilege, and the loss thereof was proximately caused by the trespass complained of, the plaintiffs were entitled to be compensated therefor, and it was for the jury, under all the evidence, to say if they were entitled to any compensation, and, if so, how much. The evidence did show that the plaintiffs had such a privilege, and that they paid a certain amount of money therefor, and that it was of beneficial use to them. There is also evidence which tends to show that the cause of their leaving the premises was that the trespass complained of made their place of business unfit for the purposes for which they had leased, occupied, and possessed it. The trespass caused them to abandon the water privilege. The loss of the water privilege was one of the injuries resulting from this abandonment. This injury, then, was proximately caused by the trespass, and the plaintiffs were to be compensated therefor. We perceive no error in the eighth instruction given, nor in the evidence offered and admitted in support of the demand.

It is further urged in behalf of the appellants' contention that the instruction given by the court is at variance with section 3333 of the Civil Code, and misleading, in that it permits and directs the jury to take into consideration anything, however remote, which might appear to them

to indicate "loss or harm." The instruction reads as follows: "(9) The jury are instructed that if they believe from the evidence that the plaintiffs had a leasehold interest in the premises in question, and that by reason of the wrongful acts of the defendant said leasehold interest was rendered wholly or in part worthless to the plaintiffs, or that they were compelled to abandon the same, then the plaintiffs are entitled to such an amount as will compensate them for all loss or harm suffered thereby, taking into consideration the length of time of said lease and the length of time it had been enjoyed by the plaintiffs, and the value of such advantages as they may be satisfied by the evidence were a part of or directly grew out of said leasehold interest, but not including in this item anything for loss of hot-water rights or established trade and business." Fairly considered, this instruction announces to the jury that the damages recoverable by the plaintiffs for any loss suffered by them which rendered their leasehold interest wholly or in part worthless, occasioned by the wrongful acts of the defendant, must be measured by the whole duration of said lease under the terms thereof, and the length of time it had been enjoyed by them, up to the time of the reception of the injury, and by the value of such advantages as accrued to them under the lease, which grew directly out of their interest therein, but not to include anything which resulted from the loss of hot-water rights or established trade or business, and that these damages must be in such an amount as will compensate them for any such loss. This did not, in our judgment, direct the jury to give damages in their nature remote or speculative, but was confined to a verdict for such detriment only as was proximately caused by the wrongful acts of the defendant as affecting loss from the injury done alone to the leasehold interest held by the plaintiffs; and although, perhaps, the instruction is not so perspicuous and clear as it might have been, we see nothing in it misleading or conflicting with other instructions, which last most clearly kept before the jury the idea that they were to give no damages except such as were the proximate result of the injury done. And this will appear by a glance at the other instructions given.

It is further claimed that the court erred in instructing the jury that in estimating the damages done the plaintiffs they might consider the evidence concerning the expenses of the enforced removal of the plaintiffs from the premises to another place of business, and that regarding any damage which might result from the deprivation of the use of improvements abandoned by them. The defendant contends that these elements of damage were not recoverable. The argument in this connection appears to be that the plaintiffs could only recover for the benefits which they might have had if the defendants had permitted them to remain at their former place of business untrampled upon. But the plaintiffs were not, according to the tendency of their evidence, permitted to remain un-

molested, but were driven away by the wrongful acts of the defendants. Hence the former were entitled to recover whatever their loss might be of which the defendants' wrongful acts were the efficient cause. "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation." *Insurance Co. v. Boon*, 95 U. S. 130. "That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." *Brady v. Insurance Co.*, 11 Mich. 425. Here the evidence on behalf of the plaintiffs tended to show that the trespass of the defendant, and his acts in accomplishing it, resulted in the plaintiffs having to leave their place of business, give up their leasehold interest, go to expense in moving their appurtenances, etc., lose the privilege which they had of hot water for baths and barber-shop, and in their having to go to another place of business less favorable or profitable, which entailed loss in their established trade and business, and having to lose the use of abandoned permanent improvements. The cause which sets all the rest in motion was the trespass; the operation of the subsequent agencies of loss were the result of this wrongful injury. Hence they proximately resulted from that trespass. To the first cause primarily all the damages resulting are to be attributed, although each item of damage was produced by some separate cause following the primary cause, and operating more immediately in producing the damages. *Insurance Co. v. Boon*, supra, citing *Insurance Co. v. Tweed*, 7 Wall. 44. Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action, but "are parts of the tort itself for which the cause of action is given." *Wood v. Currey*, 57 Cal. 210. No error is perceived in the rulings of the trial court as to the instructions just mentioned, or as to the evidence admitted on the points involved therein.

Further complaint is made because the trial court allowed a question to be put to one of the plaintiffs, as follows: "What is that leasehold worth to you?" If erroneous because it did not seek for the market value of that interest, it was harmless in view of the answer of the witness, which plainly indicated that the value of which he testified was the market value. The appellant contends that the court erred in allowing evidence to go to the jury as to the amount of business done by the plaintiffs before and after the alleged trespass. The complaint charged as one of the elements of damage resulting from the trespass that the plaintiffs had lost thereby their established trade and business. With a view to show what that loss was we think the evidence was admissible. "The best-considered cases agree that where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this ques-

tion evidence of the profits which he was actually making is admissible." *Lambert v. Haskell*, 80 Cal. 619, 22 Pac. Rep. 327.

The point is made that the defendant should have been allowed to demur to the amended complaint, and to file an answer thereto. While the trial was in progress, the plaintiffs asked leave to amend the fifth paragraph of their complaint. The request was granted. The amendment was made, and a copy of it served and filed. A recess was then taken by the court to allow the defendant to plead thereto. Upon the reassembling of the court the defendant presented, filed, and read a demurrer, which went to other matters besides the amendment filed by the plaintiffs. Previous to this the defendant had demurred generally to the complaint, before amendment, which was overruled for want of "presentation." We suppose this was intended to read "prosecution." The court refused to consider the demurrer to the amended complaint, except as directed to the amendment allowed to be made, and as to that overruled the demurrer. The defendant then asked leave to file an answer to the whole complaint as amended. This the court refused to allow, upon the ground that the only portion of the complaint which had been amended was the fifth paragraph thereof, and that the defendant might file an answer to that. Maintaining his right to answer the whole complaint and reserving his exception, the defendant answered the fifth paragraph of the complaint. It is true that "the amendment, together with the original amended complaint, constituted a new complaint, which superseded all other pleadings in the case." *Thompson v. Johnson*, 60 Cal. 295. But no reason is shown why the demurrer as filed should have been sustained on any of the grounds alleged therein, nor do we perceive that the amended complaint was obnoxious to that demurrer. The defendant was in no worse condition by the refusal of the court to consider anything but the demurrer as applicable to the amendment made to the complaint than he would have been had the court considered and overruled the demurrer as a whole.

As to the action of the court in refusing to allow the filing of an amended answer except to that portion of the complaint which had not been already answered, it does not appear that the answer proposed to be filed differed in any essential respect from the answer on file except with reference to that part answering the amendment of the fifth paragraph of the complaint; and that portion of the proposed answer was filed and considered. In the action of the court, therefore, as to these matters, there appears no abuse of discretion. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PEOPLE V. JOHNSON. (No. 20,711.)

(Supreme Court of California. March 2, 1891.)

CRIMINAL LAW—JUDGMENT—APPEAL—PRESUMPTIONS.

1. Defendant, who was charged with burglary and with a former conviction of grand larceny, both of which charges he denied by his plea, and against whom was rendered a verdict for burglary only, may be sentenced to imprisonment for both offenses, where, on the day of the trial, he withdrew his denial of the conviction of larceny.

2. Though the time fixed for pronouncing judgment was not at least two days after the verdict, as required by Pen. Code Cal. § 1191, defendant's failure to object to such time will be deemed an assent thereto, he having a right to waive the time allowed to elapse by the provisions of the Code.

3. Where the charge was not given in writing, it will be presumed, on appeal, unless the contrary is shown, that it was taken down by the phonographic reporter, as required by Pen. Code Cal. § 1093, subd. 6.

4. Where the information charges that the offense was committed in "the city and county of San Francisco," the place where it was committed need not be repeated in the judgment.

5. A judgment by which it is "ordered, adjudged, and decreed" that defendant be imprisoned, is sufficient in form.

Commissioners' decision. Department

2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTEER, Judge.

*Carroll Cook* and *J. E. Foulds*, for appellant. *George A. Johnson*, Atty. Gen., for the people.

BELCHER, C. The defendant was charged in the information filed against him with the crime of burglary, and with a prior conviction of grand larceny. He was tried and found guilty of burglary in the second degree. Judgment was entered that he be imprisoned in the state prison for the term of 10 years. From this judgment he has appealed, but the record brought up contains no bill of exceptions and none of the instructions given to the jury. In support of the appeal it is argued that the defendant, as shown by the record, was arraigned only for the crime of burglary, and pleaded simply not guilty; that this plea put in issue every allegation of the information, and upon it he was tried and found guilty simply of burglary in the second degree; that, as there was no verdict as to the prior conviction, it could not be taken into consideration in pronouncing judgment, and hence, as the maximum term of imprisonment authorized by the statute in such a case was five years, (Penal Code, § 461,) the judgment was illegal, and should be reversed. It is true that the record as originally filed in this court showed no admission by the defendant or finding as to the alleged prior conviction, but, on suggestion of a diminution of the record, an amendment duly certified was subsequently filed, showing that after the appeal was taken the trial court amended its record of the case *nunc pro tunc*, so as to show that on the day of the trial the defendant admitted the prior conviction set forth in the information, and withdrew his former denial thereof. The record, therefore, as now presented, does not support the argument. The de-

fendant clearly had the right at any time to withdraw his plea of not guilty to the charge of prior conviction, and to confess the same, and, having done so, the jury had nothing to say or find in regard to it. The verdict covered the only issue submitted to the jury, and upon it the court was authorized to affix the penalty, as it did, at 10 years' imprisonment. Pen. Code, § 666; *People v. Brooks*, 65 Cal. 300, 4 Pac. Rep. 11. It is also argued that the record affirmatively shows error, because it appears therefrom that the verdict was rendered on January 15, 1890, and the court thereupon appointed January 17th as the time for pronouncing judgment, and on the last-named day pronounced the judgment appealed from. It is said that, under section 1191 of the Penal Code, the time fixed for pronouncing judgment in cases of felony must be at least two days after the verdict, and that the minutes show that two full days could not have intervened. A sufficient answer to this point is that one found guilty of a felony may waive the time which the Code says must elapse between the verdict and sentence, and may consent that judgment be pronounced immediately. *People v. Robinson*, 46 Cal. 94. Here it does not appear that the defendant ever made any objection in the court below on account of this alleged shortness of time, and he must therefore be held to have assented to it. In *People v. Mess*, 65 Cal. 174, 3 Pac. Rep. 670, the same point was made, and, as we think, correctly held untenable. It is further said that the record shows affirmatively that an oral charge was given by the court to the jury, and that this was an error, calling for a reversal of the judgment. But the giving of an oral charge is not necessarily error. The statute says: "The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law. If the charge be not given in writing, it must be taken down by the phonographic reporter." Pen. Code, § 1093, subd. 6. Here it does not appear that the charge complained of was not given at the request of the defendant, nor that it was not taken down by the phonographic reporter. It will be presumed, therefore, that it was so taken down. The well-settled rule is that error is not to be inferred, but must affirmatively appear in the record. *People v. Huff*, 72 Cal. 117, 13 Pac. Rep. 168; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. Rep. 254; *People v. Cline*, 83 Cal. 374, 23 Pac. Rep. 391.

Another point made for reversal is that the judgment was illegally pronounced, for the reason that the defendant was not informed by the court, or under its direction, of the nature of the charge against him, or of his plea or of the verdict. And it is said, under this head, that the minutes do not show that the judgment was pronounced in open court, or by any judge of the court, and that it cannot be seen therefrom whether there was any judge present, or whether the court had been or was opened. These objections are sufficiently met and answered by the recitals in the judgment itself, as shown by the

certified copy thereof in the record, which was sufficient to show that the judgment was pronounced in open court, and by the judge thereof, and to meet the requirements of sections 1200 and 1207 of the Penal Code.

It is further said that the judgment fails to show that it was pronounced for any crime committed within the jurisdiction of the court, and that it simply orders that defendant be punished by imprisonment, but does not direct that he be imprisoned, and hence is not such a judgment as is contemplated in criminal practice. There is nothing in these objections. The information charged that the offense was committed in the city and county of San Francisco, and it was not necessary that the judgment should state where it was committed. It was "ordered, adjudged, and decreed" that the defendant be punished by imprisonment in the state prison, and this was all that is necessary. We find no material error in the record, and advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(88 Cal. 176)

PEOPLE v. BARTON. (No. 20,712.)

(*Supreme Court of California.* March 2, 1891.)

CRIMINAL LAW—APPEAL—PRESUMPTIONS.

1. Though, on a conviction for burglary, the time appointed for pronouncing judgment was not at least two days after verdict, as required by Pen. Code Cal. § 1191, this is no ground for reversal where defendant made no objection at the trial.

2. Where the charge to the jury in a prosecution for felony was given orally, it will be presumed on appeal, in the absence of a contrary showing, that it was taken down by the phonographic reporter, as required by Pen. Code Cal. § 1093, subd. 6.

3. Though the judgment roll does not show that when judgment was pronounced defendant was informed by the court of the nature of the charge against him, of his plea, and of the verdict, conceding that these statements are required by Pen. Code Cal. § 1200, it will be presumed on appeal that they were made, when the contrary is not shown.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

*Carroll Cook* and *J. E. Foulds*, for appellant. *W. H. H. Hart*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted by the jury which tried him of burglary in the first degree. He pleaded not guilty as to that charge, but admitted prior conviction of grand larceny, as charged in the information. The notice of appeal states that the appeal is taken from the judgment, from an order denying a motion in arrest of judgment, and from an order denying a motion for a new trial. But it nowhere appears that any such motions were ever made or acted upon. There is no bill of exceptions in the record. The first point made for a reversal of the judgment is that the time

appointed for pronouncing it was not at least two days after verdict, and is therefore in violation of section 1191 of the Penal Code. The defendant seems to have made no objection at any time to this action of the trial court, and under the decision of the appellate court in *People v. Mess*, 65 Cal. 174, 3 Pac. Rep. 670, the point made is without merit. It is further claimed that, the offense being a felony, error is shown upon the minutes of the court, in that it is there stated that the charge to the jury was given orally. It is true that subdivision 6, § 1093, of the Penal Code requires that, where the charge in such a case is not given in writing, it must be taken down by the phonographic reporter. But it is not made to appear here that it was not so taken down, and the presumption must be that it was. The defendant must show error affirmatively. *People v. Tonielli*, 81 Cal. 279, 22 Pac. Rep. 678; *People v. Carroll*, 80 Cal. 153, 22 Pac. Rep. 129; *People v. Marks*, 72 Cal. 46, 13 Pac. Rep. 149; *People v. Huff*, 72 Cal. 117, 13 Pac. Rep. 168; *People v. Leong Sing*, 77 Cal. 119, 19 Pac. Rep. 254; *People v. Cline*, 83 Cal. 377, 23 Pac. Rep. 391. It is said that the judgment was illegally pronounced, because it does not appear from the judgment roll that the defendant was informed, as he should have been, under section 1200, Penal Code, by the court, or under its direction, of the nature of the charge against him, or of his plea, or of the verdict. Conceding that it appears to have been held in *People v. Murback*, 64 Cal. 372, that these preliminary statements are necessary, and that they form no part of the judgment pronounced, yet it does not appear in the record that such statements were not made; and the presumption must be indulged that they were, unless the appellant has shown to the contrary, which he has not done. The prior conviction of larceny was confessed by the defendant. The jury then passed only upon the charge of burglary. "The judgment follows the verdict and confession of the defendant, and is in all respects regular," as we think. *Ex parte Young Ah Gow*, 73 Cal. 442, 15 Pac. Rep. 76. The admission of prior conviction of larceny here is not shown to have been brought out by any question of the court, but appears, so far as the record shows, to have been voluntarily made when the defendant was called on to plead. As before said, it is for the appellant who claims error to show it. We perceive no prejudicial error, and advise that the judgment be affirmed.

We concur: BELCHER, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(88 Cal. 169)

*Ex parte IRWIN.* (No. 20,793.)

(*Supreme Court of California.* March 2, 1891.)

CONVICTS—ESCAPE—COMMENCEMENT OF TERM.

Petitioner was sentenced to the state-prison for a term of nine years for grand larceny, and also for a term of five years for burglary, the latter term to begin at the expiration of the for-

mer. He escaped from prison during the first term, and on recapture was sentenced to serve a term of nine years for such escape, under Pen. Code Cal. § 105. That section provides that the term of imprisonment for the escape shall "commence from the time the prisoner would have otherwise been discharged from the prison." Held, that it did not commence until petitioner had served out both the former terms, less whatever credits he may have earned.

Department 1. *Habens corpus.*

*Carroll Cook*, for petitioner. *W. H. B. Hart*, Atty. Gen., for the People.

PATERSON, J. The petitioner was convicted in the superior court of Sonoma county of the crime of grand larceny, and on the same day, and before sentence was pronounced in the first case, was convicted of the crime of burglary. He was sentenced by the court to serve a term of nine years in the state-prison in the grand larceny case, and in the burglary case the court imposed the sentence of five years in the state-prison, said term to commence at the expiration of the term of nine years imposed in the grand larceny case. His first term of imprisonment commenced on the 21st day of October, 1879, and he remained in the state-prison until August 21, 1880, when he escaped therefrom. He was captured, and again confined under the first judgment on the 9th day of November, 1880. Thereafter an information was filed against him in the superior court of Marin county for the crime of escaping from prison, and he was tried, convicted, and sentenced to serve a term of nine years, "said term of imprisonment to commence from the time he would otherwise have been discharged from said prison." Allowing the credits provided for by statute, the petitioner's first term expired not later than December 9, 1884, and if the term of imprisonment for escaping from the prison commenced to run at the expiration of the term which he was serving when he escaped, all of the terms of imprisonment imposed by the three judgments—allowing the credits provided for by statute, all of which it is admitted he has earned—have expired, and the petitioner is entitled to his discharge. Section 105 of the Penal Code provides that "every prisoner confined in the state-prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state-prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would have otherwise been discharged from said prison." The last clause of this section was added by amendment of the section in April, 1880, and plainly states that the term of imprisonment for an escape from the prison shall commence to run from the time that the prisoner would have been discharged from the prison if he had not escaped therefrom. The petitioner's term of imprisonment from the escape did not commence to run until he had served the 14 years imposed by the two judgments of the superior court, less credits allowed, because, except for his escape, he would not have been discharged from the prison until he had served out the full term im-

posed by the two judgments. The language of the section is unambiguous, and its meaning is clear. Petition denied.

We concur: HARRISON, J.; GAROUTTE, J.

(88 Cal. 179)

SWASEY v. ADAIR. (No. 13,173.)

(Supreme Court of California. March 3, 1891.)

EQUITABLE DEFENSES—TRIAL BY COURT—WAIVER.

1. In an action for the recovery of possession of personal property, an answer claiming that defendant is the owner of the property, and further setting up a counter-claim for damages for conspiracy and deceit, presents no equitable defense justifying the court in proceeding to try it in advance of a trial of the issues at law.

2. After the court had denied defendant's written application for a jury trial, failure to repeat the application did not waive defendant's right to such trial.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John F. Burris and Jos. M. Kinley, for appellant. C. K. Royce, for respondent.

HARRISON, J. The complaint herein is in the ordinary form of an action for the recovery of the possession of certain personal property. When the cause came on for trial the appellant demanded a jury, and her application was denied by the court, "on the ground that the defense set up was an equitable defense, and should be tried by the court in the first instance." The correctness of this ruling is the principal error presented on this appeal.

It has been stated by this court in many cases that when the defendant interposes equitable and legal defenses to the complaint the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. *Arguello v. Edinger*, 10 Cal. 160; *Estrada v. Murphy*, 19 Cal. 273; *Weber v. Marshall*, Id. 457; *Lestrade v. Barth*, Id. 671; *Martin v. Zellerbach*, 38 Cal. 319; *Fish v. Benson*, 71 Cal. 434, 12 Pac. Rep. 454. By making an equitable defense in such an action the defendant does not, however, lose any right which he would otherwise have to have the issues of law tried by a jury; nor does the court, by virtue of being called upon under the above rule to first hear and dispose of the equitable defense, acquire the right to pass upon all the issues in the case without a jury. It may happen in many cases that the result of the trial of the equitable defense will obviate the necessity of a trial of the legal issues. The trial may dispose of all of the issues in the case, or the equitable relief granted may be such as to prevent the trial of the issues at law, as was the case in *Bodley v. Ferguson*, 30 Cal. 512. But whenever the trial of the equitable defense does not have such result, and the issues at law remain undisposed of, these issues are to be tried in the same manner as if no equitable defense had been interposed. In *Arguello v. Edinger*, supra, the court says: "If upon hearing the evidence the court should determine there was ground for relief, it would enjoin the further prosecution of

the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issues upon the general denial." In *Weber v. Marshall*, supra, the court says: "The parties are entitled to a trial by jury upon the legal issues." In *Lestrade v. Barth*, supra, it is said: "The equitable defense should, therefore, be first passed on by the court, as according to the determination of the claim of the defendant to the relief he seeks will the necessity of proceeding with the action at law depend." In *Martin v. Zellerbach*, supra, the court says: "The more regular and orderly practice in such cases clearly is first to dispose of the equitable defenses set up in the answer. If these are found for the defendant it will obviate in most cases the necessity of trying the law side of the action, but, if found against the defendant, he still has the right to be heard on his other defenses." It has never been held, however, that every defense of an equitable nature that may be interposed to an action at law must be heard and determined by the court before proceeding to try the issues at law. Such a rule of practice would, in many instances, be inconvenient, and would tend to embarrass, rather than facilitate, the trial of the cause. The cases in which the rule has been laid down were cases in ejectment, in which the defendant asserted such a controlling equity as, if ripened into a decree, would prevent the plaintiff from asserting his legal claim. The equitable defense which is referred to in the rule is properly an equitable right of action existing in behalf of the defendant, which he might have asserted in an independent suit brought by him against the plaintiff for the purpose of enforcing such right, but which, under our system, he can also rely upon as a defense in an action involving the same subject-matter brought against him by the plaintiff. The party relying upon such equitable defense must, however, plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity. His answer, being the in the nature of a bill in equity, must contain all the essential averments of such a bill. He then becomes an actor with respect to the matters alleged by him, and his defense must be of such a character as may be ripened into a decree in his favor. *Estrada v. Murphy*, 19 Cal. 273; *Davis v. Davis*, 26 Cal. 39; *Carpentier v. Oakland*, 30 Cal. 443; *Bruck v. Tucker*, 42 Cal. 352. It is very clear upon an inspection of the answer in the present case that there was no equitable defense presented thereby which, within the foregoing principles, authorized the court to insist that it should be "tried by the court in the first instance," or that would justify the court in proceeding to try it in advance of a trial of the issues at law. Not only do the facts alleged fail to show such equitable defense, but it is with much force urged that the only issues presented by the answer are the title of the plaintiff to the property sued for, and its value. In the first portion of the answer the facts alleged present no other issue than the



claim of the defendant that she was herself the owner of the property, which is only an other mode of denying the plaintiff's title. *Thompson v. Thompson*, 52 Cal. 154. The "separate and distinct answer" which the appellant sets up under the head of "second count" is more in the nature of a counter-claim for damages arising from an alleged conspiracy and deceit practiced towards her by the plaintiff in connection with others. It further appears from the record that after the court had made the above ruling the appellant's attorney stated to it that he had no evidence to offer in support of the answer, excepting upon the question of the value of the property; and thereupon the court proceeded to the trial of the issues presented by the complaint. It was urged at the argument that, as the appellant did not, after such ruling, again demand a jury, she is now precluded from making an objection to the action of the

court. But it was not necessary that she should make any demand for a jury. This was secured to her by the provisions of section 592, Code Civil Proc., unless a jury trial should be waived by her in one of the modes prescribed in section 631, 1d. Not only did she did not waive it in any of these modes, but she had filed a written demand for a jury, and this must be held to be a continued refusal to waive her right thereto. After the court had once denied her application it was not necessary for her to repeat the demand. The action of the court thereafter in proceeding to try the cause without a jury was under her exception. In view of what is stated above, this ruling of the court was erroneous, and for this error its judgment and order denying a new trial must be reversed; and it is so ordered.

We concur: PATERSON, J.; GAROUTTE, J.

END OF VOLUME 25.







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